

REDRESS

Ending Torture. Seeking Justice for Survivors

**JUSTICE FOR VICTIMS:
THE ICC'S REPARATIONS MANDATE**

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REDRESS TRUST
87 VAUXHALL WALK
LONDON, SE11 5HJ
UNITED KINGDOM

TEL: +44 (0)20 7793 1777; FAX: +44 (0)20 7793 1719
EMAIL: INFO@REDRESS.ORG

www.redress.org; www.vrwg.org

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Acronyms

ASP - Assembly of States Parties of the International Criminal Court
CAR - Central African Republic
DRC - Democratic Republic of Congo
ECCC - Extraordinary Chambers in the Courts of Cambodia
ICC - International Criminal Court
ICCPR - International Covenant on Civil and Political Rights
ICRC - International Committee of the Red Cross
ICTR - International Criminal Tribunal for Rwanda
ICTY - International Criminal Tribunal for the former Yugoslavia
IHL - International Humanitarian Law
ILC - International Law Commission
IOM - International Organisation for Migration
OPCV - Office of Public Counsel for Victims
OTP - Office of the Prosecutor of the ICC
SCSL - Special Court for Sierra Leone
TFV - Trust Fund for Victims
UN - United Nations
UPC - *Union des Patriotes Congolais* (Union of Congolese Patriots)
VPRS - Victims Participation and Reparations Section (ICC Registry)
VWU - Victims and Witnesses Unit (ICC Registry)

¹ Carla Ferstman, Mariana Goetz and Alan Stephens (eds), *Reparations for Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making*, Martinus Nijhoff 2009.

Executive Summary

The International Criminal Court (ICC) has a broad and innovative mandate in relation to victims. Where victims' interests are affected, they may participate in ICC proceedings in a manner designed to protect their physical and psychological wellbeing as well as their dignity and privacy.² They may present their views and concerns at appropriate stages of proceedings,³ to a certain extent modelled on the civil law notion of *partie civile*, where civil parties can be enjoined into criminal proceedings with a view to claiming damages. The Rome Statute of the International Criminal Court (ICC Statute) provides that victims in general are to be informed of decisions that concern them,⁴ and are entitled to protection and support in relation to their appearance before the Court.⁵ In addition, they can be granted legal aid to ensure their representation.⁶ In particular the ICC enables victims to claim reparation for harm suffered. A dedicated Trust Fund for Victims is provided for in response to their right to claim reparation,⁷ having a dual mandate of implementing reparations awards ordered by the Court and providing assistance outside the scope of reparation.⁸

The ability of the ICC to award reparations to victims is a critical component of its overall framework to enable victims' rights.⁹ Hailed by the international community as a beacon of justice, the ICC will also be referred to as a model in terms of domestic implementation of victims' rights within the context of complementarity.¹⁰ With its first proceedings well underway, the Court may soon be faced with the prospect of ordering its first reparations awards. This Report is prepared as a means of contributing to the Court's reflection on what reparation means and should mean in the context of mass atrocity.

² Article 68(1) of the Rome Statute of the International Criminal Court (hereinafter "ICC Statute") reads: "The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. [...]". Statute of the International Criminal Court, A/CONF.183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The ICC Statute entered into force on 1 July 2002.

³ Article 68(3) of the ICC Statute provides that: "Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence."

⁴ For instance, Rule 92(3) of the ICC's Rules of Procedure and Evidence provides that: "In order to allow victims to apply for participation in the proceedings in accordance with Rule 89, the Court shall notify victims regarding its decision to hold a hearing to confirm charges pursuant to article 61..."

⁵ In accordance with Article 43(6), the Registrar has set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

⁶ For instance, Rule 16 (1)(b) of the ICC's Rules of Procedure and Evidence provides that with respect to victims, the Registry shall be responsible for: "Assisting them in obtaining legal advice and organizing their legal representation, and providing their legal representatives with adequate support, assistance and information, including such facilities as may be necessary for the direct performance of their duty, for the purpose of protecting their rights during all stages of the proceedings in accordance with rules 89 to 91."

⁷ Article 75 of the ICC Statute provides that the Court shall "establish principles relating to reparations to, or in respect of, victims" and, based on these principles, the Court may "determine the scope and extent of any damage, loss and injury to, or in respect of, victims". Paragraph (2) authorises the Court either to "make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation" or, where appropriate, to "order that the award for reparations be made through the Trust Fund provided for in article 79."

⁸ Article 79 of the ICC Statute provides that: "A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes."

⁹ See the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN General Assembly Resolution 60/147, 16 December 2005, E/CN.4/Sub2/1993/8. See also REDRESS, Handbook on the Basic Principles and Guidelines on the Right to a Remedy and Reparation, March 2006, www.redress.org/downloads/publications/Reparation%20Principles.pdf, available in English, French, Spanish, Arabic and Russian.

¹⁰ The principle of complementarity underscores that States have a primary responsibility to prevent and punish international crimes, with the ICC being complementary to States' primary jurisdiction.

Part A sets out the existing normative framework for reparations of international crimes within the jurisdiction of the Court. It considers international and domestic frameworks as well as the incorporation of these standards *inter alia* into the United Nations (UN) Basic Principles and Guidelines on the Right to a Remedy and Reparation and the ICC's Statute and related legal texts.¹¹ Some lessons learned are also included in Part A, emanating from the International Criminal Tribunals for the former Yugoslavia and Rwanda's inability to award reparation as well as from the Extraordinary Chambers of the Courts of Cambodia's first decision on reparations in 2010.

Part B examines the respective roles of the judges' Chambers, the Registry and the Prosecutor's Office in preparing to ensure victim-sensitive policies and procedures that will allow for the effective discharge of their respective functions. Numerous unanswered questions about the reparations process leave victims of crimes within the ICC's jurisdiction with questions as to what to expect both procedurally and substantively. The Court, in accordance with article 75 of the ICC Statute, is explicitly tasked with establishing principles upon which it will base its decisions relating to reparations, and these principles have as yet not been agreed. The Court may award reparation directly against a convicted person based on liability for facts proven during the criminal proceedings.¹² However, there have been suggestions that reparations proceedings could establish further, civil liabilities, beyond those established through the criminal trial, widening the scope of eligibility for reparations.¹³

The breadth of open-ended questions and the need to inform and prepare victims so as to manage expectations points to the urgent need for the Court to establish reparations principles, in accordance with the requirements in the ICC Statute to this effect.¹⁴ These would guide its decisions both in terms of its approach and in substance. The purpose and need for Court-wide principles are considered in detail in Part B, Section 4.1. A draft sample set of reparations principles are also provided in Annex 1. In order to guide decision making, principles should highlight the centrality of ensuring dignity, fairness, effectiveness, non-discrimination, gender equity, sustainability and the avoidance of stigma, amongst other values examined in context herein. The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation (UN Basic Principles)¹⁵ provide best practice guidelines in this regard.

Part B, Section 5 considers the role of the Prosecutor in investigating and prosecuting cases and bringing charges that are representative of the victimisation. Section 6 explores the role of the Registry in particular, in ensuring effective dissemination of information, outreach and training to ensure that victims are informed of their rights and are enabled to claim reparation. It also considers the role of the Registry in facilitating reparations requests and processing claims in order for the Chamber to make its decisions.

With the first trial due to end in 2011, Part C considers the real and urgent need to clarify the modalities for reparation proceedings, including evidence relating to reparations presented during trial as well as the modalities for dedicated reparations hearings after a conviction. The experience of other courts and administrative bodies makes clear that this will not be an easy process, which is made more complex at the ICC taking into account the context of international criminal law proceedings. International law requires that reparations are adequate and effective and respond to the harm suffered. Equally, the process of seeking reparations should be inclusive, transparent and fair; it should not disempower or re-victimise. These basic requirements should frame the ICC's consideration of both its reparations procedures and the substance of awards.

Part D considers issues relating to how the Court will arrive at procedural decisions as well as its substantive awards on reparations. Key issues include the determination of the scope of eligible

¹¹ *Supra*.

¹² Article 75(2) of the ICC Statute.

¹³ OTP Policy Paper on Victim Participation under Article 68(3) of the Statute, Draft as of 7 December 2009; Final version, April 2010, page 9.

¹⁴ Article 75(1) of the ICC Statute.

¹⁵ *Supra*.

beneficiaries and the appropriate methodologies for assessing harm. In determining the scope of beneficiaries, an examination of the definition of victims will need to be considered anew, including direct and indirect victims, as well as the rights of deceased victims and next of kin. All these questions are discussed in Section 9, as is the possible nexus between the charges proven at trial and harm suffered by victims. Section 10 considers methodological and evidential challenges surrounding the assessment of harm, including considerations for individual or collective approaches.

Part E examines questions relating to the implementation of reparation awards by the Trust Fund for Victims with a particular emphasis on issues regarding individual or collective awards. Finally, challenges relating to effective protective measures for tracing, freezing and seizing of assets for the purposes of reparations awards are considered, with a range of recommendations proposed regarding monitoring and enforcement of cooperation requests to ensure effective follow-up and coordination.

Summary of Key Recommendations

Recommendations to the Court:

- Establish Court-wide principles on reparation;
- Clarify what constitutes a complete application;
- Clarify appropriate protective measures in relation to reparation requests;
- Consider all means of reparation available in order to fulfil victims' needs in an appropriate manner;
- Provide reasoned decisions and distinguish categories of harm;
- Consider appropriate options to avoid unnecessarily arbitrary or limited awards in relation to the scope of eligible beneficiaries.

Recommendations to the Registry:

- Make reparations proceedings accessible by ensuring timely and effective public information, outreach and training with specific strategies to reach women and girl victims;
- Ensure training on trauma for staff who are in contact with victims;
- Develop and provide application forms in Arabic;
- Establish dedicated capacity and policies on asset tracing for the purposes of reparations awards, including on-going cooperation with States.

Recommendations to the Office of the Prosecutor:

- Develop a policy on its role to investigate and prosecute crimes as broadly as possible on the basis of an objective and consistently applied gravity test;
- Ensure effective information gathering from the ground level in order to ensure appropriate victim-mapping as part of investigation strategies;
- Investigate financial aspects of crime as a means of tracing assets for reparation;
- Ensure that prosecutorial strategies integrate victims' rights and interests to remedies and reparation in line with international standards.

Recommendations to the Office of Public Counsel for Victims:

- Support capacity building of local lawyers in order to ensure sustainable representation of victims both within the context of the ICC and complementary domestic proceedings.

Recommendations to the Trust Fund for Victims:

- Develop an effective fundraising capacity and communications strategy;
- Develop policies on maintaining and setting aside funds for the purposes of reparation from its 'other resources';
- Monitor trials and consider the range of roles that might be played by the Trust Fund in advance of first reparations awards, enabling scaling up and down of activities;
- Review implementation of relevant restitution, rehabilitation and compensation awards granted by other courts and tribunals;
- Establish and maintain a list of experts that the Fund may be able to call upon;
- Establish standards and modalities for cooperation with intergovernmental, international or national organisations or State entities.

Recommendations to States parties:

- Ensure regular and appropriate contributions to the Trust Fund for Victims;
- Adopt effective implementing legislation and internal procedures to respond to cooperation requests regarding the tracing, freezing and seizure of assets for the purposes of reparations;
- Develop a capacity for the ASP to monitor implementation of cooperation requests;
- Ensure consideration of victims' rights in the context of complementarity, particularly by giving effect to international standards relating to reparation, such as the UN Basic Principles.

A. Normative Framework and the Meaning of Reparations

1. *International and domestic reparations frameworks*

The right to reparation is a well-established principle of international law, both in terms of States *inter se*, as well as for individual victims. In the oft-cited *Chorzów Factory case*, the Permanent Court of International Justice held that:

[I]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.¹⁶

It was further held that “reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability have existed if that act had not been committed.”¹⁷ The ILC Articles on the Responsibility of States provide that “the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act”.¹⁸ Accepted forms of reparation to be made between states include restitution, compensation and satisfaction, either singly or in combination, with cessation and guarantees of non-repetition as appropriate, constituting separate consequences of a breach of an international obligation.¹⁹

1.1 International Human Rights Law

With respect to reparation for individuals, human rights law, and to a certain extent international humanitarian law, provides a legal basis for victims’ right to a remedy and reparation. Numerous human rights treaties set out States’ obligations to investigate and prosecute suspects, but also to protect citizens and afford them remedies and reparation to redress violations.

The Universal Declaration of Human Rights states “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights [...]”²⁰ The UN Convention Against Torture²¹ provides more explicitly for reparation in its article 14(1):

Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.²²

The International Covenant on Civil and Political Rights (ICCPR) provides that States Parties must undertake to ensure individuals whose rights are violated under the Covenant “shall have an

¹⁶ *Chorzów Factory (Claim for Indemnity, Merits) Judgment*, 13 September 1928, PCIJ Series A, No. 17, p.29.

¹⁷ *Idem*, p.47.

¹⁸ Article 31, ILC Articles on the *Responsibility of States for Internationally Wrongful Acts*, adopted by the International Law Commission in 2001. See Chapter II, *Reparation for Injury*. It is unfortunate that the ILC’s Articles do not cover the responsibility of States towards individuals as such. This lacuna is noted as an area of contention, given the contemporaneous development of individuals’ rights to remedies and reparation for gross violations of human rights. See for instance, Van Boven ‘Victims’ Right to a Remedy and Reparation’, in Ferstman et al., *supra*, at p. 19.

¹⁹ These have been enumerated in the Articles on the *Responsibility of States for Internationally Wrongful Acts*, *supra*. Arts. 34 and 30.

²⁰ Article 8, Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

²¹ Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment, 1984, 1465 UNTS 85 (hereinafter: “Convention Against Torture”).

²² Article 14(1) Convention Against Torture.

effective remedy.” Such remedies shall be determined by a competent judicial, administrative or other authority, which will enforce the remedies granted.²³ With regard to the obligation to provide reparation, in addition to some explicit provisions in the ICCPR,²⁴ the Human Rights Committee has developed the normative framework for reparation through its quasi-judicial function, issuing “views” on individual complaints and “observations” on States’ submissions through its reporting procedure. It also periodically issues General Comments that interpret the provisions of the International Covenant on Civil and Political Rights.²⁵

The nature of the procedural remedies (judicial, administrative or other) as well as the relief provided for such violations should accord with the substantive rights violated.²⁶ For instance, “administrative remedies cannot be deemed to constitute adequate and effective remedies [...] in the event of particularly serious violations of human rights [...]”²⁷ In terms of the extent of reparation to be afforded, the Committee established that “although compensation may differ from country to country, adequate compensation excludes purely ‘symbolic’ amounts of compensation.”²⁸ The Committee has also referred to the duty to provide “appropriate” compensation.²⁹ For instance it has ordered that the State pay “appropriate compensation for the period of [the applicant’s] detention in the prison in Melilla.”³⁰

With respect to addressing the present situation of victims, compensation is routinely cited as an appropriate measure owed to the victim and his or her family, though restitution or rehabilitation are also stipulated, for instance to ensure that all necessary medical treatment is received.³¹ The Human Rights Committee established an obligation to provide the victim with compensation for physical as well as mental injury and suffering caused by inhuman treatment.³² Compensation was to be paid to surviving family members for the loss of a deceased relative, but also to family members in their own right for the anguish suffered:

The [Human Rights] Committee understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has a right to know what has happened to her daughter. In these respects she too is a victim of the violations of the Covenant suffered by her daughter, in particular of Article 7.³³

Regional human rights bodies have also developed significant practice in upholding individuals’ rights to an effective remedy and reparation, particularly the Inter-American Commission and Inter-American Court of Human Rights.

²³ Article 2(3)(a), (b) and (c), International Covenant on Civil and Political Rights, GA res. 2200A (XXI), UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967).

²⁴ For instance, Article 9(5), International Covenant on Civil and Political Rights provides that: anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”

²⁵ See in particular General Comment 31, The Nature of the General Legal Obligation imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004).

²⁶ See for instance the Human Rights Committee Concluding Observations on Finland’s report on its obligations under Article 2(b) ICCPR; “while noting that a recent reform of the Penal Code makes punishable the violation of several rights and freedoms, including those protected by articles 21 and 22 of the Covenant, the Committee is concerned that criminal law may not alone be appropriate to determine appropriate remedies for violations of certain rights and freedoms.” Concluding Observations, Human Rights Committee, Finland: 08/04/98 CCPR/C/79/Add.91.

²⁷ *Bautista de Arellana v Colombia*, Doc. CCPR/C/55/D/563/1993 (1995), para. 8.2

²⁸ *Albert Wilson v the Philippines*, Communication no. 868/1999, UN Doc. CCPR/C/79/D/868/199 (2003).

²⁹ *Bozize v Central African Republic*, Communication no. 449/1990, UN Doc. CCPR/C/50/D/428/1990 (1994).

³⁰ *Griffin v Spain*, Communication no.493/1992, UN Doc. CCPR/C/53/D/493/1992 (1995), para. 11

³¹ For instance, *Gustavo Raul Larrosa Bequio v Uruguay*, Case no. 88/1981.

³² For instance, *Antonio Vianna Acosta v Uruguay*, Case no.110/1981.

³³ *Almeida de Quinteros v Uruguay*, Case no. 107/1981, para.14.

The Inter-American Court has by far the most developed practice with respect to asserting victims' right to effective remedies and adequate compensation. In the *Velásquez Rodríguez case*,³⁴ the Court cited the International Court of Justice's ruling in *Chorzów Factory*³⁵ whereby a violation of an international obligation, which results in harm, creates a duty to make adequate reparation. It went on to state that:

Reparation of harm brought about by the violation of an international obligation consists in full restitution (*restitutio in integrum*), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm.³⁶

As for emotional harm, the Court held that compensation could be awarded under international law, and in particular in the case of human rights violations.³⁷ The Court cited the Human Rights Committee as repeatedly having called for compensation for violations of the ICCPR. The Court iterated that obligations to investigate facts relating to Velásquez's disappearance, punish those responsible and issue a public statement condemning the practice, which had already been pronounced by the Inter-American Commission in this case, continued until they were fully carried out. The main focus of the decision was monetary compensation however. It set out in some detail the basis for calculating compensation for lost earnings owed to the family as well as compensation for emotional suffering by Velásquez's wife and children. It went on to specify that Honduran inheritance laws need not be followed as the entitlement to the reparation award derived from an international obligation. The Court detailed how the compensation should be disbursed, including the establishment of a trust fund with the Central Bank of Honduras *under the most favourable conditions permitted by Honduran banking practice* as a means of preserving the sums of money owed to the minor children of Mr Velásquez.³⁸

The jurisprudence of the Inter-American Court has developed since this first judgment. In the 2009 Cotton Fields case,³⁹ the judgment on *Merits, Reparation and Costs*, simply states in its Chapter on Reparations, that, “[i]t is a principle of international law that all violations of an international obligation that result in harm include the obligation to ensure adequate reparation. This obligation is regulated by International Law. The Court has based its decisions on Article 63(1) of the American Convention in this regard.”⁴⁰ Thirty-seven pages of detailed provisions on reparations follow, with sub-chapters for issues such as defining the injured party; ensuring identification; trial and punishment of those responsible including officials that committed irregularities; measures of satisfaction including public acts to acknowledge responsibility; measures to ensure non-repetition; compensation; rehabilitation; material harm; emotional (moral) harm; and modalities of payment.

1.2 International Humanitarian Law

There are a number of State obligations under international humanitarian law, which directly or indirectly refer to victims' rights to effective remedies. The Hague Conventions of 1907 provide that: “[a] belligerent Party which violates the provisions of the said Regulations [annexed to the Convention] shall, if the case demands, be liable to pay compensation. It shall be responsible for all

³⁴ *Velásquez Rodríguez v. Honduras*, Inter-Am Ct. H.R., Judgment of 29 July 1989.

³⁵ *Factory at Chorzów*, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 21, and *Factory at Chorzów*, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 29; *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 184.

³⁶ *Velásquez Rodríguez*, *supra*, para. 26.

³⁷ *Ibid.*, para. 27.

³⁸ *Velásquez Rodríguez*, *supra*, para. 46-59, and Judgment of 17 August 1990, *Interpretation of the Compensatory Damages Judgment*, at paras. 30-33.

³⁹ *Gonzales y Otras v. Mexico* (Cotton Fields Case), Inter-Am Ct. H.R. (16 November 2009).

⁴⁰ *Ibid.*

acts committed by persons forming part of its armed forces”.⁴¹ Several other provisions explicitly refer to compensation, though these imply reparations between States *inter se*.⁴² The closest mention of individual rights to reparation in the Conventions would appear to be that “[a]ny claim by a prisoner of war for compensation in respect of any injury or other disability arising out of work shall be referred to the Power on which he depends, through the Protecting Power.”⁴³

The obligation of States under humanitarian law to provide legal avenues for individuals to claim reparation is seen by the International Committee of the Red Cross (ICRC) as an emerging customary norm.⁴⁴ The UN Basic Principles are a reflection of this emerging status.⁴⁵

In its recently published database on customary IHL, the ICRC indicates “there is an increasing trend in favour of enabling individual victims of violations of international humanitarian law to seek reparation directly from States responsible.”⁴⁶ As noted by the ICRC, Article 33(2) of the ILC Articles on State responsibility provides that the responsibility of States “is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.” Furthermore, the commentary on article 33 indicates that:

When an obligation of reparation exists towards a State, reparation does not necessarily accrue to that State’s benefit. For instance, a State’s responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights.⁴⁷

An array of State practice is indicative of the emerging norm status. For instance, the Conference on Jewish Material Claims Against Germany led to the compensation by Germany for injuries inflicted upon Jewish victims of the Holocaust, including serious violations of international humanitarian law. These include the establishment of a number of Funds such as the Hardship Fund and the German Foundation “Remembrance, Responsibility and Future”.⁴⁸ Practice identified by the ICRC includes UN General Assembly resolutions on the former Yugoslavia, wherein the Assembly affirmed “the right of victims of ‘ethnic cleansing’ to receive just reparation for their losses” urging parties to the conflict “to fulfil their agreements to this end.”⁴⁹

Other developments granting reparation for violations of humanitarian law include a variety of mechanisms, such as the UN Claims Commission, established by the UN Security Council to resolve claims arising out of the Iraqi occupation of Kuwait on the basis that Iraq was “liable,

⁴¹ Article 3 of The Hague Convention IV of 18 October 1907 concerning the laws and customs of war on land, Regarding the Laws and Customs of Land Warfare, See: Zemmali, *Reparations for Victims of Violations of International Humanitarian Law*, Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms : Maastricht, 11 - 15 March 1992.

⁴² For instance, article 41 of the Regulations Concerning the Laws and Customs of War on Land provides that “[a] violation of the terms of the armistice by private persons acting on their own initiative only entitles the injured party to demand the punishment of the offenders or, if necessary, compensation for the losses sustained.” Also, Additional Protocol I to the 1949 Geneva Conventions, relating to the Protection of Victims of International Armed Conflicts, provides in Article 91 that “a party to the conflict which violates the provisions of the Conventions or of this Protocol shall if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.”

⁴³ Article 68, Geneva Convention Relative to the Protection of Prisoners of War of 1949.

⁴⁴ ICRC Customary Law database on www.icrc.org.

⁴⁵ Principle 15 of the UN Basic Principles on the Right to a Remedy and Reparation provides that: “Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law.”

⁴⁶ See Customary IHL database on www.icrc.org, Chapter 42, Rule 150.

⁴⁷ International Law Commission, Commentary on Article 33 of the Draft Articles on State Responsibility (cited in Vol. II. Ch. 42, § 350).

⁴⁸ See. G. Taylor, ‘The Claims Conference and the Historic Jewish Efforts for Holocaust-Related Compensation and Restitution’, in Ferstman et al., *supra*.

⁴⁹ UN General Assembly, Res. 48/153 and Res. 49/196; see also UN Commission on Human Rights, Res. 1998/70.

under international law, for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of its unlawful invasion and occupation of Kuwait.”⁵⁰

1.3 Domestic frameworks for reparation in criminal and civil proceedings

The notion of reparation in domestic law is often expressed as the right to restitution, compensation or damages for loss or injury. International obligations to implement Article 14 of the Convention Against Torture reinforce this norm. In the US case of *Filartiga v Pena-Irala*, which concerned a civil lawsuit against an alleged torturer living illegally in the US, in assessing damages, which were awarded to the sum of \$10 million, the Court stated that:

Chief among the considerations the court must weigh is the fact that this case concerns not a local tort but a wrong as to which the world has seen fit to speak. Punitive damages are designed not merely to teach a defendant not to repeat his conduct but to deter others from following his example [...]. To accomplish that purpose this court must make clear the depth of the international revulsion against torture and measure the award in accordance with the enormity of the offence. Thereby the judgment may perhaps have some deterrent effect.⁵¹

Enabling victims to claim reparation in the course of criminal proceedings is increasingly seen as best practice. Indeed, the idea that victims should have justiciable rights and be compensated for criminal wrongdoing as part of a single, combined process is also by no means novel. The emergence of a schism separating civil from criminal wrongdoing in the common law, developed organically through history and should not be considered set in stone. Civil law jurisdictions, such as France and Belgium for instance, allow physical and legal persons to become civil parties enjoined into the criminal process, with an interest in reparation. The notion of *restitutio in integrum*, whereby “[a]ny act whatsoever by one person to the detriment of another shall be made good by the individual through whose fault the loss has arisen,” is expressly provided for in the French Civil Code,⁵² and is applicable in French civil law, criminal law as well as public law.⁵³

1.4 Development of Norms from the Victims’ Perspective

While human rights treaty provisions are framed in terms of rights and obligations, the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (hereinafter the “1985 Victims’ Declaration”)⁵⁴ established significant crosscutting normative concepts derived from domestic contexts. The Victims’ Declaration highlights recognition at national level of victims’ need for state compensation and for rehabilitative support.⁵⁵ While the Victims’ Declaration draws attention to, and clarifies norms in relation to crimes under national law and crimes resulting from abuse of power,⁵⁶ the 2005 UN Basic Principles⁵⁷ focuses on norms relating to international crimes.

⁵⁰ UN Security Council Resolution 687 of 3 April 1991.

⁵¹ Cited by late Professor R.B.Lillich in, *Damages for Gross Violations of International Human Rights*, Human Rights Quarterly, 15(2) 1993, p.213. See REDRESS, *Promoting the right to reparation for survivors of torture: what role for the International Criminal Court*, June 1997, p.14.

⁵² Article 1382 of the French *Code Civil*.

⁵³ See Lapie, *supra*.

⁵⁴ 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN General Assembly Resolution 40/34 of 29 November 1985.

⁵⁵ L. Lambron, *The United Nations Declaration on Victims: Incorporating “Abuse of Power”*, 19 Rutgers Law Journal 59 (1987-8).

⁵⁶ The Victims’ Declaration is divided into two parts. The first focuses on victims of violations of national criminal laws, the second on persons harmed by certain types of abuse of power.

The scope of the UN Basic Principles is with respect to “gross violations” of human rights law, and “serious violations” of international humanitarian law. The Basic Principles borrows its definition of victims from the 1985 Victims’ Declaration, and provides as follows:

Victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights [...]. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress [...].

It is noteworthy that individuals as well as collectivities are included in this definition.⁵⁸ In providing for collective victimisation, it is acknowledged that reparation may be appropriate for groups or communities to repair collective harm. Professor Van Boven’s Final Report to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities on reparation to victims of gross human rights violations explains that most of the gross violations inherently affect the rights of individuals as well as the rights of collectivities.⁵⁹ Indeed, crimes of mass atrocity such as genocide, war crimes and crimes against humanity will see large numbers of individuals affected, sometimes on the basis of discrimination, affecting group rights. In this respect, the Inter-American Court has developed jurisprudence awarding specific measures of reparation aimed at redressing harm done to community life, cultures or society.⁶⁰ This issue is brought up in Section 9 below in relation to the ICC’s interpretation of “victims” in its Rules of Procedure.

Procedural and Substantive Rights

The UN Basic Principles illustrate how victims’ substantive right to reparation is integral to victims’ combined right to an effective remedy and reparation. While ‘reparation’ is often equated with compensation or the provision of certain compensatory benefits in response to wrongdoing, procedural rights to an investigation, to truth and to justice are equally central to victims’ perceptions of reparation. Indeed, in some instances, the procedural remedy, in the form of an effective investigation and trial, may in and of itself constitute full or partial reparation.⁶¹ In this respect, the entire judicial process including procedural as well as substantive aspects, are integral to reparation.

Principle 11 of the UN Basic Principles outlines victims’ rights to remedies as such:

11. Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim’s right to the following as provided for under international law:

- (a) Equal and effective access to justice;
- (b) Adequate, effective and prompt reparation for harm suffered;

⁵⁷ Supra.

⁵⁸ Collectivities are also assumed in the Sub-Commission on Prevention of Discrimination and Protection of Minorities resolution 1989/13 which provided some useful guidelines with respect to the question of who is entitled to reparation.

⁵⁹ Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Forty-fifth session, Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report submitted by Mr Theo van Boven, Special Rapporteur, E/CN.4/Sub.2/1993/8, 2 July 1993 E/CN.4/Sub.2/1993/8, page 8, para. 14.

⁶⁰ The Case of *Plan de Sánchez Massacre v Guatemala*, Inter-American Court for Human Rights, Judgment of 29 April 2004 (Merits).

⁶¹ The Inter-American Court has highlighted that “international case law has established repeatedly that the judgment constitutes *per se* a form of reparation.” See for instance the case of *Tibi v. Ecuador*, Judgment of 7 September 2004 (Preliminary Objections, Merits, Reparations and Costs), para. 243; the case of *Juvenile Reeducation Institute v Paraguay*, Judgment of 2 September 2004, (Preliminary Objections, Merits, Reparations and Costs), Judgment of 2 September 2004, para. 295 and the case of *Plan de Sanchez*, Judgment of 19 November 2004 (reparations), para.81.

(c) Access to relevant information concerning violations and reparation mechanisms.⁶²

The UN Basic Principles outline necessary components to ensure access to justice, as the fundamental basis for obtaining adequate reparation. In order to give effect to access to justice principles, adequate outreach and dissemination of information about available remedies, processes and decisions is essential. Measures should be taken to “minimise inconvenience to victims and their representatives, to protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation as well as that of their families and witnesses, before, during and after judicial, administrative or other proceedings that affect the interests of victims.”⁶³ In addition victims should be provided with proper assistance in seeking access to justice.⁶⁴

Forms of Reparation

Accepted forms of reparation have been set out in the 1985 Victims’ Declaration as well as the 2005 UN Basic Principles and the ILC Articles on State Responsibility as covering restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. In this respect, the UN Human Rights Committee has expressed the obligations of States as follows:

Without reparation to individuals whose [...] rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2(3) is not discharged. In addition to the explicit reparation required by articles 9(5) and 14(6) the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.⁶⁵

Restitution

Restitution is the act of restoring the victim, to the extent possible, to the original situation before the violation, crime or injury occurred. The 1985 Victims’ Declaration stipulates that:

offenders or third parties should make fair restitution to victims, their families or dependents. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimisation, the provision of services and the restoration of rights.⁶⁶

The UN Basic Principles provide that:

Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property.⁶⁷

The principle reflects accepted international treaty provisions and jurisprudence. For instance, the Inter-American Court of Human Rights has held that “full restitution (*restitutio in integrum*) includes the restoration of the prior situation, the reparation of the consequences of the violation,

⁶² UN Basic Principles, *supra*, Principle XI.

⁶³ Principle XII (b), *ibid*.

⁶⁴ Principle XII (c), *ibid*.

⁶⁵ General Comment 31, *supra*, para.16

⁶⁶ Principle 8, Declaration of Basic Principles of Justice for Victims of Abuse of Power, A/RES/40/34, 29 November 1985.

⁶⁷ The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation *op.cit.*, Principle 19.

and indemnification for patrimonial and non-patrimonial damages, including emotional harm.”⁶⁸ In recognition of the fact that the desired aim of full restitution for the injury suffered is not always possible to achieve, given the irreversible nature of the damages suffered, the Inter-American Court held, in the *Velásquez Rodríguez* Case that “under such circumstances, it is appropriate to fix the payment of “fair compensation” in sufficiently broad terms in order to compensate, to the extent possible, for the loss suffered.”⁶⁹

Compensation

As a distillation of a range of international and regional instruments that afford specific rights to compensation in relation to specific violations,⁷⁰ the UN Basic Principles provide that:

Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

- (a) Physical or mental harm;
- (b) Lost opportunities, including employment, education and social benefits;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Moral damage;
- (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.⁷¹

Compensation is central to the right to an effective remedy, particularly when restoring the victim to the situation *ex-ante* is not possible as is frequently the case in respect of many international crimes, such as those involving acts of rape or torture.

Rehabilitation

Rehabilitation is an important component of reparation,⁷² and the UN Basic Principles provide that “rehabilitation should include medical and psychological care as well as legal and social services”.⁷³

The Convention on the Rights of the Child notes in Article 39 the need for “physical and psychological recovery and social reintegration of a child victim.” The Convention against Torture and the Declaration on Enforced Disappearances refer to “the means for as full rehabilitation as possible.”

The Inter-American Court has been the most active of the regional courts in referring to the importance of rehabilitation in the overall framework of reparations. A series of judgments have awarded rehabilitation as part of broader measures of reparation. In the *Barrios Altos* case, the

⁶⁸ *Godínez Cruz v. Honduras*, Series C No. 8, Compensatory Damages, Judgment of 21 July 1989, para. 24.

⁶⁹ *Velásquez Rodríguez*, Interpretation of the Compensatory Damages Judgment, Judgment of August 17, 1990, Para. 27.

⁷⁰ For instance, the International Covenant on Civil and Political Rights, in addition to its general provision in Article 2(3) requiring each State Party to ensure effective remedies to those whose rights are violated, provides specifically for a right to an “enforceable right to compensation” in Article 9(5), as does the European Convention on Human Rights in its article 5(5). Article 14(1) of the United Nations Convention against Torture refers to “an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.” Similarly, the new International Convention for the Protection of All Persons from Enforced Disappearance (not yet in force), refers in Article 24(4) to the obligation to afford “prompt, fair and adequate compensation.” Article 21(2) of the African Charter on Human and Peoples’ Rights, in respect of spoliation of resources, refers to the obligation to afford adequate compensation.

⁷¹ Principle 20, UN Basic Principles and Guidelines *supra.*, elaborate the scope and nature of the right to reparations under Chapter IX, “Reparation for harm suffered.”

⁷² For a comprehensive analysis of the right to rehabilitation under international law, see REDRESS Report, *Rehabilitation as a Form of Reparation Under International Law*, December 2009, www.redress.org/reports/The%20right%20to%20rehabilitation.pdf.

⁷³ Principle 21, UN Basic Principles and Guidelines, *supra.*

Court approved the agreement signed by the State and the victims wherein the State recognised its obligation to provide “diagnostic procedures, medicines, specialized aid, hospitalisation, surgeries, labouring, traumatic rehabilitation and mental health.”⁷⁴ In other cases, the Court provided for the future medical treatment of victims, where there was a direct link between the condition and the violation.⁷⁵

Satisfaction and guarantees of non-repetition

While measures of satisfaction and guarantees of non-repetition generally relate to reparations awarded against States rather than against an individual, in the first case at the ECCC victims requested that apologies made during trial be recorded and published as a form of satisfaction.⁷⁶

According to the UN Basic Principles satisfaction should include, where applicable, any or all of the following:

- a) Effective measures aimed at the cessation of continuing violations;
- b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim’s relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;
- c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;
- d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;
- e) Public apology, including acknowledgement of the facts and acceptance of responsibility;
- f) Judicial and administrative sanctions against persons liable for the violations;
- g) Commemorations and tributes to the victims;
- h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.⁷⁷

Some of the above or other specific requests from victims falling within the concept of satisfaction could be possible as against individuals if considered and implemented creatively.

With regard to guarantees of non-repetition, there are difficulties in conceptualising this form of reparation as a remedy awarded against an individual rather than a State. Nonetheless, there may be specific requests that could be appropriately awarded against an individual. For instance, victims refer to measures to promote reconciliation as a means of addressing underlying causes of the violence. Specific requests from victims may require publication of findings or statements made during the course of the trial that relate to the truth regarding underlying causes of the conflict, and these may be guided by principles relating to guarantees of non-repetition.

The UN Basic Principles provide a timely and useful tool for the implementation of victims’ rights at national level, as well as a benchmark for international bodies such as the ICC. In this respect, they

⁷⁴ *Chumbipuma Aguirre et al. vs Peru (Barrios Altos Case)*, Series C No. 87, Reparations, Judgment of 30 November 2001, para 40.

⁷⁵ See, for example, *Cantoral Benavides Case vs Peru*, Series C No. 88 Reparations Judgment of 3 December 2001; *Durand and Ugarte Case vs Peru*, Series C No. 89 Reparations agreement between the victims and the State, 3 December 2001.

⁷⁶ Civil Parties' Co-Lawyers' Joint Submission on Reparations", E159/3. 14 September 2009 (Joint submission by Civil Parties).

⁷⁷ Principle 22, UN Basic Principles and Guidelines, *supra*.

are particularly expedient as a source of applicable law in interpreting the ICC Statute⁷⁸ as well as in ensuring positive complementarity in relation to the ICC's jurisdiction. They also reflect the understanding of justice as a holistic and reparative process, as opposed to a series of discrete and divisible rights.

In addition to official instruments that consider victims' rights, there are also civil society initiatives which have sought to promote the rights of victims. The Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation⁷⁹ in particular provides gender specific considerations with respect to the formulation and implementation of reparations, emphasising additional aspects of importance of the process of obtaining reparation. For instance, the Nairobi Declaration highlights the fundamental importance of a consultative process, which empowers women and provides that:

Processes must empower women and girls, or those acting in the best interests of girls, to determine for themselves what forms of reparation are best suited to their situation. Processes must also overcome those aspects of customary and religious laws and practices that prevent women and girls from being in a position to make, and act on, decisions about their own lives.⁸⁰

⁷⁸ Article 21(1) of the ICC Statute provides that: "The Court shall apply (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including established principles of the international law of armed conflict."

⁷⁹ Nairobi Principles on Women and Girls' Right to a Remedy and Reparation, 21 March 2007, See: http://www.womensrightscoalition.org/site/reparation/signature_en.php.

⁸⁰ Ibid., Principle 3D.

2. The ICC and its Reparations Mandate

2.1 The ICC's legal framework in relation to reparations

The nature of the crimes of genocide, war crimes and crimes against humanity falling within the ICC's jurisdiction implies that there will be large numbers of victims in any given case.

Definition of "Victims"

Rule 85 of the ICC Rules of Procedure and Evidence, defines "victims" as follows:

- (a) 'Victims' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
- (b) Victims may include organisations or institutions that have sustained direct harm to any of their property, which is dedicated to religion, art, or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

The ICC's definition of victims includes both natural and legal persons. Unlike the definition of victims in the 2005 UN Basic Principles, the ICC definition does not explicitly recognise collective victimisation in its definition. This issue is taken up again in Section 9 below in relation to Court's interpretation of Rule 85(a).

Victim Participation

Article 68(3) of the ICC Statute provides that victims may participate in appropriate stages of proceedings where their personal interests are affected, and may be granted legal assistance to ensure their representation.⁸¹

The jurisprudence of the Court has established that victims may participate in proceedings relating to the investigation into a situation, as well as in the pre-trial and trial phases of a case. The modalities and specific rights surrounding participation have evolved as a result of the first cases, but a few salient features that have a direct impact on victims' right to claim reparation are as follows:

- The application process to establish victim status within the proceedings includes a four-tier test (discussed in Section 9.1 below in relation to the scope of beneficiaries), which interprets the definition of "victim" under Rule 85. Many concepts developed as part of the four tier-test for the purposes of participation, such as "personal", "direct" and "indirect harm" may be used, or may provide building blocks for the definition of victim for the purposes of reparations.
- As yet it has been difficult for victims to influence the scope of charges brought in a given case by the mere fact of their participation.
- The modalities of victim participation during trial includes the right to examine witnesses, not merely in relation to guilt, but also for the purposes of reparation. This is discussed further in Section 7.1 below in relation to evidence relating to reparation during trial.
- Victims may provide evidence during the trial. This practice may help to ensure that the specific facts relating to their particular victimisation can be entered into evidence, potentially underpinning later findings of the Court. In addition, jurisprudence has developed the provision

⁸¹ For instance, Rule 16 (1)(b) of the ICC's Rules of Procedure and Evidence provides that with respect to victims, the Registry shall be responsible for: "Assisting them in obtaining legal advice and organizing their legal representation, and providing their legal representatives with adequate support, assistance and information, including such facilities as may be necessary for the direct performance of their duty, for the purpose of protecting their rights during all stages of the proceedings in accordance with rules 89 to 91.

in Regulation 56 of the Regulations of the Court, that evidence may be heard during the trial for reparations purposes.⁸²

- Regulation 55 of the Regulations of the Court provides the Chamber with the ability to modify the legal characterisation of the facts that underpin the charges in its final judgment on the merits of the case. While this modification cannot exceed the facts and circumstances described in the charges and any amendments to the charges, it can have a significant impact on the scope of beneficiaries.

Reparations

Article 75 provides the legal basis for reparations to victims. The provisions adopted at the Rome Conference only provide a very basic conceptual framework, leaving fundamental principles to be determined elsewhere.⁸³ Article 75(1) provides that:

The Court shall establish principles relating to reparations to, or in respect of victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury of victims and will state the principles on which it is acting.

The use of the expression “to, or in respect of victims” in Article 75(1) was intended to relate to the next of kin of victims. As clarified in a footnote in the report of the Working Group on Procedural Matters at the Rome Conference, it was noted that:

Such a provision refers to the possibility for appropriate reparations to be granted not only to victims but also to others such as the victims’ families and successors. For the purposes of interpretation of the terms “victims” and “reparations”, definitions are contained in the text of article 44(4) of the Statute, article 68(1) and its accompanying footnote, the Declaration of Basic Principles of Justice for the Victims of Crime and Abuse of Power (General Assembly resolution 40/34 of 29 November 1985, annex) and the examples in paragraphs 12 to 15 of the revised draft basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law (E/CN.4/Sub.2/1996/17).⁸⁴

In terms of the modalities of a reparations order by the Court, an award can be either directly against a convicted person, specifying appropriate reparation to, or in respect of victims, including restitution, compensation and rehabilitation;⁸⁵ or where appropriate, through the Trust Fund for Victims, if for instance, it is “impossible or impractical” to make individual awards directly to each victim.⁸⁶

⁸² Regulation 56 of the Regulations of the Court, as well as the ensuing jurisprudence is discussed in further detail in Section 7 below, in relation to evidence relating to reparation during Trial.

⁸³ Reasons for the basic conceptual framework in the Statute include the relatively late introduction of a provision on reparations during negotiations, and the complexity of the issues and lack of precedent for a reparation regime in an international criminal jurisdiction. France made a first proposal at the Preparatory Committee meeting of December 1997, followed by a joint proposal submitted by France and the United Kingdom at the March 1998 Preparatory Committee. This text provided the basis of negotiations in Rome, in June-July 1998. See P. Lewis & H. Friman, ‘Reparations to Victims’, in Roy S. Lee (ed.) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001) p. 476-7.

⁸⁴ Footnote 5 to Article 73 on Reparations to Victims in the Report of the Working Group on Procedural Matters, A/CONF.183/C.1/WGPM/KL.2/Add.7 (13 July 1998), Reprinted in P. Lewis, *Reparations to Victims, op.cit.*

⁸⁵ Article 75(2) of the ICC Statute.

⁸⁶ Rule 98(2) of the Rules of Procedure and Evidence reads: “The Court may order that an award for reparations against a convicted person be deposited with the Trust fund where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim...”

Victims can request reparation in writing and can file such applications with the Registrar at any stage of the proceedings.⁸⁷ The Rules provide that the Registrar is to develop standard forms for victims to apply to participate in proceedings,⁸⁸ and also to present their requests for reparation. It is bound to make these available to victims, groups of victims or civil society organisations that may assist in the dissemination of such forms. Victims are not obliged to use such forms. The Court's Regulations, reinforced by its jurisprudence, provide that the application forms shall be used "to the extent possible".⁸⁹ Victims who are unable to use the Court's Standard Application Forms are thus not excluded, though they will still need to provide the information required in Rule 94(1) of the Rules of Procedure and Evidence to the Registry, including:

- (a) The identity and address of the claimant;
- (b) A description of the injury, loss or harm;
- (c) The location and date of the incident and, to the extent possible, the identity of the person or persons the victim believes to be responsible for the injury, loss or harm;
- (d) Where restitution of assets, property or other tangible items is sought, a description of them;
- (e) Claims for compensation;
- (f) Claims for rehabilitation and other forms of remedy;
- (g) To the extent possible, any relevant supporting documentation, including names and addresses of witnesses.⁹⁰

A new 'combined' participation and reparation application form has been devised by the Registry and approved by the Presidency in 2010, replacing the somewhat unpopular and lengthy first set of Standard Application Forms. The forms are available from the Court's website in English and French, though not in Arabic despite the Darfur and Libya Situations.⁹¹ According to the provisions, the Registry is to make the forms available to victims, groups of victims or intergovernmental and non-governmental organisations, which may assist in disseminating the forms as widely as possible.⁹²

2.2 The ICC's Organs and Offices Most Relevant to Reparations

• The Presidency and Chambers

The Presidency, made up of the President and the Vice President, who are selected for specific terms amongst the judges, provides an oversight function of the Court.⁹³ Judges are assigned to different Divisions within Chambers, with Pre-Trial and Trial Judges serving in those divisions for a period of three years, and thereafter until the completion of a case that has commenced within that division. The Appeals Judges serve in the Appeals Division for their entire term.

⁸⁷ In accordance with Rule 94 of the Rules of Procedure and Evidence (RPE).

⁸⁸ Regulation 104 of the Regulations of the Registry.

⁸⁹ Regulation 88(1) of the Regulations of the Court.

⁹⁰ Rule 94(1) of the Rules of Procedure and Evidence, Procedure upon request.

⁹¹ Victims have been using the English and French forms to apply to participate in proceedings since the investigation into the Situation in Darfur was opened in June 2005. Victims are not able to apply for reparation as yet in the Darfur Situation given that no charges have been confirmed. The charges were not confirmed in the case against Abu Garda at the confirmation hearing in October 2009, the case that has progressed the furthest to date.

⁹² In order to enable the procedure for reparations upon request in accordance with Rule 94, Regulation 88(1) provides that the Registrar shall develop a standard form for victims to present their requests for reparations and shall make it available to victims, groups of victims, or intergovernmental and non-governmental organisations which may assist in its dissemination, as widely as possible. This standard form shall be approved in accordance with Regulation 23(2) (i.e. by Presidency) and shall to the extent possible be used by victims. The forms are available at: <http://www.icc-cpi.int/Menu/ICC/Structure+of+the+Court/Victims/Forms.htm>.

⁹³ Article 38 of the ICC Statute.

The ICC's decisions have no precedential value, in that individual Chambers “*may* apply principles and rules of law as interpreted in [...] previous decisions” (emphasis added), but are not obligated to do so.⁹⁴ However, applications and interpretations of law by the Court “must be consistent with internationally recognised human rights [...].” In terms of applicable law, the Court is to apply in the first place the ICC Statute, Elements of Crimes and Rules of Procedure and Evidence (as well as other internal Rules and Regulations).⁹⁵ The Court will also apply applicable treaties and established principles of international law, including international humanitarian law. Further, the Court is to apply general principles of law derived by the Court from national legal systems of the world.

- **The Registry**

The Registry provides a support function to all the other entities, and houses crosscutting administrative and operational services such as public information and outreach, administration, human resources and security. The Registry also provides direct support to the judicial process through its Court Services Division. Specific units of most relevance to victims include the Public Information and Documentation Section (PIDS), and in particular its Outreach Unit, the Victims' Participation and Reparations Section (VPRS) and the Victims and Witnesses Unit (VWU).

Public information and outreach (PIDS)

Public information as well as specific outreach to affected communities is fundamental to enabling victims' access justice. If victims are to benefit from the mechanisms provided by the ICC, they must be informed of their existence as well as the tenets of the Court's jurisdiction and their rights within its framework. It is important that regular, accurate and objective information about ongoing proceedings is provided to affected communities. Experience has shown that misinformation on the ground can spiral out of control putting victims or intermediaries at risk, or prejudicing victims' likelihood of benefiting from the mechanisms available.⁹⁶

Specific strategies are required to reach particularly vulnerable, invisible or traumatised victims, including women those with disabilities, or displaced or homeless victims.

There are specific instances within its proceedings where the Court must inform victims of particular decisions. These include the Registry's obligations to notify victims of their rights in relation to specific stages of the proceedings, for instance prior to the holding of hearings to confirm charges,⁹⁷ during trial in relation to hearing dates, postponements, delivery of decisions, as well as in the event of reparations hearings.⁹⁸ In practice much of this specific notification will be undertaken by, or in conjunction with, the VPRS.

The Victims' Participation and Reparations Section (VPRS)

⁹⁴ Article 21(2) of the ICC Statute, Applicable Law.

⁹⁵ Other Rules and Regulations adopted pursuant to the Statute or Rules of Procedure include the Regulations of the Court, Regulations of the Registry and Regulations of the Trust Fund for Victims.

⁹⁶ For instance, misinformation in Bunia, Ituri has been a common feature around major events in the first case, such as the two decisions for the immediate release of Thomas Lubanga.

⁹⁷ Rule 92(3) provides that: “In order to allow victims to apply for participation in the proceedings in accordance with Rule 89, the Court shall notify victims regarding its decision to hold a hearing to confirm charges pursuant to article 61...”

⁹⁸ Rule 96 provides that: “...the Registrar shall, insofar as practicable, notify the victims or their legal representatives and the person or persons concerned. The Registrar shall also, having regard to any information provided by the Prosecutor, take all the necessary measures to give adequate publicity of the reparations proceedings before the Court, to the extent possible, to other victims, interested persons and interested States.”

The VPRS responds directly to the Registry's obligations to facilitate victims' ability to participate in proceedings and claim reparation under the Statute. The Rules of Procedure of the Court provide that the Registry shall be responsible for:

Assisting [victims] in obtaining legal advice and organizing their legal representation, and providing their legal representatives with adequate support, assistance and information, including such facilities as may be necessary for the direct performance of their duty, for the purpose of protecting their rights during all stages of the proceedings.⁹⁹

VPRS has been tasked with preparing the Standard Application forms for victims' participation in proceedings and for requesting reparation.¹⁰⁰ It receives applications from victims and is involved in collecting missing information in accordance with Regulation 88(2) of the Regulations of the Court. VPRS then processes and presents victims' applications to the relevant Chamber with a Report thereon.¹⁰¹ Furthermore, VPRS is tasked with assisting victims in organising their common legal representation.¹⁰²

- **The Office of Public Counsel for Victims (OPCV)**

The OPCV was established under Regulation 81 of the Regulations of the Court, and is mandated to provide support and assistance to the legal representatives of victims and to victims including legal research, advice and appearing before a Chamber in respect of specific issues.

- **Trust Fund for Victims (TFV)**

The TFV was established by the Assembly of States Parties in accordance with Article 79 of the ICC Statute.¹⁰³ Its dual mandate in relation to victims is a key and innovative feature of the ICC's reparations mandate. The Trust Fund acts as a depository for any assets seized from a suspect or accused for the eventual purposes of reparation. It is designed to fulfil the important function of implementing reparations awards where it would be impractical or impossible for the Court to award reparations directly to each victim.

In addition, the Trust Fund may use its "other resources", (i.e. resources it has obtained through voluntary contributions or fundraising rather than seized from the suspect or accused) to undertake specific activities and projects, if its Board of Directors consider it necessary to provide physical, psychological rehabilitation or material support for the benefit of victims and their families. This assistance mandate enables the Trust Fund for Victims to undertake projects independent of cases, but also enables the Fund to complement reparations beyond the immediate scope of awards, which may be limited by the criminal process. The ability to provide assistance to victims during on-going processes, corresponds to international standards on victims' rights, which recognise that victims have a right to assistance as integral to their right to a remedy and reparation.¹⁰⁴

With respect to its role in facilitating and implementing reparations, the Court may order that an award for reparations be made through the Trust Fund for Victims by virtue of Article 75(2). It may do so for the purposes of making disbursements or granting individual benefits to victims or, in

⁹⁹ Rule 16 (1)(b) of the ICC's Rules of Procedure and Evidence.

¹⁰⁰ In accordance with Regulation 104 of the Regulations of the Registry.

¹⁰¹ In accordance with Regulation 86(5) and 86(6) of the Regulations of the Court.

¹⁰² In accordance with Rule 90 of the Rules of Procedure and Evidence.

¹⁰³ The Regulation of the Trust Fund for Victims was adopted by Resolution ICC-ASP/4/Res.3 during the 4th Session of the Assembly of States Parties, 28 November to 3 December 2005.

¹⁰⁴ For instance, Article 12 of the UN Basic Principles (under Chapter VIII entitled "Access to Justice") provides that: "A victim of a gross violation of international human rights law [...] shall have equal access to an effective judicial remedy as provided for under international law." In giving effect to this right, Article 12 enumerates the international standards applicable to States, including that they should: "12(c) Provide proper assistance to victims seeking access to justice".

accordance with Rule 98(3), “where the number of victims and the scope, forms and modalities of reparations makes a collective award more appropriate”.

3. Lessons learned from other international criminal jurisdictions

While the ICC's mandate in relation to victims is innovative, it builds on domestic practice and international human rights standards, as well as the prior experiences of international courts and tribunals, which were unable to consider victims' views and interests in the justice process. It is critical that the ICC recognises these past experiences, so as to ensure that lessons are learned and mistakes are not repeated.

3.1 Missed Opportunities: the Yugoslavia and Rwanda Tribunals

The International Criminal Tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR), have limited tools to facilitate reparation at national level. The relevant provisions have been left dormant by the Tribunals who have never made effective determinations in their findings, that might, for instance safely identify victims, thereby enabling them to use the judgments in their domestic contexts to claim damages on the basis of Rules 106(b) and (c) of the Rules of Procedure and Evidence of the Tribunals.¹⁰⁵

Even if judgments would have been sufficiently specific to be effectively relied on in domestic courts, they may nonetheless have remained unenforced. Where damages were awarded in Rwanda in domestic proceedings pursuant to national law,¹⁰⁶ these have remained unenforced due to lack of funds domestically. The Chief Prosecutor of the *ad hoc* Tribunals criticised these inadequacies in 2000, and indicated a desire to see things change.¹⁰⁷ Similarly, the Presidents of the *ad hoc* Tribunals also expressed related concerns. These histories underscore the relevance and importance of the ICC's reparations mandate coupled with that of the Trust Fund for Victims.¹⁰⁸

¹⁰⁵ Rules 105 and 106 of the Rules of Procedure and Evidence of the ICTY and ICTR were designed to facilitate domestic claims for reparation. Rule 106 provides: (a) The Registrar shall transmit to the competent authorities of the States concerned the judgement finding the accused guilty of a crime, which has caused injury to a victim. (b) Pursuant to the relevant national legislation, a victim or persons claiming through the victim may bring an action in a national court or other competent body to obtain compensation. (c) For the purposes of a claim made under Sub-rule (b) the judgement of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury.

¹⁰⁶ Organic Law No. 08/96 of August 30, 1996. According to private sources in Rwanda, as at 31 December 2001, out of the trials of 6,454 individuals before the specialized chambers, more than 36 billion Rwandan francs had been awarded in reparations proceedings, though there has been no enforcement. See: Ferstman, *The Reparation Regime of the International Criminal Court: Practical Considerations*, 15 *Leiden Journal of International Law* (2002), 667-686, p.671.

¹⁰⁷ Interview with former ICTY/R Prosecutor Carla del Ponte: "I'd go even further by saying that whenever a financial investigation takes place as part of a general investigation and we manage to freeze a defendant's money, the judges ought to decide what happens to that money. For me, there is only one proper response: give it to the victims. Of course, the pain does not go away. But if you are a victim and receive financial support, especially in the difficult conditions that we know about in Rwanda, then that's already a real bonus. According to the law governing international tribunals, all compensation claims must be made to the national legal system, which is the only body apt to judge. But just think of a civil action taken in a country like Rwanda or anywhere else: it takes a long time and costs a lot of money. Changing things on this front is a tricky business, since it requires changing the legal statutes, which means that the decision is down to the Security Council. That said, I have to say that there is a loophole in the law, which might allow us to make some headway on the question. There is a rule which states that it is up to the judges to rule "on sentences and sanctions". I'm going to use the concept of sanctions to argue that sentences means prison and sanctions is the confiscation of money that has been sequestered. Let's say I'm making an interpretation. We're not quite there yet, but I've opened up the debate at least." *Compensating victims with guilty money*. Interview with Carla del Ponte, The Hague, June 9, 2000. Copyright *Diplomatie Judiciaire*, quoted in Ferstman, *Reparation Regime*, *supra*, p.672.

¹⁰⁸ The Presidents of both the Yugoslav and Rwanda Tribunals sent letters to the UN Secretary General in 2000 and 2001 respectively, expressing the limitations of their mandate and highlighting "the need, or even the right, of the victims to obtain compensation is fundamental for restoration of the peace and reconciliation in the Balkans." See Letter of 14 December 2000 of the UN Secretary General, addressed to the President of the Security Council, S/2000/1198, cited in Ferstman, *Reparation Regime*, *supra*, p.672. Judge Pillay, President of the ICTR at the time made reference to Article 75 of the ICC Statute, acknowledging that the Tribunal's framework would need to be modified to ensure that victims have access to reparations. The option of a Trust Fund for victims for the ICTR was raised in this context. See equivalent letter sent by President Judge Jorda of ICTY, S/2000/1063, also cited in Ferstman, *Reparation Regime*, *supra*.

REDRESS has documented survivors' reactions to post-genocide justice in Rwanda. Survivors and lawyers representing them have highlighted a range of disappointments and concerns with available accountability mechanisms, including the ICTR.¹⁰⁹ Prevailing issues raised include:

- the Rwanda Tribunal's inability to award compensation ("*dommages et intérêts*") - a legal concept integral to victims' perception of justice in Rwandan domestic law;
- a sense of remoteness leading to "judges not understanding the genocide"; and
- Long-term protection concerns for those associated with the process.

3.2 Learning from the first ECCC reparations order

As the ICC rapidly approaches a landmark in its procedure, that of its first reparations hearings, the lack of reparations principles raises concerns in terms of how adequately the Court will deal with relevant requests in a manner that respects victims' rights in the absence of a principled approach. It is difficult not to draw some perhaps unfortunate parallels with the first reparations award granted by the Extraordinary Chambers in the Courts of Cambodia (ECCC), which were unable to meet the vast majority of victims' requests, due to the inadequacy of the applicable internal rules that the judges had established. Specific rules to remedy these inadequacies were only adopted after the first reparations phase was concluded. As these provisions are not retroactive, the victims of the first case have essentially been denied an effective process.

The ECCC is similar to the ICC in that victims may be legally represented, in this case as civil parties "to allow victims to seek collective and moral reparations."¹¹⁰ The ECCC's rules applicable at the time of the first case against Kaing Guek Eav, *alias* Duch, specified that, upon conviction of an accused, civil parties are entitled to "collective and moral reparations" that must be borne exclusively by the accused. Kaing Guek Eav served as Deputy and then Chairman of S-21, a security centre that interrogated, tortured and executed persons perceived as enemies of Democratic Kampuchea by the Communist Party of Kampuchea between 1975 and 1979. The Chamber found that every individual detained within S-21 was destined for execution in accordance with the Communist Party of Kampuchea policy. In addition to mass executions, many detainees died as a result of torture and their conditions of detention. The Chamber found that a minimum of 12,272 individuals were detained and executed at S-21 on the basis of prisoner lists, but that the actual number of detainees is likely to have been considerably greater.¹¹¹

While the ECCC acknowledged victims' right to reparation, its first judgment rejected the majority of the civil parties' claims.¹¹² Civil parties had requested that the ECCC compile and disseminate all of the statements of apology that Duch made during the trial, as well as comments made by the civil parties. This request was partially granted by the Court. However, the Chamber rejected the inclusion of statements by the civil parties in the compilation, "on grounds that such statements are distinct from the apologies made by Kaing Guek Eav, and as their content has not been specified."¹¹³ Civil parties requested access to free medical care (both physical and psychological), including free transportation to and from medical facilities.¹¹⁴ The Chamber rejected this request on the grounds that:

¹⁰⁹ African Rights & REDRESS, *Survivors and Post-Genocide Justice in Rwanda: Their Experiences, Perspectives and Hopes*, November 2008, available at: www.redress.org/downloads/publications/Rwanda%20Survivors%2031%20Oct%2008.pdf.

¹¹⁰ Art. 23(1) of the Internal Rules of the Extraordinary Chambers in the Court of Cambodia.

¹¹¹ ECCC Press Release, 26 July 2010: *Kaing Guek Eav convicted of crimes against humanity and grave breaches of the Geneva Conventions of 1949*. Available at: <http://www.eccc.gov.kh/en/articles/kaing-guek-eav-convicted-crimes-against-humanity-and-grave-breaches-geneva-conventions-1949>.

¹¹² Judgment in Case 001 against Accused Kaing Guek Eav alias Duch, July 26, 2010, (referred to as "TC Judgment"), at http://www.eccc.gov.kh/sites/default/files/documents/court/20100726_Judgment_Case_001_ENG_PUBLIC.pdf

¹¹³ *idem*.

¹¹⁴ Civil Parties' Co-Lawyers' Joint Submission on Reparations", E159/3. 14 September 2009 (Joint submission by Civil Parties), p. 234

Requests of this type - which by their nature are not symbolic but instead designed to benefit a large number of individual victims - are outside the scope of available reparations before the ECCC. Provision of free medical care to a large and indeterminate number of victims may purport to impose obligations upon national healthcare authorities and thus exceed the scope of the ECCC's competence.¹¹⁵

As the civil parties explained in their appeal, the request had been intended only for the direct survivors of S-21 and S-24 and indirect victims.¹¹⁶ The number of requesting civil parties is 17 in total, including five rejected Applicants. The Civil Parties also explained that the request was not directed to the Cambodian government but intended for the accused to bear the cost of treatment, medication and transportation, or if necessary the cost could be borne by other entities regardless.

Similarly a request for the erection of memorials and pagoda fences at S-21 (Choeung Ek and Prey Sar) as well as in the local communities of the Civil Parties was also rejected on the basis that it lacked sufficient specificity regarding the exact number of memorials sought and their nature, their envisaged location, or estimated cost. On appeal the civil parties explained that the location was very specific, but that it was not for the civil parties to determine costs, and that requiring an over-burdensome threshold of specificity ran contrary to the practice of other jurisdictions.¹¹⁷

Requests for compensation were also rejected, as were measures of satisfaction, such as the establishment of memorial days, and other benefits. The Court found that the requests went beyond the scope of reparations permitted under its internal Rules, and "limitations of this nature [could] not be circumvented through jurisprudence but instead require Rule amendments."¹¹⁸

This position, whereby the Court faulted its own internal rules as the basis for its limited approach, is quite unfortunate, particularly as the internal rules have subsequently undergone a revision by the Judges, leaving the claimants in the first trial far from being repaired. In this respect, drawing lessons for the ICC, it is clear that a pro-active and thoughtful course of action must be considered well in advance of the reparations phase in order to ensure that the process is fit for purpose.

Under the new rules, the mandate of the ECCC's Victim Support Section has been expanded to enable it to afford non-judicial remedies for victims. In particular, Rule 23(3) of the ECCC's amended rules of procedure provides that in deciding the modes of implementation of the awards, the Chamber may, in respect of each award, either: a) order that the costs of the award shall be borne by the convicted person; or b) recognise that a specific project appropriately gives effect to the award sought by the Lead Co-Lawyers and may be implemented. Such projects shall have been designed or identified in cooperation with the Victims Support Section and have secured sufficient external funding. This is an important expansion, given that the ECCC does not have a specialised Trust Fund for Victims.

The Victim Support Section has an important role in shaping, developing and making effective its expanded mandate. However, the amended Rules remain unclear on essential questions of implementation. It is specified that "national authorities" are responsible for implementing awards made against convicted perpetrators, but there is no further indication as to who these authorities are and what steps would need to be taken to secure enforcement. As the rules prohibit monetary payments to civil parties, the awards will be "collective or moral" and the methods for enforcing such types of awards are not obvious.

¹¹⁵ ECCC Judgment in *Kaing Guek Eav, alias Duch*, Case 001118-07-2007-ECCC/TC, 26 July 2010, para 674-675.

¹¹⁶ Appeal against Judgment on Reparations, by Co-Lawyers for Civil Parties - Group 2, 2 November 2010, in the case of *Kaing Guek Eav, alias Duch*, ECCC, Case 001118-07-2007-ECCC/TC, 26 July 2010, p.22-26.

¹¹⁷ *Idem*.

¹¹⁸ ECCC Judgment in *Kaing Guek Eav, alias Duch*, *supra*, para. 662, p.238.

B. Preparing for ICC Reparations: Preliminary Steps and Information Needed

4. Chambers: Establishing Reparations Principles

4.1 The need for Court-wide Reparations Principles

Article 75 prescribes that “[t]he Court shall establish principles relating to reparations to, or in respect of victims, including restitution, compensation and rehabilitation.” The Rules of Procedure and Evidence set out the definition of victim and canvass certain procedural aspects of the reparations process. However, the underlying principles upon which reparation is to be based still remain to be established by the Court.¹¹⁹

President Sang-Hyun Song announced in May 2011¹²⁰ that the reparations principles will be developed through the Courts’ jurisprudence. This is unfortunate, and as explained below, REDRESS’ view is that Court-wide reparations principles should be prepared and agreed in advance of the first reparations proceedings. These will be essential to ensure certainty and consistency as a general principle of law. The dangers in not establishing an adequate basis upon which decisions are made before the first case are clearly demonstrated in the unfortunate experience of the ECCC as portrayed in Section 3.2 above. In addition, Court-wide principles are necessary for the purposes of internal preparation, intra-organ coordination and the preparation of external stakeholders:

- **General principle of law.** As a general principle of law, there is a need to ensure a degree of certainty and consistency between Chambers, and to assist applicants and potential applicants to know the basis upon which decisions regarding their claims are to be determined.

As reparations proceedings may occur concurrently in the first and second cases, there is an added need for Court-wide principles to ensure consistency of approaches, given that both cases concern victims of the Ituri conflict. The absence of a consistent approach could have negative repercussions on the ground, given the ethnic cleavages between different

¹¹⁹ A footnote on reparations principles was added to the report of the Working Group on Procedural Matters at the Rome Conference, expressing the views of some delegations at the Rome Conference that the Court might issue general statements on the right to restitution, rehabilitation or compensation without necessarily making a determination on the specific means, the nature or implementation of rehabilitation measures, or the quantum of damages to be repaired. Footnote 6 to Article 73 on reparations to victims in A/CONF.183/C.1/WGPM/KL.2/Add.7 (13 July 1998), Reprinted in P. Lewis, *Reparations to Victims*, *op.cit.* With regard to article 75(1), it was expressed that:

This provision intends that where there are only a few victims the Trial Chamber may make findings about their damage, loss or injury. Where there are more than a few victims, however, the Trial chamber will not attempt to take evidence from or enter orders identifying separate victims or concerning their individual claims for reparations. Instead, the Trial Chamber may make findings as to whether reparations are due because of the crimes and will not undertake to consider and decide claims of individual victims.

As explained by those present, it was understood that the Rules of Procedure and Evidence would have to address such issues, and that this footnote only reflected the opinion of a few delegations at the Rome Conference. At a key inter-sessional meeting hosted by France in Paris, it was decided that the Court should itself develop its principles for reparations. The *Paris Seminar*, organised by the French Government was held from 27-29 April 1999 on “Victims’ access to the International criminal Court” and provided the basis for draft Rules of Procedure in relation to victims and witnesses. Workshop 4 focused on Reparations and the Trust Fund for Victims. See PCNICC/1999/WGRPE/INF.2, Report on the “Paris seminar” on victims’ access to the ICC. See both P. Lewis & H. Friman, *Reparations to Victims*, in Roy S. Lee (ed.), *supra*, at p. 478; and D. Donat-Cattin, ‘Reparations to Victims’, in O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, Hart Publishing, 2000, pp. 969-70.

¹²⁰ Opening Address, *Reparations before the ICC: Issues and Challenges*, Conference organized by REDRESS and Leiden University/Grotius Centre, Peace Palace, The Hague, 12 May 2011.

factions and underlying tensions regarding resources. In addition, certainty and consistency would enable more effective and appropriate outreach that would be able to address expectation management.

- **Internal Preparation.** Court-wide principles are needed to inform appropriate outreach, planning and preparation for all organs and entities within the Court’s structure. Court-wide principles would provide clarity about the interpretation of the Court’s mandate with respect to reparations. It will also ensure that reparations will be considered consistently from case to case, and situation to situation.
- **Inter-Organ Coordination (including other entities such as OPCV and TFV).** In addition to internal preparations of respective organs and entities in accordance with their mandates, there is a need to ensure that organs and entities are working seamlessly together to ensure an effective overall process. The absence of principles does not only affect the consistency of judgments, but also makes it more difficult for the different organs to work to a common vision in order to enable reparations to be realised practically and effectively. For instance, the respective outreach and communications efforts of the Public Information and Documentation Section, the Victims Participation and Reparations Section and the Trust Fund for Victims could begin to address issues of expectation management. In this regard, a common vision could usefully be integrated into the Court-wide Strategy on Victims.¹²¹
- **External Preparation.** It is also critical that other stakeholders of the reparations process are able to prepare. Victims, intermediaries and victims’ legal representatives require certainty and consistency in order to be able to frame their claims in the appropriate manner. Certainty and consistency will also allow these stakeholders to adjust their expectations. In the case of victims and committed intermediaries who are often members of the affected communities, expectation management may be significant in avoiding re-traumatisation.

4.2 Principles should reflect custom and emerging norms

Reparations principles should include general provisions, which provide an underlying understanding of the concept of reparation in accordance with international law. In line with the language of Article 75 of the Statute, the ICC’s reparations principles should also provide a framework for determining “the scope and extent of damage, loss or injury.” The principles might usefully cover, in accordance with Article 75, established law and practice relating to forms of reparation such as restitution, compensation and rehabilitation, considered in Section 1.4 above on the development of existing norms. An example of draft principles prepared by REDRESS is provided as Annex 1 to this report, also covering procedural aspects regarding the reparations process and principles regarding enforcement. A number of the issues highlighted in the draft principles are expounded here.

General Principles

General principles should frame reparations within accepted international standards as set out in Section A above, and should state that in accordance with Article 21 of the ICC Statute, the Court will apply international law and standards on victims’ right to a remedy and reparation. For instance, the principles may reiterate the general principle of law that “every violation of an international obligation which results in harm creates a duty to make adequate reparation”¹²² and

¹²¹ The ICC’s *Strategy in Relation to Victims* recognises the importance of communicating the role of the Court, its judicial activities and victims’ rights to petition the Court, participate in proceedings or seek reparation. See, The ICC Strategy in Relation to Victims, November 2009, ICC-ASP/8/45, http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-45-ENG.pdf.

¹²² *Chorzów Factory* (Claim for Indemnity, Merits) Judgement, 13 September 1928, PCIJ Series A, No. 17, p.29.

that “reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability have existed if that act had not been committed.”¹²³

Reparations principles should also capture international human rights norms relating to pertinent characteristics of reparation, namely the requirement of appropriate, adequate and prompt reparation expressed in extensive jurisprudence of regional human rights courts and UN treaty bodies. As noted in Section 1.4 above, the UN Basic Principles emphasise in this respect that victims are entitled to “adequate, effect and prompt reparation”, which should be “proportional to the gravity of the violations and harm suffered.”¹²⁴

The practice of other bodies which have determined or recommended reparations¹²⁵ has established general values and criteria for the determination of reparations such as non-discrimination, gender equity, equal access, non-stigmatisation, sustainability and consultative process. The Principles should ensure that reparations do not discriminate on the basis of gender, ethnicity, race, age, political affiliation, class, marital status, sexual orientation, nationality, religion or disability, and should endeavour to provide affirmative measures to redress inequalities.

In view of the prevalence of gender-based violence and the additional obstacles for women and girls to access justice, the Court should take gender-sensitive measures to facilitate participation in reparations hearings and in conceptualising reparation awards for victims of sexual violence.¹²⁶ As far as possible, reparations should address underlying injustices and should take into consideration the particular socio-legal and cultural context so as to ensure that women and girls are able to benefit from awards, and that they are not implemented through structures that are discriminatory. It is fundamental that women and girls are consulted so as to inform priorities and modalities themselves, not merely to contribute to their empowerment, but to ensure for instance, that delivery of benefits meet their needs for privacy which may be a *sine qua non* for women to take up the benefits offered.

Principles should recognise that trauma, dependency and social exclusion are often reminders of the suffering that victims endure and that in order to redress human injustices, reparations shall seek to restore human dignity and acknowledge victims’ suffering as well as build solidarity and raise awareness of victimisation. Measures should not stigmatise or reinforce existing stigma, for instance by singling out categories of victims inappropriately.

Principles must acknowledge the importance of age-sensitive measures ensuring that awards are considered in terms of appropriateness for their life-stage, and within their socio-legal context. For instance, awards benefiting children should be devised in the best interests of the child, which may include supporting the family or community that the child is dependent on, or devising projects that benefit a wider range of children so as to avoid stigma.¹²⁷

Principles should address equal access, particularly with regard to women and girl victims’ rights. Reparation procedures and awards must be transparent (as far as appropriate given security or other stigma related concerns), with a view to ensuring that victims within the jurisdiction of the Court have adequate and timely notice of, and access to, reparations proceedings and that reparations awards are fully motivated and explained to those affected.

Principles for determining the scope and extent of damage

¹²³ *Idem*, p.47.

¹²⁴ Principle IX, 15 of the UN Basic Principles, UNGA Res. 60/147, 16 December 2005, E/CN.4/Sub2/1993/8, *supra*.

¹²⁵ For instance, the Truth and Reconciliation Commission for Sierra Leone’s Final report and recommendations on reparation. See, *Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission*, 2004.

¹²⁶ See Rule 16(1)(d), Rules of Procedure and Evidence.

¹²⁷ See REDRESS, *Child Soldiers before the International Criminal Court: Victims, Heroes or Perpetrators?* September 2006, Section on reparations. <http://www.redress.org/downloads/publications/childsoldiers.pdf>.

In order to ensure consistency and fairness as mentioned in relation to the need for court-wide principles in Section 4.1 above, principles should address issues of eligibility as well as the extent of damage, as provided for in Article 75(1). Principles regarding the scope of beneficiaries should afford due regard to victims who have explicitly requested reparation, as well as direct and indirect victims that have suffered harm as a result of the specific crimes for which there is a conviction, even if such individuals are as yet unidentified.

Consideration should be given to ensuring that indirect victims benefit from reparation, such as widows, the children of child-mothers and other dependants of direct victims, with particular concern for women and children. Principles should clearly state that next of kin may benefit from reparation on behalf of deceased or disappeared victims. The issues regarding direct and indirect victims are discussed further in relation to scope and eligibility in Section 9 below.

With respect to undertaking an assessment of the “extent of any damage, loss and injury”, principles should ensure that appropriate experts are appointed in accordance with Rule 97(2) and that consultations with victims and affected communities are conducted. Experts should include experts on trauma, sexual violence and violence against children in addition to those with area-specific or country expertise. Among other factors, experts should seek to identify needs that are sometimes poorly expressed due to the nature of the crimes or particular contexts of victim disempowerment.

Principles should ensure that the standard of evidence for establishing identity and evidence of harm should recognise the often-difficult circumstances of victims and availability of evidence and should make use of presumptions where appropriate.

Principles regarding reparations decisions and orders

Principles should ensure that victims’ requests specified through application forms, consultation, hearings or other means are given due consideration in determining the nature and form of awards. Particularly in relation to collective awards, facility should be made to enable, though not require, groups of victims, associations and other collectives to make joint submissions. Correspondingly, collective forms of consultation should be envisaged.

Communication of decisions should be done in a language understood by the victims in question. Appropriate and symbolic means of communication should be considered. In communicating decisions, the harm suffered as a result of specific crimes should be acknowledged, as should the impossibility of fully repairing such harm. Use of appropriate language to acknowledge massive trauma can provide a basis for healing when recognised at individual, community, national and international levels.

Principles regarding forms of reparation

Article 75 lists restitution, compensation and rehabilitation as possible forms of reparation. (These are discussed above in relation to the normative framework on reparations in Part A). In deciding how to ensure adequate reparation, best practice indicates that a range of measures that consider victims’ past, present and future realities in an interdisciplinary manner are necessary.¹²⁸

Principles should ensure that reparations reflect and remedy the harm suffered to the extent possible. Reparations must address the specific harm suffered and should not be linked to the convicted persons’ capacity to pay.

¹²⁸ See Yael Danieli, ‘Massive Trauma and the Healing Role of Reparative Justice’; and Anne Saris & Katherine Lofts, ‘Reparation Programmes: A Gendered Perspective’, both in Ferstman et al., *supra*, at pp. 41 and 79 respectively.

With respect to Individual and collective awards, the Principles should ensure that determination by the Court either way consider the circumstances and the particular nature of the victimisation in the case before the Court. Where reparation is awarded on a collective basis, forms of reparation should address the specific harm suffered by eligible victims such as specific medical services, psychosocial treatment, housing, education and training benefits or awareness raising on victimisation as a means of enabling more effective reintegration, without being subsumed within general humanitarian or developmental assistance, as appropriate.

While the Statute refers to restitution, compensation and rehabilitation, these measures of reparation should not be understood as being exclusive. Other forms of reparation such as satisfaction and guarantees of non-repetition may also be appropriate forms of reparation, depending on the context.

The ICC's Reparations Principles may wish to reflect that the duty to repair may fall on a number of actors. Effective and timely outreach shall seek to ensure that national authorities, local communities and affected populations do not have misplaced expectations of the Court's mandate. Where possible and appropriate, for instance after awards have been determined, the Court may engage with national authorities to ensure clear and complementary messaging.

In order to ensure that certain victims do not unfairly cumulate benefits, the Principles should establish a framework to ensure that, in determining its awards, benefits received by victims through other national or international processes are taken into consideration. In such instances, the Court shall afford those concerned with the opportunity to counter claims that they had benefited cumulatively.

Finally, the Principles should provide a framework to ensure clear guidance to the Trust Fund for Victims as it fulfils its role in implementing orders for reparation.

5. The Prosecutor: Investigating and prosecuting representative criminality

According to Article 75 of the ICC Statute, reparations may be ordered after conviction either “directly against a convicted person”, or “through the Trust Fund for Victims” as appropriate. While this provision has not yet been interpreted, it is relatively clear that in relation to reparations awarded “directly against a convicted person,” these would only relate to liability established at trial.¹²⁹ Thus, it is anticipated that the convicted person will be liable to repair harm in relation to the breadth and scope of charges proven at trial. In this respect, the case that the prosecutor establishes provides the framework for future reparations.¹³⁰

As put by the Office of the Prosecutor, its investigation strategy is characterised by a “focused approach” to investigations of the “most serious” crimes, sequencing these in relation to their gravity.¹³¹ While such a limitation exists for the Special Court for Sierra Leone for instance,¹³² the ICC Statute does not impose such a limitation, although there is arguably a need to have a focused approach, in that the vast majority of perpetrators of widespread criminality cannot feasibly be prosecuted by the ICC.

In practice the limitation of the Prosecutor’s case to “most serious” crimes has resulted in extremely few, almost token cases being brought, with limited charges raised in these few cases. For instance, the only charges brought in the first case, against *Thomas Lubanga*, alleged leader of the UPC militia, are for “enlisting, conscripting and actively using children under the age of fifteen in hostilities”.¹³³ The case against the alleged leader of the UPC thus ignores widespread killings, rapes, torture and pillaging reportedly committed by the group.¹³⁴ The second Democratic Republic of Congo (DRC) case, against *German Katanga and Mathieu Ngudjolo*, is slightly broader in terms of the range of crimes covered, including charges for gender based violence (sexual slavery and rape) as well as murder, directing an attack against a civilian population, pillage, destruction of property, and actively using children under fifteen in the hostilities. However, the charges all relate to a single attack on a single village, again limiting the scope of victimisation and the potential scope of those able to claim reparation from the two main other armed groups operating

¹²⁹ Note, however that the Office of the Prosecutor’s *Policy on Victim Participation*, April 2010, provides a view that liability need not be confined to that established through the prosecution case, see page 9: “[...] for the reparations stage, the Office favours a wider approach to allow participation of victims and representations from or on behalf of victims and other interested persons who suffered harm as a result of crimes other than those included in the charges selected for prosecution. Any other approach would be overly restrictive and unfair, since the Prosecution must necessarily limit the incidents selected in its investigation and prosecution. Accordingly, the Office will support reparations applications, as appropriate, by a broader range of individuals and entities than those who are linked to the charges for which the accused is ultimately convicted. Modalities will need to be further developed consistent with the generally broad scheme of reparations envisioned in the Statute.”

¹³⁰ There are possibilities to modify the legal characterisation of facts pursuant to Regulation 55 of the Regulations of the Court. However, such modification is nonetheless still dependent on the inclusion of factual evidence and circumstances in the Prosecutor’s Document Containing the Charges, providing the factual basis for the modified legal characterisation.

¹³¹ Office of the Prosecutor, Paper on some policy issues before the Office of the Prosecutor, September 2003; OTP Report on Prosecutorial Strategy, 14 September 2006, p.5.

¹³² Article 1 of the Statute of the Special Court for Sierra Leone provides: “The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.”

¹³³ Pursuant to Article 8(b)(xxvi) of the ICC Statute.

¹³⁴ For reports on widespread atrocities in Ituri, see: Human Rights Watch, *Ituri Covered in Blood*, July 2003; Institute for War and Peace Reporting (IWPR), *Call for Lubanga Charges to Cover Rape*, 12 May 2008, <http://iwpr.net/report-news/call-lubanga-charges-cover-rape>; Amnesty International, *DRC: Systematic Rape and Torture of Tens of Thousands of Women and Girls Leaves Public Health Crisis*, 24 October 2004 http://www.amnesty.org.uk/news_details.asp?NewsID=15660; *Report of the UN Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003*, United Nations, OHCHR, August 2010, http://www.ohchr.org/Documents/Countries/ZR/DRC_MAPPING_REPORT_FINAL_EN.pdf.

in Ituri at the height of the conflict in that Province in 2002-3.¹³⁵ While there have perhaps been some improvements, further prosecutions are needed to ensure a modicum of justice for the victims of a war that is said to have “covered Ituri in blood”.¹³⁶

A similarly limited approach has been taken in relation to the situation in Central African Republic, where only Jean-Pierre Bemba, former Vice President of DRC, is being prosecuted. The Prosecutor has indicated that in line with his “sequential” approach, the possibility of a further prosecution will be reviewed only once the trial against Mr Bemba is complete.¹³⁷ The Prosecutor has made an ambiguous affirmation that he has not rejected, on grounds of interest of justice, the possibility of investigating or prosecuting Bemba for crimes in Ituri.¹³⁸ Local human rights groups again have been disappointed at this omission, confirming what appears to be a patchy approach to the criminality in DRC, based on expediency, with added uncertainties for victims about obtaining a remedy and reparation.¹³⁹

The “most serious crimes” interpretation of the Statute is problematic at two levels:

- 1) the Prosecutor’s interpretation the “most serious crimes” in Article 5 of the Statute has been removed from its statutory context and has been attributed a new meaning which is not warranted by the provisions;
- 2) the notion of “most serious crimes” is applied to situations and cases, limiting both the number of cases brought and the breadth of criminality covered in each case in a manner contrary to the Prosecutor’s obligations under Article 54(1) of the Statute.

The Prosecutor’s 2003 policy document,¹⁴⁰ that sets out the “focused approach” to the “most serious” crimes, sequencing these in relation to their gravity, purports to impose this limitation based on the *chapeau* to Article 5 of the ICC Statute. Read in context, article 5 provides that:

The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) the crime of genocide;
- (b) crimes against humanity ...¹⁴¹

¹³⁵ The Prosecutor v Germain Katanga & Mathieu Ngudjolo, Case no. ICC-01/04-01/07. Charges included in the Warrant of Arrest and confirmed for trial include: murder, wilful killing, inhuman acts and/or treatment, sexual slavery, attacks against civilian population and pillaging (either as war crimes or as crimes against humanity).

¹³⁶ See: Human Rights Watch, *Ituri Covered in Blood*, July 2003. The Prosecutor has issued an arrest warrant against Mr Jean-Bosco Ntanganda, considered a somewhat ‘bigger fish’ than others indicted in the situation to date. However, he remains at large.

¹³⁷ The Trial in the case of The Prosecutor v Jean-Pierre Bemba, Case no. ICC-01/05-01/08 commenced on 22 November 2010.

¹³⁸ On 28 June 2010, two alleged victims in Ituri requested to present their views and concerns about the Office of the Prosecutor (OTP)’s decision not to investigate Jean Pierre Bemba’s crimes in Ituri. This request was rejected on the basis of the Prosecutor’s submission that he had not rejected, on interest of justice grounds, the possibility of investigating or prosecuting Bemba for crimes in Ituri. Decision on the request of the legal representative of victims VPRS 3 a n d VPRS 6 to review an alleged decision of the Prosecutor not to proceed, 25 October 2010, ICC-01/04-582, <http://www.icc-cpi.int/iccdocs/doc/doc957796.pdf>

¹³⁹ FIDH, ASADHO, Groupe Lotus, Ligue des Electeurs, Press release, *Victims question the ICC about lack of proceedings against Jean-Pierre Bemba for crimes committed in the DRC: Judges dismiss the request considering that the Prosecutor’s investigation is still open*, 3 November 2010.

¹⁴⁰ Office of the Prosecutor, Paper on some policy issues before the Office of the Prosecutor, September 2003; OTP Report on Prosecutorial Strategy, 14 September 2006, p.5.

¹⁴¹ Article 5, Crimes within the jurisdiction of the Court, ICC Statute.

Article 5 lists the crimes within the jurisdiction of the Court as genocide, crimes against humanity, war crimes, and the crime of aggression, qualifying these as the most serious crimes of concern to the international community as a whole. It does not limit the prosecutor's investigation to the most serious incidences of these crimes. It merely defines the jurisdiction of the court *rationae matorie*. If further crimes were to be added, these would be limited to crimes of most serious concern to the international community by virtue of the *chapeau*. Incidences of these crimes, as defined in the Statute, constitute by definition the most serious crimes of concern to humanity.

The prosecution of these crimes need not be limited any further. On the contrary, the Prosecutor is mandated to pursue these crimes, which, as individually defined in articles 6, 7 and 8 of the Statute, are by definition already limited to severe manifestations of the same. For instance, the definition of genocide, in addition to its particular *dolus specialis*, requires multiple acts or a pattern of similar conduct to be committed in order for these to qualify as genocidal acts.¹⁴² Crimes against humanity must, by definition be committed as part of a widespread or systematic attack, again by definition the acts are of the most serious nature in being linked to a context of criminality. Finally, war crimes, which might otherwise be susceptible of constituting single acts, has its own qualifying *chapeau*, which provides that the Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.¹⁴³ Thus, the reference to Article 5, as a basis for limiting investigations and prosecutions in the superlative, to the "most serious" crimes within the Statute's jurisdiction, is in our view incorrect.

Furthermore, by virtue of Article 54, on *the Duties and Powers of the Prosecutor with Respect to an Investigation*, the Prosecutor is obligated to extend his investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under the Statute. There is no reference to "most serious" examples of criminal responsibility or crimes within the Statute. Indeed, Article 5, which lists the crimes within the Statute, does not limit the crimes listed to the "most serious" expressions of such crimes; it merely provides that the crimes listed constitute the most serious crimes of concern to humanity. In conjunction with the gravity threshold provided in Article 17 and discussed further below, the Prosecutor is tasked to fully investigate the crimes that fall within the ICC Statute giving effect to survivors' established rights to an effective investigation required in numerous human rights instruments and at national level.¹⁴⁴ Article 54 provides:

Duties and powers of the Prosecutor with respect to investigations:

1. The Prosecutor shall:
 - a. In order to establish the truth, extend his investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under the Statute, and in so doing, shall investigate incriminating and exonerating circumstances equally.

The Prosecutor's policy paper also bases the limitation to "most serious" crimes on the gravity test for admissibility in Article 17 of the Statute. This provision provides a minimum gravity threshold for cases to be admissible, as yet to be defined in the Court's jurisprudence. Article 17, on Issues of admissibility reads as follows:

1. Having regard to paragraph 10 of the Preamble and Article 1, the Court shall determine that a case is inadmissible where: [...]

¹⁴² Article 6, Genocide, provides that " For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; etc. *The dolus specialis*, or very unique mental element requiring an intention to destroy in whole or in part a group, as well as the need for multiple acts, by definition limit genocide to the most serious crimes of concern to humanity.

¹⁴³ Article 8(1).

¹⁴⁴ The right to an effective investigation has been expanded by regional human rights bodies as well as UN treaty mechanisms such as the Human Rights Commission and Torture Committee.

d) The case is not of sufficient gravity to justify further action by the Court.¹⁴⁵

However, the object of this provision is to demand that cases of genocide, war crimes and crimes against humanity should meet an objective and constant threshold of gravity. This provision does not attempt to limit the number or size of cases selected on the basis that they are *the most* serious cases, as comparative concept. The notion of “sufficient gravity” demands that a certain level of gravity has been reached; everything above that level of gravity should be admissible. It does not imply a limit on cases or charges in relation to others. In accordance with article 54, the Prosecutor is mandated to pursue the serious crimes that are defined in the Statute which meet a test of *sufficient* gravity. The current approach, whereby cases are limited by number instead of by an objective threshold of gravity, is in our view, inconsistent with the Statute.

In addition, the limitation of the number of cases is compounded by the often-limited scope of the charges. Limiting cases to too few charges or incidences could in fact be perceived as displaying insufficient gravity. Given the widely available reports on the atrocities committed in the situation countries, the presentation of token, or minimalist cases contributes to an ever increasing impunity gap. These limitations reinforce a denial of the truth contrary to Article 54, regarding actual criminality, and hamper the ability of victims’ to exercise their right to a remedy and reparation for what constitute crimes of the most serious concern to the international community.

Case Study: impact of OTP’s policy on reparations in the first 2 DRC cases

As a direct result of the prosecutorial strategy, only a very limited class of victims will be eligible for reparation ordered directly against the convicted person. In the context of the first cases relating to the conflict in Ituri Province, Eastern DRC, their limited scope will raise serious implementation challenges on the ground. For instance, the only “victims” in the case against *Thomas Lubanga* are children who were recruited and or actively used as child soldiers by the UPC.¹⁴⁶ The individuals who suffered pillages, killings and rape at the behest of the UPC’s “army of children”¹⁴⁷ are not recognised as victims in the case. While the trial has considered evidence of the attacks committed by the UPC child soldiers, it has not granted victim status to the victims of those attacks. The lack of any recognition of the sexual and reproductive violence committed against girl soldiers may also limit the possibility of reparation for the specific harm suffered which often has lifelong repercussions, given the birth of children as a result of forced marriages during their time with the UPC.

Tokenistic charging may result in unfair reparations, and this may be seen when comparing the ‘winners’ and ‘losers’ of the first two cases. Given the inter-ethnic cleavages in Ituri that underlie the conflict, the first case against Lubanga (*Hema* community) has a tendency to be pitted against the second case, against Ngudjolo and Katanga (*Lendu* and *Ngiti* communities). Mr *Lubanga’s* UPC, representing the *Hema* and backed by Uganda, received *Hema* children into his war effort as well as forcibly recruiting children from other communities. The *Hema* children who joined the UPC “voluntarily” will benefit from reparation if Mr *Lubanga* is convicted. In addition, *Hema* civilians, who are victims of killings, rapes and pillaging in the second case will benefit from reparation in the second case. Thus, while civilians suffered on all sides, the “foreign-backed” *Hema* may well benefit from both cases, whilst the *Lendu* and other civilians will benefit from neither case (other than the children recruited by the UPC). On the ground, misinformation about the charging strategy

¹⁴⁵ Article 17(1)(d) of the ICC Statute. Paragraph 10 of the preamble emphasises that the ICC is complementary to national jurisdictions. Article 1 establishes the Court, again highlighting that it is complementary to national jurisdictions.

¹⁴⁶ The children’s parents or next of kin who are able to demonstrate harm suffered on account of the recruitment of their children are also considered victims, as well as individuals who may have suffered as a result of intervening to prevent the commission of the crimes; see Appeals Chamber, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432, par. 31, <http://www.icc-cpi.int/iccdocs/doc/doc529076.pdf>; Redacted version of “Decision on indirect victims”, ICC-01/04-01/06-1813, 8 April 2009, <http://www.icc-cpi.int/iccdocs/doc/doc662407.pdf>. Legal persons, such as schools may also be considered as victims if evidence is provided that the legal person suffered harm as a result of the recruitment.

¹⁴⁷ Human Rights Watch, *Paying for sending children to war*, 27 January 2009.

has led affected communities to believe that the ICC is biased in favour of the foreign-backed Hema, who are ethnically related to the Tutsi of Rwanda.

If the criminality pursued by the Prosecutor is not representative of the victimisation on the ground, there is a likelihood that reparations could exacerbate existing cleavages and animosity between communities, or entrench the sense of despair and injustice already felt by affected communities, running diametrically against the objectives of the justice process.

6. The Registry: Facilitating reparation requests

6.1 Effective information, outreach and training

In order to ensure that victims are able to access reparations they require information about the Court's mandate, and more specifically, information about the possibility of petitioning the Prosecutor, participating in proceedings and requesting reparation.¹⁴⁸ Effective and targeted outreach activities must address all these aspects specifically; using means adapted to reach rural communities and the most vulnerable and dispossessed victims. Specific strategies need to be adopted and applied to ensure that information is able to be transmitted to women and girl victims and other vulnerable or disadvantaged groups and that these groups are able to engage with the Court and exercise their rights under the Statute. In all cases, attention must be given to ensuring that media used, such as television, radio, street theatre or other market place outreach are appropriate, sufficient and effective in achieving the desired two-way communication.

With respect to victims' specific rights to participate in proceedings or request reparation, outreach is fundamental in clarifying expectations and reducing potential frustration and re-victimisation. There is an urgent and specific need for targeted outreach strategies and messaging to be delivered in relation to reparations. While it may be difficult to formulate appropriate messaging given the lack of clarity about the process and absence of reparations principles, victims may apply for reparation from the confirmation of charges onwards and should receive information about the process from this stage, even if the information merely outlines the framework. Given the new 'combined' application form, outreach on reparations may more easily be combined with information about participation. A lack of information, in contrast, can lead to confusion and misinformation spiralling out of control on the ground. For instance, with respect to the first cases in the Democratic Republic of the Congo (DRC), there is much confusion regarding reparation, with some groups believing that 'assistance' projects provided by the Trust Fund for Victims constituted reparations and that they have missed the opportunity to benefit. At one stage, when the immediate release of Mr Lubanga had been ordered, rumours circulated in Ituri that this was a ploy by the Court to avoid having to pay reparation.

It is suggested that greater awareness of victims' needs from a trauma perspective should underpin strategies to manage expectations more systematically. As a starting point, outreach strategies should recognise that inevitably, justice becomes intertwined with victims' continuing experiences in the same manner as any other trauma work. The importance of recognition, acknowledgement (through listening), compassion, and the significance of relationships that victims build in the aftermath of trauma can be factored into outreach strategies, so as to ensure that existing interactions are qualitatively adapted to constitute positive experiences for victims as opposed to reinforcements of injury.

Training on trauma and working with victims of trauma should be provided to all staff who are in contact with victims as a matter of course.¹⁴⁹ Awareness of principles relating to trauma work should also be included in trainings conducted for intermediaries.¹⁵⁰

¹⁴⁸ The ICC's *Strategy in Relation to Victims* recognises the importance of communicating the role of the Court, its judicial activities and victims' rights to petition the Court, participate in proceedings or seek reparation. See, The ICC Strategy in Relation to Victims, November 2009, ICC-ASP/8/45, http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-45-ENG.pdf. Objective I, p.4 aims to "Ensure that the role of the Court and its judicial activities are clearly communicated to all victims of a situation or case potentially falling within the jurisdiction of the Court, including their right to petition the Court (i.e. the right to give information to the Prosecutor to form the basis of a *proprio motu* investigation), to participate in proceedings at the Court or to seek reparation."

¹⁴⁹ It is noted that the Seminar on Victims held at the ICC on 8-9 November 2010 identified as a priority area the need for staff to also have protection against secondary traumatisation. In order for staff to be able to appropriately work with victims, it is key that they too receive such support as part of a holistic approach to increased awareness about trauma See press statement on the seminar at <http://www.icc-cpi.int/NR/exeres/90631044-6F99-4D24-93B6-72EA91253883.htm>

¹⁵⁰ See for instance: David Becker, *Dealing with the Consequences of Organised Violence in Trauma Work*, Research Centre for Constructive Conflict Management, Edited version August 2004. Available at http://www.berghof-handbook.net/documents/publications/becker_handbook.pdf

Training of Intermediaries

If intermediaries are relied upon to disseminate application forms within affected communities they will require training on how these forms are to be completed and how they will eventually be used by the Court so as to enable victims to make informed choices. While the Victims Participation and Reparations Section (VPRS) conducts training sessions on how to complete the application forms, these might benefit from more systematic planning and further resources. An initial victim mapping exercise would assist to devise appropriate situation-specific strategies. Identifying and supporting local lawyers, who are willing to work alongside intermediaries at this early stage would also be a means of increasing the quality of initial advice to victims in conjunction with the Office of Public Counsel for Victims.

The Registry is under a specific obligation to notify victims of reparations proceedings.¹⁵¹ However, reparation hearings will only take place in the event of conviction. If the Registry waits until a conviction to inform victims of their rights to apply, victims may in practice have insufficient time to present their claim and may also have missed opportunities to safeguard their interest in reparation during the trial phase. Thus, outreach about reparations should be conducted in a manner that integrates participation and reparation rights. This is all the more important now that a combined form has been adopted, whereby victims fill in their request for participation and/or reparation at the same time.

Relatively few applications for reparation have been filed in the first on-going cases. In this respect, focus group discussions with affected communities in Ituri have revealed a worrying apathy as regards applying for reparation. Many victims were put off by the lengthy, “bureaucratic” forms and the slowness of proceedings to date,¹⁵² which they felt were “a waste of time”.¹⁵³ There are significant disappointments on the ground, in particular with respect to the scope of the first trials and the limited number of people who will, in their view, be able to benefit from reparation, but also with respect to interactions with the Court and alleged lack of follow up. There will be other reasons for the minimal applications for reparation filed so far. As the rights to participate and claim reparation have been seen as separate, many victims and their legal representatives may be under the impression that they are to wait until conviction to apply, or may want to know the full extent of any culpability before applying.

Insufficient training on reparations could also impede victims from understanding what might be realistic in a manner that does not suppress their legitimate claims. In this regard, victims who do not receive sufficient information and advice, particularly youths formerly associated with armed groups, might make unrealistic claims, for instance, that they want \$1million in compensation, which could undermine the credibility of their requests.

6.2 Ensuring Adequate Time limits

Article 29 of the ICC Statute provides that ICC crimes are not subject to any statute of limitations. This implies that the Prosecutor may investigate and prosecute these crimes well into the future. However, as regards access to reparations that may be awarded in relation to a specific conviction, plans must be made to ensure that victims who have not made requests in the context of the trial

¹⁵¹ For instance, Rule 92(3) of the ICC’s Rules of Procedure and Evidence provides that: “In order to allow victims to apply for participation in the proceedings in accordance with Rule 89, the Court shall notify victims regarding its decision to hold a hearing to confirm charges pursuant to article 61...”

¹⁵² It must be noted that the first trial against Thomas Lubanga has seen the case stayed with orders for immediate release pending before the Appeals chamber twice, putting the trial on hold for a total of 8 months. Mr Lubanga was arrested in March 2005, and transferred to the Court a year later. While he first appeared before the Court on 20 March 2006 his trial only started on 26 January 2009.

¹⁵³ As expressed by intermediaries working with victims participating in case before the Court in Ituri, Sept 2010.

are not discriminated against. Many victims will not have sufficient information or the ability to pro-actively seek reparation initially, but may come forward at a later date following conviction. This is particularly the case given the limited amount of outreach on reparations undertaken to date. Where reparations orders do not identify victims, and where these must be identified by the Trust Fund for Victims, contingencies should be foreseen for those who are eligible but are not immediately identified. Practice exists for instance in relation to reparation for Holocaust survivors through the Conference on Jewish Material Claims Against Germany as well as other mass claims processes.¹⁵⁴

In this regard, specific lessons on ensuring adequate time limits include:

- Ensuring that victims are able to apply for reparation in a given case from the confirmation of charges, and reminded of this right in all outreach;
- Further consolidating the current practice of VPRS to automatically consider application forms received from victims for reparation if there is no indication to the contrary;
- Ensuring sufficient notification of “reparations proceedings” when a criminal conviction is entered, in addition to prior outreach;
- Ensuring that notification is not be limited to those who already communicated with the Court;
- While there is an understanding that it will be necessary to set a time limit, the time limit for filing reparation claims should be reasonable in light of prevailing circumstances of victims, where they live, what logistical challenges they may have;
- Making provision for the time limit to be extended if necessary (while acknowledging that it cannot be indefinite).

6.3 Efficient processing of reparation requests

A new ‘combined’ participation and reparation Standard Application Form (described in Section 2.1 above) was devised by the Registry and approved by the Presidency in 2010. The new, shorter application form is a welcome response to long-standing criticisms from civil society groups regarding the length and complexity of the first set of forms. The new form combines participation and reparation into a single form of seven pages, as oppose to two forms of 17 pages each. The new form also appears much clearer, with useful guide notes along the margin, though its practicality will be revealed as it is used in the field and processed by the Registry thereafter. The combining of participation and reparation into one form goes in the direction of increasing efficiencies. Nonetheless, there are further efficiencies that can be conceived. For instance, it is suggested that processing forms in the field, as close to the victims as possible, may enable more efficient collection of missing information and completion.

The Chambers have determined what constitutes a ‘complete’ application form for the purposes of victim participation. With respect to the Registry’s preliminary role in facilitating the receipt of the information required and ensuring appropriate efficiencies, it is suggested that, verifying completeness and admissibility of claims should be progressed as far as possible as an administrative function. The adversarial examination of individual claims should be avoided in favour of, for instance, a revision of collective groupings or recommendations made by the Registry, particularly where there are large numbers of applicants. If Chambers were to identify parameters or an appropriate test for substantive consideration of admissibility or eligibility of requests for reparation, much of this processing could be undertaken by the Registry. Substantive consideration of reparations requests is considered in Section 6 below.

¹⁵⁴ These See Gideon Taylor, ‘The Claims Conference and the Historic Jewish Efforts for Holocaust-Related Compensation and Restitution’, in Ferstman et al., *supra*, p.103.

What constitutes a “complete” request?

At the commencement of the trial, subject to any protective measures, the Court is obliged to request the Registrar to notify requests for reparation received to those named in the request or identified in the charges.¹⁵⁵ The Registrar is also obliged to notify the requests to any interested persons or States.¹⁵⁶ During negotiations on the Rules of Procedure, there was some discussion as to the appropriate time for claims to be notified to an accused. It was determined that the appropriate junction was after charges were confirmed, namely at the opening of the trial, because until charges were confirmed, it would be unclear whether a person could face any claims.¹⁵⁷

In accordance with Rule 94 of the Rules of Procedure and Evidence, the Registry has filed reparations requests with the Chamber as and when these have been received. These have been duly notified to the defence¹⁵⁸ initially in redacted form,¹⁵⁹ but also in un-redacted form.¹⁶⁰ While the Chambers have provided the Registry with some guidance on what constitutes a complete application for the purposes of participating in proceedings, there has not been any equivalent guidance with respect to processing requests for reparation.¹⁶¹

For the purposes of participation, and in accordance with Regulation 86(2) of the Regulations of the Court, the Chambers requires the following elements for an application to be considered complete:¹⁶²

- Proof of identity of the applicant;
- The date and place of the alleged crime(s);
- A description of the harm suffered resulting from the commission of crime(s) under the jurisdiction of the Court;
- The express consent of the victim if an application is made on her/his behalf;
- When a victim is a minor, evidence of a family link or legal guardianship;¹⁶³
- A signature or thumb print on the document and at least on the last page of the application.

¹⁵⁵ Rule 94(2) of the Rules of Procedure and Evidence.

¹⁵⁶ *ibid.*

¹⁵⁷ See P. Lewis and H. Friman, in R. Lee (ed) *ICC Elements of Crimes and Rules of Procedure and Evidence*, *supra*, at p.480

¹⁵⁸ The only time reparations requests were also shared with OTP was in relation to victims with dual status. Two victims had also testified as OTP witnesses in the case Katanga & Ngudjolo; see: *Notification des demandes en réparation aux parties*, 30 September 2009, ICC-01/04-01/07-2430.

¹⁵⁹ The Registry filed reparations requests received for the first time in the Lubanga case on 26 January 2009: *Notification to the Defence of applications for reparations in accordance with Rule 94(2) of the Rules of Procedure and Evidence*, ICC-01/04-01/06-1652. The Registry addressed the Chamber orally during proceedings indicating that: “VPRS has made its redactions based on the usual guidelines of the Chamber. At this point in time the Registry does not plan to disclose the applications or notify the applications to other individuals. The Registry does not believe [...] that the notification of the applications to another person or a state is necessary at this point in time. We shall continue to analyse the situation and shall inform the Chamber if a person or a state were to be notified. Finally, the Registry believes that any application for reparations which is received during the proceedings should be notified to the Defence and to interested persons as and when they are received.” Transcript, ICC-01/04-01/06-T-105-FRA ET WT 22-01-2009 23/61 NB T, page 8, line 8 to page 9, line 21.

¹⁶⁰ Unredacted forms have been transmitted only in cases where the defence already knew the identity of the victim and was in possession of unredacted application forms to participate in proceedings.

¹⁶¹ For instance the Registry has indicated orally to the Chamber during the Lubanga trial that: “The proposal that we make is that in future applications for reparations are automatically communicated to the Defence once any necessary redactions have been implemented.” Transcript, ICC-01/04-01/06-T-224-ENG ET WT 08-01-2010, page 18, lines 9 to 15.

¹⁶² See ICC-01/04-374, Pre-Trial Chamber I, 17 August 2007, par. 12. See also No. ICC-02/05-111-Corr, Pre-Trial Chamber I (Single Judge), 14 December 2007, paras. 24 and 26; No. ICC-01/04-374, Pre-Trial Chamber I (Single Judge), 3 July 2008, par. 17; No. ICC-02/05-01/09-255, Pre-Trial Chamber I (Single Judge), 10 December 2009, par. 8; and No. ICC-02/05-02/09-255, Pre-Trial Chamber I (Single Judge), 19 March 2010, para. 4.

¹⁶³ ICC-01/04-505, Pre-Trial Chamber I (Single Judge), 3 July 2008, para. 31.

This judicial determination provided useful guidance for the Registry to be able to assist and support proceedings. Rather than taking up valuable court time with incomplete applications, it was decided that the Registry should only submit “complete” applications to Chambers and notify applicants of missing information directly. In this regard, the Registry is to “seek all necessary additional information from a victim in order to complete his or her requests [for reparation] in accordance with Rule 94(1).” Furthermore, the Registry is to “assist victims in completing such requests.”¹⁶⁴

Guidance on reparations claims might include:

- Stipulation as to whether the jurisprudence on accepted types of documentation for proving identity established for the purposes of participation shall also apply to requests for reparation;
- Types of acceptable documentary support for the purposes of proving harm;
- Examples of where harm might be presumed given the prevailing circumstances in the field and the type of evidence that might be obtained; or
- Levels of specificity required with respect to the form of reparation indicated in the claim.

Providing a possibility for victims to indicate types of collective awards

At present, the reparation form only provides applicants the possibility of providing information on individual harms suffered. The form should also specifically allow applicants to indicate the types of collective awards they see as appropriate, with appropriate guidance given.

Furthermore, given the concrete possibility of the Court to make an award on a collective basis, it would seem appropriate that victims might be able to collectively request reparation.¹⁶⁵

Appropriate protective measures relating to reparation requests

Considering the requirement to notify requests not only to parties but also to interested States, it is critical that the Registry is provided with guidance on appropriate protective measures. It appears that the Registry has notified reparations requests to the Defence, as provided for by Rule 94(2) of the Rules of Procedure and Evidence, both in redacted as well as un-redacted forms to date.¹⁶⁶ Trial Chambers I and II have both requested that the Registry redact reparations requests transmitted to the Defence. However, when Trial Chamber III failed to refer to the need for redactions in the *Bemba Case*, the Registry automatically applied the same redactions as were ordered for the purpose of applications for participation.¹⁶⁷ Due attention and consistency are required in order to be able to provide a degree of certainty to applicants.

¹⁶⁴ Regulation 88(2) Regulations of the Court.

¹⁶⁵ See Rule 97 of the Rules of Procedure and Evidence.

¹⁶⁶ Un-redacted versions have only been provided to the Defence where it was already in possession of the un-redacted version of the application for participation of the victim. For instance in the Katanga and Ngudjolo case, 45 reparation claims have been transmitted to the Defence as of 15 March 2011, all in redacted format, with the identity of the claimant being left unredacted only when it is already known by the Defence. See: *Notification des demandes en réparation aux équipes de la Défense*, ICC-01/04-01/07-1672, 24 November 2009; *Deuxième notification des demandes en réparation aux équipes de la Défense* ICC-01/04-01/07-1837, 4 February 2010; *Notification des demandes en réparation aux parties*, ICC-01/04-01/07-2430, 30 September 2010.

¹⁶⁷ Trial Chamber I ordered orally on 8 January 2010 that new applications for reparations be automatically communicated to the Defence once any necessary redactions have been implemented, ICC-01/04-01/06-T-224-ENG ET WT 08-01-2010, page 18, lines 9 to 15; Trial Chamber II ordered on 24 November 2009, that the Registry transmit to the two accused and their defence reparation forms “in consultation with the specialised units of the Registry”. ICC-01/04-01/07-T-80-ENG RT 24-11-2009, p 20; Trial Chamber III asked the Registrar “to provide notification of any request for reparations received so far to Mr Bemba as soon as practicable “ without mentioning the need for redaction, however in its transmission to the defence, the Registry stated that it had “ redacted the applications for reparations in accordance with the guidelines on redactions for applications for participation provided in the 22 February 2010 Decision [on victims’ participation].” *Notification to the Defence of applications for reparations in accordance with Rule 94(2) of the Rules of Procedure and Evidence*, ICC-01/05-01/08-1132, 12 January 2011 and Transcript of the 24 November 2010 hearing, ICC-01/04-01/07-T-80-ENG ET WT, p 20.

Avoiding the need to re-consider admissibility of applications

In order to maximise efficiencies, it is suggested that where victims have participated in trial proceedings, and have thus already obtained ‘victim status’ in relation to the case, their reparation claims should as far as possible¹⁶⁸ be considered admissible in the reparation phase. In this manner, only new victims approaching the Court for the first time at the reparation phase will have to be pre-assessed in terms of whether their requests for reparation are admissible.

6.4 Verifying Identity: types of documentary support

Rule 94 requires claimants to provide their identity and address. The Chambers’ jurisprudence on establishing identity for the purposes of victim participation may be useful in this regard. In the *DRC Situation*, Pre-Trial Chamber I noted that “in regions which are or have been ravaged by conflict, not all civil status records may be available and if available, they may be difficult or too expensive to obtain.”¹⁶⁹ Pre-Trial Chamber I elaborated a list of acceptable documents to prove identity, kinship, guardianship or legal guardianship:

- (i) National identity card, passport, birth certificate,¹⁷⁰ death certificate, marriage certificate, family registration booklet, will, driving licence, card from a humanitarian agency;
- (ii) Voting card, student identity card, pupil identity card, letter from local authority, camp registration card, documents pertaining to medical treatment, employee identity card, baptism card; certificate/attestation of loss of documents (loss of official documents), school documents, church membership card, association and political party membership card, documents issued in rehabilitation centres for children associated with armed groups.

Subsequent jurisprudence has confirmed and extended the list of possible documentation in relation to the particulars of the domestic context. Chambers have been mindful of the particular contexts in which victims are living, and in particular the different security situations, political, social and personal circumstances that might prevail, affecting their ability to obtain such documentation. The Single Judge in the Uganda Situation stated that:

[i]n a country such as Uganda, where many areas have been (and, to some extent, still are) ravaged by an on-going conflict and communication and travelling between different areas may be difficult, it would be inappropriate to expect applicants to be able to provide a proof of identity of the same type as would be required of individuals living in areas not experience the same kind of difficulties. On the other hand, given the profound impact that the right to participate may have on the parties and, ultimately, on the overall fairness of the proceedings, it would be equally inappropriate not to require that some kind of proof meeting a few basic requirements be submitted.¹⁷¹

¹⁶⁸ Discussion of the applicable test for establishing victim status for the purposes of reparation is contrasted with potential tests for the purposes of reparation. A simple and unified system would be crucial to ensuring efficiency and avoiding duplication of processing.

¹⁶⁹ ICC-01/04-374, Pre-Trial Chamber I, 17 August 2007, par. 14.

¹⁷⁰ In a subsequent decision, Pre-Trial Chamber I recalled the jurisprudence of the IACtHR (*Plan de Sanchez Massacre v. Guatemala, Decision on reparation 19 November 2004, para 63*) which held that victims would be recognised “if they showed a record of birth, proof of residence, a marriage certificate or *any other document issued by an authority and mentioning one of the victims*” and rules that attestation from the civil registrar were admissible. *Decision on the confirmation of charges*, ICC-01/04-01/06-803m 14 May 2007, para 107-117.

¹⁷¹ Single Judge’s “Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06”, ICC-02/04-101, 13 August 2007, para 16; Single Judge’s “Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06,

Following the receipt of a Registry Report on the availability of identity documents in Uganda, the Single judge noted, that “these requirements must be lowered and adapted to the factual circumstances in the region.”¹⁷² The list of acceptable documents was extended to include, *inter alia*: an identification letter issued by the Local Council; a letter issued by the leader of an IDP camp; a “reunion” letter issued by the resident District Commissioner; an identity card issued by a work place or educational establishment; a camp registration card; and card issued by a humanitarian relief agency such as the United Nations High Commissioner for Refugees (UNHCR) and the World Food Programme; a baptism card; a letter issued by a Rehabilitation Centre.¹⁷³

In the Case of *Jean Pierre Bemba*, the Pre-trial Chamber identified the following documentation as acceptable proof of identity:

Nationality identity card, driving licence, passport, family registration book, marriage certificate or extract thereof, death certificate or extract thereof, supplementary judgement, birth certificate or extract thereof, new identity card, expired identity card, professional card, association membership card, receipt of request for a national identity card, employee identity card, member of parliament card, church membership card, will, and pension book.¹⁷⁴

Building on the jurisprudence in the *Uganda Situation*, in *Jean-Pierre Bemba*, it was found appropriate to take a flexible approach, adapted to the realities in the individual Situation country.¹⁷⁵ The Chamber indicated that where it is not possible for a victim applicant to acquire or produce a document of the kind set out above, the Chamber will consider a statement signed by two witnesses attesting to the identity of the victim applicant and including, where applicable, the relationship between the victim applicant and the person acting on his or her behalf. The statement should be accompanied by proof of identity of the two witnesses as set out above.¹⁷⁶

6.5 Verifying completeness of other elements

Description of injury, loss or harm

As with victims’ applications for participation in proceedings, victims are required to demonstrate that they have suffered harm as a result of the commission of the crime within the Court’s jurisdiction. For the purposes of establishing the completeness or admissibility of a claim, it is submitted that the *prima facie* requirements applicable to the participation phase may be appropriate for establishing a complete form, whereby the victim is simply required to list forms of harm. The Appeals Chamber has found, in relation to establishing ‘victim status’ for the purposes of

a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06”, ICC-02/04- 125, 14 March 2008, para 6. The Chamber had requested the Registry to submit a report on the types of identification documents that would fulfil established criteria. The Report stressed that obtaining such identification was problematic in Uganda.

¹⁷² Situation in Uganda, Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06, 14 March 2008, ICC-02/04-125

¹⁷³ *Ibid.*

¹⁷⁴ ICC-01/05-01 08-168-Conf-Exp-Anx2.

¹⁷⁵ Situation in the Central African Republic, The Prosecutor v. Jean-Pierre Bemba Gombo, *Fourth Decision on Victims’ Participation*, 12 December 2008, par. 35, <http://www.icc-cpi.int/iccdocs/doc/doc610092.pdf>

¹⁷⁶ *Ibid.*, par. 37. This follows the practice established in the Inter-American Court; In the case of *Aloeboetoe v Suriname*, Judgment on reparations, 10 September 1993, paras 64-6, the Court recognised that Suriname did not have effective or accessible systems for individuals to obtain identification cards, and that it could not require victims to provide the impossible. Alternative methods of establishing identity were used, such as officialised statements.

participation, that material, physical, and psychological harm are all forms of harm if they are suffered personally by the victim.¹⁷⁷

Claims for restitution, compensation and/or rehabilitation

With respect to restitution of assets, property or other tangible items, victims are to provide a description of them and supporting documents as far as possible. In many instances, evidence of specific loss will be unavailable as documents may have been unavailable in the circumstances, lost or destroyed, or means of proving possession of livestock or other possessions will be impossible. In this regard there will be a need to rely on other means of determination, either through reports provided by the Registry at the request of the Chambers (as to availability of certain types of documentation or evidence). The practice of using presumptions of harm and other creative approaches to evidential obstacles, may be useful in this context as it has been in other jurisdictions. These are examined further in Section 7.3 below.

Claims for compensation may quantify any loss as far as possible, including elements such as lost earnings, loss or damage to property or expenses incurred. Claims for rehabilitation should provide sufficient information as to cover physical, psychosocial or other needs, including needs for legal services.¹⁷⁸ Where possible medical reports should be included, however, it may be appropriate for victims to request medical examination as part of their claim if they have been unable to obtain appropriate examination. In this respect, there is a role for experts and officials of the Court to assist the Chamber with appropriate determinations about medical and psychosocial needs for the purposes of defining awards.

While the focus in Article 75 is on restitution, compensation and rehabilitation, other forms of remedy are not excluded. In many instances forms of satisfaction may be very meaningful to victims and essential in establishing a sense of *restitutio in integrum*. For instance, in the reparation phase of the first case before the Extraordinary Chambers in the Courts of Cambodia, victims requested publication of all instances of apology that *Kaing Guek Eav alias 'Duch'* had uttered in the course of the trial. Other measures requested included the construction of memorials and access to free health care services from the government. While some requests were denied as they were interpreted as requiring material input from the government (which civil parties have appealed as an error of fact),¹⁷⁹ others were rejected on the basis of lack of specificity or sufficient information. It is recommended that claimants should have opportunities to clarify their requests, and that other interested parties, such as States, as well as the Trust Fund for Victims be invited to make observations during hearings so that potential difficulties can be identified and addressed prior to awards being made.

¹⁷⁷ Appeals Chamber, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432, <http://www.icc-cpi.int/iccdocs/doc/doc529076.PDF>

¹⁷⁸ The definition of Rehabilitation in the UN Basic Principles on the Right to a Remedy and Reparation.

¹⁷⁹ Appeal against Judgement on reparations by Co-Lawyers for Civil Parties – Group 2, filed before the Supreme Court Chamber, 2 November 2010, Case no. 001/18-07-2007-ECCC/TC.

Part B Recommendations: Preparing for ICC Reparations: Preliminary Steps and Information Needed

Recommendations to Chambers:

- Ensure adequate time limits for granting reparation claims;
- Develop and provide application forms also in Arabic;
- Clarify what constitutes a complete application;
- Clarify appropriate protective measures in relation to reparations requests transmitted to interested parties;
- Ensure non-duplication of admissibility considerations for participating victims who also request reparation.

Recommendations to the Office of the Prosecutor:

- Develop a policy on its role to investigate and prosecute crimes as broadly as possible on the basis of an objective and constant gravity test;
- Ensure effective information gathering from the ground level in order to ensure appropriate victim-mapping as part of investigation strategies;
- Investigate financial assets with a view to ensuring the preventive freezing of assets and future reparations.

Recommendations to the Registry:

- Ensure effective and targeted outreach;
- Continue to develop specific strategies to ensure appropriate engagement with women and girl victims and other vulnerable or disadvantaged groups;
- Ensure training on trauma for all staff working with victims;
- Develop and provide application forms also in Arabic;
- Consider and propose further efficiencies to processing of requests to Chambers;
- Propose and develop a possibility for collective applications for reparation with corresponding collective consultations.

C. Considering the modalities of reparations proceedings

7. Proceedings relating to reparation before or during Trial

7.1 Evidence relating to reparation during Trial

In accordance with Regulation 56 of the Regulations of the Court, the Trial Chamber may hear witnesses and examine evidence for the purposes of a decision on reparations at the same time as for the purposes of trial.¹⁸⁰ Jurisprudence from the Lubanga Trial and confirmed in the Bemba Trial has developed this principle in relation to a) hearing evidence relating to reparation in general, b) specific questioning of witnesses in relation to reparation and c) testimony given by participating victims in relation to reparation. Trial Chamber I in the *Lubanga* case set out its approach as follows:

120. In the judgment of the Chamber, Regulation 56 of the Regulations does not, [...] undermine the rights of the defence and the presumption of innocence. The objective of this provision is to enable the Chamber to consider evidence at different stages in the overall process with a view to ensuring the proceedings are expeditious and effective. This will enable the Chamber to avoid unnecessary hardship or unfairness to the witnesses by removing, where appropriate, the necessity of giving evidence twice. This will guarantee the preservation of evidence that may be unavailable to the Chamber at a later stage of the proceedings.

121. In discharging its judicial function, the Chamber will be able, without difficulty, to separate the evidence that relates to the charges from the evidence that solely relates to reparations, and to ignore the latter until the reparations stage (if the accused is convicted). Should it emerge that evidence relating to reparations introduced during the trial may be admissible and relevant to the determination of the charges, consideration will need to be given in open court as to whether it is fair for the Chamber to take this into account when deciding on the accused's innocence or guilt. The Trial Chamber has borne in mind that it has a statutory obligation to request the submission of all evidence that is necessary for determining the truth under Article 69(3) of the Statute, although this requirement must not displace the obligation of ensuring the accused receives a fair trial.

122. The Chamber does not agree with the prosecution's concept of a wholly "blended approach" because there will be some areas of evidence concerning reparations which it would be inappropriate, unfair or inefficient to consider as part of the trial process.

The extent to which reparations issues are considered during the trial will follow fact sensitive decisions involving careful scrutiny of the proposed areas of evidence and the implications of introducing this material at any particular stage. The Trial Chamber may allow such evidence to be given during the trial if it is in the interests of individual witnesses or victims, or if it will assist with the efficient disposal of issues that may arise for determination. However, the Chamber emphasises that at all times it will ensure that this course does not involve any element of prejudgment on the issue of the defendant's guilt or innocence, and generally that it does not undermine the defendant's right to a fair trial."¹⁸¹

¹⁸⁰ Regulation 56 of the Regulations of the Court.

¹⁸¹ Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119, <http://www.iclklamberg.com/Caselaw/DRC/Dyilo/TCI/ICC-01-04-01-06-1140-ENG.pdf>.

This approach has been endorsed by Trial Chamber III in the *Bemba* trial.¹⁸² In relation to questioning of witnesses in relation to reparations, the Trial Chamber in the case of *Lubanga* also ruled that, as provided for under Rule 140(2)b of the Rules, parties could question witnesses on “other relevant matters” which includes *inter alia*, “trial issues (e.g. matters which impact on the guilt or innocence of the accused such as the credibility or reliability of the evidence), sentencing issues (mitigating or aggravating factors), and reparation issues (properties, assets and harm suffered).”¹⁸³ Of note in this first case has been the systematic questioning of witnesses by Judge Odio Benito with regard to harm, including harm resulting from sexual violence suffered by girl child soldiers. While this practice was opposed by the Defence, the Chamber ruled on judicial questioning, noting that nothing prevented it to “ask questions about facts and issues that have been ignored, or inadequately dealt with, by counsel. For the reasons set out above, the general evidence in the case is not restricted to the facts and circumstances described in the charge and any amendments to the charges, and under article 69 (3) the Chamber is entitled to request the submission of all evidence that it considers necessary for the determination of the truth.”¹⁸⁴

As for victims’ personal testimony in relation to reparation, a small number of victims have requested and have been granted leave to testify in person in the all of the first three trials (*Lubanga*,¹⁸⁵ *Katanga and Ngudjolo*¹⁸⁶ as well as the *Bemba* trials¹⁸⁷).

Enabling victims to present evidence in person has mainly been framed in the context of the Chamber’s right under article 69 “to request the submission of all evidence that it considers necessary for the determination of the truth.” However, when granting the request by three victims to testify, Trial Chamber I in the *Lubanga* case indicated that “this evidence may assist the Chamber in its consideration of reparations for certain victims, if these arise later in the proceedings.”¹⁸⁸

In the *Katanga and Ngudjolo* case, the Chamber stated that: “the appearance of Victims [...] was of a nature to contribute in a significant and effective manner to the search for the truth and to the process of establishing the facts.” It furthermore underlined that “victims’ testimonies could later on assist the Chamber should it have to proceed with an assessment of all the harms suffered by victims.”¹⁸⁹ One of the four victims granted leave to testify in person in that case was a minor who was to be represented by his/her guardian. The Court decided to hear the guardian on behalf of the child-victim, but also chose to invite her to testify as a witness of the Court in her own right.¹⁹⁰

¹⁸² Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings, 12 July 2010, ICC-01/05-01/08-807-Corr, para 28, <http://www.iclklamberg.com/Caselaw/CAR/Bemba/TCIII/807-corr.pdf>.

¹⁸³ Decision on various issues related to witnesses’ testimony during trial, 29 January 2008, ICC-01/04-01/06-1140, paragraph 32; This practice was later confirmed by the same Chamber with regards to the questions put by the Bench to witnesses, Decision on judicial questioning, 18 March 2010, ICC-01/04-01/06-2360, para 36, 39, <http://www.iclklamberg.com/Caselaw/DRC/Dyilo/TCI/2360.pdf>

¹⁸⁴ Decision on judicial questioning, 18 March 2010, ICC-01/04-01/06-2360, para 36, 39, <http://www.iclklamberg.com/Caselaw/DRC/Dyilo/TCI/2360.pdf>

¹⁸⁵ Rachel Irwin, *Latest News : Three victims to testify* <http://www.lubangatrial.org/2009/08/07/latest-news-three-victims-to-testify/> . 7 August, 2009, Lubanga Trial Blog, Open Society Institute.

¹⁸⁶ *The Prosecutor v Thomas Lubanga*, Décision aux fins de comparution des victimes a/0381/09, a/0018/09, a/0191/08 et pan/0363/09 agissant au nom de a/0363/09, 9 November 2010, ICC-01/04-01/07-2517, <http://www.icc-cpi.int/iccdocs/doc/doc964978.pdf>

¹⁸⁷ *The Prosecutor v Germain Katanga & Mathieu Ngudjolo*, Decision on 653 applications by victims to participate in the proceedings, 23 December 2010, ICC-01/05-01/08-1091, <http://www.icc-cpi.int/iccdocs/doc/doc991989.pdf>.

¹⁸⁸ Decision on the request by victims a/ 0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial, ICC-01/04-01/06-2032-Anx, 26 June 2009, para 29, <http://www.iclklamberg.com/Caselaw/DRC/Dyilo/TCI/2032anx.pdf>

¹⁸⁹ Décision aux fins de comparution des victimes a/0381/09, a/0018/09, a/0191/08 et pan/0363/09 agissant au nom de a/0363/09, 9 November 2010, ICC-01/04-01/07-2517, para 20.

¹⁹⁰ It appears from a later filing by her legal representative, that issues arose as to her credibility, and as a result she was removed from the list of victims being called to testify.

Thus, victims who testify in person during the trial can potentially add extremely valuable evidence about the context in which the crimes were committed, or other facts impacting on conviction as well as reparations.

In general victims and their legal representatives need to be well aware of the possibility of providing evidence during trial for the purposes of reparation. Currently it would seem that while the practice has been followed in all three trials, the possibilities of establishing facts regarding the full extent of damage could be explored further.

7.2 Considerations relating to Judgment on Merits

Establishing presumptions that unidentified victims exist

Given the nature of the crimes within the Court's jurisdiction, it is foreseeable that large numbers of victims will be directly affected by the crimes being prosecuted. During the course of the trial, it may become apparent that only a few victims have been able to participate in proceedings, and many direct and indirect victims of the crimes for which an accused is convicted remain unidentified.¹⁹¹

In this respect, the Inter-American Court of Human Rights has been mindful to establish presumptions that other victims might be identified subsequently. For instance, in the Judgment on Merits in the case of *Plan de Sanchez Massacre*, the Court held that:

The victims of the violations mentioned [...] are the persons listed by the Commission in its application (*supra* para. 42.48), and those that may subsequently be identified, since the complexities and difficulties faced in identifying them lead to the presumption that there may be victims yet to be identified.¹⁹²

The Trial Chambers may similarly wish to establish such a presumption in the final decision and as a consequence mandate the Registry to proactively undertake steps to identify potential victims by ensuring that the decision is well publicised in victims' communities, and that information and assistance is available to enable additional applicants to request reparation.¹⁹³ Such measures are discussed further in Section 5.1 below with respect to modalities for reparations proceedings.

¹⁹¹ Rule 94, regarding the procedure for requesting reparation provides no restriction on who may apply, other than persons who are victims, within the definition of victims under Rule 85 of the Rules of Procedure and Evidence.

¹⁹² The Case of *Plan de Sánchez Massacre v Guatemala*, Inter-American Court for Human Rights, Judgment of 29 April 2004 (Merits), para 48. See also the Judgment of 19 November 2004 (Reparations), para 62.

¹⁹³ Regulation 88 of the Regulations of the Court obligate the Registry to make the application forms for reparation available to victims, victims' groups, intergovernmental or non-governmental organisations which may assist in their dissemination. The Registrar is also obligated to assist victims in completing their requests for reparation.

8. What modalities for Reparations Proceedings?

Before the Chamber can make an order for reparations, it must consider representations to be made by the convicted person, the victims and other interested persons or States.¹⁹⁴ Reparations proceedings can be triggered either by requests filed by victims, or on the Court's own motion.¹⁹⁵

In terms of timing, such proceedings might constitute a separate 'reparations phase' after conviction, to take place as part of the trial in the context of hearings on sentencing.¹⁹⁶ The convicted person, as well as others to whom requests for reparation were notified during the course of the trial (e.g. other interested persons or states), have an automatic right to make representations in response to the claims.¹⁹⁷ Such representations may be made in writing and/or orally.

It is suggested that reparations *hearings* would be an appropriate means of fulfilling at least in part, the Chamber's obligation to consider representations.¹⁹⁸

8.1 Notification and publicity of reparations hearings

The Registrar is bound to notify victims or their legal representatives as well as the person or persons concerned of reparations proceedings. Such notification is specifically required, without prejudice to other obligations to notify victims and other commitments to communicate with affected communities.¹⁹⁹ Furthermore, in determining what measures are necessary to give adequate publicity to the reparations proceedings, the Registry has an obligation to take into account:

[F]actors relating to the specific context such as languages or dialects spoken, local customs and traditions, literacy rates and access to the media. In giving such publicity, the Registry shall seek to ensure that victims make their applications before the start of the stage of the proceedings in which they want to participate in accordance with Regulation 86(3) of the Regulations of the Court.²⁰⁰

In order to give full effect to the obligation to notify victims of special reparations proceedings, pro-active measures should be foreseen. The Court should not restrict itself to those that have applied, and as a starting point, the Registry might carry out an analysis of the findings on culpability to help it devise an appropriate notification and outreach strategy, either as mandated by the Chamber or on the basis of its existing obligations in relation to notification and assisting victims.²⁰¹

¹⁹⁴ Article 75(3) of the ICC Statute.

¹⁹⁵ See rules 94 and 95 of the Rules of Procedure and Evidence. Rule 94: Procedure on Request; Rule 95, Procedure on the motion of the Court.

¹⁹⁶ Article 76(3) provides that "representations under Article 75 [on reparations] shall be heard during the further hearings referred to in Article 76(2), and if necessary during any additional hearing. Article 76(2) provides that "before the completion of the trial, the Trial Chamber may on its own motion and shall at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to sentence..."

¹⁹⁷ Rules 94 and 95 of the Rules of Procedure and Evidence.

¹⁹⁸ Rules 94 and 95 of the Rules of Procedure and Evidence provide that those notified of reparations requests (victims' claims for reparation), are entitled to file representations, and that these shall be filed with the Registry. Article 75(3) enables the Chamber to invite representations also from victims themselves, and obligates the Chamber to consider the representations received.

¹⁹⁹ Rule 96 of the Rules of Procedure and Evidence, Publication of reparations proceedings.

²⁰⁰ Regulation 103 of the Regulations of the Registry.

²⁰¹ Eg. Rule 96 of the Rules of Procedure and Evidence, Regulation 88 of the Regulations of the Court and Regulation 103 of the Regulations of the Registry.

As is seen in the *Situation in the Central African Republic*, where over 1,350 victims are participating in the case against *Jean Pierre Bemba*, a pro-active approach to identify and assist victims is crucial if they are to benefit from the rights afforded through the ICC's judicial framework. In this instance, the Office of Public Counsel for Victims undertook a proactive approach to identify and advise victims of their rights, though other factors also contributed, such as the absence of conflict and increased security as compared to the DRC Situation. The most vulnerable and dispossessed victims will not be in a position to apply for reparation unless they are proactively informed and assisted.

Given the adverse living circumstances of the vast majority of victims, and the obstacles to obtain information and documents, the Court may wish, *inter alia* to:

- Invite the Registry to conduct targeted outreach;
- Extend deadlines where outreach is shown to have been deficient;
- Use its *proprio motu* powers to establish necessary procedures or dedicated strategies to notify victims when there are no or very few reparations requests;
- Designate a provisional legal representative or the Office of Public Counsel for Victims to represent the interests of unidentified victims;
- Invite submissions from other experts for the purposes of ensuring effective notification.

8.2 The need for clear modalities for reparations proceedings

While the modalities of victims' participation in proceedings up until conviction may continue to apply to reparations proceedings to a certain extent, as highlighted throughout this Report, there are a number of issues that need clarification. As indicated earlier in this Report, some of these issues would best be clarified through principles adopted pursuant to Article 75. Regardless of whether such principles will be adopted, there will nonetheless be a need to clarify the modalities for reparations proceedings within the context of individual cases before the Court, including in reference to timings of submissions, etc.

It is suggested that the Court holds consultations at the earliest opportunity and that it also enables exchanges between the parties before establishing such modalities. Such processes can usefully raise issues and options that might not otherwise have been foreseen. Judicial exchanges on the modalities might take place in the form of filings made in parallel to the trial proceedings. In this manner the Chamber might be able to clarify an array of questions that remain as yet unclear, allowing the Registry as well as victims' and their representatives to prepare.

Considerations relating to the composition of the bench for reparations proceedings

One issue that is being raised both inside and outside the Court, and was raised in a side event during the course of the 8th Session of the Assembly of States Parties in New York in December 2010, is the composition of the bench for the purposes of reparations proceedings. The Victims' Rights Working Group has prepared a paper in March 2011 on this issue.²⁰²

The provisions within the ICC Statute and Rules of Procedures, which provide that reparations proceedings are technically part of the trial, imply that the Trial Chamber, which has heard the case, and evidence relating to reparations during trial, will also hear evidence and render its decision on reparations.²⁰³ While article 39(2)(iii) provides that a Pre-Trial Chamber can delegate

²⁰² See, Victims Rights Working Group, *A Victims Perspective, The Composition of Chambers for reparations proceedings*, http://www.vrwg.org/VRWG_DOC/2011_VRWG_JudgesReparations.pdf.

²⁰³ While Article 75 and Rules 94-98 on "Reparation to Victims" use the word "Court" as the entity mandated to conduct hearings and make decisions on reparation, Article 76 and Rule 143 on "Additional Hearings on matters related to sentence or

some matters to a Single Judge, there is no equivalent provision for the Trial Chamber. Rule 144 on Delivery of Decisions of the Trial Chamber, stipulates that decisions concerning admissibility, jurisdiction, criminal responsibility, sentence and reparations fall within the purview of the Trial Chamber, whose “functions [...] shall be carried out by three judges.”²⁰⁴

8.3 Representations by the Registry, Trust Fund, interested States or persons

The Role of the Registry

The Registry may provide information or make recommendations regarding a range of matters to assist the Chamber in its consideration of the scope and extent of damages.²⁰⁵ For instance, the Registry is well placed to provide information regarding challenges to obtain certain forms of evidence, and might propose possible alternative forms of evidence in particular locations or circumstances. Given its on-going contact with victims participating in proceedings, the Registry might provide considerations on the types and modalities of reparations as well as factors relating to the appropriateness of awarding reparations on an individual or collective basis. The Registry, which may know the terrain and intermediaries supporting eligible victims, may usefully provide information relating to the modalities for the implementation of reparations awards, the role for the Trust Fund for Victims, enforcement measures and appropriate experts that may assist the Chamber.²⁰⁶

In the Kenya Situation, the Registry took a proactive role in ‘mapping’ victims to establish an outreach strategy to obtain victims’ representations regarding to the opening of the Prosecutor’s *proprio motu* investigation in accordance with Article 15 of the Statute.²⁰⁷ This approach allowed for targeted outreach, which sought to cover all relevant constituents. It is recommended that victim mapping be used for the purposes of planning outreach and notification around victims’ right to request reparation.

Victim mapping should ideally be undertaken in all situation countries at the initial stages of the Court’s work, in order to place the Registrar in an adequate position to assist the Court with relevant demographic and other data. Proactive preparations for reparations does not impinge upon the Registrar’s neutrality with regard to the process, it should be seen as an effective discharge of the Registrar’s obligations towards victims under the Statute and Rules.

In some instances the Registrar has been specifically requested to undertake fact-finding regarding victims, however, it is suggested that the Registrar has direct obligations towards victims, and it may not be necessary for it to be explicitly instructed by a Chambers to fulfil aspects of its mandate.

The Inter-American Court of Human Rights has also established a precedent for undertaking fact-finding missions in relation to reparation for victims, and fact-finding has been a regular feature of

reparation” as well as Rule 144 on “Delivery of decisions of the Trial Chamber” all expressly refer to the Trial Chamber. If reparations hearings take place after an appeal on merits, this would in all likelihood require Trial Judges’ term of office to be extended, as provided for by article 36 (10).

²⁰⁴ Article 39(2)(ii) of the ICC Statute.

²⁰⁵ In accordance with Rule 97 of the Rules of Procedure and Evidence, the Chamber may appoint appropriate experts to assist it in determining the scope, extent of any damage, loss and injury to or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparation.

²⁰⁶ Regulation 110(2) of the Regulations of the Registry.

²⁰⁷ Kenya is the only Situation in where the prosecutor’s investigation was opened *proprio motu*, in accordance with Article 15 (Uganda, DRC and Central African Republic were all referred by the State Party; the Situations in Darfur and Libya were referred by the Security Council). *Proprio Motu* initiation of an investigation is decided upon by the Pre Trial Chamber on the basis of evidence submitted by the Prosecutor, as well as any representations made by victims.

other regional human rights treaty bodies. In the case of *Aloeboetoe v Suriname*, the Inter-American Court visited Suriname, enabling proactive identification of injured parties and quantification of damage. The Court’s Deputy Registrar gathered information about the country’s economic situation and visited a village to gather specific data needed by the Court to award reparation.²⁰⁸ It did not wait for the victims to supply such information themselves.

The Role of the Trust Fund for Victims

Article 75 of the ICC Statute provides that the relevant Trial Chamber may order that an award for reparations be made through the Trust Fund for Victims. This may be done for a number of reasons, in particular, as provided by Rule 98(3) of the Rules of Procedure “where the number of victims and the scope, forms and modalities of reparations makes a collective award more appropriate.”²⁰⁹

Involving the Trust Fund in reparations hearings will be important to ensure viable and smooth implementation of Article 75(2). While there is no provision that specifically provides for the Trust Fund to be consulted as a matter of course, Rule 98(4) enables the Chamber to consult with the Trust Fund where an award for reparations is “made through the Trust Fund to an intergovernmental, international or national organisation approved by the Trust Fund.”

Given the Trust Fund’s operational experience gained through its assistance mandate, it is well placed to provide observations to Chambers on a range of issues, including operational realities, the availability of local services and possible implementing partners on the ground, specific needs and beneficiary groups.²¹⁰ While the Trust Fund may be called upon to provide such information subsequent to an order of the Court, it would seem logical for the Court to hear submissions from the Trust Fund prior to issuing its order where appropriate.

The funds available for reparation may well be limited; funds collected from reparation awards, fines and forfeitures will often be minimal if non-existent. Regulation 56 of the Regulations of the Trust Fund for Victims, stipulates that the Board of Directors of the Trust Fund shall make all reasonable endeavours to manage the Fund taking into consideration the need to provide adequate resources to complement payments for awards under Rule 98(3) and, in this light, may determine whether to complement resources collected through awards for reparations, fines or forfeiture with its “other resources”.

In this respect, the Trust Fund may wish to inform the Trial Chamber of its fundraising plans and objectives with respect to a given situation for the purposes of complementing otherwise meagre or non-existent resources, or amounts already set aside. In addition, any analysis or forward planning with respect to categories of harm and related statistical data (such as morbidity rates, material loss, including land or property rights as well as physical and moral harm) will be useful to help determine whether there may be un-identified victims as well as the extent of a ‘class’ of beneficiaries. Indications that the Registry and the Trust Fund may be undertaking joined-up or common analysis of the overall situation of victims in preparation for the reparation phase appears is positive, making the most of in-house expertise.

²⁰⁸ Sandoval-Villalba, ‘The Concepts of Injured Party and Victim of Gross Human Rights Violations in the Jurisprudence of the Inter-American Court of Human Rights: A Commentary on their implications for Reparations’, in Ferstman et al., *supra*, at p.254.,

²⁰⁹ Rule 98(3) of the Rules of Procedure and Evidence.

²¹⁰ For instance, the Trust Fund has undertaken a longitudinal study that considers a range of data relating to victims benefiting from its assistance projects. According to the Trust Fund’s Fall 2010 Progress Report, data collected indicates that girls and women experience violence and its consequences differently from men, with social stigma and exclusion having greater and longer-term impact for girls and women victims of sexual and gender based violence, and widows also expressing greater trauma and vulnerability. Such victims who suffer from exclusion, stigma or who have been displaced may prefer individualised remedies to community ones depending on the current social context in which the victim is living and their particular situations of survival, Fall 2010 Progress Report. See: <http://www.trustfundforvictims.org/sites/default/files/imce/TFV%20Programme%20Report%20Fall%202010.pdf>. These findings correspond and reinforce the Nairobi Declaration on Women and Girls’ Right to a Remedy and Reparation, See: http://www.womensrightscoalition.org/site/reparation/signature_en.php.

Representations by interested States

Before the Court makes an order for reparation, it may invite representations from the convicted person, victims, other interested persons or States.²¹¹ Requests for reparation filed by victims are, at the request of the Chamber, to be notified “to the extent possible” to victims, interested persons and interested States. Those notified are entitled to file with the Registry any representations they wish to make, which in turn shall be considered by the Court.²¹² It is not entirely clear on what basis the Chamber would determine that a State has an interest, nor what is implied by “to the extent possible” in this regard. Nonetheless, it is suggested that, in the best interest of victims, States which may play a role in the implementation of awards, particularly in cooperating with the Court, be notified, even on a very general basis and invited to make representations on the nature of victims’ requests, as far as appropriate and possible.²¹³

There are a number of interests that States may have in relation to reparations awards. From an implementation point of view, it is clear that a range of awards may have implications at national level, or may require acquiescence or the express consent of the State wherein reparations are to be given effect. For instance, a number of requests made by civil parties in the *Duch* case before the ECCC might have been viable had the State been invited to give its observations during hearings.²¹⁴

While States may be interested or concerned due to their perceived involvement in a given conflict, the ICC can only establish culpability and civil liabilities in relation to individuals convicted by the Court.

Representations by interested persons

The provisions set out in relation to interested States are the same as for interested persons, which may include legal persons such as international organisations or nongovernmental organisations.

The Court may wish to request the Registry or Trust Fund for Victims to identify potentially interested organisations, which it may wish to invite to provide observations or representations to the Chamber. For instance, intergovernmental agencies of the United Nations may be able, willing and actually mandated to fulfil aspects of the implementation of awards. Such involvement, in consultation with the Trust Fund for Victims²¹⁵ may contribute specific expertise, or implementation options regarding the reparations process. For instance, a project to conserve the memory of a genocide or those who died or suffered in a given conflict, or the requirements to have a specific site such as a massacre site registered or preserved, may be an appropriate undertaking for UNESCO.²¹⁶

²¹¹ Article 75(3) of the ICC Statute.

²¹² Rules 94(2) and 95(1) of the Rules of Procedure and Evidence, in conjunction with Article 75(3) of the ICC Statute.

²¹³ A possible consideration for not involving States might be security concerns for eligible victims.

²¹⁴ See Section 3.2 above, Learning from the first ECCC reparations order.

²¹⁵ Rule 98(4) of the Rules of Procedure and Evidence provides that the Court may order that an award for reparations be made through the Trust Fund to an intergovernmental, international or national organisation approved by the Trust Fund. Regulation of the Trust Fund, Section 2(8) provides that: The Board of Directors may invite others with relevant expertise to participate, as appropriate, in specified sessions of the Board and to make oral or written statements and provide information on any question under consideration.

²¹⁶ Numerous sites relating to genocide or other grave violations of human rights have been registered as part of UNESCO's Memory of the World programme. See the online Memory of the World Register: http://portal.unesco.org/ci/en/ev.php-URL_ID=17534&URL_DO=DO_TOPIC&URL_SECTION=201.html

Should the Court be mindful to entertain awards linked to land or property rights, their implementation may require the involvement of a specialised agency such as the International Organisation of Migration (IOM), which has significant expertise and experience in this area. Reparation for former child soldiers may appropriately benefit from the involvement of experts from UNICEF to advise on policy aspects of awards and/or on implementation plans. UN Women, UNDP, OHCHR, UNHCR and other agencies may already be operating in the same locality, and inviting such entities to express observations may equally prove useful to avoid duplication.

While some of these agencies may have funds or mandates to contribute to the implementation of awards, it is important that reparations do not become discriminatory, based on external actors' interests and willingness to fund certain types of projects in relation to discrete forms of harm. Indeed, the Regulations of the Trust Fund for Victims do not allow voluntary contributions from non-State sources to be earmarked for more than one third of the contribution for a given activity or project. Nonetheless, as was seen with regard to the implementation of reparations recommended by the Truth and Reconciliation Commission of Sierra Leone, certain areas, such as pressing medical needs for victims of sexual violence may appropriately be prioritised and start ahead of other areas if funds to cover all areas are not immediately available.²¹⁷

8.4 The Role of Experts in the Reparation Phase

The Chamber can call upon experts to assist it in determining the scope, extent of any damage, loss and injury to or in respect of victims at the request of victims, their legal representatives or the convicted person; or on the Chamber's own motion.²¹⁸ Experts can also suggest options of appropriate types and modalities of reparations. Another area for which experts may provide assistance, is on whether reparations should be awarded on an individual or collective basis, or a combination of both.²¹⁹ The victims or their legal representatives, the convicted person as well as other interested persons or interested States will then be able to make observations on experts' reports.

The use of experts is an important means at the Chamber's disposal to bring factual information such as demographic and statistical data concerning the nature of the criminality to the proceedings as well as to benefit from special expertise that might not figure among Court personnel, including criminological and psychological expertise on victimisation and harm suffered.

²¹⁷ See, Heike Niebergall, *Reparations for Victims of Sexual Gender Based Violence in Sierra Leone*, ACCESS Bulletin, Spring 2011, Issue 18. Available from <http://www.vrwg.org>.

²¹⁸ Rule 97(2) of the RPE on the Assessment of Reparations.

²¹⁹ Rule 97(1) RPE provides that "In taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualised basis or, where it deems it appropriate, on a collective basis or both."

Part C Recommendations: Considering the modalities of reparations proceedings

Recommendations to the Registry:

- Ensure pro-active approaches to notification and publicity of reparations hearings;
- Ensure pro-active approaches to the identification of potential applicants, and addressing evidential or other gaps in forms.

Recommendations to the Chambers:

- Ensure that evidence relating to reparation during the Trial is effectively drawn out in the judgment on merits;
- Ensure that findings acknowledge the context of victimisation;
- Establish clear modalities for the reparations phase at the earliest opportunity;
- Enable representations by the Registry, the Trust Fund for Victims, interested States and persons so as to ensure that all relevant aspects of reparation are considered;
- Ensure effective use of experts as a means of increasing efficiencies;
- Delegate and request the Registry and in particular the VPRS to promote efficiencies as well as to lessen the burden on victims to prove certain aspects of their claims.

D. Considerations in reaching a decision or making an award

9. Scope: who is eligible for reparation?

9.1 Establishing status of ‘victim’ under Rule 85

Victims are defined in Rule 85 of the ICC Rules of Procedure and Evidence as “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.” Victims may also include legal persons, such as organisations or institutions.²²⁰

In order to establish the criteria for determining whether applicants meet the definition of victim set out in Rule 85(a) in relation to natural persons, a four-part test was established by Pre-Trial Chamber I in the *Situation in the Democratic Republic of Congo*,²²¹ and has been subsequently followed by other Chambers and confirmed on appeal.²²² The constituent parts of the test are:

- (i) whether the identity of a natural person or legal person can be established;
- (ii) whether the applicants claim to have suffered harm;
- (iii) whether a crime within the jurisdiction of the Court can be established; and
- (iv) whether harm was caused “as a result” of the event constituting the crime within the jurisdiction of the Court.

A similar set of criteria was established in relation to the definition of victims as legal persons, as set out in Rule 85(b). In this regard, Pre-Trial Chamber I granted victim status to a school as a legal person in the *Situation in the Democratic Republic of Congo*.²²³ The application was submitted by the headmaster of the school which had allegedly been ransacked in the course of forcible enlisting of children under the age of fifteen into the armed group. Pre-Trial Chamber recalled the criteria and principles for awarding victim status to organisations as follows:

- (i) an organisation or institution whose property is dedicated to religion, education, art or science or charitable purposes, a historical monument, hospital or other place or object for humanitarian purposes;
- (ii) the organisation or institution must have sustained direct harm;
- (iii) the crime from which the harm arises falls within the ICC’s jurisdiction; and
- (iv) a causal link between the harm and the crime.

9.2. Proving Identity

A range of acceptable documents for the purposes of proving victims’ identity have been listed by each Chamber in relation to the particular circumstances of the situation countries or by case.

²²⁰ Rule 85 of the Rules of Procedure and Evidence.

²²¹ The Situation in the Democratic Republic of Congo, *Decision on the application for participation in the proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS6*, 17 January 2006, ICC-01/04-101-tEN-Corr, at para. 9. <http://www.icc-cpi.int/iccdocs/doc/doc183441.PDF>.

²²² *The Prosecutor v Thomas Lubanga, Judgment on the Appeals of the Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008*, ICC-01/04-01/06-1432, dated 11 July 2008, at <http://www.icc-cpi.int/iccdocs/doc/doc529076.PDF>.

²²³ The Situation in the Democratic Republic of Congo, *Décision sur les demandes de participation à la procédure déposées dans le cadre de l’enquête en République démocratique du Congo par a/0004/06 à a/0009/06, a/0016/06 à a/0063/06*, [...]. ICC-01/04-423, dated 24 December 2007.

These are set out in Section 6.3 above. While proving identity is essentially a substantive function, it is suggested that, as far as possible, verification of identity be carried out as an administrative function by the Registry in order to promote efficiencies. Section 6.4 therefore considers issues in relation to verification of identity, including appropriate standards of proof, which are further discussed in Section 10 below in relation to assessment. As noted in Section 6.3 above, if Chambers were to identify parameters or an appropriate test for substantive consideration of admissibility or eligibility of requests for reparation, much of the processing could be undertaken by the Registry.

9.3 Individual, Direct or Indirect Harm

Individual (Personal) harm

The notion of “harm” is not defined in the Statute or Rules of Procedure and Evidence, and has not been defined as such in jurisprudence relating to victims’ participation. The Appeals Chamber has indicated that the word “harm” denotes hurt, injury, loss or damage,²²⁴ which are essentially synonyms of “harm”. In interpreting the personal nature of “harm”, the Appeals Chamber has stated that harm need not be direct but that:

[T]he harm suffered by a natural person is harm to that person, i.e. personal harm. Material, physical, and psychological harm are all forms of harm that fall within the rule if they are suffered personally by the victim. Harm suffered by one victim as a result of the commission of a crime within the jurisdiction of the Court can give rise to harm suffered by other victims. This is evident for instance, when there is a close personal relationship between victims such as the relationship between a [former] child soldier and the parents of that child. The recruitment of a child soldier may result in the personal suffering of both the child and the parents of that child [...]. The issue for determination is whether the harm suffered is personal to the individual. If it is, it can attach to both direct and indirect victims. Whether or not a person has suffered harm as the result of a crime within the jurisdiction of the Court and is therefore a victim before the Court would have to be determined in light of the particular circumstances.²²⁵

For the purposes of participation, Pre-Trial Chamber I considered that “the determination of a single instance of harm suffered is sufficient, at this stage, to establish the status of victim.”²²⁶

The Court has identified a number of types of damage, harm or injury, though the list compiled here is merely indicative:

- **Physical harm** has included: injury by gunshots,²²⁷ beatings and torture,²²⁸ incommunicado detention, denial of medical treatment and limited access to food.²²⁹

²²⁴ The Prosecutor v Thomas Lubanga, Appeals Chamber, *Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008*, 11 July 2008, ICC-01/04-01/06-1432, par. 31, <http://www.icc-cpi.int/iccdocs/doc/doc529076.PDF>

²²⁵ *ibid.*

²²⁶ Situation in the Democratic Republic of Congo, *Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5, VPRS6*, of 17 January 2006, 17 January 2006, ICC-01/04-101-TEN-Corr. <http://www.icc-cpi.int/iccdocs/doc/doc183441.PDF>

²²⁷ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case* of 10 June 2008, ICO-01/04-01/07, at paras. 71, 115.

²²⁸ Situation in the Democratic Republic of Congo, *Decision on the Applications for Participation in the Proceedings of 17 January 2006*, *supra* at para.173; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case* of 10 June 2008, ICO-01/04-01/07, at paras. 69, 67.

²²⁹ Situation in Darfur, *Decision on Victim Participation* of 14 December 2007, ICC-02/05, at para. 40.

- **Emotional or Psychosocial harm** has included: emotional suffering related to the loss of family members,²³⁰ forced recruitment into rebel movements and participation in hostilities resulting in continuous psychological problems,²³¹ emotional and physical suffering related to enslavement and detention,²³² and displacement of families.²³³
- **Material harm** has included economic loss due in particular to looting, destruction and burning of houses.²³⁴

In terms of thresholds of harm, the Court has not considered the need for specific levels of gravity to be established for the purposes of victim participation.²³⁵ However, this may be required for the purposes of awarding reparation, particularly where individual disbursements are foreseen. The issue of gravity has been dealt with in a variety of ways by mass claims bodies. A number of mass claims processes have decided not to assess the extent of harm in relation to each individual applicant due to the difficulties in obtaining sufficient evidence and the costs involved in processing claims having to be offset against the total amount of funds available to repair victims, and have instead awarded a set sum for a specific type or class of harm.²³⁶

With respect to legal persons under Rule 85(b), the Court has established that the harm suffered must be “direct harm”. However, Rule 85(a) concerning natural persons allows for a purposive interpretation, in which “people can be the direct or indirect victims of a crime within the jurisdiction of the Court.”²³⁷ Indirect victims are persons who are affected, whether morally or materially, by reason of their relationship with a direct victim of a crime within the jurisdiction of the Court.²³⁸ The Appeals Chamber gave the example of the indirect harm suffered by the parents of a child soldier: “the recruitment of a child soldier may result in personal suffering of both the child concerned and the parents of that child.”²³⁹ Following this, Trial Chamber I granted victim status to parents in relation to the loss of their children.²⁴⁰

²³⁰ Situation in the Democratic Republic of Congo, *Decision on the Applications for Participation* of 17 January 2006, *supra*.

²³¹ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on Victim Participation* dated 2 April 2008, ICC-01-04-01-07-357, para. 11.

²³² Situation in the Democratic Republic of Congo, *Decision on the Applications for Participation in the Proceedings* of 17 January 2006, *supra* n. 186 at para. 147.

²³³ Situation in Darfur, *Decision on Victim Participation* of 14 December 2007, ICC-02/05, *supra* n. 189, para. 40.

²³⁴ Situation in the Democratic Republic of Congo, *Decision on the Applications for Participation in the Proceedings* of 17 January 2006, *supra* n.186 at paras. 132, 162; Situation in Darfur, *Decision on Victim Participation* of 14 December 2007, ICC-02/05, *supra* at footnote 194 at para. 40.

²³⁵ See Henzelin, Heskanen and Mettraux, ‘Reparations to Victims before the International Criminal Court: Lessons from International Mass Claims Processes’, *Criminal Law Forum* (2006), cited in Ferstman et al., *supra*, p. 326.

²³⁶ For instance reparations made by the German Forced Labour Compensation Programme, completed in 2005 by IOM did not seek to determine individual extent of harm, with all victims of a particular class receiving the same fixed amount regardless of the extent of harm suffered individually. IOM resolved all 332,000 slave and forced labour claims received and made full payments to more than 80,000 surviving victims of slave and forced labour under the Nazi regime. IOM has also paid all eligible claims for personal injury, including medical experiments.

²³⁷ Appeals Chamber, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432, <http://www.icc-cpi.int/iccdocs/doc/doc529076.PDF>.

²³⁸ Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432 OA9 OA10. Judge Pikis and Judge Kirsch each issued partly dissenting opinions to the majority's decision.

²³⁹ Appeals Chamber, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432, par. 31, <http://www.icc-cpi.int/iccdocs/doc/doc529076.PDF>.

²⁴⁰ *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, “Decision on the applications by victims to participate in the proceedings”, ICC-01/04-01/06-1556, 15 December 2008, at <http://www.icc-cpi.int/iccdocs/doc/doc610182.pdf> *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, “Decision on the supplementary information relevant to the applications of 21 victims”, ICC-01/04-01/06-2063, dated 21 July 2009, at <http://www.icc-cpi.int/iccdocs/doc/doc714238.pdf>, Pre-Trial Chamber II also followed the appeals ruling and granted victim status to a number of children of deceased parents in *the Kony et al Case (Uganda)* on the basis of their parent-child relationship to deceased victims, *Prosecutor v. Joseph Kony et al.*, Pre-Trial

Indirect Harm: Victims as family members or next of kin

The reference to ‘in respect of victims’, in so far as it was intended to include family members²⁴¹ has been developed in the Regulations of the Trust Fund for Victims, which provides that:

The resources of the Trust Fund shall be for the benefit of victims of crimes within the jurisdiction of the Court, as defined in Rule 85 of the Rules of Procedure and Evidence, and, where natural persons are concerned, their families.²⁴²

The notion of family has not been defined in the ICC’s provisions or jurisprudence to date. As noted by others, the definition varies from one culture to another and would allow the Court and the Trust Fund the flexibility to respond as necessary in different contexts.²⁴³

There has been some inconsistency in the Court’s practice with regard to the ability of next of kin to represent victims who have died in addition to acting on the basis of their own suffering as indirect victims.²⁴⁴ Some rulings have indicated that the difficulty only arises in relation to participation rights; whereby deceased victims are not able to “participate” in proceedings in view of the particular the wording of Rule 89(3), while their successors would be entitled to reparation on their behalf.²⁴⁵

For instance, Pre-Trial Chamber I, in relation to the *Situation in the Democratic Republic of Congo*, found that it is not possible to apply to participate in proceedings on behalf of a deceased person,²⁴⁶ on the basis that Rule 89(3) of the Rules of Procedure and Evidence “limits the

Chamber II, *Decision on victims’ applications for participation*, ICC-02/04-01/05-282, 14 March 2008, at <http://www.icc-cpi.int/iccdocs/doc/doc454997.PDF>.

²⁴¹ See discussion in Section 2.1 above, in relation to the legal framework relating to victims, sub-section on reparations.

²⁴² Regulation 42 of the Regulations of the Trust Fund for Victims.

²⁴³ Edda Kristjansdottir, ‘International Mass Claims Processes and the ICC Trust Fund’, in Ferstman et al., *supra*, p.182.

²⁴⁴ Pre-Trial Chamber I refused to grant victim status for the purposes of participation to a deceased person, see *Decision of 10 June 2008*, para. 62, which quotes the Corrigendum to the *Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of the Congo*, ICC-01/04-423-Corr-tENG, 31 January 2008, paras. 23 to 25:

[R]ule 89(3) of the Rules states that an application for participation may be made by a person acting on behalf of the victim concerned with the victim’s consent, or on the victim’s behalf in the case of a child or a disabled person. However, no provision permits the submission of an application for participation on behalf of a deceased person. Rule 89(3) authorises the submission of an application for participation on a person’s behalf provided the person consents. The Single Judge notes that such consent cannot be given by a deceased person [...].

See also, Pre-Trial Chamber I, Corrigendum to *Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07*, ICC-02/05-111, 14 December 2007, paras. 35 and 36; Pre-Trial Chamber I, *Decision on the applications for participation filed in connection with the investigation in the Democratic Republic of Congo by Applicants a/0047/06 to a/0052/06, a/0163/06 to a/0187/06, a/0221/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06, and a/0241/06 to a/0250/06*, ICC-01/04-505, 3 July 2008, para. 23.

On the other hand, Pre Trial Chamber III taking into account the jurisprudence of the Inter-American Court of Human Rights, considered that, despite the fact that a deceased person cannot express his or her views and concerns, there is nothing to stop his or her rights being exercised during the proceedings by his or her successors if they have been granted the status of victims participating in the proceedings. See Pre-Trial Chamber III, *Fourth Decision on Victims’ Participation*, 12 December 2008, ICC-01/05-01/08-320. Later, Trial Chamber I in the *Lubanga* case also recognised this possibility, see: Order issuing confidential and public redacted versions of Annex A to the “Decision on the applications by 7 victims to participate in the proceedings of 10 July 2009” (ICC-01/04-01/06-2035), dated 23 July 2009, ICC-01/04-01/06-2065-Anx2, page 15. <http://www.icc-cpi.int/iccdocs/doc/doc716246.pdf>,

²⁴⁵ When considering the jurisprudence of the Inter-American Court of Human Rights, on which one Chamber of the Court based its ruling in accepting the participation of the successors of the deceased, Trial Chamber II found that it “would appear difficult to transpose to the present case, given that the ICC Statute draws a clear distinction between the phase of participation in the proceedings and the reparations phase, once an accused has been found guilty, with the former not being a precondition for the latter”, Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims, ICC-01/04-01/07-1491, 10 March 2010, para 55; Also Article 79 as well as Regulations 42, 46, 61 and 70 of the Trust Fund Regulations, clearly refer to victims, *and their families* [emphasis added].

²⁴⁶ *Situation in the Democratic of Congo*, Pre-Trial Chamber I, “Corrigendum to the ‘Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of Congo by a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 to a/0110/06, a/0188/06, a/0128/06 to a/0162/06, a/0199/06,

submission of applications on behalf of others to applications made with the consent of the victim or on behalf of children under the age of 18 and disabled persons.”

This jurisprudence was largely followed by Pre-Trial Chamber II in the *Katanga and Ngudjolo case*,²⁴⁷ which denied victim status to deceased persons represented by relatives.²⁴⁸ The Chamber noted that the question of deceased persons as participants was not discussed during the Preparatory Committee sessions on the Rome Statute or on the drafting of the Rules of Procedure and Evidence.²⁴⁹ Trial Chamber II recognised that the Inter-American Court of Human Rights allows persons to appear on behalf of deceased victims, but considered it difficult to apply the practice in the context of the right to participate in ICC proceedings. Trial Chamber II indicated that the application process for reparations was different, and that the ICC Statute clearly drew a distinction between the phase of participation in the proceedings and the reparations phase. The approach taken for the purposes of participation was contested by Judge Hans Peter-Kaul in a dissenting opinion. He argued, referring to his decision as Single Judge on victims’ issues for Pre Trial Chamber III, that the relatives of the deceased should be able to represent the interests of the deceased persons as well as their own in both the trial and reparation phases.²⁵⁰

In the *Prosecutor v Jean Pierre Bemba*, in the *Central African Republic Situation*, Judge Hans Peter-Kaul acting as Single Judge for Pre Trial Chamber III affirmed the rights of deceased persons to participate as victims through a proxy.²⁵¹ The Judge recognised that a deceased person could not participate in the proceedings, but took the view that his or her rights could be represented by a successor so long as the successor was also a victim participating in the proceedings.²⁵² The Single Judge recognised the possibility for a deceased person to be granted victim status in the case when their successor makes an application on his or her behalf. He placed three conditions on victim status, as follows:

1. The deceased was a natural person;
2. The death of the person appears to have been caused by a crime within the jurisdiction of the Court; and
3. A written application on behalf of the deceased person has been submitted by his or her successor.

While recalling the limitations of Rule 89(3), highlighted in Pre Trial Chamber I’s jurisprudence, the Single Judge in the *Bemba* case held that “the question whether a deceased person may be

a/0203/06, a/0209/06, a/0214/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06, a/0227/06 to a/0230/06, a/0234/06, a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06 and a/0241/06 to a/251/06 to a/0250/06”, ICC-01/04-423, 24 December 2007, at <http://www.icc-cpi.int/iccdocs/doc/doc463642.PDF>.

²⁴⁷ In the *Katanga and Ngudjolo Case*, Trial Chamber II decided that a close relative of a deceased victim can only participate as a victim on account of his or her own suffering, and not on the behalf of the deceased victim. However, the Chamber accepted that the person appointed by the family of a deceased victim can continue the action triggered by the victim upon his death, under the following conditions: (a) if they demonstrate a family link with the victims, and (b) if their participation was to be limited to the views and concerns exposed in the victims’ original application made prior to death. Trial Chamber II, *Dispositif de la deuxième décision relative aux demandes de participation de victimes à la procédure*, 23 November 2009, ICC-01/04-01/07-1669, <http://www.icc-cpi.int/iccdocs/doc/doc784793.pdf>. On 22 December 2009, TCII issued the motivation for this second decision related to victims’ application for participation: *Motifs de la deuxième décision relative aux demandes de participation de victimes à la procédure*, 22 Décembre 2009, ICC-01/04-01/07-1737, para. 30 to 32, <http://www.icc-cpi.int/iccdocs/doc/doc797065.pdf>.

²⁴⁸ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, “*Dispositif de la décision relative aux 345 demandes de participation de victimes à la procédure*”, ICC-01/04-01/07-1347, 31 July 2009, at <http://www.icc-cpi.int/iccdocs/doc/doc718988.pdf>.

²⁴⁹ *Ibid*, para. 53.

²⁵⁰ *Partly Dissenting Opinion of Judge Hans-Peter Kaul to the Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims*, ICC-01/04-01/07-1491-Red-TENG, 10 March 2010 in which he refers to *Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber III, “*Fourth Decision on Victims’ Participation*”, ICC-01/05-01/08-320, 12 December 2008, at <http://www2.icc-cpi.int/iccdocs/doc/doc610092.pdf>.

²⁵¹ *Prosecutor v. Jean-Pierre Bemba Gombo*, single Judge Hans-Peter Kaul, Pre-Trial Chamber III, *Fourth Decision on Victims’ Participation*, ICC-01/05-01/08-320, 12 December 2008, at <http://www2.icc-cpi.int/iccdocs/doc/doc610092.pdf>

²⁵² *Ibid*, para. 44.

recognised as a victim of the case must be decided in conformity with internationally recognized human rights and related jurisprudence pursuant to article 21(3) of the Statute. [It is] ... self-evident that a victim does not cease to be a victim because of his or her death.”²⁵³

In this regard, the inter-American Court has developed its jurisprudence over time in relation to direct and indirect victims as well as the notion of “injured parties”, where next of kin are not considered victims in their own right.²⁵⁴ Initially in the period from 1991-97, the Court identified victims as the direct victims of the case, and considered next of kin as “injured parties”, continuing the action of deceased victims and as successors of the direct victim.²⁵⁵ Later in the period 1997-2001, as a result of amendments to the Court’s rules of procedure, the Court began to consider certain next of kin as “indirect victims”, given the level of grief and suffering caused. This was initially confined to next of kin of the most egregious violations, such as arbitrary killings or disappearances. It was considered that the next of kin of such crimes were autonomous victims of the violations of the American Convention on Human Rights.²⁵⁶

Finally, in the period 2001-7, most next of kin, including parents, siblings or those with close relationships, were considered as victims in their own right for the purposes of reparation, with the concept of “injured party” used more infrequently. In addition, the Court has developed ‘other forms of reparation’ for the community or society as a whole.²⁵⁷

It is suggested that for the purposes of reparation deceased persons should be considered as victims in their own right, and that next of kin may claim both in relation to the deceased persons as their successor, and also in relation to the harm they suffered personally that resulted from the crime inflicted on the deceased person.²⁵⁸

Presumption of harm for next of kin or family members

The jurisprudence relating to victims’ participation seems to indicate a willingness to presume that close family members or next of kin have suffered on account of the harm to the direct victim. By majority ruling of the Appeals Chamber²⁵⁹ the Court found that in a particular instance, “applicants had suffered emotional harm as a result of the loss of a family member” and that there was no need to submit evidence relation to the harm suffered. The Chamber held that its ruling was based on the particular facts at hand, and that the Chamber would reconsider the issue on different facts if it arose again.

In this regard, the UN Human Rights Committee has established that where a victim is compensated for physical or mental injury caused by inhuman treatment,²⁶⁰ compensation should also be paid to surviving family members in their own right for anguish suffered.²⁶¹ It stated that:

²⁵³ *Ibid*, para. 39-40.

²⁵⁴ For a detailed study, See Sandoval-Villalba, *supra*.

²⁵⁵ For instance the cases of *Aloeboetoe v Suriname*, Judgment on Reparations 10 September 1993 and *El Amparo v Venezuela*, Judgment on Reparations, 14 September 1996.

²⁵⁶ See *Blake v Guatemala*, Judgment on Merits, 24 January 1998.

²⁵⁷ See Clara Sandoval-Villalba, *The Concepts of Injured Party and Victim, supra*.

²⁵⁸ This would appear to follow Trust Fund Regulation 46 which states that: Resources collected through awards for reparations may only benefit victims as defined in rule 85 of the Rules of Procedure and Evidence, and, where natural persons are concerned, their families, affected directly or indirectly by the crimes committed by the convicted person.

²⁵⁹ *Prosecutor v. Joseph Kony et al.*, Appeals Chamber, “Judgment on the appeals of the Defence against the decisions entitled ‘Decision on victims’ applications for participation a/0010/06, a/0064/06, a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/120/06, a/021/06 and a/0123/06 to a/0127/06’ of Pre-Trial Chamber II”, ICC-02/04-01/05-371, dated 23 February 2009, at <http://www.icc-cpi.int/iccdocs/doc/doc635580.pdf>

²⁶⁰ For instance, *Antonio Viana Acosta v Uruguay*, UN Human Rights Committee, Communication no.110/1981, (31 March 1983). U.N. Doc. Supp. No. 40 (A/39/40) at 169 (1984).

²⁶¹ As for instance in *Quinteros v. Uruguay*, U.N. Human Rights Committee, Case No. 107/1981.

The Committee understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has a right to know what has happened to her daughter. In these respects she too is a victim of the violations of the Covenant suffered by her daughter [...].²⁶²

It is suggested that presumptions of harm might be considered for indirect victims based on close family relationships for certain types of crimes or the particular circumstances of certain types of crimes.

Intervention on behalf of a direct victim

A further category of “indirect victims” has been identified where an individual intervenes to prevent the commission of a crime and suffers direct harm as a result of the commission of the crime. For instance, where an individual intercedes to try to protect a victim from being enlisted or conscripted by an armed group (where child recruitment is being prosecuted) and he is tortured or suffers harm as a result. In such instances the Chamber has also sought to establish whether the direct victim suffered “relevant” harm.²⁶³

Collective Harm

The Pre-Trial Chamber in the DRC Situation has stated that harm suffered by a collective is not, as such, relevant or determinative, and that “there may clearly be harm that could be both personal and collective in nature. The fact that harm is collective does not mandate either its inclusion or exclusion in the establishment of whether a person is a victim before the Court. The issue for determination is whether the harm is personal to the individual victim.”

The Court’s jurisprudence confirms the definition of victims in Rule 85(a) as being based on individual rather than collective harm for the purposes of participating in proceedings.²⁶⁴ However, as regards reparation, the Rules of procedure allow for an order to be awarded individually, collectively or both.²⁶⁵

In other contexts, collective reparation aims to repair collective or group harm. As an example, the Inter-American Court has held that reparation will still be due to the individual members of that community, providing, for instance specific measures aimed at redressing the harm done to the community or group, by benefitting its individual members, as well as providing measures that may be devised to benefit the community as a whole in a more abstract sense. In the *Plan de Sanchez* case, in addition to pecuniary damages (compensation for loss and injury) to individual victims, non-pecuniary damages were established for moral harm caused to the direct victims and their next of kin as well as ‘other forms of reparation’ which included public acts or the implementation of

²⁶² Ibid., para.14.

²⁶³ Redacted version of “*Decision on indirect victims*”, 8 April 2009, ICC-01/04-01/06-1813 (ICC-01/04-01/06-1634), para 51: The Chamber explained that “given that the harm of the indirect victim must arise out of harm to the direct victim, the Chamber will need to investigate, if necessary, whether the direct victim has suffered any ‘relevant’ harm. However, on this issue, depending on the individual facts, psychological harm to a direct victim may be inflicted once they become aware that an attempt is being made to conscript, enlist or to use them actively to participate in hostilities. In these circumstances, the loss, injury or damage suffered by the person intervening may be sufficiently linked to the direct victim’s harm by the attempt to prevent the child from being further harmed as a result of a relevant crime.”

²⁶⁴ The Pre-Trial Chamber in the DRC Situation has stated that harm suffered by a collective is not, as such, relevant or determinative, and that “there may clearly be harm that could be both personal and collective in nature. The fact that harm is collective does not mandate either its inclusion or exclusion in the establishment of whether a person is a victim before the Court. The issue for determination is whether the harm is personal to the individual victim.” Situation in the Democratic Republic of Congo, *Decision on the Applications for Participation in the Proceedings* of 17 January 2006, *supra.*, at para. 2.

²⁶⁵ Rule 97(1) of the Rules of Procedure and Evidence.

projects with public repercussions such as publishing messages that officially condemn the violence in question, making public commitments to putting measures in place that would prevent such actions occurring again. As explained by the Court:

Such acts have the effects of restoring the memory of the victims, acknowledging their dignity, and consoling their next of kin.²⁶⁶

The ICC’s definition of “victim” does not recognise collective harms or collectivities as victims, in contrast to, for instance, the Inter-American Court, which has made interesting awards directed at redressing harms suffered by indigenous groups, such as the Mayan people. Collective awards have sought to help restore ancestral lands and preserve culture.²⁶⁷ Thus, the notion of awarding reparation collectively as per Rule 97 of the ICC’s Rules of Procedure, may refer to redressing “personal” or “individual” harm through collective measures. Where harm has been suffered individually, international standards and practice suggest that individual responses would be required.²⁶⁸ Even if these are implemented through collective projects, the benefits of such projects would be aimed at victims individually. Such collective projects could include medical or psychosocial treatment, housing projects or other services made available free of charge to individual victims.

It is suggested nonetheless that the Court review its approach to redressing violations of rights that are collective in nature, for instance, there is inherently a group aspect to the crime of genocide, and reparation that seeks to redress group harm would also be appropriate.

9.4 Crimes within the ICC’s jurisdiction

The definition of victim under Rule 85 simply requires “harm as a result of the commission of any crime within the jurisdiction of the Court”, without tying the crimes to those charged in a given case. The corresponding four-tier test to establish victim status requires that “a crime within the jurisdiction of the Court can be established.”²⁶⁹

Nexus to crimes proven at trial

For the purposes of victim participation at Trial, victims’ involvement is limited to the narrow scope of the charges being tried. Thus, for example, victim applicants seeking to participate in the trial against *Jean-Pierre Bemba* would only be recognised as victims for the purposes of the trial if they suffered harm in connection with the charges. The Chamber found that as torture, temporary detainment, assault, humiliation or degrading treatment were not included in the charges, victims’ applications based only on that harm should be rejected.²⁷⁰

Given that orders for reparation may be made by the Court “against the convicted person”, it is possible that the charges proven at trial will also define the scope of eligibility for reparation. However, it would appear that the Court has considerable margin in this regard, as Article 75 of the Statute, provides that “the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of

²⁶⁶ Case of the *Plan de Sanchez Massacre* of 19 November, 2004, para. 80.

²⁶⁷ *Ibid.*, para. 110. See the separate opinion of Judge Sergio Garcia-Ramirez in the Judgment on Reparations in the Case of the *Plan de Sanchez Massacre* of 19 November, 2004.

²⁶⁸ The experience of the Trust Fund for Victims indicates that combinations of individual and collective approaches may also be appropriate, particularly where there has been individual and collective harms and where rehabilitation depends upon reintegration into a family and, or community. See Trust Fund for Victims, Fall 2010 Progress Report, *supra*.

²⁶⁹ Rule 85(a) of the Rules of Procedure and Evidence.

²⁷⁰ *The Prosecutor v Jean Pierre Bemba, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, 15 June 2009, ICC-01/05-01/08-424, <http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf>

victims”, being silent on the issue of nexus or causation. The fact that the Chamber is able to determine the scope, without there being a limitation *per se*, would suggest that at the very least a broader interpretation could be litigated during the reparations phase.²⁷¹

The view that victims of other crimes allegedly committed by the accused should be able to claim and obtain reparation is consistent with REDRESS’ understanding of the views of victims’ communities, some of whom have expressed concern about singling out former child soldiers, for example, as the sole recipients of reparations in the case against *Thomas Lubanga*, as to do so would contribute to further ostracisation and resentment in the communities. However, from a procedural perspective, there are a range of issues which would need to be clarified. While the Trust Fund can and has already applied its voluntary contributions for the benefit of victims and their families outside of the specific crimes under consideration by the Court, under the approval of the relevant chambers, a legal or policy framework would be necessary to guide a reparations phase if any new liabilities could be established.²⁷²

There are other possibilities given the broad phrasing of Article 75 of the Statute and Rule 85 of the Rules of Procedure and Evidence, which may nonetheless produce awards that are less arbitrary, without necessarily requiring new liabilities to be established at the reparation phase. For instance, the Chamber may wish to consider that victims of related crimes within the same context of criminality are eligible based on a combination on evidence produced at trial, a broad interpretation of causation or the use of presumptions. These options are discussed below.

9.5 Harm as a result of the criminal conduct

The definition of victim in Rule 85 does not indicate the nature of the causal link between the crimes and the harm suffered. Early jurisprudence of the Court, namely the Pre-Trial Chambers in the Situation in the Democratic Republic of Congo, held that it was “not necessary to determine in any great detail at this stage the precise nature of the causal link and the identity of the persons responsible for the crimes.” The low threshold applied was merely that “there are grounds to believe that the [individual applying to participate in proceedings] suffered harm as a result of the commission of those crimes”.²⁷³ Indeed, that Chamber explained that with regard to the Situation in Uganda, early jurisprudence established:

a pragmatic, strictly factual approach, whereby the alleged harm will be held as “resulting from” the alleged incident when the spatial and temporal circumstances surround the appearance of the harm and the occurrence of the incident seem to overlap, or at least to be compatible and not clearly inconsistent.²⁷⁴

In the first case against *Thomas Lubanga*, the Pre-Trial Chamber required “a sufficient causal link between the harm they suffered and the crimes for which there are reasonable grounds to believe that Thomas Lubanga Dyilo is criminally responsible.”²⁷⁵ This case set the precedent for requiring a direct degree of causation between the charges and the harm suffered. For the purposes of participating in proceedings, victims were limited to victims of the crimes charged. In that case, the civilian victims of crimes committed by the “child soldiers” recruited by *Thomas Lubanga*, were

²⁷² See REDRESS, *Comments on the OTP Policy Paper on Victim Participation under Article 68(3) of the Statute*, February 2010.

<http://www.redress.org/downloads/publications/REDRESS%20Comments%20on%20the%20OTP%20Policy%20Paper%20on%20Victims%20Feb%202010.pdf>

²⁷³ Decision on the Applications for Participation in the Proceedings, 17 January 2006, *supra*.

²⁷⁴ *Situation in Uganda, Decision on victims’ applications for participation a/010/06, a/064/06, a/070/06, a/081/06 to a/104/06 and a/111/06 to a/127/06*, dated 10 August 2007. ICC-02/04-101.

²⁷⁵ *Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to 6 in the Case the Prosecutor v Thomas Lubanga Dyilo*, 29 June 2006 ICC-01/04-01/06-172tEN, at 6. The applicants in this instance were rejected on the basis of insufficient nexus to the crimes particularised in the arrest warrant.

initially included as a category of “indirect victims”. On appeal the nexus to the crimes charged was deemed too remote.

The Appeals Chamber largely based its reasoning on the language in Article 68(3) which provides that victims may participate in appropriate stages of proceedings “where their personal interests are affected.” It stated that the purpose of the ICC’s proceedings “is the determination of the guilt or innocence of the accused person of the crimes charged” and it is only victims “of the crimes charged” who may participate in the trial proceedings pursuant to Article 68(3), when read together with Rules 85 and 89(1).²⁷⁶

However, as regards reparation, the limitations regarding participation in proceedings provided in Article 68(3) do not necessarily apply, and thus it may be useful to revisit the majority decision of the Trial Chamber in the *Lubanga case*, at first instance. In that case, the Presiding Judge, His Honour Judge Fulford for the majority held that:

Rule 85 of the Rules does not have the effect of restricting the participation of victims to the crimes contained in the charges confirmed by Pre-Trial Chamber I, and that this restriction is not provided for in the ICC Statute framework. Rule 85(a) of the Rules simply refers to the harm having resulted from the commission of a “crime within the jurisdiction of the Court” and to add the proposed additional element -that they must be the crimes alleged against the accused - therefore would be to introduce a limitation not found anywhere in the regulatory framework of the Court.”²⁷⁷

With respect to harm suffered by legal persons, the Chamber held that a causal link was required to demonstrate “that the harm is a direct result of the commission of a crime within the jurisdiction of the Court.”²⁷⁸ In this instance, the applicant had sufficiently indicated that the school had suffered harm as a result of the pillaging, burning and destruction of its facilities during an attack where children were forcibly recruited.

²⁷⁶ *The Prosecutor v Thomas Lubanga*, Appeals Judgment, 11 July 2008, ICC-01/04-01/06, *supra*. para.58.

²⁷⁷ *The Prosecutor v Thomas Lubanga*, Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119, *supra*.

²⁷⁸ Décision sur les demandes de participation à la procédure déposées dans le cadre de l'enquête en République démocratique du Congo (*supra*), dated 24 December 2007, para 141.

10. Assessment: Extent of harm, injury or loss

In accordance with Article 75, “the Court may [...] determine the scope and extent of any damage, loss and injury.” Thus, it would appear that the Court may choose to undertake an assessment of harm, which could be on an individual basis, collective basis or both.²⁷⁹ Equally, it would appear that the Court may choose not to undertake an assessment and simply “order that the award for reparations be made through the Trust Fund” if it were to make a finding that it was appropriate to do so.²⁸⁰

In terms of the extent and type of assessments that the Court may wish to undertake there seem to be several options. At a minimum the Court may wish to establish the scope of beneficiaries, and in this regard, it may establish that there may be victims who have applied for reparation as well as unidentified victims that fit within this class. If the Court limits its decision to simply identifying a class to be repaired, this would leave the Trust Fund with a quasi-judicial role akin to the administration of a mass claims process, requiring identification and verification of beneficiaries.²⁸¹

Alternatively, if the Court so decided, it could, after establishing the scope of beneficiaries, undertake an assessment of the extent of damage, loss and injury.

Judicial reasoning and recognition of categories of harm

Whether the Chamber decides to undertake an assessment of the scope and extent of damage, or whether it orders reparation through the Trust Fund in a more general manner, its decisions should provide sufficient reasoning for the benefit of the victims²⁸² and sufficient clarity for the benefit of the Trust Fund, identifying the remit and boundaries of its decision. Such reasoning “is essential to the very quality of justice and provides a safeguard against arbitrariness.”²⁸³

It is suggested that categories of harm should at a minimum be clarified judicially. A judicial clarification may provide victims with significant recognition, given the Court’s mandate in delivering justice and truth, providing victims with an entitlement that empowers them as rights holders instead of as mere beneficiaries of benevolence. The issue here is the appropriate discharge of the Court’s duties with respect to victims, particularly in a manner that respects individual dignity and humanity, ensuring that victims are perceived of as persons with entitlements.

10.1 Burden and Standards of Proof

While the burden of proof during the criminal trial rests with the Prosecutor, for the purposes of participation, victims have had to establish their status. For the purposes of reparation, the normal

²⁷⁹ In relation to Rule 97(1) RPE, which provides that “In taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualised basis or, where it deems it appropriate, on a collective basis or both.”

²⁸⁰ In accordance to Rule 98(3).

²⁸¹ For an extensive analysis of the role of the Trust Fund for Victims in this capacity, see Edda Kristjansdottir, ‘International Mass Claims Processes and the ICC Trust Fund’, in Ferstman et al., *supra*, p.167.

²⁸² The European Court of Human Rights has held that “according to its settled case-law, judgments of courts and tribunals should adequately state the reasons on which they are based.” European Court of Human Rights (ECHR), *Taxquet v. Belgium*, Application no. 926/05, Chamber Decision of 13 January 2009, para. 40.

²⁸³ *Ibid*, para 43.

civil law maxim that “he who asserts shall prove” would suggest that the claimant would need to establish damage, loss or injury.²⁸⁴

As regards the standard of proof required and method of examination to enable victims to participate at the Pre-Trial stage, the ICC’s early jurisprudence provides that:

[A]ll relevant factors identified are to be proved to a level which might be considered satisfactory for the limited purposes of rule 85(a). Each statement by Applicant victims will therefore be assessed both on the merits of its intrinsic coherence and on the basis of information otherwise available to the Chamber.²⁸⁵

This *prima facie* standard was raised slightly for the purposes of participation in Trial proceedings to “reasonable grounds to believe.”²⁸⁶ The standard of proof appropriate for reparations proceedings has yet to be established both for the purposes of determining the relevant elements that constitute “victim” as well as for an evaluation of the gravity of harm sustained.

Certain Chambers have hinted that the standard at reparations phase could be higher than for purposes of allowing participation in proceedings. For instance, Pre Trial Chamber II in the Situation in Uganda indicated in dicta that:

Whilst the determination of a causal link between a purported crime and the ensuing harm is one of the most complex theoretical issues in criminal law, the Single Judge shares Pre-Trial Chamber I’s view that a determination of the specific nature of such a link goes beyond the purposes of a determination made under rule 89 of the Rules, whether in the context of a situation or of a case. In particular, whereas such an analysis may be required for the purposes of a reparation order, it does not seem required when the determination to permit an applicant to present “views and concerns” within the meaning of article 68, paragraph 3 of the Statute is at stake.²⁸⁷

While a *prima facie* standard of proof has been applied for the purposes of establishing eligibility for participation, this standard would also seem appropriate for admissibility in presenting a claim for reparation given the availability of evidence, victims’ ability to obtain evidence and the facts underlying reparations requests would in principle be uncontested at this stage of proceedings, having been proven at trial.

There are concerns that a more demanding standard of proof would be inappropriate in the context of the ICC’s reparations for a number of reasons including the unavailability of evidence and the challenges impeding victims from proving harm. Without a relaxed standard, it is likely that some of the worst affected victims will be deemed ineligible.

A more relaxed standard of proof is often applied in mass claims contexts to alleviate these difficulties, particularly when or if the outcome of reparations does not meet the individual moral and material damages that an individual will suffer. In other words, certain reparations programmes that have determined precise liabilities which correspond to actual harm have generally adopted a standard such as balance of probabilities, relaxing as appropriate when it is clear that the evidence which victims possess falls significantly below the bar. Reparation programmes that have afforded collective awards, *cy-près* remedies or lump sum payments which have only symbolic correspondence to the actual harm suffered, have gone much further, allowing

²⁸⁴ Eg. In UK Civil law matters, the claimant must prove the facts asserted on a balance of probabilities, *Miller v Minister of Pensions* [1947] 2 All ER 372.

²⁸⁵ *Prosecutor v. Joseph Kony et al.*, Pre-Trial Chamber II, “Decision on victims’ applications for participation a/0114/07 to a/0020/07 and a/0076/07 to a/0125/07”, ICC-02/04-01/05-356, 21 November 2008, at <http://www.icc-cpi.int/iccdocs/doc/doc595959.pdf>

²⁸⁶ *Supra*.

²⁸⁷ Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 10 August 2007, ICC-02/04-101, para. 14, <http://www.icc-cpi.int/iccdocs/doc/doc311236.PDF>. [Emphasis added]

for reversals in burden of proof and a range of other procedural techniques designed to be as inclusive as possible.²⁸⁸

In mass claims cases or where reparation is tied to a process where liability is already established, such as the *partie civile* system, or in civil law jurisdictions, given the prior establishments of the facts, damages are often awarded on the basis of ‘fairness’ or ‘equity’ to reduce the burden on the injured parties.²⁸⁹ This practice is also followed for instance at the Inter-American Court of Human Rights, which awards reparations on the basis of ‘fairness’ or ‘equity’ applying a relaxed standard of proof.

Use of presumptions and cy-près doctrine

There are a number of common challenges in seeking to repair mass victimisation. Large numbers of victims usually imply extraordinary circumstances such as war or hasty displacement of populations with inherent implications on the availability of documentary evidence. The incidence of lost, stolen or destroyed evidence in contexts of great upheaval is high, and creative means for circumventing these evidential obstacles are a common feature of major mass claims processes.

In addition, the need for speedy and efficient processing of a large volume of claims will be a concern, not only because justice delayed is justice denied, but because expediency will enable reduced processing costs, often maximising the funds available for victims.²⁹⁰ On the other hand, speedy processing of claims can diminish accuracy and individual fairness. As put by one author, “whether based on legal liability or moral duty to provide reparation, a claims process is an exercise in futility for all parties involved if it does not deliver a sense of justice to its intended beneficiaries.”²⁹¹

Presumptions have been applied as a means of dealing with these combined challenges. In the *Plan de Sanchez Massacre case*, the Inter-American Court expressed that “taking into account, inter alia, the circumstances of the case [...] there are sufficient grounds for presuming the existence of damage.”²⁹² However, at the Inter-American Court, the nature of the damages being claimed has also had an impact on the standard applied. In the case of *Juvenile Re Education Institute*, the Court held that for loss of profits (in which the Court was actually seeking to restore an amount which corresponded to what was said to be lost) a higher standard should be applied, namely, “damages must be calculated on the basis of a definite injury that is sufficiently substantiated to find that the injury likely occurred.”²⁹³ Other examples of presumptions used by the Inter-American Court include for instance, the presumption that next of kin had suffered²⁹⁴ or that unidentified victims who would fit within an eligible class were presumed to exist.²⁹⁵

Mass claims processes, on the other hand, which are not determining liability against an individual, often apply a “relaxed” standard of proof. As noted by one author, the ICC’s framework incorporates a recognition of the need to consider evidence available and appropriate use of standards of proof. Regulation 55 of the Trust Fund’s Regulations provides that, in determining the

²⁸⁸ J. Gribetz and S. Reig, *The Swiss Banks Holocaust Settlement*, in Ferstman et al. *supra*. p. 135-6.

²⁸⁹ See the discussion regarding damages and the burden of proof in the Dutch legal system in Liezbeth Zegveld, *Compensation for the Victims of Chemical Warfare in Iraq and Iran*, in Ferstman et al., *supra*, at p.378

²⁹⁰ In Edda Kristjansdottir, *International Mass Claims Processes and the ICC Trust Fund*, in Ferstman et al. *supra*. p.178

²⁹¹ *Ibid.*

²⁹² *Plan de Sanchez Massacre v Guatemala*, Inter-American Court of Human Rights, Judgment of 19 November 2004 (Reparations).

²⁹³ *Juvenile Reeducation Institute v Paraguay*, Judgment of 2 September 2004, (Preliminary Objections, Merits, Reparations and Costs), para. 288.

²⁹⁴ For instance, the parents of the victims in *Aloeboetoe v Suriname*, Judgment on Reparations 10 September 1993.

²⁹⁵ For instance, unidentified victims in *Mapiripan v Colombia*, Judgment on Merits, 15 September 2005, were able to claim benefits within 24 months. See, Sandoval-Villalva, *supra*, at p.269.

size and nature of awards, *inter alia*, the Trust Fund will consider “the nature of the crimes, the particular injuries to the victims and the nature of the evidence to support such injuries ...”

It is suggested that in relation to the crimes established at trial, flexible approaches should be adopted. Flexible approaches have already been demonstrated with respect to establishing identity, whereby, if applicable evidence is not available, this can be substituted by a declaration witnessed by two individuals. Equally, where victims have simply put “sexual violence” in their application forms, the Court considered circumstantial evidence to infer that “rape” was implied, but that due to social stigma of discussing such crimes, the victim was not in a position to elaborate on the details.²⁹⁶

Regional human rights bodies have used presumptions in relation to establishing certain facts. For instance, the Inter-American Court has held that:

In determining whether or not the State is responsible for violations of the substantive rights under the American Convention, the Court freely takes into account circumstantial evidence, presumptions of fact, and to draw inferences. In this regard, the Court has recognized that:

in the exercise of its jurisdictional function, and in the process of obtaining and assessing the evidence it needs to decide the cases it hears, it may, in certain circumstances, use both circumstantial evidence and indications or presumptions as a basis for its pronouncements, when consistent conclusions regarding the facts can be inferred from same.²⁹⁷

Similarly, in *Cantoral-Benavides*, the Court noted that:

In addition to direct evidence, be it testimonial, expert or documentary, international courts, as well as domestic courts, can base their judgments on circumstantial evidence, indications and presumptions, provided same lead to sound conclusions regarding the facts.²⁹⁸

The prevalence of a certain type of violations, such as illegal detention or torture in a given context is an important factor in considering whether an alleged victim has been subjected to ill-treatment. However, the Inter-American Court has also ruled that even where the existence of the practice is proved beyond doubt, corroborative evidence is required to link an individual claimant to the practice.²⁹⁹

National truth telling commissions have also used presumptions. For instance, the National Commission on Illegal Detention and Torture in Chile indicated that victims who were able to prove detention in certain detention facilities in Chile at a certain time were presumed to have been tortured due evidence of systematic torture being used in those facilities at that time.³⁰⁰

²⁹⁶ The Prosecutor v Jean Pierre Bemba, *Decision on 772 applications by victims to participate in the proceedings*, 18 November 2010, ICC-01/05-01/08-1017, para 57.

²⁹⁷ *Castillo-Petruzzi et al.* Case, Inter-Am. Ct HR, 30 May 1999, para. 62; *Loayza-Tamayo* (Reparations), Judgment of November 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 42 (1998), para. 51. *Paniagua Morales et al. v. Guatemala* (The *White Van Case*) (Merits), Inter-Am. Ct HR, 8 March 1998, para. 72; *Blake v Guatemala* (Merits) Inter-Am. Ct HR, 24 January 1998, para. 49; and *Gangaram-Panday v. Suriname* (Merits, Reparations and Costs) Judgment of 21 January 1994, Inter-Am. Ct HR, Series C No. 16, para. 49.

²⁹⁸ *Cantoral-Benavides v. Peru* (Merits), Inter-Am. Ct HR, 18 August 2000, para. 47.

²⁹⁹ *Fairén-Garbi and Solís-Corrales v. Honduras*, Inter-Am. Ct HR, Judgment of 15 March 1989 (Merits), paras. 157-9.

³⁰⁰ Informe de la Comisión Nacional sobre Prisión Política y Tortura (Santiago, 2005), highlighted in Pablo de Grief, Paper on “Implementation of Reparations, 2006. See, <http://www.redress.org/downloads/events/CollectiveReparationsMG.pdf>

Another tool, used in mass claims cases, particularly in the United States is the *cy-près* doctrine.³⁰¹ This doctrine, which evolved through the law of trusts is translated as meaning “as near as possible”. It has been used to endow beneficiary groups with entitlements where a specified group cannot be found, or has ceased to exist. For instance, where a trust was established to assist the abolition of slavery in the United States, its purpose was altered once slavery was abolished, and instead the fund was applied to assisting needy persons of African descent.³⁰² The *cy-près* doctrine is appropriate for instance where collective awards or fixed lump sums are foreseen for a large number of victims, and where the extent of individual harm and suffering within a given category is immaterial.³⁰³

10.2 Individual and Collective Assessments

In the context of the crimes within the jurisdiction of the Court it is typically impossible to restore victims to the situation before the crimes occurred. Some specific aspects of material loss can be assessed and restitution may be possible, for instance providing restoration of land rights or assets. However pain and suffering cannot be undone. Rehabilitation services may be vital, as is compensation and further elements of satisfaction.

According to the UN Basic Principles, compensation “should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as: (a) physical or mental harm; (b) lost opportunities, including employment, education and social benefits; (c) Material damages and loss of earnings, including loss of earning potential; (d) Moral damage; (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.”

As was held by the Inter-American Court of Human Rights with regard to compensation, “it is appropriate to fix the payment of ‘fair compensation’ in sufficiently broad terms in order to compensate to the extent possible for the loss suffered.” The existence of large numbers of victims is no reason not to consider compensation as an appropriate form of reparation. In numerous cases before the Inter-American Court for Human Rights, there have been large numbers of victims. For instance, the *Plan de Sanchez Massacre Case*, involved 317 victims who were individually compensated.

The approach taken in this case, as is the practice at the Inter-American Court, was to quantify harm, based on a scale of assessment for different categories of harm. The Inter-American Court has developed a practice whereby it considers harm generally in three categories: pecuniary damages, non-pecuniary damages and “other forms of reparation” (satisfaction). With respect to pecuniary damages, the Court will consider quantifiable loss and injury such as:

- death or injury;
- loss of homes, animals, livelihoods and possessions;
- damage to property, expenses incurred, etc.

Quantifying death or injury would be based on loss of earnings minus living expenses for the remainder of the individual’s life, based on average life expectancy. The loss of earnings would be based on the minimum wage applicable in the victims’ country of residence, where the victims are rural agricultural farmers. For instance, in Guatemala \$5000 was awarded for each victim of a massacre (distributed to the next of kin).

³⁰¹ The *cy-près* doctrine is a legal doctrine that first arose in courts of equity in relation to the execution of trusts. The term is translated “as near as possible” or “as near as may be.” The doctrine has been applied in the context of class action settlements in the United States as well as international mass claims processes in the post conflict context.

³⁰² *Jackson v. Phillips*, (1867) 96 Mass. 539.

³⁰³ See Heike Niebergall, *Overcoming Evidentiary Weaknesses in Reparation Claims Programmes*, in Ferstman et al., supra,.

Non-pecuniary damages principally aim at redressing anguish and suffering, or the moral harm inflicted. Here the Inter-American Court has awarded lump sums “in fairness” (in equity) to survivors who were also victims of the violations (persecution, etc.) and who are presumed to have suffered as indirect victims for the loss of family members. In the case of the *Plan de Sanchez Massacre*, \$20,000 was awarded for each surviving victim using this approach.

For victims to be able to be considered eligible for compensation before the Inter-American Court, their claims generally need to be individualised; or sometimes a presumption is established that unidentified victims exist, and a procedure is set up to identify them thereafter. In addition to these first types of awards, which are largely compensation based, the Inter-American Court has also been pro-active at awarding “other forms of reparation”, these are generally collective in nature, and include rehabilitation services, public acts aimed at recognition, memory, acknowledgement, apology or aimed preserving culture or reducing stigma. Rehabilitation projects have had both collective and individual aspects - allowing individual victims to obtain services free of charge, but also constituting symbolic acts, addressing harm to the community.

With respect to compensation, individualised disbursements can be costly to administer and could result in *de minimus payments*. Collective approaches may be asked for by victims, as there are often uncomfortable feelings surrounding accepting money.³⁰⁴ Where collective measures involve and empower victims, such approaches can be very beneficial for their rehabilitation. Measures might include symbolic endeavours, such as the building of a memorial, commemorative acts, education or income generation programmes as well as medical or counselling centres. However, the key to maintaining the reparative focus of such programmes is the consultative and empowering process that establishes them. There is a danger that such forms of reparation lose their reparative objective and become humanitarian or developmental in nature given the post conflict context in which they are implemented, particularly if they are implemented by a tendering process through third parties, that may be removed from the justice process.

The examples of collective reparations requested and granted through the Inter-American Court may be indicative in that they are generally conceived and devised of by the community of victims, who may have been empowered through the bringing of their case in the first instance. Given that the ICC’s framework for victim participation does not involve the same degree of ownership of the process as is the case in a human rights court, the quality and quantity of consultations with victims individually but also collectively in the case of collective approaches will be critical to ensuring a reparative, rather than a merely humanitarian effect.

³⁰⁴ See discussion by Yael Danieli in ‘Massive Trauma and the Healing Role of Reparative Justice’, in Ferstman et al., supra,.

Part D Recommendations: Reaching a decision or making an award

Recommendations to Chambers:

- Delegate as appropriate, consideration of admissibility or eligibility of requests for reparation to the Registry;
- Enable deceased persons to be considered as victims in their own right;
- Enable next of kin to claim reparation in relation to the deceased persons as their successor, and/or in relation to the harm they suffered personally that resulted from the crime inflicted on the deceased person;
- Consider the ability of victims to obtain evidence in relation to their identity, to harm suffered, to deceased persons, etc.;
- Consider the use of relaxed standards of proof, flexible approaches and the use of presumptions as appropriate;
- Consider individual and collective approaches, and give due consideration to victims who have applied;
- Consider the possibility of collective applications for reparation in the future.

E. Implementation and Enforcement

11. Implementation of Reparation Decisions by the Trust Fund for Victims³⁰⁵

Given the multifaceted functions that the Trust Fund may be called upon to undertake, it will be useful for the Trust Fund to consider the range of possible roles it may play well in advance of a decision on reparation, enabling scaling up of its activities when it comes to prepare its first draft implementation plan.

11.1 Individual Approaches

While “individual awards for reparations shall be made directly against the convicted person,”³⁰⁶ there may be instances where the Chamber will decide that, at the time of making the order, it is impossible or impracticable for it to make individual awards directly to each victim. In such cases the award can be deposited with the Trust Fund and is to be separated from other resources and forwarded to each victim as soon as possible.³⁰⁷

While there are challenges in processing vast numbers of individual claims, these challenges are by no means insurmountable, as has been evidenced by the range of international practice, and may be appropriate in certain circumstances.³⁰⁸ In this regard, the individual awards recognise the harm suffered personally and specifically in a way that collective awards typically cannot and it is important that this specificity of harm is not lost. Practice of mass claims processes shows that it is important and possible to maintain a clear distinction between awards based on legal entitlement on the one hand, and other forms of aid and assistance, which are not.³⁰⁹ Given that the Trust Fund for Victims is able to complement awards with its “other resources”, and given the lesser restrictions on the use of funds from its “other resources” it would be able to complement individual awards with collective elements on its own initiative, beyond the confines of the Court’s decision.

In all instances where the Court orders that an award for reparations against a convicted person be deposited with the Trust Fund or that an award be made through the Trust Fund in accordance with Rule 98(2) to 98(4) of the Rules of Procedure and Evidence, the Secretariat of the Trust Fund for Victims is obligated to prepare a draft plan to implement the order of the Court, to be approved by the Board of Directors, and to be submitted to the relevant Chamber for approval.³¹⁰

The Board of Directors may also invite others with relevant expertise to participate, as appropriate, in specified sessions of the Board and to make oral or written statements and provide information on any question under consideration.³¹¹

³⁰⁵ Significant portions of this Section have been reproduced from an earlier paper: REDRESS, *Comments to the Trust Fund For Victims on the Progressive Realisation of its Mandate*, 22 March 2010. Available at: http://www.redress.org/downloads/publications/REDRESS_Paper_for_TFV_Board_22March2010.pdf

³⁰⁶ Article 75(2) of the ICC Statute, Rule 98(1) of the Rules of Procedure and Evidence.

³⁰⁷ Rule 98(2) of the Rules of Procedure and Evidence.

³⁰⁸ A mass-claims style process could be appropriate for instance where significant assets were seized for the purposes of reparation, as could be the case in the Situation in Libya. For a comprehensive study of mass claims processes see: Redressing injustices through mass claims processes: innovative responses to unique challenges, Ed. International Bureau of the Permanent Court of Arbitration, Oxford University Press, 2006.

³⁰⁹ See Edda Kristjansdottir, *supra*.

³¹⁰ Regulations 54 and 57 of the Regulations of the Trust Fund.

³¹¹ Regulation of the Trust Fund, Section 2(8).

In preparing its draft implementation plan, and in determining the nature and size of awards subject to any orders of the Court, the Trust Fund must take into account a number of factors. These factors are listed in Regulation 55 of the Trust Fund’s Regulations. They include taking into account the nature of the crimes, the particular injuries to the victims and the nature of the evidence to support such injuries, and the size and location of the beneficiary group.³¹²

Where the relevant Chambers identifies each beneficiary, the draft implementation plan shall set out the names and locations of victims to whom the award applies, where known (and subject to confidentiality), and any procedures that the Trust Fund intends to employ to collect missing details and methods of disbursement.³¹³ Regulation 118 of the Regulations of the Registry sets out that the Victims Participation and Reparation Section (VPRS) of the Registry shall, where requested by the Chamber or by the Presidency, and after consultation with the victims or their legal representatives, provide the Secretariat of the Trust Fund for Victims with the information it has received from victims and in victims’ application forms which are necessary for the implementation of the Court’s order.

Where victims are not individually identified

Where the Court has stipulated individual awards are to be granted pursuant to Rule 98(2) but beneficiaries are not identified (names and/or locations of the victims are not known), these would have to meet the criteria of “victim”, as defined in Rule 85 of the Rules of Procedure.

The unidentified victims may need to correspond to a precise “class” defined by the Chamber.³¹⁴ For instance, if there were to be a conviction and reparations order in the *Lubanga case*, the Chamber might indicate that victims of child recruitment by a specific armed group, during a specific period or geographic location should be awarded certain types of benefits in relation to certain specified harms suffered. In this sense, the Trust Fund could be entrusted with a quasi-judicial task of assessing the evidence that might demonstrate that an individual is a member of the beneficiary group and has suffered the specified harm. In such instances, it may be appropriate for the Trust Fund to propose in its draft implementation plan, how it would go about identifying and verifying potential beneficiaries. Flexible standards that rely on presumptions might be necessary and desirable, and align with the good practice of many mass claims processes.

Where the number of victims is such that it is impossible or impracticable for the Secretariat to determine these with precision, the Regulations specify that the Secretariat shall set out all relevant demographic and statistical data about the group of victims, as defined in the order of the Court, and shall list options for determining any missing details for approval by the Board of Directors.

Regulation 61 of the Regulations of the Trust Fund provides that such options may include:

- (a) The use of demographic data to determine the members of the beneficiary groups; and/or:
- (b) Targeted outreach to the beneficiary group to invite any potential members of the group who have not already been identified through the reparations process to identify themselves to the Trust Fund, and, where appropriate, these actions may be undertaken in collaboration with interested States, intergovernmental organisations, as well as national or international non-governmental organisations. The Board of Directors may put in place reasonable deadlines for the receipt of communications, taking into account the situation and location of victims;

³¹² Regulation 55 of the Regulations of the Trust Fund.

³¹³ Regulation 59 *ibid*.

³¹⁴ However, consideration must be given by either the Chamber or the Trust Fund to how to mitigate against potential further stigmatisation in relation to the use of strict “classes” to identify beneficiary groups. For instance, numerous humanitarian projects seeking to support former child soldiers have also integrated other vulnerable children into their programmes so as to avoid further stigmatisation of former child soldiers and assist in their rehabilitation into the Community. See, REDRESS, *Child Soldiers before the International Criminal Court: Victims, Perpetrators or Heroes*, September 2006, Section on reparations.

- (c) The Secretariat may consult victims or their legal representatives and families of individual victims, as well as interested persons, interested States and any competent expert or expert organisation in developing these options.

In order to identify eligible beneficiaries, specific efforts will need to be made to reach women and girl victims in particular, taking into consideration social stigma and the cultural obstacles that mitigate against victims of sexual gender based violence to identify themselves publicly. The Trust Fund has already issued a number of special calls for proposals in relation to its support of assistance projects that address or respond to the needs of such victims. In addition, the interests of the community that the victims may be part of or dependent on will need to be considered. This is particularly relevant for child victims, whose best interests should be considered holistically with attention being given to the context in which the child lives, the need for re-integration into the family and community, avoiding further stigmatisation or being inappropriately singled out against other children.³¹⁵ Significant stigma surrounds victimisation resulting from rape and child recruitment. Singling out already stigmatised and alienated individuals may be counterproductive and could even ignite resentment against such individuals. In both Uganda and the Democratic Republic of Congo, there is a sense that former combatants are the ones to have benefited through demobilisation incentives and amnesty laws.³¹⁶ Young people formerly associated with armed groups are perceived by many as perpetrators as well as victims, and it would be difficult to see how reparation that favours “former perpetrators” over those that they terrorised would be well received within the communities that these young people may wish to reconcile with.

Where resources are inadequate

For all activities and projects that are triggered by a decision of the Court, the Board of Directors of the Trust Fund will need to determine how any funds available through a) fines and forfeiture deposited with the Trust Fund or b) resources collected through awards for reparations should best be complemented with “other resources” of the Trust Fund. According to Regulation 56 of the Trust Fund Regulations, the Board “shall make all reasonable endeavours to manage the Fund taking into consideration the need to provide adequate resources to complement payments for awards under Rule 98(3) and 98(4) of the Rules of Procedure and Evidence and taking particular account of on-going legal proceedings that may give rise to such awards.” On this basis the Board of Directors would need to consider how best to complement existing funds with “other resources”, advising the relevant Chamber accordingly.³¹⁷ In this respect, Pre Trial Chamber I, in the DRC Situation alluded to this provision in its decision of 11 April 2008. It recommended that before resorting to any other activities or projects, the Board of Directors of the Trust Fund, in accordance with its obligations under regulation 56 of the Regulations of the Trust Fund, should undertake a study evaluating and anticipating the resources which would be needed to execute in the cases pending before the Court an eventual reparation order pursuant to article 75 of the Statute.³¹⁸

Finally, the Trust Fund will need to submit to the relevant Chamber, via the Registrar, the draft implementation plan for approval, and will consult the relevant Chamber, as appropriate, on any questions that arise in connection with the implementation of the award.³¹⁹ Thereafter, the Trust Fund will need to provide updates to the relevant Chamber on progress in the implementation of

³¹⁵ See REDRESS, *Victims, Perpetrators or Heroes? Child soldiers before the International Criminal Court*, September 2006, <http://www.redress.org/publications/childsoldiers.pdf>, in particular Part 3 “Ensuring Children’s Rights in all Phases of Proceedings”. Children have a right to respect for their dignity, a right to be protected from discrimination, and a right to protection -both physical and emotional, promoting the child’s harmonious development, and ensuring the best interests of the child, see the UN Guidelines on Justice for Child Victims and Witnesses of Crime (ECOSOC Resolution 2005/20, 22 July 2005) and Convention on the Rights of the Child, 1989.

³¹⁶ *Victims, Perpetrators or Heroes?*, *ibid.*, Part I, Child Soldiers in Northern Uganda & DRC; in particular Section 1.2.4 “Mixed perceptions of children’s victimization: age and demobilization packages”, p.14.

³¹⁷ Regulation 56 of the Regulations of the Trust Fund.

³¹⁸ Decision on the Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund, ICC-01/04-492, 11 April 2008, p. 11.

³¹⁹ Regulation 57 of the Regulations of the Trust Fund.

the award, in accordance with orders of the Chamber. Once the implementation period is complete, the Trust Fund shall submit a final narrative and financial report to the relevant Chamber.³²⁰

If resources for individual awards have been collected from fines and forfeitures, and transferred to the Fund,³²¹ or if they are specifically collected through awards for reparations,³²² the Board of Directors must determine the uses of such resources in accordance with any stipulations or instructions of the Court, in particular on the scope of beneficiaries and the nature and amount of the awards. When using these particular funds, the Board must comply with any relevant decisions issued by the Court on the case at issue and in particular any decisions issued that:

- a) determine the scope and extent of any damage, loss and injury to, or in respect of victims; or any decision issue [Article 75(1) of the ICC Statute] or
- b) relate to the assessment of reparations [Rule 97 of the Rules of Procedure and Evidence].³²³

The Board may seek further instructions from the relevant Chamber on the implementation of its orders.³²⁴

Implementation of Individual Reparations Awards

When it comes to disbursing individual awards, the Secretariat will need to verify that any persons who manifest themselves to the Trust Fund are in fact members of the beneficiary group in accordance with any principles set out in the order of the Court.³²⁵ The Board of Directors will need to determine the standard of proof for the verification, subject to any stipulations set out in the order of the Court.³²⁶ Given the urgent situation of many victims, the Board may decide to undertake verification and disbursement in a phased approach, for instance prioritising a subgroup that has particular needs. A final list of beneficiaries will need to be approved by the Board of Directors.³²⁷

11.2 Implementation of Collective Awards through the Trust Fund for Victims

The Court may order that an award for reparations be made through the Trust Fund where the number of victims and the scope, form and modalities of reparations make a collective award more appropriate than individual awards.³²⁸ Collective awards are a vital component of reparations, particularly in mass crimes cases. Certain forms of victimisation may be appropriately captured by collective awards, such as harm directed at a particular group or community or aimed at group interests. Also, certain forms of reparation may be most effectively distributed to beneficiaries through collective projects that provide services to affected communities or particularly vulnerable classes of victims, such as medical treatment, psychosocial counselling, skills training, education or

³²⁰ Regulation 58 *ibid.*

³²¹ Pursuant to Article 75(2), article 79(2) or Rule 98(2)-(4).

³²² See Regulation 34 of the Regulations of the Trust Fund for Victims.

³²³ See Regulations 43 to 45 of the Regulation of the Trust Fund for Victims.

³²⁴ Regulation 45 of the Regulation of the Trust Fund for Victims.

³²⁵ Regulation 62 *ibid.*

³²⁶ Regulation 63 *ibid.*

³²⁷ Regulations 64 and 65 *ibid.*

³²⁸ Article 75 (2) of the ICC Statute and Rule 98(3) of the RPE.

income generation. As highlighted above, consideration would always need to be given to the specific harms being addressed and how the projects can nonetheless recognise the specific harm being repaired without being subsumed into a more general humanitarian project. In terms of the processes set out in relevant provisions, there is an important role for the Trust Fund for Victims to provide input to the Court in its consideration of the forms and modalities of collective awards and in devising appropriate projects and activities to implement its reparations orders.

The procedure described above, relating to the preparation of the draft implementation plan for the relevant Chamber's approval, also applies to collective awards triggered by a decision of the Court under article 75(2). When the Court orders that an award for reparations against a convicted person be deposited with the Trust Fund, or that an award be made through the Trust Fund in accordance with Rules 98(2) - 98(4), the Secretariat must prepare a draft plan to implement the order, to be approved by the Board of Directors and the Chamber.³²⁹ The draft implementation plan is to set out the precise nature of the collective award(s), where not already specified by the Court, as well as the methods for their implementation. The Court will need to approve such determinations.³³⁰

In some instances the Court may make a precise order for collective reparations. Article 75(1) indicates that "in its decision, the Court *may*, either upon request or on its own motion [...] determine the scope and extent of any damage loss and injury to or in respect of victims."³³¹ Thus, it could for instance outline different categories of harm and the corresponding types of remedy that victims should receive, either identifying them by name or simply by beneficiary "class". Here the Trust Fund might play a role in developing a workable and practical plan to identify, locate and then deliver the activities or projects to the beneficiary group or class, for the approval of the Chamber. It is here that the Trust Fund may be able to propose options that ensure recognition of, and a link with, the harm suffered.

In preparing its implementation plan, the Board of Directors "may" consult victims as defined in Rule 85 of the Rules of Procedure and Evidence, though it is suggested that consultation is fundamental and should be a cornerstone in the planning process.

The Board of Directors may also wish to consult experts or expert organisations on the nature of the collective award(s) and the methods for their implementation.³³² Gender and child-specific consultations are critical to ensuring that plans will meet real needs of the most vulnerable victims. Other specific categories of victims, including the elderly and other groups judged to be vulnerable or to have very specific needs or requirements in the particular context, should be considered to ensure outreach and consultations are adapted on a case by case basis.

Alternatively, the Court may also order that an award for reparations be made through the Trust Fund to an intergovernmental, international or national organisation approved by the Trust Fund.³³³ Such an organisation might be specifically identified by the Chambers or not. In deciding whether to make an award through the Trust Fund to such an organisation, the Court must consult interested States and the Trust Fund itself.

Complementing reparations awards through the Fund's "other resources"

While the Board of Directors may wish to complement awards for reparation where assets obtained through seizure and forfeiture were inadequate, there is also another important aspect to the Board's ability to complement awards.

³²⁹ Regulation 54 of the Regulations of the Trust Fund.

³³⁰ Regulation 69 *ibid*.

³³¹ Article 75(1) of the ICC Statute, emphasis added.

³³² Regulation 70 of the Regulations of the Trust Fund.

³³³ Rule 98(4) of the Rules of Procedure and Evidence.

The Trust Fund is able to play an important role complementing a potentially narrow or arbitrary class of beneficiaries limited to the precise victims of the charges proven at trial. As seen in Section 9 above, the determination of the scope of beneficiaries may be limited to the specific victims able to prove that they suffered harm in relation to the precise facts proven against the convicted person, leaving a large number of victims without a remedy in spite of identical or related harm suffered. The ability of the Board of Directors to complement awards with a broader approach will be critical to alleviate arbitrariness and injustices that may be unavoidable given the limitations of the criminal process.

Part E, Section 11 - Recommendations to the Trust Fund for Victims on implementation of reparations orders

- Monitoring of on-going trials and evaluating the timing and duration of possible reparations proceedings may be helpful to assist with scheduling of work and planning of the scaling up and down of resources within the Trust Fund Secretariat.
- Establish and maintain a list of experts and expert organisations which may be called upon in relation to Regulations 50 and 70 of the Trust Fund regulations. Such a list of experts might be shared with a list of experts that may be maintained by the Registry in line with Rule 97 RPE. The following further steps may be required:
 - Establishing area(s) and levels of expertise required;
 - Establishing draft terms of reference.
- Establish standards and modalities for cooperation with intergovernmental, international or national organisations as provided for in Regulation 73 of the Trust Fund Regulations, having regard to the types and location of organisations which may be suitable entities to implement large scale or long-term services for the benefit of victims or who might be useful collaborators or partners, In particular, it would be useful for the Trust Fund to:
 - Establish, publish and disseminate transparent selection criteria provided for in Regulation 73;
 - Establish modalities for cooperation with such organisations that ensure efficiency and transparency, such as model contracts and standard operating procedures, covering, for instance, confidentiality/protection protocols and financial and narrative reporting obligations.
- In view of the eventuality that the Court requests the Trust Fund for Victims for input on appropriate forms of restitution, rehabilitation and compensation awards, the Trust Fund may wish to:
 - Review the implementation of relevant restitution, rehabilitation and compensation awards granted by other Courts and tribunals;
 - Consider the range of principles applicable to other bodies of similar mandate in order to help prepare itself for future implementation strategies, particularly in the absence of principles established under Article 75. In particular principles specific to vulnerable groups such as children might be considered;³³⁴
 - Consider the functioning of other Secretariats implementing reparations awards;
 - Develop in-house expertise to plan for restitution, rehabilitation and compensation awards that are gender and child sensitive, and also adapted to specific harms resulting from crimes within the jurisdiction of the Court;
 - Gather and develop gender and child specific best practice and expertise in implementing reparations.

³³⁴ Some guiding principles used by the Truth and Reconciliation Commission for Sierra Leone included “sustainability” and “avoiding new stigma or the reinforcement of existing stigma”. See: “How the Truth and Reconciliation Commission for Sierra Leone developed its guiding principles on reparations” in the REDRESS Report *Child Soldiers before the ICC: Victims, Perpetrators or Heroes? supra*, p.57-59, www.redress.org/publications/childsoldiers.pdf.

12. Funding and Enforcement of Reparations

12.1 Maintaining Fund Balances

Regulation 56 of the Regulations of the Trust Fund, indicates that the Board “shall make all reasonable endeavours to manage the Fund taking into consideration the need to provide adequate resources to complement payments for awards under Rule 98(3) and 98(4) Rules of Procedure and Evidence and taking particular account of on-going legal proceedings that may give rise to such awards.” The Trust Fund for Victims may wish to develop a policy framework regarding the level of resources and other assets it might set aside in order to complement an order for reparation.

It is noted that the Trust Fund for Victims set aside € 1 million euro for potential reparation in the context of the first two trials which may conclude in 2011. Presumably this implies that roughly €500,000 euro might be available for each of the first 2 cases. While this is a start, it is suggested that a policy or strategy document is developed with regard to determining the basis of the amounts to be set aside, and possible fundraising targets. For instance, a distinction could usefully be made regarding the possibility of complementing awards a) because funds are unavailable or insufficient, from b) to broaden the scope of beneficiaries or the extent of the harm to be repaired, as a means of redressing some of the limitations of the criminal process. An assessment of both these aspects is already possible in the first two cases.

It is fundamental that the Trust Fund develop its fundraising capacity, as current dependence on voluntary contributions from ICC State Parties needs to be reduced and sources of income diversified. In order to complement its fundraising capacity, the Trust Fund for Victims should enhance its communications capacity, to become a more visible and well-known institution.

In order to maintain fund balances, the Trust Fund may consider:

- How best to include the possibility of complementing reparations awards into its on-going fundraising and communications strategies;
- Developing a reserves policy for reparations, which might include, for instance, a) a policy of setting aside funds for reparations once a particular “situation” is confirmed by the Pre-Trial Chamber or once a case commences against a particular accused person; b) applying a percentage to earmarked funds for reparations reserves; c) determining minimum levels of acceptable reserves;
- Undertaking an assessment of potential costs required to implement certain types of awards, and developing a corresponding policy regarding cost-effective implementation.

12.2 Protective Measures: tracing, freezing or seizing assets

There are three types of requests for asset tracing that can emanate from the Court:

- a) OTP may seek cooperation of States in the context of criminal investigations, in linking assets to criminal conduct. OTP has a Financial Investigation Unit (FIU) which undertakes specific investigations in this regard.
- b) The Registry may seek to investigate assets of suspects and accused persons who have claimed legal aid from the Court because they have insufficient means to pay for their legal representation. The Court's practice is to assign legal aid pending a financial investigation into the individuals' financial status.³³⁵ Requests for cooperation in this regard are for information purposes, unless it is proven that the individual does have sufficient means, in which case the Chamber dealing with the case may order recovery of assets to contribute to the cost of representation.³³⁶
- c) The Pre-Trial or Trial Chamber may order "protective measures" to safeguard assets pending the outcome of a trial, for the eventual purposes of reparation or forfeiture.³³⁷ Protective measures for the purposes of reparation can be ordered upon the issuance of an arrest warrant or summons, or once a person is convicted.³³⁸

Coordination amongst organs of the Court

It is important that requests for information regarding a suspect or accused's ability to finance his legal representation are coordinated with requests for the purpose of reparations, lest the former jeopardise the efficacy of other asset tracing and freezing endeavours. Equally it would appear important that when OTP seeks the cooperation of States in relation to an arrest, that a coordinated approach is ensured with the involvement of the relevant Chamber, so that potential seizure of assets as part of the arrest operation is undertaken not merely for the purposes of criminal evidence, but also in view of potential assets for the purposes of reparation.

Coordination and collaboration between OTP and the Registry could also be critical where, for instance, OTP may have useful information regarding the location of assets, and the Registry is seeking cooperation from States in relation to an order for "protective measures" of a Chamber. A range of collaboration would be desirable, from sharing of contacts and knowledge of domestic requirements to specific information about the existence or location of assets.

Finally, it would appear that at present there are no policies that clarify the priority to be given to assets that may be frozen or seized in the event that competing requests are made for the purposes of legal aid on the one hand and eventual reparations on the other.

³³⁵ Article 55(2)(c) of the ICC Statute.

³³⁶ Rule 21(5) of the Rules of Procedure and Evidence enables the Chamber dealing with the case to "make an order of contribution to recover the cost of providing counsel."

³³⁷ Article 57(3)(k) of the ICC Statute enables the Pre-Trial Chamber to "seek the cooperation of States pursuant to article 93(1)(k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims.

³³⁸ Rule 99(1) of the Rules of Procedure and Evidence provides that: "The Pre-Trial Chamber, pursuant to article 57, paragraph 3 (e), or the Trial Chamber, pursuant to article 75, paragraph 4, may, on its own motion or on the application of the Prosecutor or at the request of the victims or their legal representatives who have made a request for reparations or who have given a written undertaking to do so, determine whether measures should be requested." Rule 57(3)(e) provides: "Where a warrant of arrest or a summons has been issued under article 58, and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in this Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to article 93, paragraph 1 (k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims."

The need for ex-parte or confidential requests

In the *Lubanga Case*, Pre-Trial Chamber I indicated that it was seized of the case and has demonstrated a concern and awareness of the urgent need to trace assets and seize property, noting that, by the time “an accused person is convicted and a reparation award ordered, there will be no property or assets available to enforce the award.”³³⁹ The Pre-Trial Chamber has powers to request cooperation of States of its own motion,³⁴⁰ and requested cooperation from the DRC both in execution of the Arrest Warrant and in tracing, identifying and seizing Thomas *Lubanga’s* assets.³⁴¹ This was done simultaneously with its request for cooperation on the Arrest Warrant, initially under seal, and later made public after *Thomas Lubanga’s* apprehension and transfer to The Hague. Furthermore, on 31 March 2006, the Pre-Trial Chamber *publicly* requested all States Parties to identify, trace and freeze or seize property and assets of Mr Lubanga.³⁴² It would appear that the practice since this first request has been to issue confidential requests, which is advisable given the mobility of assets and that public requests could be self-defeating.

Greater specificity of requests are required by certain jurisdictions

The extent of the duty to search for assets in order to give effect to requests for protective measures is unclear. Some jurisdictions, like Switzerland, do not countenance “fishing expeditions” requiring specific requests identifying for instance the existence of or location of assets. Other States, such as Belgium or the United Kingdom have less stringent approaches, and would accept simple requests to search for assets. In the *Marcos* litigation, the States in which assets were said to be located were reluctant to disclose comprehensive bank documentation, particularly without safeguarding the privacy of non-participating third parties.³⁴³

Sufficiently broad and forward looking requests

It has been suggested by some State sources that requests made by the Court are not expressed in sufficiently wide terms. It would appear that current practice of the Court is to issue requests to trace or freeze assets proven to belong to the suspect or accused. However, in practice it is important include assets held in the name of relatives, front companies or other suspect individuals or entities linked to the suspect or accused. The requirement of proving ownership or linking assets to the suspect or accused must necessarily take place *after* they have been frozen, given that such assets are likely to disappear the moment that the suspect or accused, or his agents, get wind of a tracing or freezing operation. A request could include a proviso that links be proven after the assets are frozen.

Requests must also cover future assets that may be received for instance as a result of inheritance.

Effective implementing legislation, clear procedures, centralised services

³³⁹ *Situation in the Democratic Republic of Congo (DRC) in the case of the Prosecutor v Thomas Lubanga*, “Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58”, issued under Seal, and reclassified as public on 24 February, “Decision concerning Pre-Trial chamber I’s Decision of 10 February 2006, pp 60-61.

³⁴⁰ Article 57(3)(e) of the ICC Statute.

³⁴¹ *Situation in the DRC, The Prosecutor v Thomas Lubanga Dyilo*, “Demande adressée à la République Démocratique du Congo en vue d’obtenir l’identification, la localisation, le gel ou la saisie des biens et avoirs de M Thomas Lubanga Dyilo”, 9 March 2006. ICC-01/04-01/06-62.

³⁴² *Situation in the DRC, case of the Prosecutor v Thomas Lubanga Dyilo*, “Request to States Parties to the Rome Statute for the Identification, Tracing and Freezing or Seizure of the Property and Assets of Mr Thomas Lubanga Dyilo”, 31 March 2006. ICC-01/04-01/06-62.

³⁴³ D. Chaikin (2000), *Tracking the Proceeds of Organised Crime – The Marcos Case*, Transnational Crime Conference, Canberra 9-10 March 2000, at page 16.

With respect to protective measures for the purposes of reparation, Article 93(k) provides that States Parties shall provide assistance in relation to investigations and prosecutions for:

The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purposes of eventual forfeiture, without prejudice to the rights of bona fide third parties.³⁴⁴

Once an order has been issued, the Registry will transmit the order and follow up cooperation requests with States on behalf of Chambers. Protective measures for the purposes of reparation are similar to requests by OTP in that they primarily depend on the availability of domestic procedures able to swiftly respond to a request for assistance by the ICC, and obtain cooperation from States Parties and non-State Parties alike. However, there is a fundamental difference, in that requests for asset tracing and freezing for the purposes of reparation do not require any link to criminal conduct and need not be “proceeds of crime”. Such requests are based on the need to freeze or hold assets in the context of civil proceedings where a civil defendant who is found liable must pay costs or damages. It is not clear whether implementing legislation in most States party to the ICC Statute make this distinction.

Assuming that States are willing to cooperate, appropriate domestic legislation and procedural mechanisms to foster cooperation are key. Specifically designating bodies responsible for receiving and implementing cooperation requests and ensuring that such bodies are well apprised of their responsibilities in advance of any actual request can ensure effective implementation can go a long way to increasing efficiencies. The practice of certain States such as Belgium, where implementation is centralised in parallel services within the Ministry of Justice, Prosecution Service and Judiciary can help to ensure the speedy and secure responses that are necessary in tracing and freezing operations, where monies can be easily be transferred from one jurisdiction to another or rapidly laundered beyond trace.³⁴⁵ If dedicated, centralised services are not in place, it will be important to clarify internal procedures to formally recognise and fulfil the requests, including the role of local bodies and how such requests are prioritised against local or third-country requests. Without such measures, cooperation to safeguard assets will be very slow and may ultimately undermine their preventive purpose.

For the most part, national implementing legislation has provided that the ICC’s provisional orders or warrants are enforceable as if they were domestic orders and in this respect they are not generally accorded any superiority or priority, unlike the procedures certain States have set out for the implementation of UN Security Council resolution tracing and freezing orders. Furthermore, the introduction by certain States of giving discretion to the national judge hearing the application on whether and how to give effect to the order may in practice undermine the certainty of the ICC’s cooperation regime.

12.3 Monitoring and Enforcement of reparations orders

With respect to enforcing reparations awards, article 75(5) of the ICC Statute indicates that the obligations of State Parties are the same as those set out in Article 109, which provides that:

State Parties shall give effect to fines or forfeitures ordered by the Court [...] without prejudice to the rights of bona fide third parties and in accordance with the procedure of their national law.”³⁴⁶

³⁴⁴ Article 93(k) of the ICC Statute.

³⁴⁵ Intervention made by the Federal Coordinator of Belgian Judicial Cooperation with International Criminal Jurisdictions of the Ministry of Justice at the Conference organized by REDRESS and Leiden University, Reparations before the International Criminal Court: Issues and Challenges, Peace Palace, The Hague, 12 May 2011.

³⁴⁶ Article 109(1) of the ICC Statute.

In case of the inability to give effect to a forfeiture order, a State must “take measures” to recover the equivalent value of the award.³⁴⁷ Finally, any funds recovered by the State in this respect *must* be transferred to the ICC.³⁴⁸

The Rules of Procedure and Evidence provide further detail on State obligations in this context. Rule 217 indicates that the Presidency can seek cooperation from any State connected to the sentenced person *either* by virtue of nationality or habitual residence, *or* by virtue of the location of assets connected to the victims. Rule 219 provides that States cannot modify the reparations specified by the ICC; its decision on the scope and extent of damages, loss or injury; or the principles upon which this determination was based. Furthermore, States are obliged to “facilitate the enforcement of such order.” Similarly, States cannot modify the orders of fines made by the ICC.³⁴⁹ Finally, the Presidency, having consulted with the State of enforcement, is empowered to “decide on all matters related to the disposition or allocation of property or assets realized through enforcement of an order of the Court.”³⁵⁰

Most national implementing legislation on the enforcement of reparations orders is straightforward. States must take all possible steps to enforce orders. Nonetheless, assets subject to provisional seizure orders will only be transferred to fulfil reparations orders if a much higher burden of proof is met. Not only must it be conclusively shown that the assets are owned and controlled by the debtor, but also that the assets are proceeds of crime.

There have been a number of faulty attempts in respect of other courts and tribunals (both national and international) where this burden was adjudged not to have been met.³⁵¹ This underscores the need for the Prosecutor, with the assistance of specialised national investigators as appropriate, to undertake detailed and rigorous investigations into the proceeds of crime in order that this connection can be veritably sustained. *Early correspondence and mutual assistance between the Prosecutor and States Parties should be undertaken in order to ensure sufficient expertise in tracing, freezing and transfer of assets.*³⁵² Also, a number of approaches have been taken by courts to ease this burden, including use of reverse onuses on the convicted defendant, as appropriate, to disprove that the said assets constitute proceeds of crime.³⁵³

The Statute provides that in those cases when it is not possible for a State Party to give effect to an order for forfeiture, it “shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.”³⁵⁴ This will require national courts to undertake a variety of steps associated with defaulting debtors such as garnishee orders, liens and enforced sales of property.

Monitoring State Compliance

The lack of a clear entity mandated to pursue assets from the outset until enforcement is compounded by the generality of the obligations to “cooperate” and, or to “enforce”, which

³⁴⁷ Article 109(2) *ibid.*

³⁴⁸ Article 109(3) *ibid* [emphasis added].

³⁴⁹ Rule 220 of the Rules of Procedure and Evidence.

³⁵⁰ Rule 221 *ibid.*

³⁵¹ See, for example, Decision on Inter Partes motion by Prosecutor to Freeze the Account of the Accused Sam Hinga Norman, SCSL- 2004-14-PT(3259-3268).

³⁵² For instance, the expertise of Swiss investigators was lent at an early stage to the Special Court of Sierra Leone, enabling proactive approaches to asset recovery.

³⁵³ See, for example, Article 5(7) of the United Nations Convention Against Illicit Traffic on Narcotic Drugs and Psychotropic Substances. 28 ILM 493 (1989) which provides: “Each Party may consider ensuring that the onus of proof be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation, to the extent that such action is consistent with the principles of its domestic law and with the nature of the judicial and other proceedings.”

³⁵⁴ Art. 109(2) of the Rome Statute.

equally have no clear follow-up mechanism. The experience of other human rights courts and treaty mechanisms shows the utility and merits of developing internal enforcement procedures, and as other mechanisms have done, the ICC is encouraged to develop the necessary procedures in order to ensure enforcement in practice.³⁵⁵

While a system of support for victims currently exists for the duration of the “proceedings” through VPRS, and while responsibility for collecting and allotting fines and forfeitures is accorded to the Presidency, with the possible assistance of the Registry, neither the Statute nor the Rules of Procedure and Evidence clearly specify a body that will be responsible for following up on reparations claims once awards are made by the Court.

While this lack of follow-up responsibility may be common in domestic legal systems, it seems that in light of the possible difficulties relating to obtaining the cooperation of States as described above, a stronger and more visible Court-level enforcement mechanism that can engage directly with States and track compliance is appropriate for an international court such as the ICC.

Part E, Section 12 - Recommendations for monitoring and enforcement of reparations:

Recommendations to the Office of the Prosecutor:

- Play a more pro-active role in identifying assets;
- Ensure effective coordination and collaboration with the Registry and Chambers.

Recommendations to Chambers:

- Ensure pro-active use of the ability to order “protective measures” for the purposes of reparation;
- Ensure that the ICC remains seized of cases until enforcement is assured;
- As part of the continuing responsibility of the relevant Chamber that issued the order, the person(s) affected should be entitled to seek the assistance of the Court in ensuring compliance. This would involve decisions on standing before the Court as well as continued access to legal representation in the enforcement phase.

Recommendations to the Registry, VPRS and OPCV:

- Develop policies to clarify competing interests of assets being traced: for the purposes of contributing to legal costs of the suspect or accused vs. for the purposes of reparation;
- Ensure coordination with OTP and between entities within the Registry when making requests;
- Ensure sufficiently confidential, broad, forward looking, detailed and timely requests;
- Ensure a continuing role in monitoring the enforcement of reparations awards;
- Monitor cooperation and enforcement requests, and follow up with the bureau of the Assembly of States Parties to ensure compliance;
- Ensure the possibility of victims’ legal representation into the enforcement stage;
- Ensure the continued role of VPRS and OPCV, as appropriate, and continued resources for independent legal representatives during this phase of proceedings.

Recommendations to the Assembly of States Parties:

- According to article 87(5)(b) and (7) of the ICC Statute, failure of States Parties or non-States Parties, which agreed to cooperate with the Court, to give effect to Court orders should result in the Court referring non-compliance to the Assembly of States Parties or to the Security Council, if it was the Council that had referred the matter to the ICC;
- Develop a capacity for the ASP to monitor and respond to instances of non-cooperation.

³⁵⁵ For a review of follow-up mechanisms of other international bodies, see REDRESS, Enforcement of Awards for Victims of Torture and Other International Crimes, May 2006, available at: http://www.redress.org/publications/master_enforcement%2030%20May%202006.pdf.

ANNEXES

Annex 1: REDRESS' Reflections on Draft ICC Reparations Principles

In reflecting on what the Court's reparations principles might look like, REDRESS has sought to provide a preliminary attempt to set out such principles in a cursory manner.

The preliminary reflections are set out below in the form of 'draft principles.' We hope they are useful to the Court as it progresses with the important task of developing principles in accordance with Article 75 of the Statute.

Preamble

Noting that it is a general principle of law that reparation must, as far as possible, wipe out the consequences of the wrongful act and re-establish the situation which would, in all probability, have existed if that act had not been committed,³⁵⁶

Noting that victims have a right to reparation for gross violations of human rights and serious violations of international humanitarian law;

Affirming that trauma, dependency and social exclusion are often reminders of the suffering that victims endure and that in order to redress injustices, reparations shall seek to restore human dignity and acknowledge victims' suffering as well as build solidarity and raise awareness of victimisation.

General provisions

1. *International law and standards.* In accordance with Article 21 of the ICC Statute, the Court shall apply international law and standards on victims' rights to a remedy and reparation.³⁵⁷
2. *National practice.* The Court will have regard for the practice and standards applied by States in awarding reparation, including methods of quantifying damages.
3. *Non-discrimination.* Policies and decisions relating to reparation will ensure non-discrimination on the basis of sex, gender, ethnicity, race, age, political affiliation, class, marital status, sexual orientation, nationality, religion and disability, and will endeavour to provide affirmative measures to redress inequalities.
4. *Gender-equity.* In view of the prevalence of gender-based violence, in the context of genocide, war crimes and crimes against humanity, and the additional obstacles for women and girls to access justice, the Court shall take gender-sensitive measures to facilitate

³⁵⁶ Chorzow Factory (Claim for Indemnity, Merits) Judgment, 13 September 1928, PCIJ Series A, No. 17, para 28.

³⁵⁷ International standards and principles include: the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN General Assembly Resolution 40/34 of 29 November 1985, hereinafter "Declaration of Justice for Victims", the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN General Assembly Resolution 60/147, 16 December 2005, E/CN.4/Sub2/1993/8; the UN Guidelines on Justice in Matters involving Child Victims and Witnesses, ECOSOC Resolution 2005/20 of 22 July 2005, available at http://www.unodc.org/documents/justice-and-prison-reform/Justice_in_matters...pdf. Furthermore, a gender specific set of reparations principles is contained in the Nairobi Declaration on Women and Girls' Right to a Remedy and Reparation, Nairobi, 21 March 2007, available at: http://www.womensrightscoalition.org/site/reparation/signature_en.php.

participation in reparations hearings and in conceptualising reparation awards for victims of sexual violence.³⁵⁸ As far as possible, reparations shall address underlying injustices.

5. *Avoid new stigma or reinforcement of existing stigma.* Provision of specific benefits for specific categories of individuals can create or reinforce social stigmas. Reparations shall seek to reduce or avoid such stigmas as a measure to reduce suffering and promote reintegration.
6. *Best interests of the child.* With respect to reparations directed at children, measures should always consider the best interests of the child, including support to those whom that the child is dependent upon.
7. *Equal access and transparency.* Policies and decisions shall aim to ensure equal access, particularly with regard to women and girl victims' rights. Reparation procedures and awards shall be transparent with a view to ensuring that victims within the jurisdiction of the Court have adequate and timely notice of, and access to, reparations proceedings and that reparation awards are fully motivated and explained to those affected.
8. *Protection of psychological well-being, dignity and privacy.* Appropriate policies and measures shall be taken to respect victims' psychological well-being, dignity and privacy with regard to reparations.
9. *Confidentiality and physical protection.* Considering the varying levels of insecurity in situation countries and the specific risk linked to victims' association with the Court's processes, best practices regarding confidentiality and safety shall apply with regard to reparations proceedings, the issuance of awards and their implementation.
10. *Consultative process.* In support of restoring victims' dignity, rehabilitation and reintegration into communities, policies will encourage the participation of victims in the process of decision making about reparations. Due consideration will be given to victims to determine for themselves what forms of reparation are best suited to their situation. Processes must seek to overcome aspects of customary, religious or other laws and practices that prevent women and girls from being in a position to make, and act on, decisions about their own lives.
11. *Respect for the rights of victims and convicted persons.* In accordance with Rule 97(3) of the Rules of Procedure and Evidence, in all cases, the Court shall respect the rights of victims and the convicted person, as well as interested persons and States.
12. *Feasibility.* In determining time frames for implementing reparation benefits, due regard should be given to both the immediate short term needs of the victim as well as long term needs.
13. *Sustainability.* To ensure sustainability, reparation benefits may seek to address dependency reduction and the empowerment of victims. Restoration of human dignity may be better achieved through activities that promote long-term changes such as access to gainful employment or ability to sustain a livelihood.

Principles regarding eligibility

14. *Definition of Victim.* "Victim" is defined in Rule 85 of the Rules of Procedure and Evidence.
15. *Scope of beneficiaries.* In determining the scope of beneficiaries of an award against a convicted person, due regard shall be given to victims who have explicitly requested reparation, as well as direct and indirect victims that have suffered harm as a result of the

³⁵⁸ See Rule 16(1)(d), Rules of Procedure and Evidence.

specific crimes for which there is a conviction, even if such individuals are as yet unidentified.

16. *Direct and indirect victims.* Consideration will be given to ensuring that indirect victims benefit from reparation, such as widows, the children of child-mothers and other dependants of direct victims, with particular concern for women and children.
17. *Family and next of kin.* Next of kin may benefit from reparation on behalf of deceased or disappeared victims. Best practices shall apply to ensure that women and girls are not subject to discriminatory laws or customs divesting them of their rightful benefits.

Principles relating to Procedures

18. *Publication and notification.* The Registry shall ensure effective outreach to appraise eligible victims and affected communities of eventual reparation proceedings to enable requests for reparation in advance of any reparations hearings. Sufficient notice should be provided to victims to enable participation in the process concerning reparations.
19. *Application procedure.* Victims may request reparation at appropriate stages of the proceedings. Where possible, victims shall use the standard application form, which shall be made available as far as possible in a language spoken by victims.³⁵⁹ Victims who are unable to use forms should provide the particulars required in Rule 94(1) of the Rules of Procedure and Evidence to the Registry, which will assist victims in providing complete information.
20. *Reparations on request.* Victims shall be able to withdraw or amend a request for reparation.
21. *Victims' participation.* Victims' participation during the trial, including the provision of testimony shall be noted in view of orders and awards for reparation. Victims participating in proceedings shall be able to request hearing(s) in relation to reparation.
22. *Reparation on the Court's own motion.* The Court may make determinations in relation to reparation in view of the "exceptional" circumstances that characterise post-conflict situations, wherein victims, particularly the most vulnerable ones most in need of reparations, may not be in a position to request reparation of their own accord.
23. *Confidentiality and Protection.* Due to victims' vulnerability, their identity and identifying personal data shall be protected information, to be disclosed to parties to the proceedings only on a need-to-know basis.
24. *Role of the Registry in facilitating reparation.* The Registry shall transfer relevant information provided by victim participants to enable reparation in their best interests. The Registry and/or the Trust Fund for Victims, if so designated by the Court, will undertake relevant fact-finding in order to supplement reparation requests, where available and appropriate, for instance by obtaining official records from demobilisation processes to identify appropriate beneficiaries, or other national records that would be impracticable for individual claimants to obtain.
25. *Time-limits and statutes of limitation.* In accordance with international principles and standards on victims' rights to a remedy and reparation, time limits should not unduly limit victims' access to rightful entitlements. In order to ensure adequate access to reparation, notification should ensure sufficient time periods for applicants to make requests and participate in relevant processes.

³⁵⁹ See Regulation for the Registry, Regulation 104 (1).

Principles regarding assessment

26. *Consultation with victims and others.* In undertaking assessment of reparation, appropriate experts that may be appointed in accordance with Rule 97(2) shall ensure consultation with victims and affected communities. Experts should include experts on trauma, sexual violence and violence against children in addition to those with area-specific or country expertise. Among other factors, experts should seek to identify needs that are sometimes poorly expressed due to the nature of the crimes or particular contexts of victim disempowerment.
27. *Standard of proof.* The standard of evidence for establishing identity and evidence of harm should recognise the often difficult circumstances of victims and availability of evidence and should make use of presumptions where appropriate.

Principles regarding reparations decisions and orders

28. *Decision making in relation to individual and/or collective awards.* Victims' requests specified through application forms, consultation, hearings or other means should be given due consideration in determining the nature and form of awards. Particularly in relation to collective awards, facility should be made to enable, though not require, groups of victims, associations and other collectives to make joint submissions.
29. *Communication of decisions.* Communication of decisions should be done in a language understood by the victims in question. Appropriate and symbolic means of communication should be considered. In communicating decisions, the harm suffered as a result of specific crimes should be acknowledged, as should the impossibility of fully repairing such harm. Use of appropriate language to acknowledge massive trauma can provide a basis for healing when recognised at individual, community, national and international levels.

The forms of Reparations

30. *Link between convicted person and specific harm.* Reparations should reflect and remedy the harm suffered to the extent possible. Reparations should address the specific harm suffered and need not be linked to the convicted persons' capacity to pay. Where the convicted person is unable, due to a lack of or insufficiency of resources, to comply with a reparations award, or in other circumstances as set out in Rule 98 of the Rules of Procedure and Evidence, the Court may order that an award for reparations against a convicted person be made through the Trust Fund for Victims to an intergovernmental, international or national organization approved by the Trust Fund for Victims. The Court shall engage in consultations with the Trust Fund for Victims as appropriate on the use of voluntary or other resources to fund the award. Furthermore, alternative or additional means by which the convicted person can make a measure of reparation should be explored to the fullest extent possible.
31. *Individual awards.* Determination of individual awards should be made in the context of the circumstances and the particular nature of the victimisation in the case before the Court.
32. *Collective awards.* Where reparation is awarded on a collective basis, forms of reparation should address the specific harm suffered by eligible victims such as specific medical services, psychosocial treatment, housing, education and training benefits or awareness raising on victimisation as a means of enabling more effective reintegration, without being subsumed within general humanitarian or developmental assistance, as appropriate.
33. *Forms of reparation.* While the Statute refers to restitution, compensation and rehabilitation, these measures of reparation should not be understood as being exclusive. Other forms of reparation such as satisfaction and guarantees of non-repetition may also be appropriate forms of reparation, depending on the context.

- a) *Restitution*. Restitution includes the restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return of property, return to one's place of residence and the restoration of employment.
 - b) *Compensation*. Compensation generally implies monetary compensation for physical, mental harm, lost opportunities, including employment, education and social benefits, material damages and loss of earnings, including loss of earning potential, and moral damage, and possibly costs required for legal or expert advice.
 - c) *Rehabilitation*. Rehabilitation includes medical, psychological care and social and legal services.
 - d) *Satisfaction*. Satisfaction can entail effective measures aimed at the cessation of violations, an apology, an acknowledgement of the facts and acceptance of responsibility, and/or assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wishes of the victims or local cultural practices.
 - e) *Guarantees of non-repetition*. While guarantees of non-repetition are often associated with State reforms and policies, such guarantees may also apply to individuals. Guarantees of non-repetition may be considered as an appropriate additional form of reparation, for instance where the convicted person is the leader of a political group, militia or community.
34. *Responsibility of other actors*. The duty to repair may fall on a number of actors. Effective and timely outreach shall seek to ensure that national authorities, local communities and affected populations do not have misplaced expectations of the Court's mandate. Where possible and appropriate, for instance after awards have been determined, the Court may engage with national authorities to ensure clear and complementary messaging.
35. *Maximum benefits*. In order to ensure that certain victims do not unfairly cumulate benefits, the Court may consider as appropriate, in determining its awards, benefits received by victims through other national or international processes. In such instances, the Court shall afford those concerned with the opportunity to counter claims that they had benefited cumulatively.
36. *The Role of the Trust Fund for Victims*. Clear guidance shall be provided to the Trust Fund for Victims as it fulfils its role in implementing orders for reparation.

Principles regarding Enforcement

37. *Tracing, freezing and seizing assets*. Orders requesting tracing, freezing and seizing assets shall be specific enough to meet the requirements of the domestic jurisdiction.
38. *Enforcing fines and forfeiture in view of reparations*. Orders for fines and forfeiture to be implemented at domestic level shall be sufficiently detailed.
39. *Enforcing the reparations decision*. The Trial Chamber shall remain seized in respect of monetary enforcement. The Chamber shall ensure monitoring and oversight of implementation or enforcement of individual and collective awards made against the accused and deposited with or made through the Trust Fund for Victims.

Annex 2: UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law

Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

Preamble

The General Assembly,

Guided by the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenants on Human Rights, other relevant human rights instruments and the Vienna Declaration and Programme of Action,

Affirming the importance of addressing the question of remedies and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law in a systematic and thorough way at the national and international levels,

Recognizing that, in honouring the victims' right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms international law in the field,

Recalling the adoption of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law by the Commission on Human Rights in its resolution 2005/35 of 19 April 2005 and by the Economic and Social Council in its resolution 2005/30 of 25 July 2005, in which the Council recommended to the General Assembly that it adopt the Basic Principles and Guidelines,

1. *Adopts* the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law annexed to the present resolution;
2. *Recommends* that States take the Basic Principles and Guidelines into account, promote respect thereof and bring them to the attention of members of the executive bodies of government, in particular law enforcement officials and military and security forces, legislative bodies, the judiciary, victims and their representatives, human rights defenders and lawyers, the media and the public in general;
3. *Requests* the Secretary-General to take steps to ensure the widest possible dissemination of the Basic Principles and Guidelines in all the official languages of the United Nations, including by transmitting them to Governments and intergovernmental and non-governmental organizations and by including the Basic Principles and Guidelines in the United Nations publication entitled *Human Rights: A Compilation of International Instruments*.

*64th plenary meeting
16 December 2005*

The General Assembly,

Recalling the provisions providing a right to a remedy for victims of violations of international human rights law found in numerous international instruments, in particular article 8 of the Universal Declaration of Human Rights, 1 article 2 of the International Covenant on Civil and Political Rights, 2 article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and article 39 of the Convention on the Rights of the Child, and of international humanitarian law as found in article 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV), article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, and articles 68 and 75 of the Rome Statute of the International Criminal Court,

Recalling the provisions providing a right to a remedy for victims of violations of international human rights found in regional conventions, in particular article 7 of the African Charter on Human and Peoples' Rights, article 25 of the American Convention on Human Rights, and article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms,

Recalling the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power emanating from the deliberations of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders and General Assembly resolution 40/34 of 29 November 1985 by which the Assembly adopted the text recommended by the Congress,

Reaffirming the principles enunciated in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, including that victims should be treated with compassion and respect for their dignity, have their right to access to justice and redress mechanisms fully respected, and that the establishment, strengthening and expansion of national funds for compensation to victims should be encouraged, together with the expeditious development of appropriate rights and remedies for victims,

Noting that the Rome Statute of the International Criminal Court requires the establishment of "principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation", requires the Assembly of States Parties to establish a trust fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, and mandates the Court "to protect the safety, physical and psychological well-being, dignity and privacy of victims" and to permit the participation of victims at all "stages of the proceedings determined to be appropriate by the Court",

Affirming that the Basic Principles and Guidelines contained herein are directed at gross violations of international human rights law and serious violations of international humanitarian law which, by their very grave nature, constitute an affront to human dignity,

Emphasizing that the Basic Principles and Guidelines contained herein do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms,

Recalling that international law contains the obligation to prosecute perpetrators of certain international crimes in accordance with international obligations of States and the requirements of national law or as provided for in the applicable statutes of international judicial organs, and that the duty to prosecute reinforces the international legal obligations to be carried out in accordance with national legal requirements and procedures and supports the concept of complementarity,

Noting that contemporary forms of victimization, while essentially directed against persons, may nevertheless also be directed against groups of persons who are targeted collectively,

Recognizing that, in honouring the victims' right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human

generations and reaffirms the international legal principles of accountability, justice and the rule of law,

Convinced that, in adopting a victim-oriented perspective, the international community affirms its human solidarity with victims of violations of international law, including violations of international human rights law and international humanitarian law, as well as with humanity at large, in accordance with the following Basic Principles and Guidelines,

Adopts the following Basic Principles and Guidelines:

I. Obligation to respect, ensure respect for and implement international human rights law and international humanitarian law

1. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law emanates from:

(a) Treaties to which a State is a party;

(b) Customary international law;

(c) The domestic law of each State.

2. If they have not already done so, States shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations by:

(a) Incorporating norms of international human rights law and international humanitarian law into their domestic law, or otherwise implementing them in their domestic legal system;

(b) Adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice;

(c) Making available adequate, effective, prompt and appropriate remedies, including reparation, as defined below;

(d) Ensuring that their domestic law provides at least the same level of protection for victims as that required by their international obligations.

II. Scope of the obligation

3. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, *inter alia*, the duty to:

(a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;

(b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;

(c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and

(d) Provide effective remedies to victims, including reparation, as described below.

III. Gross violations of international human rights law and serious violations of international humanitarian law that constitute crimes under international law

4. In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.

5. To that end, where so provided in an applicable treaty or under other international law obligations, States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction. Moreover, where it is so provided for in an applicable treaty or other international legal obligations, States should facilitate extradition or surrender offenders to other States and to appropriate international judicial bodies and provide judicial assistance and other forms of cooperation in the pursuit of international justice, including assistance to, and protection of, victims and witnesses, consistent with international human rights legal standards and subject to international legal requirements such as those relating to the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment.

IV. Statutes of limitations

6. Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.

7. Domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive.

V. Victims of gross violations of international human rights law and serious violations of international humanitarian law

8. For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

9. A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.

VI. Treatment of victims

10. Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation.

VII. Victims' right to remedies

11. Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law:

- (a) Equal and effective access to justice;
- (b) Adequate, effective and prompt reparation for harm suffered;
- (c) Access to relevant information concerning violations and reparation mechanisms.

VIII. Access to justice

12. A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws. To that end, States should:

(a) Disseminate, through public and private mechanisms, information about all available remedies for gross violations of international human rights law and serious violations of international humanitarian law;

(b) Take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims;

(c) Provide proper assistance to victims seeking access to justice;

(d) Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law.

13. In addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate.

14. An adequate, effective and prompt remedy for gross violations of international human rights law or serious violations of international humanitarian law should include all available and appropriate international processes in which a person may have legal standing and should be without prejudice to any other domestic remedies.

IX. Reparation for harm suffered

15. Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.

16. States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.

17. States shall, with respect to claims by victims, enforce domestic judgements for reparation against individuals or entities liable for the harm suffered and endeavour to enforce valid foreign legal judgements for reparation in accordance with domestic law and international legal obligations. To that end, States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgements.

18. In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

19. *Restitution* should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.

20. *Compensation* should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

(a) Physical or mental harm;

(b) Lost opportunities, including employment, education and social benefits;

(c) Material damages and loss of earnings, including loss of earning potential;

(d) Moral damage;

(e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

21. *Rehabilitation* should include medical and psychological care as well as legal and social services.

22. *Satisfaction* should include, where applicable, any or all of the following:

(a) Effective measures aimed at the cessation of continuing violations;

(b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;

(c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;

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

(e) Public apology, including acknowledgement of the facts and acceptance of responsibility;

(f) Judicial and administrative sanctions against persons liable for the violations;

(g) Commemorations and tributes to the victims;

(h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.

23. *Guarantees of non-repetition* should include, where applicable, any or all of the following measures, which will also contribute to prevention:

(a) Ensuring effective civilian control of military and security forces;

(b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;

(c) Strengthening the independence of the judiciary;

(d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;

(e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;

(f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;

(g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;

(h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

X. Access to relevant information concerning violations and reparation mechanisms

24. States should develop means of informing the general public and, in particular, victims of gross violations of international human rights law and serious violations of international humanitarian law of the rights and remedies addressed by these Basic Principles and Guidelines and of all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access. Moreover, victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations.

XI. Non-discrimination

25. The application and interpretation of these Basic Principles and Guidelines must be consistent with international human rights law and international humanitarian law and be without any discrimination of any kind or on any ground, without exception.

XII. Non-derogation

26. Nothing in these Basic Principles and Guidelines shall be construed as restricting or derogating from any rights or obligations arising under domestic and international law. In particular, it is understood that the present Basic Principles and Guidelines are without prejudice to the right to a remedy and reparation for victims of all violations of international human rights law and international humanitarian law. It is further understood that these Basic Principles and Guidelines are without prejudice to special rules of international law.

XIII. Rights of others

27. Nothing in this document is to be construed as derogating from internationally or nationally protected rights of others, in particular the right of an accused person to benefit from applicable standards of due process.

Annex 3: Nairobi Principles on Women and Girls' Right to a Remedy and Reparation

At the International Meeting on Women's and Girls' Right to a Remedy and Reparation, held in Nairobi from 19 to 21 March 2007, women's rights advocates and activists, as well as survivors of sexual violence in situations of conflict, from Africa, Asia, Europe, Central, North and South America, issued the following Declaration:

PREAMBLE

DEEPLY CONCERNED that gender-based violence, and particularly sexual violence and violations against women and girls, are weapons of war, assuming unacceptably alarming proportions as wars, genocide and communal violence have taken their toll inside and between countries the world over within the last two decades;

BEARING IN MIND the terrible destruction brought by armed conflict, including forced participation in armed conflict, to people's physical integrity, psychological and spiritual well-being, economic security, social status, social fabric, and the gender differentiated impact on the lives and livelihoods of women and girls;

TAKING INTO CONSIDERATION the unimaginable brutality of crimes and violations committed against women and girls in conflict situations, and the disproportionate effects of these crimes and violations on women and girls, their families and their communities;

ACKNOWLEDGING that gender-based violence committed during conflict situations is the result of inequalities between women and men, girls and boys, that predated the conflict, and that this violence continues to aggravate the discrimination of women and girls in post-conflict situations;

TAKING INTO CONSIDERATION the discriminatory interpretations of culture and religion that impact negatively on the economic and political status of women and girls;

TAKING INTO CONSIDERATION that girls specifically suffer both from physical and sexual violence directed at them and from human rights violations against their parents, siblings and caregivers;

BEARING IN MIND that girls respond differently than women to grave rights violations because of less developed physical, mental and emotional responses to these experiences. Noting also that girls are victims of double discrimination based on their gender and age.

TAKING INTO CONSIDERATION the roles and contributions of women and girls in repairing the social fabric of families, communities and societies, and the potential of reparation programs to acknowledge these roles;

BEARING IN MIND advances in international criminal law that confirm gender-based crimes may amount to genocide, crimes against humanity and war crimes;

RECALLING the adoption by the UN General Assembly in October 2005 of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*;

TAKING COGNIZANCE of the existence of international, regional and national judicial and non-judicial mechanisms for individual and collective, symbolic and material reparation, and the enormous challenges of catering for all victims and survivors, individually and/or collectively;

CONCERNED that initiatives and strategies at the local, national, regional and international levels to ensure justice have not been effective from the perspectives of victims and survivors of these crimes and violations in a holistic manner;

DECLARE AS FOLLOWS:

1. That women's and girls' rights are human rights.
2. That reparation is an integral part of processes that assist society's recovery from armed conflict and that ensure history will not repeat itself; that comprehensive programmes must be established to achieve truth-telling, other forms of transitional justice, and an end to the culture of impunity.
3. That reparation must drive post-conflict transformation of socio-cultural injustices, and political and structural inequalities that shape the lives of women and girls; that reintegration and restitution by themselves are not sufficient goals of reparation, since the origins of violations of women's and girls' human rights predate the conflict situation.
4. That, in order to accurately reflect and incorporate the perspectives of victims and their advocates, the notion of "victim" must be broadly defined within the context of women's and girls' experiences and their right to reparation.
5. That the fundamental nature of the struggle against impunity demands that all reparation programmes must address the responsibility of all actors, including state actors, foreign governments and inter-governmental bodies, non-governmental actors, such as armed groups, multinational companies and individual prospectors and investors.
6. That national governments bear primary responsibility to provide remedy and reparation within an environment that guarantees safety and human security, and that the international community shares responsibility in that process.
7. That the particular circumstances in which women and girls are made victims of crimes and human rights violations in situations of conflict require approaches specially adapted to their needs, interests and priorities, as defined by them; and that measures of access to equality (positive discrimination) are required in order to take into account the reasons and consequences of the crimes and violations committed, and in order to ensure that they are not repeated.

FURTHER ADOPT THE FOLLOWING GENERAL PRINCIPLES AND RECOMMEND that appropriate bodies at national, regional and international levels take steps to promote their widespread dissemination, acceptance and implementation.

REPARATION

A - Non-discrimination on the basis of sex, gender, ethnicity, race, age, political affiliation, class, marital status, sexual orientation, nationality, religion and disability.

B - All policies and measures relating to reparation must explicitly be based on the principle of non-discrimination on the basis of sex, gender, ethnicity, race, age, political affiliation, class, marital status, sexual orientation, nationality, religion and disability and affirmative measures to redress inequalities.

C - Compliance with international and regional standards on the right to a remedy and reparation, as well as with women's and girls' human rights.

D - Support of women's and girls' empowerment by taking into consideration their autonomy and participation in decision-making. Processes must empower women and girls, or those acting in the best interests of girls, to determine for themselves what forms of reparation are best suited to their situation. Processes must also overcome those aspects of customary and religious laws and practices that prevent women and girls from being in a position to make, and act on, decisions about their own lives.

E - Civil society should drive policies and practices on reparation, with governments striving for genuine partnership with civil society groups. Measures are necessary to guarantee civil society autonomy and space for the representation of women's and girls' voices in all their diversity.

F - Access to Justice. Ending impunity through legal proceedings for crimes against women and girls is a crucial component of reparation policies and a requirement under international law.

2 - ACCESS TO REPARATION

A - In order to achieve reparation measures sensitive to gender, age, cultural diversity and human rights, decision-making about reparation must include victims as full participants, while ensuring just representation of women and girls in all their diversity. Governments and other actors must ensure that women and girls are adequately informed of their rights.

B - Full participation of women and girls victims should be guaranteed in every stage of the reparation process, i.e. design, implementation, evaluation, and decision-making.

C - Structural and administrative obstacles in all forms of justice, which impede or deny women's and girls' access to effective and enforceable remedies, must be addressed to ensure gender-just reparation programmes.

D - Male and female staff who are sensitive to specific issues related to gender, age, cultural diversity and human rights, and who are committed to international and regional human rights standards must be involved at every stage of the reparation process.

E - Practices and procedures for obtaining reparation must be sensitive to gender, age, cultural diversity and human rights, and must take into account women's and girls' specific circumstances, as well as their dignity, privacy and safety.

F - Indicators that are sensitive to gender, age, cultural diversity and human rights must be used to monitor and evaluate the implementation of reparation measures.

3 - KEY ASPECTS OF REPARATION FOR WOMEN AND GIRLS

A - Women and girls have a right to a remedy and reparation under international law. They have a right to benefit from reparation programs designed to directly benefit the victims, by providing restitution, compensation, reintegration, and other key measures and initiatives under transitional justice that, if crafted with gender-aware forethought and care, could have reparative effects, namely reinsertion, satisfaction and the guarantee of non-recurrence.

B - Governments should not undertake development instead of reparation. All post-conflict societies need both reconstruction and development, of which reparation programmes are an integral part. Victims, especially women and girls, face particular obstacles in seizing the opportunities provided by development, thus risking their continued exclusion. In reparation, reconstruction, and development programmes, affirmative action measures are necessary to respond to the needs and experiences of women and girls victims.

C - Truth-telling requires the identification of gross and systematic crimes and human rights violations committed against women and girls. It is critical that such abuses are named and recognized in order to raise awareness about these crimes and violations, to positively influence a more holistic strategy for reparation and measures that support reparation, and to help build a shared memory and history. Currently, there is a significant lack of naming and addressing such abuses in past reparation programs and efforts, much to the detriment of surviving victims.

D - Reconciliation is an important goal of peace and reparation processes, which can only be achieved with women and girls victims' full participation, while respecting their right to dignity, privacy, safety and security.

E - Just, effective and prompt reparation measures should be proportional to the gravity of the crimes, violations and harm suffered. In the case of victims of sexual violence and other gender-based crimes, governments should take into account the multi-dimensional and long-term consequences of these crimes to women and girls, their families and their communities, requiring specialized, integrated, and multidisciplinary approaches.

F - Governments must consider all forms of reparation available at individual and community levels. These include, but are not limited to, restitution, compensation and reintegration. Invariably, a combination of these forms of reparation will be required to adequately address violations of women's and girls' human rights.

G - Reparation processes must allow women and girls to come forward when they are ready. They should not be excluded if they fail to do so within a prescribed time period. Support structures are needed to assist women and girls in the process of speaking out and claiming reparation.

H - Reparation must go above and beyond the immediate reasons and consequences of the crimes and violations; they must aim to address the political and structural inequalities that negatively shape women's and girls' lives.