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TRIAL CHAMBER II

Before: Judge Marc Pierre PERRIN DE BRICHAMBAUT, President
Judge Olga HERRERA CARBUCCIA
Judge Péter KOVÁCS

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR v GERMAIN KATANGA

Public

Redress Trust observations pursuant to Article 75 of the Statute

Source: The Redress Trust

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OBSERVATIONS BY THE REDRESS TRUST (REDRESS) PURSUANT TO RULE 75 OF THE RULES OF PROCEDURE AND EVIDENCE

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I. BACKGROUND

1. On 7 March 2014, the Chamber issued its Judgment pursuant to Article 74 of the Statute ("Judgment").[1]
2. On 23 May 2014, the Chamber issued its Decision pursuant to Article 76 of the Statute ("Sentencing decision") and sentenced Mr Katanga to 12 years imprisonment.[2]
3. On 21 August 2014, the Legal Representative of Victims requested the Chamber to set out a timetable for the submission of observations on the principles relating to reparation that could be applied in the case, and the procedure to be followed.[3]
4. On 27 August 2014, the Chamber requested the Registry to file a report with additional, up to date information setting out the number of victims, harm suffered, crimes as a result of which the victims suffered harm, and types and modalities of the reparation requested.[4] The Registry filed a public redacted version of annex 1 of its 'Report on applications for reparations in accordance with Trial Chamber II Order of 27 August' on 21 January 2015 (hereinafter the Registry's Report).[5]
5. On 21 January 2015, in accordance with Article 75(3) of the Statute, the Chamber invited representations from or on behalf of the convicted persons, victims, and other interested persons or interested States on areas including 'the issues specifically addressed in the [Registry's] Report.'[6]
6. On 2 February 2015, the Redress Trust (REDRESS) sought leave to make submissions on:
   - Factors relating to the appropriateness of awarding reparation on a collective or individual basis [Part V of the Registry Report].
   - Other Factors relevant to the types and modalities of reparation to be awarded [Part VI of the Registry Report], including :

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[1] *The Prosecutor v. Katanga*, Jugement rendu en application de l'article 74 du Statut, Trial Chamber II, ICC-01/04-01/07-3436, 7 March 2014.
[2] *The Prosecutor v. Katanga,* Décision relative à la peine (article 76 du Statut), ICC-01/04-01/07-3484, Trial Chamber II, 23 May 2014.
[3] *The Prosecutor v. Katanga,* Requête sollicitant la fixation d'un calendrier en vue de permettre aux victimes de soumettre leurs observations sur les réparations (Articles 68, 75 et 76 du Statut), ICC-01/04-01/07-3507, Victims' Representative's Filing, 21 August 2014.
[4] *The Prosecutor v. Katanga,* Order instructing the Registry to report on applications for reparations, ICC-01/04-01/07-3508, Trial Chamber II, 27 August 2014.
[5] *The Prosecutor v. Katanga,* The Registry's Report on applications for reparations in accordance with Trial Chamber II's Order of 27 August 2014, ICC-01/04-01/07-3512-Conf-Anx1-Red2, Registry Filing, 21 January 2015.
[6] *The Prosecutor v. Katanga,* Scheduling order setting a deadline for interested States or other interested persons to apply for leave to file submissions pursuant to Article 75 of the Statute, ICC-01/04-01/07-3516, Trial Chamber II, 21 January 2015.

a) How other courts, tribunals and related bodies have tackled situations in which the intended beneficiaries of reparation are no longer congregated exclusively or mainly in the area where the harm was committed, such as being dispersed over a large area within a country and/or globally. [para 71 of the Registry Report];
b) How other courts, tribunals and related bodies have tackled situations in which not all qualifying victims have presented applications for participation or reparation or have been identified [paras. 83-85 of the Registry Report].
c) How other courts and related claims bodies have dealt with the challenges of limited resources available for reparation [paras 86-87 of the Registry Report].

7. On 1 April 2015, the Chamber authorised REDRESS, Queen's University Belfast's Human Rights Centre and University of Ulster's Transitional Justice Institute, as well as an 'NGO' and the United Nations to file their observations by 30 April 2015.[7]
8. On 24 April 2015, the Chamber extended the timeframe for the submission of observations until 15 May 2015.[8]

REDRESS RESPECTFULLY MAKES THE FOLLOWING OBSERVATIONS:

II. PRELIMINARY OBSERVATIONS

9. These observations address the issues on which REDRESS has been granted leave to intervene, and will be considered in turn.
10. REDRESS limits its submission to the analysis of jurisprudence and comparative practice which may be relevant to the Chamber in its consideration of the award of reparation in the *Katanga* case.

[7] *The Prosecutor v. Katanga*, Ordonnance autorisant le dépôt d'observations en application de l'article 75-3 du Statut, ICC-01/04-01/07-3533-Red, Trial Chamber II, 1 April 2015.
[8] *The Prosecutor v. Katanga*, Décision relative à la requête des Nations Unies aux fins de prorogation du délai fixé pour le dépôt d'observations dans le cadre de la procédure en réparation, ICC-01/04-01/07-3542-Red, Trial Chamber II, 24 April 2015.

II.1 TERMINOLOGY

11. The terms 'individual' and 'collective' forms of reparation are not terms of art and have been used and applied in a variety of ways.

12. *'Individual' reparation consists of* awards that address the harms and suffering of individual persons. On one end of the spectrum, they are intended to respond to actual pecuniary and non-pecuniary losses suffered, and are determined following a process in which those harms and losses are scrutinised and assessed by decision-makers (both in terms of the quantum and quality of harm suffered). Such awards can relate to claims involving single, multiple or extremely large numbers of persons and may entail monetary or non-monetary elements (such as pension benefits; rehabilitation grants; fees for school enrolment; exhumation, identification and return of victims' mortal remains according to the wishes of their next of kin; restoration of citizenship, property or other rights) or both. At the other end of the spectrum decision-makers have made individual awards to beneficiaries that have mainly consisted of lump-sum or standardised payments or, non-monetary benefits. This is typically for reasons such as a large number of claimants, the difficulties for individuals to prove the injuries to a sufficiently high standard and/or the high administrative costs for decision-makers to assess with precision on a case-by-case basis individuals' injuries, or because the parties to a reparation claim have agreed a specific settlement amount. At times, these awards approximate the actual harms suffered by individual beneficiaries, and arrive at such approximations using principles such as statistical sampling of different beneficiary classes or by way of other principles such as of equity. In other instances, such forms of individual reparation have a more symbolic or tokenistic relationship with the actual harms and injuries caused.

13. *Collective reparation*: As noted by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence '[t]he term "collective reparation" is ambiguous, as "collective" refers to both the nature of the reparation (i.e. the types of goods distributed or the mode of distributing them) and the kind of

recipient of such reparation (i.e. collectivities).'[9] *'Collective' reparation* has been understood principally in two ways:

i) First, such awards can address the breach of a 'right' that is exercised collectively, or a harm or injury that is suffered collectively by a defined group.[10] In this sense, 'collective' reparation concerns those aspects of harm that are suffered by the group as such, which transcend or are different to the harms that individual members of the group may have also suffered in their individual capacities. Thus, collective reparation may be awarded in relation to a violation of a collective right or a violation that had an impact on a distinct group of people or community.

ii) Second, 'collective' reparation measures have been awarded to benefit a large universe of individual victims (or potential victims). In such instances, the decision to award 'collective' reparation stems mainly from practical considerations about how best to ensure that the widest array of persons who are understood to have suffered harm derive a benefit. Awards may be comprised of tangible benefits for large groups of persons (e.g., the creation and servicing of a health centre to afford rehabilitation to a whole community) or may have a more symbolic function (e.g., memorials, apologies) or may serve other reparative goals of non-repetition by targeting perpetrator groups (instituting training curricula for police or military, vetting programmes).

14. Similar to awards of individual reparation, the practice of issuing collective awards varies considerably. Collective awards have in some cases closely followed the actual injuries and harms suffered when an award has been made to address a collective harm. When collective awards have been used to respond to a large universe of individual victims, these awards tend to have had a much looser relationship with the actual injuries or harms suffered.

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[9] Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, *Report to the General Assembly on reparations for gross human rights violations and serious violations of international humanitarian law*, UN Doc. A/69/518, 14 October 2014, para. 38; See also, OHCHR, *Rule of Law Tools for Post-Conflict States: Reparation Programmes*, HR/PUB/08/1 (2008) 25-27, available at: www.ohchr.org/Documents/Publications/ReparationsProgrammes.pdf.

[10] Friedrich Rosenfeld, 'Collective Reparation for Victims or Armed Conflict', (2010) 92(879) *Intl Review of the Red Cross* 731. Rosenfeld defines collective reparation as 'benefits conferred on collectives in order to undo the collective harm that has been caused as a consequence of a violation of international law' [at 732].

II.2 THE STANDARD OF REPARATION

15. The reparation required to remedy a breach depends on the violation or crime that was committed and the harm caused. The standard of reparation first articulated by the Permanent Court of International Justice and which has thereafter framed the quantum and quality of inter-State claims is 'full,' as needing to wipe out all the consequences of the illegal act and reestablish the *status quo ante.*[11] Human rights treaties and related texts tend to use, or have been interpreted to include, descriptors such as fair, adequate or effective, used either singly or grouped together,[12] appropriate,[13] proportionate to the harm[14] and equitable.[15] These are not necessarily lesser standards; they help to clarify what is required, particularly when re-establishing the *status quo ante* is impossible and it is impractical to precisely quantify the harm.[16] Thus, there is some consistency in what is understood to be required.

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[11] *Chorzów Factory* (Merits) [1928] PCIJ Rep Series A No. 17, 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para. 152; ILC, *Articles on the Responsibility of States for Internationally Wrongful Acts* (ARS), Yearbook of the International Law Commission, 2001, vol. II (Part Two), UN Doc A/56/10, Art 31, reflecting the *Chorzów Factory (Ger. v. Pol.)* (Jurisdiction) [1927] PCIJ Rep Series A No 9, 21; See also, *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 16 December 2005 by GA resolution 60/147) 18 (hereinafter the *UN Basic Principles and Guidelines*), which describes 'full and effective' reparation for gross human rights and serious IHL violations.

[12] *Protocol on the Statute of the African Court of Justice and Human Rights*, African Union (adopted 1 July 2008, not yet in force) Art 45; *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (UN Victims' Declaration, adopted 29 November 1985 by GA resolution 40/34), 4; *American Convention on Human Rights* (ACHR, adopted 22 November 1969, entered into force 18 July 1978) Art 63(1); *Godínez Cruz v. Honduras* (Interpretation of the Compensatory Damages) IACtHR, Ser C No 10, 17 August 1990, para. 27; *Convention on the Elimination of All Forms of Racial Discrimination* (CERD, adopted 21 December 1965, entered into force 4 January 1969) Art 6; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (UNCAT, adopted 10 December 1984, entered into force 26 June 1987), art 14(1); *Convention for the Protection of All Persons from Enforced Disappearance* (CPPED, adopted 20 December 2006, entered into force 23 December 2010) Art 24(4); Committee on Economic, Social and Cultural Rights (CESCR), General Comment No 9, *The domestic application of the Covenant*, UN Doc E/C.12/1998/24, 3 December 1998, para. 9; *UN Basic Principles and Guidelines* , ibid, 15.

[13] Committee on the Rights of the Child (CRC), General Comment No. 5, *General Measures of Implementation of the Convention on the Rights of the Child*, UN Doc CRC/GC/2003/5, 3 October 2003, para. 24.

[14] *Loayza Tamayo v. Peru* (Reparations and Costs) IACtHR, Ser C No 42, 27 November 1998, para. 86; *AT v. Hungary*, UN Doc CEDAW/C/32/D/2/2003, 26 January 2005, para. 9.6 (II)(vi); *UN Basic Principles and Guidelines* (n. 11) 15, 18.

[15] *Velásquez Rodríguez v. Honduras* (Compensatory Damages) IACtHR, Ser C No 7, 21 July 1989, para. 27, in which the IACtHR applied principles of equity. See also, *Djot Bayi v. Nigeria*, Community Court of Justice of the Economic Community of West African States (ECOWAS CCJ), Comm No ECW/CCJ/JUD/01/09, 28 January 2009, paras. 45-6.

[16] *Aloeboetoe v. Suriname* (Reparations and Costs), IACtHR, Ser C No 15, 10 September 1993, para. 49.

III. FACTORS RELATING TO THE APPROPRIATENESS OF AWARDING REPARATION ON A COLLECTIVE OR INDIVIDUAL BASIS [PART V OF THE REGISTRY REPORT]

III.1 THE PRACTICE OF COURTS AND OTHER BODIES THAT HAVE THE POSSIBILITY TO AFFORD BOTH INDIVIDUAL AND COLLECTIVE FORMS OF REPARATION

16. In this section, we outline the different rationales used by judges and other decision-makers when deciding whether to award individual or collective forms of reparation or both. We have focused on those bodies which have the mandate and authority to afford both forms of reparation and have been faced with the need to decide which form of reparation is most appropriate in the given case or what would be the most appropriate apportionment of reparation (individual, collective or both).

17. The Inter-American Court of Human Rights (IACtHR)[17] and the Economic Community of West African States Community Court of Justice (ECOWAS CCJ)[18] have awarded, and the African Commission on Human and Peoples' Rights (ACHPR)[19] has recommended both individual and collective forms of reparation.[20] Domestic courts usually award individual reparation however there are a number of

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[17] See, e.g., *Plan de Sánchez Massacre v. Guatemala* (Reparations and Costs), IACtHR, Ser C No. 116, 19 November 2004; *Mapiripán Massacre v. Colombia* (Merits, Reparations, and Costs), IACtHR, Ser C No. 134,15 September 2005; *Ituango Massacres v. Colombia* (Preliminary Objection, Merits, Reparations and Costs), IACtHR, Ser C No. 148, 1 July 2006.

[18] *Hadijatou Mani Koraou v. The Republic of Niger*, ECOWAS Community Court of Justice (ECOWAS CCJ), ECW/CCJ/JUD/06/08, 27 October 2008; *SERAP v. Nigeria*, ECOWAS CCJ, ECW/CCJ/JUD/18/12, 14 December 2012.

[19] *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, ACHPR, Communication No 276/03, 11- 25 November 2009; *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*, ACHPR, Communications Nos 279/03-296/05, 13-27 May 2009; *The Social and Economic Rights Action Center (SERAC) and the Centre for Economic and Social Rights (CESR) v Nigeria*, ACHPR, Communication No 155/96, 13 - 27 October 2001.

[20] The European Court of Human Rights (ECtHR) awards just satisfaction under article 41 of the European Convention on Human Rights (ECHR). It views its judgments as declaratory, which contracting states are obliged to abide by under article 46 (1) of the ECHR. The Court has therefore largely refrained from awarding reparation other than compensation for certain violations, leaving the supervision of the execution of judgments in the form of individual and general measures to the Committee of Ministers under article 46 (2) of the ECHR. Awards have been largely on an individual basis but have also included awards for the benefit of a large number of victims, such as in the inter-state case *Cyprus v. Turkey*, Application no.25781/94, Judgment (Satisfaction), Grand Chamber, 12 May 2014, para. 58: 'In view of all the relevant circumstances of the case, and making its assessment on an equitable basis, the Court considers it reasonable to award the Cypriot Government aggregate sums of EUR 30,000,000 for non-pecuniary damage suffered by the surviving relatives of the missing persons [altogether 1,456 persons], and EUR 60,000,000 for non-pecuniary damage suffered by the enclaved residents of Karpas peninsula, plus any tax that may be chargeable on these amounts. The aforementioned sums are to be distributed by the applicant Government to the individual victims of the violations found in the principal judgment under these two heads.' (references omitted)

cases in which collective awards have been made. Many post-conflict truth and/or justice mechanisms are mandated to award both individual and collective awards.

a) Collective reparation

18. Courts have awarded collective reparation to collective rights-holders whose group rights have been violated and on some occasions, when there has been a large number of individual victims.

i) Collective reparation to a collective entity

19. Violations of collective rights consistently lead to the award of collective reparation.[21] In such cases, for a collective award to be ordered, the beneficiary must be understood to be a distinct unit, whose traditions, community dynamics and way of life has been affected by the violations. Courts have determined on a case-by-case basis whether there are elements of collective harm and whether there is a sufficient nexus to the particular group/community/entity.

20. In the *Saramaka* case, which concerned logging and mining concessions awarded by Suriname on territory possessed by the Saramaka people, the IACtHR first established that the Saramaka people made up 'a tribal community whose social, cultural and economic characteristics are different from other sections of the national community, particularly because of their special relationship with their ancestral territories, and because they regulate themselves, at least partially, by their own norms, customs, and/or traditions.'[22] It then found that they were entitled to the protection of the right to communal property[23] and ordered Suriname to provide collective damages in the form of a development fund for the Saramaka people.[24] The rationale for this type of award was that the rights affected were of a collective nature and that, as the group as a whole was affected, any reparation should also be for the benefit of the group. The

[21] See, e.g., *Case of Sawhoyamaxa Indigenous Community v. Paraguay* (Merits, Reparations and Costs), IACtHR, Ser C No. 146, 29 March 2006; *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (Merits, Reparations and Costs), IACtHR, Ser C No. 79, 31 August 2001; *Case of the Saramaka People v. Suriname* (Preliminary Objections, Merits, Reparations, and Costs), IACtHR, Ser C No. 172, 28 November 2007; *Endorois v. Kenya*, (n. 19).
[22] *Case of the Saramaka People v. Suriname,* ibid, para. 84.
[23] Ibid, para. 96.
[24] Ibid, paras. 200-202.

Court made similar findings in *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*,[25] *Sawhoyamaxa Indigenous Community v. Paraguay*[26] and *Yakye Axa Indigenous Community v. Paraguay.*[27] The ACHPR has also awarded collective reparation to indigenous peoples.[28] In doing so, it took note of the fact that 'peoples' were entitled to benefit from provisions of the African Charter on Human and Peoples' Rights that protect collective rights which made collective reparation appropriate.[29]

21. In *Social and Economic Rights Action Center (SERAC) and the Centre for Economic and Social Rights (CESR) v. Nigeria*, which concerned allegations that Nigeria failed to adequately regulate the behaviour of oil companies in Ogoniland and the Nigerian Army's attack of civilian protesters, the African Commission found a violation of the right of the Ogoni people to a general satisfactory environment favourable to their development and recommended collective forms of reparation, such as undertaking a comprehensive clean-up of lands and rivers damaged by oil operations, and setting out several measures to guarantee non-recurrence including to ensure that appropriate environmental and social impact assessments are prepared for any future oil development and that the safe operation of any further oil development is guaranteed through effective and independent oversight bodies for the petroleum industry.[30]

ii) Collective reparation to address the individualised harm of a large number of persons

22. When decision-makers have awarded collective reparation in cases involving violations of individual (as opposed to collective) rights, they have taken into account various factors. These include the collective nature of the harm suffered (a distinct criterion from the notion of harm to a specific entity described above), the impact the harm has had on the community, cultural aspects relevant to the case as well as the

[25] *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (n. 21). Here it requested the State to invest $50,000 in works or services of collective interest for the benefit of the Awas Tingni Community, by common agreement with the Community [para. 167].
[26] *Case of Sawhoyamaxa Indigenous Community v. Paraguay* (n. 21).
[27] *Case of Yakye Axa Indigenous Community v. Paraguay* (Merits, Reparations and Costs), IACtHR, Ser C No. 125, 17 June 2005.
[28] *Endorois v. Kenya* (n. 19).
[29] Ibid.
[30] *SERAC and CESR v. Nigeria* (n. 19), 15-16.

particular facts of the case.[31] For example, the *Moiwana Community v. Suriname* case[32] concerned an attack by the Suriname armed forces, resulting in the killing of over 40 men, women and children and the destruction of the Moiwana village. This led to the displacement of survivors who were unable to return to their traditional way of life. '[G]iven that the victims of the present case are members of the N'djuka culture, […] the individual reparations to be awarded must be supplemented by communal measures […] to the community as a whole'.[33] The IACtHR ordered the Government to establish a development fund for projects for the benefit of the community upon its return. The IACtHR took the same approach in *Plan de Sánchez.* In that case, which concerns the attack of a village by members of the Guatemalan Army and civil collaborators during which around 268 people were killed and abused, most of them members of the Maya-Achí people, the Court referred to the collective nature of the harm when awarding collective measures of reparation. Reparation included symbolic measures and a request that the State provide funds to maintain and improve the chapel used by survivors to commemorate those who died, as well as the implementation of development programmes for the affected communities.[34]

23. The ACHPR has equally recommended collective reparation in cases of large-scale violations. For instance, in a claim against Mauritania which concerned wide scale violations stemming from the discrimination and marginalisation of Black Mauritanians, the African Commission recommended the Government to afford a variety of collective measures (in addition to individual reparation for those affected and for their families), including to establish an independent inquiry to clarify the fate of disappeared persons, assess the status of degrading practices in the country with a view to identifying with precision the deep-rooted causes for their persistence and to put in place a strategy aimed at their total and definitive eradication, and enforce legislation on the abolition of slavery in the country.[35]

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[31] In *SERAC and CESR v Nigeria* (n. 19, para. 67), the African Commission noted that the violations 'not only persecuted individuals in Ogoniland but also the whole of the Ogoni community as a whole,' and ordered collective forms of reparation in addition to compensation to the individual victims.
[32] See, eg. *Moiwana Community v. Suriname* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Ser C No. 124, 15 June 2005.
[33] Ibid, para. 194.
[34] *Case of Plan de Sánchez Massacre v. Guatemala* (n. 17) paras. 104, 110.
[35] *Malawi African Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme v. Mauritania*, ACHPR, Communication Nos. 54/91; 61/91; 98/93; 164/97-196/97; 210/98, 11 May 2000.

24. The IACtHR adopted a similar approach in cases involving individual violations that resulted in harm to communities, such as to the Maya people in *Plan de Sánchez v. Guatemala*, which were found to possess their own traditional authorities and forms of community organisations, and had their own social economic and cultural structures.[36] However, the IACtHR has not always required there to be a distinct cultural unit for an order of collective reparation to be made. In *El Mozote v. El Salvador*, which concerned successive massacres committed by the Salvadorian army in seven places in the northern part of the department of Morazán during which approximately 1,000 people were killed, including many children, the Court referred to the fact that the scorched earth policy implemented by El Salvador against civilian populations suspected of supporting the guerrillas had deeply affected the community's social fabric as well as caused the loss of 'every social reference point of the people who lived in these villages'.[37] In addition to a range of measures of individual reparation, the Court ordered the State to implement in affected communities, 'in full coordination with the victims and their representatives, a development program that includes the following: (a) improvements to the public road system; (b) access to public services of water and electricity; (c) establishment of a health care center in a place accessible for most of the villages, with adequate personnel and conditions, that can provide medical, psychological or psychiatric care to the people who have been affected and who require this type of treatment in keeping with paragraphs 350 to 353 of the Judgment; (d) construction of a school in a place accessible for most of the villages, and (e) construction of a center for the elderly.'[38]

25. Truth and reconciliation commissions have made similar findings in cases of individual violations (also) resulting in collective harm. For example, in Morocco, serious human rights violations were committed following independence as a result of a long period of political instability. Violations included 'enforced disappearances, enforced exile, arbitrary detention, torture, sexual violence, and violations of the right

[36] *Plan de Sánchez Massacre v. Guatemala* (n. 17) para. 85.
[37] *Case of the Massacres of El Mozote and Nearby Places v. El Salvador* (Merits, Reparations and Costs), IACtHR, Ser C No. 252, 25 October 2012, paras.180-181, 208.
[38] Ibid, para. 339.

to life as a result of the excessive use of force.'[39] However, the Moroccan Equity and Reconciliation Commission (IER) also noted that certain regions and communities had suffered harm collectively including in the form of collective punishments, marginalisation, exclusion from development projects and a tarnished image resulting from the presence of secret detention centres in several communities.[40] Considering the collective harm to these regions and communities, the Moroccan Equity and Reconciliation Commission recommended that reparation, in addition to individual measures, include a community dimension.[41] Development and cultural programmes were recommended to benefit specific towns and regions as well as the reconversion of some of the former illegal detention centres into memorial sites.[42]

26. In Colombia, a series of laws have been enacted to afford reparation to victims of the conflict[43] and a National Commission for Reparations and Reconciliation was established to implement several pilot projects of collective reparation, the beneficiaries being 'groups, villages, or social and political organizations that have been affected by harm to their collective rights, serious and flagrant violations of the individual rights of the members of these collectives, or the collective impact of the violation of individual rights.'[44]

b) Individual reparation awarded in cases of large-scale violations

i) Individual reparation in conjunction with collective reparation

27. The award of collective reparation has not impeded decision-makers from also awarding individual reparation, in appropriate cases. Such awards reflect the operable international standards as well as the practice of human rights courts to award

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[39] International Center for Transitional Justice (ICTJ), *The Rabat Report: The Concept and Challenges of Collective Reparations* (February 2009), at: www.ictj.org/publication/rabat-report-concept-and-challenges-collective-reparations) 25.
[40] Royaume du Maroc Instance Equité et Réconciliation, *Rapport Final*, Vol. III: 'La Réparation des Préjudices' (2010), at: http://www.cndh.ma/sites/default/files/documents/rapport_francais_3_ok.pdf, 53-59.
[41] ICTJ, *The Rabat Report* (n. 39) 26.
[42] Ibid, 27.
[43] *Justice and Peace Law*, Law 975 of 2005, as amended; the *Victims and Land Restitution Law*, Law 1448 of 2011. See, P. Firchow, 'The Implementation of the Institutional Programme of Collective Reparations in Colombia' (2014) 6(2) *Journal of Human Rights Practice* 356.
[44] Firchow, ibid, 359.

compensation to victims of serious human rights violations as a matter of course.[45] Individual reparation in such cases is based on the nature of the right violated, and its indispensable role in repairing victims' harm.[46]

28. For instance, the ACHPR has often recommended collective reparation *in conjunction* with individual reparation measures when individual rights had been violated.[47] Truth and Reconciliation Commissions have also regularly recommended individual measures in addition to collective reparation.[48]

29. The IACtHR consistently awards individual reparation, in the form of financial compensation and/or specific rehabilitation measures, to individual members of communities when it finds that their individual rights have been violated.[49] In the *Sawhoyamaxa* case, for example, 19 members of the community died because of inadequate living conditions resulting from the group's displacement from their traditional territory. The Court awarded individual damages of $20,000 to each of the 19 victims, as well as collective reparation,[50] including *inter alia*, a special fund 'to implement educational, housing, agricultural and health projects, as well as to provide drinking water and to build sanitation infrastructure, for the benefit of the members of the Community.'[51] While the IACtHR did not order individual reparation measures in a number of cases involving communities and their members in Colombia, it has done so after taking note of the fact that a comprehensive administrative reparation programme was being implemented domestically in the country. Thus one of the

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[45] See, e.g., UN Secretary-General (UNSG), Guidance Note of the UNSG, *Reparations for Conflict-Related Sexual Violence* (UNSG Guidance Note), June 2014, available at: http://www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune-2014.pdf, 7; UN Committee Against Torture, General Comment No. 3, *Implementation of Article 14 by States Parties*, UN Doc. CAT/C/GC/3, 13 December 2012.

[46] The IACtHR has ruled that 'in matters involving violations of the right to life, […] reparation must of necessity be in the form of pecuniary compensation, given the nature of the right violated' *Aloeboetoe v. Suriname* (n. 16), paras. 46, 50. The African Commission has also held that in cases involving acts of torture and inhuman treatment, financial compensation was at the same time appropriate and indispensable to repair victims' harm. See, *Titanji Duga Ernest (for Cheonumu Martin and others) v. Cameroon*, ACHPR, Communication No. 287/04, 7 - 14 March 2014, para. 81.

[47] *Malawi African Association and others v. Mauritania* (n. 35); *SERAC and CESR v. Nigeria* (n. 19).

[48] This was the case for example, in Colombia, Kenya, Morocco, Peru and South Africa. See generally, ICTJ, 'The Rabat Report, the concept and challenges of collective reparations' (n. 39).

[49] *El Mozote v. El Salvador* (n. 37); *Rio Negro Massacres v. Guatemala* (Preliminary Objection, Merits, Reparations, and Costs), IACtHR, Ser C No. 250, 4 September 2012; *Moiwana Community v. Suriname* (n. 32), para. 194.

[50] *Case of Sawhoyamaxa Indigenous Community v. Paraguay* (n. 21), para. 226.

[51] Ibid, paras. 224-225.

factors taken into account by an international court when determining whether to afford individual reparation is whether such measures may duplicate domestic measures already underway, for those same victims.[52] Nonetheless, the IACtHR ordered the Government to ensure that the victims recognised in the case be given priority access to the domestic reparation programme.[53]

30. At the domestic level in Colombia, collective reparation measures have also been ordered alongside individual measures as was done by the Superior Court for the District of Bogotá (Justice and Peace Chamber) in the *El Iguano* case.[54] It considered that the crimes committed by the organisation Frente Fronteras of the Bloque Catatumbo (homicides, enforced disappearances, forced displacements, etc.) caused damage to the collectivity living in Norte de Santander, seriously affected the human rights of the inhabitants of Cúcuta and its surroundings and had a significant impact on the families of the victims and on society as a whole. Moreover, it considered that impunity and the absence of mechanisms to acknowledge the events generated mistrust in the institutions.[55] The Court found that the damage suffered by the community of Norte de Santander affected the foundations of the society in which that community lived. For these reasons, it considered it necessary to establish mechanisms aimed at restoring the bases of the social order in that community.[56] The Court ordered symbolic measures and guarantees of non-repetition as well as the creation of a recovery center for victims of the armed conflict in Cúcuta or, in the alternative that a branch of the local hospital be transformed to focus on psychological therapy.[57] The Court also found that in the particular circumstances of the case, which included a high number of victims and violations on a massive scale, it was appropriate to award individual financial reparation on an equitable basis.[58] Referring

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[52] The European Court of Human Rights has also taken into account the fact that claimants had already received compensation from the State when defining its reparation awards. See *Finogenov et al v Russia* (Applic. nos. 18299/03 and 27311/03), ECtHR, 20 Dec. 2011, para. 289.
[53] *Case of the Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Ser C No. 270 20, November 2013, para. 474; *Case of the Santo Domingo Massacre v. Colombia* (Preliminary objections, merits and reparations), IACtHR, Ser C No. 259, 30 November 2012, para. 336; *Mapiripán Massacre v Colombia* (n. 17), para 269.
[54] *Prosecutor v. Jorge Iván Laverde Zapata alias El Iguano* (Sentence) Tribunal Superior Del Distrito Judicial De Bogota, Case N. 2006-80281, 2 December 2010, para. 451.
[55] Ibid, paras. 418-419.
[56] Ibid, para. 422.
[57] Ibid, para. 426.
[58] Ibid, paras. 440-441.

to the practice of the IACtHR in cases relating to massacres in Colombia, it ordered individual monetary compensation of 40,000,000 Pesos (approximately USD 16,000) for direct family members (and lesser awards for other relatives).[59] The decision to award compensation on an equitable basis was successfully challenged by victims before the Supreme Court which ruled that while the principle of equity could be applied where evidence is not sufficient to show the exact scope of damage,[60] it was not appropriate to apply it in cases under the framework of the Justice and Peace Law, under which specific procedures are already established to address such cases.[61] The Supreme Court thus modified the previous judgment and ordered individualised financial reparation to the victims on the basis of the evidence provided.[62]

ii) Individual reparation only

31. Some courts and other decision-making bodies have awarded individual reparation only, even when the claims have involved large numbers of victims. Indeed, this is the typical type of award made by domestic courts, whether these are civil courts hearing claims for pecuniary and/or non-pecuniary losses or criminal courts in civil law jurisdictions assessing reparation claims brought by 'parties civiles'. Thus, individual reparation awards have been ordered by judges after a finding of liability. They have also been ordered or subjected to the scrutiny and approval of courts as a result of settlements between the parties.

32. Individual reparation awards have also been issued by specialised claims bodies, such as the United Nations Compensation Commission, the Holocaust Victims Assets Programme, the Claims Resolution Tribunal for Dormant Accounts in Switzerland and the German Forced Labour Compensation Programme which have provided individual compensation using mass claims techniques to address the challenge posed by the large number of claimants. Individualised reparation awards have also been made by property restitution bodies such as the Commission for Real Property Claims of Displaced Persons and Refugees (CRPC) in Bosnia and Herzegovina and the Housing and Property Claims Commission (HPCC) in Kosovo, which have confirmed

[59] Ibid, paras. 450-451.
[60] *Prosecutor v. Jorge Iván Laverde Zapata alias El Iguano,* Corte Suprema De Justicia (Sala De Casación Penal) Segunda Instancia Rad. 35637, 6 June 2012, para 7.3.3.
[61] Ibid, paras. 7.3.5 and 7.3.8.
[62] Ibid, para 7.4.5.

ownership and other rights over land and property and facilitated individuals' access to property and in certain cases afforded compensation in lieu of return.[63]

33. The IACtHR has not automatically assumed that a group of victims constitutes a 'collective' unit, and has sometimes declined to order collective reparation where the requisite threshold had not been met. For instance, in *Norín Catrimán v. Chile,* the IACtHR did not find the mere fact that the named victims were leaders from the same community sufficient to award collective reparation to the community as requested by the victims' representative.[64] Similarly, in the *El Aleman case,* a Colombian Superior Court for the District of Bogota (Justice and Peace Chamber) did not treat victims as a 'collective' on account of their having been recruited as child soldiers into the same paramilitary group because, despite their ethnic identity, they were not a group with a unique history or project, or a community with shared values and traditions.[65] The Court found that treating the minors as a unique social group entitled to collective reparation on the basis of the sole criterion of age was inappropriate. According to the Court, if collective reparation measures were implemented, the minors would have realised that they did not share much apart from age and would have felt dissatisfied and wished they had received individual reparation instead.[66] It ordered the payment of monetary compensation including 'for approximately 15 months of work at minimum wage for children who were recruited between 15 and 17 years old, with higher payments to those who were recruited at an earlier age' as well as medical and psychological care.[67]

34. In summary, courts and other decision-making bodies have awarded collective and/or individual reparation in a variety of situations, having taken into account whether the

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[63] H.M. Holtzmann and E. Kristjánsdóttir (eds), *International Mass Claims Processes: Legal and Practical Perspectives* (Oxford University Press, 2007) 72; International Organization of Migration, *Property Restitution and Compensation: Practices and Experiences of Claims Programmes*, Doc. Ref 978-92-9068-450-3, 2008.
[64] *Case of Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile* (Merits, Reparations and Costs), IACtHR, Ser C No. 279, 29 May 2014, paras. 466, 467.
[65] *Prosecutor v. Fredy Rendón Herrera*, Case No. 2007-82701, Superior Tribunal of Bogotá, 16 December 2011, para. 880: 'In this case a collective redress cannot be granted since even when the majority of the Urabá population have a shared identity –african american asendancy-, minors of the region are not a group with a shared history, a shared project or a common system of values and traditions, but rather diverse groups with dissimilar histories. This chamber holds that in considering the minors victims of forced recruitment by the Emar Cardenas Faction, the claimants mistakenly confuse a group with constitutional protection with a collective subject entitled to fundamental rights.' (unofficial translation)
[66] Ibid, para. 881.
[67] Ibid, paras. 749, 801. 827-834.

violation or the harm suffered was collective in nature or whether a 'community' had been particularly impacted. In doing so, the mere belonging of victims to a group has not automatically resulted in an award of collective reparation; there are various example in which only individual reparation was ordered despite a large number of claimants with common circumstances. Also, most decision-making bodies have not considered that an award of collective reparation limited or prevented them from also ordering individual reparation when individual rights were violated.

c) Key factors taken into consideration when determining the nature of the award

i) Consultation and claimant preferences

35. Consultation and claimant preferences are considered by courts and other decision-makers when deciding whether to award collective or individual reparations or both. International instruments and judicial and quasi-judicial bodies recognise that victims should be consulted and have a voice in all phases of reparation processes.[68] Consultation is grounded in notions of procedural justice, including the right of victims to access effective remedies. Adequate consultation is increasingly seen as integral to the design and development of reparation programmes.[69] Consultation of victims in the mapping, design, implementation, monitoring and evaluation of reparation forms part of broader processes of victims' participation. Its aim is to enable victims to exercise their rights and identify their interests and needs, which foster victims' agency recognised in the principle that reparation should be victim-oriented.[70] According to recognised principles, consultation must be (i) non-discriminatory; (ii) sensitive to victims' experiences in conformity with the principle of 'no harm'; (iii) carried out so as to minimise the risk to victims, including by

[68] International Law Association, *Declaration of Procedural Principles for Reparation Mechanisms*, adopted at the 76th ILA Conference (Washington, Resolution 1/2014) (hereinafter ILA Procedural Principles), Principle 2; *The Prosecutor v. Lubanga*, Decision Establishing the Principles and Procedures to be Applied to Reparations, ICC-01/04-01/06-2904, Trial Chamber I, 7 August 2012, paras. 202-206

[69] UNSG Guidance Note (n. 45) 1, which sets out that 'Consultations with victims are particularly important in order to hear their views on the specific nature of reparation'; See also Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff (n. 9) paras. 74-80.

[70] UNSG Guidance Note, Ibid, 9, which sets out that 'The process of obtaining reparations should itself be empowering and transformative.' See also REDRESS, *Articulating Minimum Standards on Reparations Programmes in Response to Mass Violations Submission to the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrenc*e (July 2014), para 42, at http://www.redress.org/downloads/publications/Submission%20to%20Special%20Rapporteur%20on%20Reparations%20Programmes%20-%20public.pdf

providing adequate forms of protection; (iv) provide victims with information about their rights, justice processes and forms of reparation; (v) enable victims to participate, including through effective representation; and (vi) be regular at all stages of proceedings, sufficiently specific and transparent so as to enable the effective exercise of victims' rights.[71] This approach provides victims with an active role in the process, and enhances the prospects of awards that reflect victims' preferences. It also advances the wider goals of reparation, such as restoring the dignity of victims, redressing the power balance inherent in the violation and enabling victims to rebuild their lives.[72]

36. These standards are also reflected in the practice of the IACtHR, which recognises that reparation should have a causal nexus with the measures requested to repair the harm[73] and tends to closely follow the preferences of the victims, as expressed in requests made. When awarding collective reparation in particular, the Court will assess whether the proposed measures are consistent with the requested remedies and whether the measures are capable of being implemented in alignment with cultural practices. In the *Saramaka case,* the IACtHR, as in many other IACtHR cases involving collective reparation, ordered that an implementation committee be appointed 'composed of a representative appointed by the victims, a representative appointed by the State, and another representative jointly appointed by the victims and the State.' According to the Court, the implementation committee was to be responsible for the implementation of the collective measures of reparation following consultation with the Saramaka people before taking decisions.[74] In *Operation Genesis v. Colombia*, the IACtHR made clear that 'in scenarios … in which States must assume their obligations to make reparation on a massive scale to numerous victims, … measures of reparation must be understood in conjunction with other measures of truth and justice, provided that they meet a series of related requirements, including their legitimacy – especially, based on the consultation with and

[71] UNSG Guidance Note, Ibid, 1 and Operative Paragraph 6; See also REDRESS, *Articulating Minimum Standards*, ibid. paras. 41, 68.
[72] Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff (n. 9) para. 9; UN Committee Against Torture, General Comment No. 3 (n. 45) para. 6.
[73] See, e.g., *Case of Expelled Dominicans and Haitians v. Dominican Republic* (Preliminary objections, merits, reparations and costs), IACtHR, Series C No. 282, 28 August 2014, para 445; *Operation Genesis v. Colombia* (n. 53), para 411; *Norín Catrimán v. Chile* (n. 64), para. 414; *El Mozote v. El Salvador* (n. 37), para. 304; *Rio Negro Massacres v. Guatemala* (n. 49) para. 247.
[74] *Case of the Saramaka People v. Suriname* (n. 21), para. 202.

participation of the victims…'[75] The African Commission has similarly recommended States to consult with victims in the implementation of collective reparation measures.[76]

37. Conversely, individual and/or collective reparation measures have sometimes been awarded in cases even where victims had not requested those measures. At times, such orders have been made in addition to what victims requested, on the basis that they are necessary to adequately repair the consequences of the violations.[77] In the *Rochela Massacre case*, the IACtHR added in the obligations on the State to: investigate and prosecute those responsible; protect judicial officials, witnesses, victims and their next of kin; afford medical and psychological assistance to the victims and their next of kin and train members of the security forces on the principles and rules governing human rights and international humanitarian law.[78]

38. In other instances, awards have varied from victims' preferences, based on the decision-maker's view (different to the claimants) of the appropriate form of reparation in the circumstances. In *Selimović & others v. the Republika Srpska,* the Human Rights Chamber for Bosnia and Herzegovina awarded a lump-sum contribution to the Foundation of the Srebrenica-Potocari Memorial and Cemetery for the collective benefit of all the applicants and the families of the victims of the Srebrenica events. This was awarded 'to benefit all the family members of the persons missing from Srebrenica', which the Chamber considered to 'provide the best form of reparations for the violations found of the applicant's rights', given that the primary goal of applications was the desire to know the fate and whereabouts of the missing loved ones. The award was made notwithstanding victims' request for individual compensation awards.[79] The Chamber recognised that the applicants had personally suffered pecuniary and non-pecuniary damages, however it highlighted its understanding that the primary goal of the applications was the applicants' desire to know the fate and whereabouts of their missing loved ones and thus found it

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[75] *Operation Genesis v. Colombia* (n. 53), para. 470.
[76] See, e.g., *Endorois v. Kenya* (n. 19), recommendation (f).
[77] E.g., *Case of the Rochela Massacre v Colombia* (Merits, Reparations and Costs), IACtHR, Ser C No. 163, 11 May 2007, para. 286.
[78] Ibid, paras. 287 – 303.
[79] *Ferida Selimović et al. v. the Republika Srpska* (Decision on Admissibility and the Merits) Human Rights Chamber for Bosnia and Herzegovina, 7 March 2003, paras. 214, 217.

'appropriate to make a collective compensation award to benefit all the family members of the persons missing from Srebrenica.'[80]

39. In yet other instances, awards have varied from victims' preferences, based on other considerations relating to the lack of specificity of the claim and the infeasibility of the request coupled with the large number of potential beneficiaries.[81] In *SERAP v. Nigeria*, the ECOWAS CCJ noted, in response to the request that Nigeria be ordered to pay one billion USD to victims of human rights violations in the Niger Delta, that 'the Plaintiff failed to identify a single victim to whom the requested pecuniary compensation could be awarded', and noted the difficulty to develop clear and manageable criteria to determine who should benefit and how. It asked: 'what would be the criteria to identify the victims that deserve compensation? Why compensate someone and not compensate his neighbour? Based on which criteria should be determined the amount each victim would receive? Who would manage that one Billion Dollars?'[82] It then determined that '[i]n case of human rights violations that affect indetermined number of victims or a very large population, as in the instant case, the compensation shall come not as an individual pecuniary advantage, but as a collective benefit adequate to repair, as completely as possible, the collective harm that a violation of a collective right causes.'[83] But, as is described elsewhere, there are many instances in which courts and other decision-making bodies have afforded individual reparation in cases involving a very large number of victims.[84] In contrast to the ECOWAS CCJ ruling, in another case, also relating to multiple human rights violations committed against the Ogoni communities in Nigeria by oil companies, the

[80] Ibid, para. 218. Note, however, the dissenting opinion of Judge Vitomir Popović. He stated at para. 6, that 'I disagree with this order because the basic claim of the applicants was to obtain information from the respondent Party about the fate and whereabouts of their loved ones missing from Srebrenica and to bring the perpetrators to justice, and, in addition, a large number of them claimed compensation for their suffering, in an unspecified amount. In the present decision, the Chamber should have decided on the compensation claims raised in this fashion, and it should have awarded the applicants adequate amounts of compensation for their suffering, since that is what they precisely claimed. The applicants did not request to have these compensatory funds paid to the Foundation responsible for the construction and maintenance of the Srebrenica-Potocari Memorial and Cemetery. Acting in this manner, by stepping beyond the compensation claims raised, the Chamber also went beyond the scope of its established case law. It is a generally known fact that such similar foundations and associations are frequently subject to large-scale misuses of funds. For example, in my opinion, awarding certain amounts for the return of refugees and displaced persons, who are incapable of providing sufficient means even for their own bare existence and survival, would be more useful. Indeed, some of the members of the Chamber had the opportunity to personally familiarise themselves with this difficult situation.'
[81] *SERAP v Nigeria* (n. 18).
[82] Ibid, paras. 113-116.
[83] Ibid, para. 116.
[84] See below, paras. 53-54.

African Commission awarded both individual and collective forms of reparation.[85] Indeed, there are instances in which courts have seized upon the challenge of unidentified victims and lack of criteria to determine beneficiaries, and developed in the course of their rulings, those very criteria, in order to make individual reparation a veritable possibility.[86] The ECOWAS CCJ did not see itself as the appropriate jurisdiction to take on that challenge.

40. Similarly, a number of civil parties claimed individual reparation before the Extraordinary Chambers of the Courts of Cambodia (ECCC). However, their claims were dismissed because the regulations concerning reparation before the Chamber that the judges themselves put in place, limit the Chambers to awarding collective and moral awards.[87] In the second case, civil parties were able to submit 13 projects as part of their request for collective reparation with all but two approved.[88] While some of the civil parties welcomed the judgment as a form of reparation in itself, others vehemently criticised the approval of the 13 projects as 'worthless' unless individual reparation was also ordered.[89]

Linkages between Victims' Perceptions about the Legitimacy of Reparation Processes and any Prior Roles they May Have Had in Articulating Preferences

41. Respect for victims' rights, including the right to reparation, is increasingly recognised in national, regional and international systems as an integral element of criminal justice.[90] It therefore complements and reinforces goals such as the effective prosecution of serious crimes and the ending of impunity highlighted in the Preamble

[85] *The Social and Economic Rights Action Center and the Centre for Economic and Social Rights v Nigeria* (n. 19). The Commission appealed to the State of Nigeria to, *inter alia*, ensure 'adequate compensation to the victims of the human rights violations, including relief and resettlement assistance to victims of government sponsored raids, and undertaking a comprehensive clean-up of lands and rivers damaged by oil operations.' [at 9]
[86] Ibid.
[87] ECCC, Internal Rules, Rule 23; *Case 001 (against KAING Guek Eav alias 'DUCH')*, Judgment, ECCC, 001/18-07-2007/ECCC/TC, Doc N.E188, 26 July 2010; *Case 001 (against KAING Guek Eav alias 'DUCH')*, Appeals Judgment, ECCC, 001/18-07-2007-ECCC/SC, Doc N.F28, 3 February 2012.
[88] The Chambers rejected two projects due to the fact that insufficient funding had been secured in order to implement them. *Case 002/01 (against KHIEU Samphan and NUON Chea)*, Judgment, ECCC, 002/19-09-2007/ECCC/TC, Doc N. E313, 7 August 2014.
[89] Compare the reaction of the Center for Justice and Accountability representing victims residing in the USA with that of other civil parties, in Amy Taxin, 'Miles Away and Years on, Cambodians Relish Verdict', (7 August 2014) *ABC News*, at www.cja.org/downloads/ABC%20News%20via%20AP%20Sophany%20Bay%20for%20Khmer%20Rouge%20Verdict.pdf and Kuch Naren and Holly Robertson, 'Victims Call for Money From ECCC', (17 October 2014) *The Cambodia Daily*, at www.cambodiadaily.com/news/victims-call-for-compensation-from-eccc-70135/.
[90] See, e.g., UN Victims' Declaration (n. 12); *UN Basic Principles and Guidelines* (n. 11).

of the ICC Statute. The need to respect victims' rights is reflected in a number of provisions of the ICC Statute, notably articles 68 and 75, and has been affirmed by the Court, which has stressed that '[a] key feature of the system established in the Rome Statute is the recognition that the ICC has not only a punitive but also a restorative function.'[91]

42. Victims' perceptions of the legitimacy of the ICC's approach to reparation is a measure of the Court's ability to fulfil this function, in addition to serving as an important factor to ensure the sustained engagement of victims with the Court to advance its punitive function. The ICC has emphasised that 'the success of the Court is, to some extent, linked to the success of its reparation system'.[92] The ICC has recognised the need to ensure that reparation measures are 'meaningful' to victims.[93] To date, the Court has not put in place a methodology to assess the impact of reparation awards on victim beneficiaries, including evaluating victims' level of satisfaction with the types of reparation.

43. There is a growing body of knowledge about victims' views on other reparation processes and preferences on the modalities of reparation. Victims have articulated such views in the course of proceedings and in a number of surveys and consultations, such as in relation to the Democratic Republic of the Congo,[94] Uganda[95] and Darfur.[96] The Office of the High Commissioner for Human Rights (OHCHR), in collaboration with local stakeholders, has conducted consultations with victims of gender-based and

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[91] ICC, *Report of the Court on the strategy in relation to victims*, ICC-ASP/8/45, 10 November 2009, para. 3.
[92] *The Prosecutor v. Lubanga*, 'Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58,' ICC-01/04-01/06-8-Corr, Pre Trial Chamber I, 10 February 2006, para. 136*; The Prosecutor v. Lubanga*, 'Order for reparations (as amended)', ICC-01/04-01/06-3129-AnxA, Appeals Chamber, 3 March 2015, para. 3; *The Prosecutor v. Lubanga*, Decision Establishing the Principles and Procedures to be Applied to Reparations (n. 68) para. 178.
[93] ICC, 'Report of the Court on the strategy in relation to victims', (n. 91), para 51.
[94] UN Office of the High Commissioner for Human Rights (OHCHR), *Report of the Panel on Remedies and Reparations for Victims of Sexual Violence in the Democratic Republic of Congo to the High Commissioner for Human Rights*, March 2011, at: www.ohchr.org/Documents/Countries/CD/DRC_Reparations_Report_en.pdf.
[95] See, e.g., Uganda Human Rights Commission and OHCHR, *The Dust Has Not Yet Settled, Victims' View on the Right to Remedy and Reparation*, 2011, at: www.ohchr.org/Documents/Press/WebStories/DustHasNotYetSettled.pdf.
[96] African Union High-Level Panel on Darfur, *Darfur: The Quest for Peace, Justice and Reconciliation, Report to the African Union*, PSC/AHG/2 (CCVII), 2009.

sexual violence in a range of countries.[97] Submissions made and positions of victims demonstrate that victims, while frequently having diverging views,[98] opt for a range of measures that typically include both individual and collective reparation in case of mass violations. In contrast, limited research has been undertaken to identify and analyse victims' satisfaction, or lack thereof, with reparation awards and the underlying reason therefor.[99]

44. As victims are not a homogenous group, their perceptions of the legitimacy of, and satisfaction with reparation awards are likely to diverge based on a variety of factors, including the current economic situation, official and societal recognition and the level of rehabilitation attained. Even victims who share similar characteristics are likely to perceive awards in a different manner,[100] and perceptions may vary over time.[101] Victims' views can therefore be difficult to assess, a challenge that is sometimes increased by various entities purporting to speak on victims' behalf, or to represent 'the views of victims'.[102]

45. Satisfaction levels are potentially greater where victims' articulated preferences are reflected in the awards made. Victims' groups have for example objected to concerns that individual compensation creates the risk of tensions in communities as 'paternalistic', preferring instead to mitigate any risks by involving victims in the design of how individual compensation can be disbursed in a safe way, such as

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[97] See, e.g., UN General Assembly, *Analytical study focusing on gender-based and sexual violence in relation to transitional justice*, Report of the Office of the United Nations High Commissioner for Human Right, UN Doc. A/HRC/27/21, 30 June 2014; OHCHR, *Healing the Spirit: Reparations for Survivors of Sexual Violence Related to the Armed Conflict in Kosovo,* 2013, at: www.unifem.sk/uploads/doc/Study_OHCHR_ENG_Final_HQ.pdf.
[98] Compare findings of two separate studies which considered victims' views on reparation in Cambodia in PN. Pham, P. Vinck, M. Balthazard, S. Hean, E. Stover, *So We Will Never Forget: A Population - Based Survey on Attitudes about Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia*, Human Rights Center, University of California, Berkeley, January 2009, at: www.law.berkeley.edu/files/HRC/Publications_So-We-Will-Never-Forget_01-2009.pdf; and N. Stammel, S. Burchert, S. Taing, E. Bockers and C. Knaevelsrud, *The Survivors' Voices: Attitudes on the ECCC, the Former Khmer Rouge and Experiences with Civil Party Participation*, Berlin Center for the Treatment of Torture Victims, December 2010, at: http://psychologybeyondborders.org/wp-content/uploads/2013/08/bzfo_cambodia_report_20101.pdf.
[99] See for an earlier survey, REDRESS, *Torture Survivors' Perceptions of Reparation*, June 2001, available at www.redress.org/downloads/publications/TSPR.pdf, 50-53.
[100] Ibid, 62-67.
[101] Ibid.
[102] *Prosecutor v Laurent Gbagbo, Redress Trust observations to Pre-Trial Chamber I of the International Criminal Court pursuant to Rule 103 of the Rules of Procedure and Evidence*, ICC-02/11-01/11-62, Amicus submission, 16 March 2012, paras. 40-45, at: www.redress.org/downloads/1206%20Laurent%20Gbagbo%20pretrial%20chamber%20I.pdf; See also REDRESS, *Articulating Minimum Standards* (n. 70), para 48.

through the payment of instalments/pensions rather than lump sums.[103] Another relevant factor in determining the level of satisfaction is whether the decision-making body has justified, with reference to recognised criteria, why it has decided to make an award that differs from victims' stated preferences. The IACtHR typically assesses each of the measures requested by victims prior to awarding or rejecting them, and has been commended for its reparation policy. However, the rationale for its decision to award or reject a reparation measure request by victims is not always clear or consistent. Similarly, the African Commission appears to only consider reparation if requested by victims and does not systematically address each of the reparation measures requested.[104]

46. Truth and reconciliation commission type reparation processes have not followed a uniform practice, and victims' perceptions of the adequacy and effectiveness of consultations can differ significantly. In South Africa, for example, public hearings were held throughout the country with victims, civil society groups, academic institutions, churches and others to open up debate on the final reparation policy.[105] The TRC recommended individual compensation payments, along with individually-accessible health care and education benefits, symbolic reparation measures and adopted the proposal of Khulumani Support Group, the largest victims' organisation, of 'community-based reparations' that would fund housing and livelihood programmes designed by victims' communities.[106] In Peru, the TRC involved victims in a consultative workshop on the development of its reparation policy. This resulted in the addition of a new programme seeking to reflect victims' priorities, and also

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[103] Survivors have advanced the fact that 'they know what they want to use their awards for' and questioned the right of decision-making bodies to decide for them how to spend the money. REDRESS, Interview with a representative of a victims' organisation in South Africa, April 2015. Similar views were expressed by victims in Sierra Leone, REDRESS, Interview with staff involved in the implementation of the IOM reparation programme in Sierra Leone, April 2015.
[104] See, REDRESS, *Reaching for Justice: The Right to Reparation in the African Human Rights System*, October 2013, 23-24, at http://www.redress.org/downloads/publications/1310Reaching%20For%20JusticeFinal.pdf.
[105] C.J. Colvin, 'Reparations Program in South Africa' in Pablo de Greiff (ed), *The Handbook of Reparations* (Oxford University Press, 2008) 191.
[106] See *Interim Final Report, Reparation and Rehabilitation Policy*, Volume 5, Chapter 5 (29 October 1998), at: www.polity.org.za/polity/govdocs/commissions/1998/trc/index.htm. See also, *Final Report of the Truth and Reconciliation Committee, Administrative Report, Report of the Reparation & Rehabilitation Committee*, volume 6, section 2, chapter 8, p. 165 (2003), at: www.justice.gov.za/trc/report/finalreport/vol6_s2.pdf.

sensitised victims to the difficulties faced by the TRC in defining appropriate measures.[107]

47. Levels of satisfaction have been low where victims' preferences were reflected in the reparation award but later ignored during implementation. This phenomenon has been particularly prevalent in the implementation of TRC recommendations, which have been informed by, if not based on victims' stated preferences. In several instances, governments have failed to involve and consult victims and proceeded to order new or different measures from those recommended through consultation processes. For example, in South Africa, the government, without consulting victims, set the amount of compensation at a level substantially lower than that recommended by the Truth and Reconciliation Commission. Further criticisms concerned proposals for collective reparation, which were made without consultations, and in which 18 communities were identified as beneficiaries of mostly infrastructure projects.[108] Victims expressed strong opposition due to the absence of transparency as to the criteria used for the selection of the beneficiary communities and the lack of consultation with victims including on the type of projects that were deemed appropriate.[109]

ii) Feasibility

48. In deciding on the type of reparation, some courts and bodies have considered whether the type of reparation sought by the claimants was 'feasible'. Practical considerations that decision-makers have taken into account include the number of victims and available resources; whether victims could or had been identified; and whether their individual claims could be sufficiently substantiated.

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[107] C. Correa, J. Guillerot and L. Magarrell, 'Reparations and Victim Participation: A Look at the Truth Commission Experience' in C. Ferstman, M. Goetz and A. Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making* (Leiden/Boston: Martinus Nijhoff, 2009) 402-3.
[108] South African Coalition for Transitional Justice (SACTJ), *Comments on the Draft Regulations published by the Department of Justice dealing with Reparations for Apartheid Era Victims*, 31 January 2014, at: www.khulumani.net/khulumani/documents/category/8-government.html?download=139:sactj-comments-for-doj-community-rehabilitation-v1-30-jan-2014&start=20.
[109] Ibid. See also O. Makhalemele, 'Still Not Talking: The South African Government's Exclusive Reparations Policy and the Impact of the R 30,000 Financial Reparations on Survivors' in Ferstman et al. (n. 107), 541 *et seq.*

49. The large number of victims has sometimes been used as a rationale by decision-makers to afford or recommend collective as opposed to individual reparation.[110] For example, the ECOWAS CCJ, when ruling on a case relating to large-scale violations committed in the Niger Delta, considered it 'impossible to fairly implement any individual compensation when an undetermined number of victims or a very large population is affected'.[111]

50. In the *Case of the Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*,[112] which relates to a counterinsurgency military operation and paramilitary incursions that led to the forced displacement of hundreds of members of two afro-descendent communities, the IACtHR emphasised that 'international law establishes the individual entitlement of the right to reparation'. In evaluating the administrative programme of reparation in Colombia, the Court made clear that in order for reparation with a collective dimension, here the family unit, to serve as a legitimate alternative to individual reparation, a range of other criteria must be met, namely: 'legitimacy – especially, based on the consultation with and participation of the victims; their adoption in good faith; the degree of social inclusion they allow; the reasonableness and proportionality of the pecuniary measures; the type of reasons given to provide reparation by family group and not individually; the distribution criteria among members of a family (succession order or percentages); parameters for a fair distribution that take into account the position of the women among the members of the family or other differentiated aspects, such as whether the land and other means of production are owned collectively.'[113] The Court added that 'in the case of pecuniary reparations, a criterion of justice should include aspects that, in the specific context, do not become illusory or derisory, and make a real contribution to helping the victim deal with the negative consequences of the human rights violations on his life.'[114] While the large number of claimants and feasibility have been recognised as relevant considerations when opting for particular types of reparation, the criteria identified by the Court set out important procedural

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[110] See, N. Roht-Arriaza, 'Reparations in the Aftermath of Repression and Mass Violence,' in Eric Stover and Harvey Weinstein (eds), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity (*New York: Cambridge University Press, 2004) 127.
[111] *SERAP v Nigeria* (n. 18), paras. 114-115.
[112] *Operation Genesis v. Colombia* (n. 53), para. 474.
[113] Ibid, para. 470.
[114] Ibid, para. 471.

prerequisites and substantive components that provide guidance on how collective reparation should be developed and implemented.

51. Factors such as the importance of consultations and victim preferences, as well as the need to take into account feasibility, form part of the ICC's jurisprudence to date, to a degree. Trial Chamber I of the ICC found that collective reparation measures were appropriate to repair the harm suffered as a result of child conscription, enlistment and use in hostilities, in light of 'the uncertainty as to the number of victims of the crimes in this case- save that a considerable number of people were affected- and the limited number of individuals who have applied for reparations.'[115] Despite a number of individual applications for reparation which had called for individual reparation, the Chamber endorsed the Trust Fund's position that 'a community-based approach, using the [Trust Fund]'s voluntary contributions, would be more beneficial and have greater utility than individual awards, given the limited funds available and the fact that this approach does not require costly and resource-intensive verification procedures.'[116] The Appeals Chamber noted that it was consistent with the Statute and Rules of Procedure and Evidence for the Trial Chamber to award collective reparation only, even where there were individual applications for reparation. However, as it determined that none of the parties alleged errors with respect to the Trial Chamber's decision to award reparation on a collective basis, it did not assess whether the Trial Chamber appropriately interpreted and applied the factors set out in Rule 98(3) of the Rules of Procedure and Evidence.[117]

52. Feasibility has also been a factor militating in favour of awarding collective reparation, when it was determined to be impossible to adjudicate individual claims with sufficient precision. Thus, where it would be too difficult to determine who would be eligible to receive individual reparation measures because of an absence or unavailability of records to prove membership in a class, certain decision-making bodies have decided to privilege collective awards. For example, as part of the

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[115] *The Prosecutor v. Lubanga*, Decision Establishing the Principles and Procedures to be Applied to Reparations, (n. 68) para. 219.
[116] *The Prosecutor v. Lubanga*, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012, ICC-01/04-01/06-3129, Appeals Chamber, 3 March 2015, paras. 219, 274.
[117] Ibid, paras. 147 – 157.

considerations for the modalities of reparation in the Swiss Bank settlement, it was determined that the Looted Assets class, was 'potentially vast, … [yet] … [o]n the other hand, there is no legitimate or responsible way to determine what property was lost, to whom, in what amount, and where it ended up.'[118] As a result it was determined that neither a case-by-case adjudication of individual claims nor a *pro rata* distribution was possible or acceptable. For that class of victims, it was decided to take a *cy-pres* approach and afford 'targeted humanitarian assistance to the very neediest class members, elderly Holocaust survivors who "perhaps would be less in need today had their assets not been looted and their lives nearly destroyed" during the Nazi era. The Distribution Plan provided for a multi-year assistance programme to be operated by experienced service agencies with decades of experience in administering similar programmes and who therefore were familiar with the claimants as well as the country-specific distribution mechanisms.'[119] A *cy-pres* remedy, which has been used by certain US courts to address the fact that not all victims have been identified or come forward[120] allows unclaimed funds to be donated to a charitable organisation connected to the substance of the case.[121]

53. Many courts and other decision-making bodies regularly award individual reparation to often extremely large numbers of victims. This is the typical practice for class action lawsuits which operate in the United States and several other countries. It is also the practice of a number of large or mass claims compensation bodies such as the Iran-US Claims Tribunal, the UN Claims Commission, the German Forced Labor Compensation Programme and the Holocaust Victims Assets Claims Programme and the Claims Resolution Tribunal for Dormant Accounts in Switzerland, some of which

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[118] See, J. Gribetz and S.C. Reig, 'The Swiss Banks Holocaust Settlement' in Ferstman *et al* (eds), (n. 107), 135.
[119] Ibid, 136.
[120] In US class actions, a member of a court-certified class has to opt out of an action/settlement if he or she wishes to be excluded. This means that a significant number of class members become beneficiaries under an award/settlement because they have not opted out, rather than having actively opted in. In circumstances where it is difficult to identify the individual class members, or the amounts of the individual claims are too small to justify the effort required to collect them, some (often not insignificant) portion of the class/settlement fund remains unclaimed.
[121] In determining whether the distributions reasonably approximate the interests of the class, the courts consider a variety of factors including (i) the purposes of the underlying statutes claimed to have been violated, (ii) the nature of the injury to the class members, (iii) the characteristics and interests of the class members, (iv) the geographical scope of the class, (v) the reasons why the settlement funds have gone unclaimed, and (vi) the closeness of the fit between the class and the *cy pres* recipient, see *In re: Lupron Marketing and Sales Practices Litigation* 677 F.3d 21 (1st Cir. 2012).

have dealt with victims of the most serious international crimes spread over large geographical areas.[122]

54. The experiences of such bodies demonstrate that the potential size of the beneficiary class is not an insurmountable obstacle to awarding individualised reparation. Techniques that have been used to address the challenges of large numbers of potential beneficiaries are to group claims into several classes and to introduce standardised approaches to adjudication within those classes. Claims are then processed using a variety of abridged procedures such as computerised matching of claims and verification of information, sampling, and/or statistical modelling. These models have tended to rely on a central registry or secretariat to aid with the matching of potential beneficiaries; individual beneficiaries have often not been required to produce a high standard of proof, as collation of evidence to substantiate a claim has proceeded with the assistance of the secretariat. As Niebergall has noted, the secretariats of most claims processes have themselves actively participated in the gathering of evidence.[123] She notes the need for such a pro-active approach, taking into account that the reasons why victims lack evidence is usually linked to the nature of the harm they suffered as a result of the crimes committed against them.[124] Some human rights courts have likewise recognised the need for States to proactively assist victims with access to evidence to prove their entitlement to reparation. In the *Case of the "Las Dos Erres" Massacre v. Guatemala*, owing to the remote location of some of the victims and the difficulties for the victims' legal representatives to reach some of the heirs and beneficiaries and the difficulties for them to access data to prove eligibility because some records had been destroyed or were badly preserved and it was proving impossible for the victims to remedy those failings, the IACtHR recognised that 'the State [should] … collaborate with them in order to, through its agencies and registries, be able to gather the missing information.'[125]

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[122] H.M. Holtzmann and E. Kristjánsdóttir (n. 63) 72.
[123] H. Niebergall, 'Overcoming Evidentiary Weaknesses in Reparation Claims Programmes', in Ferstman et al. (eds) (n. 107) 153.
[124] Ibid, 150: '[i]n reparation claims programmes that address gross violations of human rights following a conflict or crisis, the lack of evidence in individual claims is very much linked with the circumstances leading to the losses and violations that were sustained and that are to be redressed through the programme. As a result, past reparation claims programmes had to be sensitive to the evidentiary difficulties victims faced and needed to take an innovative approach to the administration and assessment of evidence, in order to ensure that those victims who the programme was meant for were indeed reached and benefiting from the programme.'
[125] See, *Case of the "Las Dos Erres" Massacre v. Guatemala* (Monitoring Compliance with Judgment), IACtHR, 4 September 2012, paras. 20, 21.

IV: OTHER FACTORS RELEVANT TO THE TYPES AND MODALITIES OF REPARATION TO BE AWARDED [PART VI OF THE REGISTRY REPORT]

IV.1 Situations where beneficiaries are no longer congregated exclusively or mainly in the area where the harm was committed, such as being dispersed over a large area within a country and/or globally

55. The right to seek and obtain reparation is not contingent on residence in the place or State where the crime or violation occurred. However, in situations of crimes committed in the context of conflict or repressive regimes, victims will often leave or be forced to leave their homes and their communities. Consequently, they may become internally displaced or emigrate abroad, either as a direct result of the crime (such as an attack) or as a result of events occurring afterwards. Victims may be reluctant to return, for fear of ongoing insecurity or simply because they have built a new life somewhere else. Such situations pose a series of challenges to ensure that victims' are able to exercise their rights and that their right to reparation is adequately recognised and implemented.

56. As will be described, courts and other bodies that have considered the situation of dispersed or displaced victims have developed a variety of techniques to address the challenges associated with designing and distributing reparation awards for beneficiaries that are no longer congregated exclusively or mainly in the area where the harm was committed.

a) Reaching victims

57. A key challenge faced by courts and other bodies is how to access and effectively consult victims about reparation. This challenge is also present when seeking to identify potential beneficiaries, and to distribute awards to them.

58. Not all those who sought refuge abroad will have gone through refugee status determination mechanisms and/or agencies and may not appear on official registers. Similarly, internally displaced persons (IDPs) may not be systematically registered. In addition, relocated individuals may have limited access to regular information channels, they may be illiterate or speak different languages to those in operation where they have moved and may as a result not have been made aware of a reparation

process. Stigma, often but not exclusively related to gender-based violence, and security consideration can also affect victims' ability and/or willingness to come forward,[126] in particular when the community they have relocated to is not aware of their victimisation. Some individuals may have been further victimised after or during their relocation and may be in a particularly vulnerable position. In addition, victims may not be able to engage with bodies located in far away places or abroad, some of which require victims to be physically present. These factors, which often operate in combination, mean that victims may lack awareness of reparation processes and may not be able to access them. Unless special corrective steps are taken, these victims are less likely to be consulted and/or involved in the design and implementation of reparation measures, and may not benefit.

59. Some decision-making bodies have addressed these challenges by recognising the need for comprehensive outreach, both within and outside the country where crimes were committed. This approach is supported by the *Updated Set of Principles to Combat Impunity* which emphasises that outreach should also take place outside the country so as to reach victims living in exile: 'ad hoc procedures enabling victims to exercise their right to reparation should be given the widest possible publicity by private as well as public communication media. Such dissemination should take place both within and outside the country, including through consular services, particularly in countries to which large number of victims have been forced into exile.'[127]

60. Mass claims bodies have used a combination of both traditional and new media to reach potential claimants spread over a number of countries. For instance, Bosnia and Herzegovina's Commission for Real Property Claims of Displaced Persons and Refugees shared information through its offices which included satellite offices in a number of countries where large numbers of refugees were located, by media, distribution of pamphlets and through the participation of relevant staff in radio and

[126] For example in Sierra Leone, victims of sexual violence were reluctant to come forward for fear of stigmatisation and the number of registered victims of sexual violence was lower than what the TRC and the implementing agency had expected. See ICTJ, Rabat Report (n. 39) 4.
[127] Report of Diane Orentlicher, independent expert to update the Set of principles to combat impunity, *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*' UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, Principle 33. See also on the need for outreach, Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff (n. 9) para. 76.

TV programmes and at meetings with representatives of potential claimants.[128] The UN Compensation Commission cooperated with various international organisations and United Nations offices to reach out to refugees and potential stateless claimants.[129] Internet resources have also proven useful to reach potential claimants in most instances. Many mass claims bodies have set up a specific website designed to provide information to potential claimants, often in more than one language. This approach, while of limited use in places where victims have little access to the internet, can prove a valuable tool to reach diaspora-type populations who relocated in countries where such resources are more accessible. It can also be useful for service providers and other organisations who are working directly with the target beneficiary groups. Some claims bodies contacted potential claimants by sending packages of information relating to the reparation process and how to access it,[130] though the success of this methodology is contingent on the effectiveness of traditional mail services in the countries in question.

61. What is evident is the need to tailor the approach to the particularities of the targeted population. The International Organization for Migration, which implemented a number of post Holocaust settlements directed to non-Jewish survivors, has highlighted that with regards to particularly vulnerable survivors, extensive research and outreach to national and international organisations proved to be insufficient and only by undertaking systematic investigation at the community level did it begin to gain access to relevant information: 'Despite nearly 18 months of extensive research and subsequent outreach to national and international organizations for the disabled, very few eligible victims were located. In total, over 360 disability organizations were contacted. Not until IOM began its systematic investigation at the community level did it begin to gain access to promising sources of information.' … 'IOM first sought to reach eligible homosexual victims through 67 gay support organizations and 22 specialized publications. These efforts yielded virtually no information concerning the existence or location of potential beneficiaries. IOM field offices had similar results. Thanks to the good offices of the Programme Coordinator for Europe of the United

[128] CRPC Book of Regulations on Procedure, Article 7, referred to in H.M. Holtzmann and E. Kristjánsdóttir (eds) (n. 63) 144.
[129] Ibid, 143.
[130] For example 80,000 information packages were sent by the Claims Resolution Tribunal-II to potential claimants. See, ibid, 144-145.

States Holocaust Memorial Museum, IOM reached four homosexual survivors in Austria, France and Germany. Living alone and of advanced age, all gratefully accepted HSP medical assistance and homecare.'[131]

62. Courts and other bodies have also relied on local and international intermediaries to reach out to victims. Such approaches can be used to address situations where it is not practical or possible for the primary body in charge of identifying claimants and/or implementing reparation to be based in the various locations where claimants reside. In situations where claimants are spread over a large number of countries, some claims bodies relied on private firms or international organisations with a wide reach to disseminate information and receive claims. For example the Claims resolution Tribunal for Dormant Accounts in Switzerland (CRT-I) worked together with an international accounting firm with offices in multiple countries.[132] Similarly the Foundation "Remembrance, Responsibility and Future" delegated outreach to potential claimants to its partners, such as IOM which possesses a network of field offices.[133] Relying on intermediaries can also be necessary in light of the relationship of trust they may have with victims, and as a result the increased ability they have to reach out to them. However, it can also introduce additional challenges, such as risks to confidentiality and/or risks that the message eventually filtered to victims may change or become diluted when multiple parties are involved in transmitting it. Naturally, victims may have questions that will require feedback, and entrusting intermediaries to respond to victim queries requires significant coordination and training.

63. The use of outreach can create fear that a large number of irrelevant, non-qualifying or fraudulent claims will be received.[134] However, mass claims processes have reported relatively few attempts at fraud and indicated that mechanisms can and should be put in place to mitigate such risks. Mechanisms or procedures set out to 'weed out' potential fraudulent claims have also at time been perceived as overly

[131] IOM, *Humanitarian and Social Programmes, Final report on assistance to Needy, Elderly Survivors of Nazi Persecution*, 2006, 16.
[132] H.M Holtzmann and E, Kristjansdottir, (n. 63) 144.
[133] German Foundation Act, Section 10, para 2, referred to in H.M. Holtzmann and E. Kristjánsdóttir (eds), Ibid, 146.
[134] One counsel spoke to REDRESS about the risk of 'band wagon' jumping that outreach creates and related his experience where outreach led to a large number of new claims, some of which were either fraudulent or not qualifying.

intimidating or degrading to victims and a lesson learnt from the German compensation programme is that the right balance has to be found between checking the accuracy and legitimacy of claims while ensuring victims' access to the process.[135]

b) Designing reparation awards for dispersed beneficiaries

64. The fact that potential beneficiaries are no longer located in a single area can impact on the measures that will be appropriate to repair their harm. Some decision-makers have reflected that fact in the design of reparation measures. A key consideration is whether there exists a real prospect for the victims to return (and whether the victims wish to return), and, if so, under what conditions.

65. Some reparation awards have been aimed at creating the conditions to enable victims who have been displaced to return. For example, in a claim concerning violations committed in Darfur which led to widespread displacement, the ACHPR recommended measures aimed at 'rehabilitat[ing] economic and social infrastructure, such as education, health, water, and agricultural services, in the Darfur provinces in order to provide conditions for return in safety and dignity for the internally displaced persons and refugees'.[136] The IACtHR has also regularly ordered States to address victims' security concerns to allow for their return and has also ordered reparation measures aimed at rehabilitating destroyed villages, and has recommended States to establish development funds[137] and housing programmes for survivors wishing to return.[138]

66. But, access to reparation is not contingent on victims' willingness to return to the communities from which they fled. There are a variety of reasons why victims may not return. Conflicts may be protracted; the security situation may remain volatile,

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[135] N. Roht-Arriaza, 'Reparations Decisions and Dilemmas', 27 *Hastings Int'l & Comp. L. Rev.* 157 (2004) 170, at: http://repository.uchastings.edu/faculty_scholarship/691.
[136] *COHRE v. Sudan* (n. 19), dispositif; The Commission also recommended 'Stopping all attacks on Ogoni communities and leaders by the Rivers State Internal Securities Task Force and permitting citizens and independent investigators free access to the territory' in *SERAC and CESR v. Nigeria* (n. 19). See also *Malawi African Association and others v. Mauritania* (n. 35), where the ACHPR recommended the Government to 'To take diligent measures to replace the national identity documents of those Mauritanian citizens, which were taken from them at the time of their expulsion and ensure their return without delay to Mauritania as well as the restitution of the belongings looted from them at the time of the said expulsion.'
[137] *Moiwana Community v. Suriname* (n. 32), paras. 212 and 213.
[138] *Case of the Pueblo Bello Massacre v. Colombia* (Merits, Reparations and Costs), IACtHR, Ser C No. 140, 31 January 2006 paras. 275-276; *El Mozote v. El Salvador* (n. 37) para. 346.

and/or victims may simply have set down roots elsewhere following their displacement. A variety of courts and other decision-making bodies have recognised that the obligation to afford reparation is not limited to those who remained in the vicinity of the crimes or are prepared to return. To the contrary, when the initial violation or crime led to the displacement, reparation must account for victims that have been forcibly displaced; displacement is not a choice and victims should not lose out on reparation just because they have relocated in search of security and have no wish to return. As the IACtHR held in *El Mozote v. El Salvador*, when victims are not able or willing to return, 'the State must provide the necessary and sufficient resources to enable the victims of enforced displacement to resettle in similar conditions to those they had before the events, in the place that they freely and willingly indicate …'[139]

67. At the IACtHR, some decisions have only vaguely framed the need to adequately account for beneficiaries' current situations. For example, in the *Case of the "Las Dos Erres" Massacre v. Guatemala*, the IACtHR stressed that rehabilitation measures ordered as a form of reparation 'must be provided, to the extent possible, in the centres nearest to their places of residence'.[140] In other cases, vaguely worded awards which did not specifically cater for persons located outside of the jurisdiction were addressed during the compliance proceedings. In the *Cantoral Benavides case*, the IACtHR ordered Peru to afford rehabilitation measures (in the form of a fellowship) to be implemented through State institutions despite evidence that the intended beneficiary resided in Brazil and as a result would not be able to access the services. Ultimately, Peru agreed to fund Mr. Benavides' studies in Brazil instead of providing a grant or a scholarship.[141]

68. Some recent cases have been more explicit. In *García Lucero v. Chile*, the IACtHR observed that Mr García Lucero who resided in the United Kingdom after having been forced into exile, did not have access to various components of Chile's reparation

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[139] *El Mozote v. El Salvador*, ibid, para. 345.
[140] *Case of the "Las Dos Erres" Massacre v. Guatemala* (Preliminary Objection, Merits, Reparations, and Costs), IACtHR, 24 November 2009, Ser C No. 211, para. 270; *Case of Uzcátegui et al. v. Venezuela* (Merits and Reparations), IACtHR, Ser C No. 249, 3 September 2012, para. 253(d).
[141] See, *Case of Cantoral-Benavides v. Peru* (Reparations, and Costs), IACtHR, Ser C No. 88, 3 December 2001, para. 80. See also, *Case of Cantoral-Benavides v. Peru* (Compliance Order), IACtHR, 14 November 2010, para. 12.

programme; 'in relation to the educational benefits and the "right" to "physical rehabilitation" established by Law No. 19,992, it is a fact that the respective services are available to people who are on Chilean territory, and that, although Mr. García Lucero is entitled to this "right," he cannot enjoy it while he lives outside Chile.'[142] The Court urged Chile 'to provide a discretionary sum of funds in pounds sterling that is reasonably adequate to cover the costs of his medical and psychological treatments in his current place of residence in the United Kingdom.'[143] In the *Rodríguez Vera et al. v. Colombia* case, the IACtHR ordered rehabilitation measures for the benefit of the victims (medical and psychological treatment) and expressly noted that some of the beneficiaries did not reside in the country where the crimes took place. It ordered the State to provide them a lump sum payment of $7,500 USD for treatment-related expenses 'so that they may receive this attention in the place where they reside.'[144] The same approach was taken in *Gudiel Álvarez v Guatemala.*[145]

69. The IACtHR has also requested that the State facilitate and cover the cost of victims to attend commemorative events[146] and ordered that the judgment be made available online on a website that is 'accessible from abroad.'[147]

70. At the ECCC, civil parties located outside of Cambodia are able to request collective reparation to be implemented in the form of projects in their country of residence. For example, victims residing in France requested the construction of a stupa in the pagoda at Vincennes, Paris, to serve as a place of remembrance and acknowledgment for the Cambodian Civil Parties living in France.[148]

71. TRCs have not followed a consistent practice of addressing access of exiled victims to reparation In Chile, for example, victims living in exile were recognised as

[142] *Case of Garcia Lucero et al v. Chile* (Preliminary objection, merits and reparations), IACtHR, Ser C No. 267, 28 August 2013, para. 197.
[143] Ibid, para. 233.
[144] *Case of Rodríguez Vera et al. (Persons Disappeared from the Palace of Justice) v. Colombia* (Preliminary objection, merits and reparations), IACtHR, Ser C No. 287, 14 November 14, para. 569.
[145] *Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala* (Merits, Reparations and Costs), IACtHR, Ser C No. 253, 20 November 2012, para. 340.
[146] *Case of the Santo Domingo Massacre v. Colombia* (n. 53) para. 302.
[147] *Case of Garcia Lucero et Al v. Chile* (n. 142) para 226.
[148] However, as projects have to be financed externally to be recognised as reparation, in that case, the project was not endorsed due to insufficient funding. Nevertheless, the Chamber found that the awards sought 'may well appropriately address the harm suffered by victims and may provide moral and collective reparations' and reminded donors 'that they have the option to support measures that have not been specifically endorsed in this judgement.' *Case 002/01 Judgment* (n. 88) paras. 1130, 1161, 1164.

beneficiaries of the *Programa de Reparación y Atención Integral de Salud* programme but were only able to receive benefits in-country with no provision as to how such benefits could be acceded from abroad.[149] In South Africa, the only specific form of reparation awarded was a special benefit system (special pension dispensation of approximately 8,000 rand per month) set up to reach survivors living abroad.

72. Bodies tasked with disbursing compensation awards have traditionally sought to use banking structures when they exist. When they are not in place, or victims have limited access to them, arrangements are sometimes made for the opening of bank accounts for claimants. For instance, as a result of the United Kingdom agreement to provide compensation to Mau Mau Kenyans who had been subjected to torture and other forms of ill-treatment at the hands of the British colonial administration during the Kenya Emergency during the 1950's, over 5,200 beneficiaries located in Kenya, received individual compensation awards. Their representatives 'set up individual bank accounts for each victim and transferred their damages in full directly to each account from London within weeks of the settlement agreement being signed and made public'.[150] As a result of another settlement reached with 15,600 Nigerian fishermen victims of an oil spill and the oil company Shell, each beneficiary was due to receive approximately 600,000 Nigerian Naira (£2,200) into an individual bank account. Similarly mass claims bodies have generally been able to disburse individual financial awards to a large number of beneficiaries no longer residing in the place where the crimes were committed by securing agreements with financial institutions with a view to processing individual payments.[151] Yet, banking methods can prove problematic when beneficiaries do not have the means to cover the running costs of such accounts. In such instances, civil society groups working with survivors have sometimes been able to secure preferential accounts with banks for the purpose of receiving reparation.[152] It can also prove challenging in situations where victims are

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[149] *García Lucero et al v. Chile* (n. 142), paras. 231-233, 246.
[150] Leigh Day, *Response to Mau Mau allegations*, 31 October 2014, available at :http://www.leighday.co.uk/News/2014/October-2014/Response-to-Mau-Mau-allegations
[151] H.M Holtzmann and E. Kristjansdottir (n. 63), pp. 132-140.
[152] This situation arose in South Africa where survivors were asked to open a bank account to apply for reparation. Reparations awards were often paid a long time afterwards with some banks closing the accounts in the meantime to comply with anti-money laundering legislation. In addition, many victims could not afford to pay account management fees. In response to these challenges, victims' organisations were able to convince banks to create special types of accounts which could be opened with a very small amount of money, did not incur fees and could stay opened without activity for long periods. REDRESS, Interview with member of a survivors group in South Africa, April 2015.

still living in precarious conditions as a result of displacement. Counsel representing victims in Kenya and Nigeria explained that workshops on how to use a bank account have been necessary in some instances where victims had no prior experience of banking.[153] Another strategy suggested by a victims' organisation to address the challenges of traditional banking is to increase the use of mobile money, which is a popular way of sharing funds between persons in many African countries. The use of mobile phone technology can be a powerful tool to send money to rural survivors. In the same context the use of redeemable cards with cash amounts stored on them has been suggested.[154]

73. Another method used by some claims bodies has been to rely on partners and intermediaries to implement reparation awards in multiple locations, under the supervision of the primary decision-making body. For example, the Foundation "Remembrance, Responsibility and Future" (described above) provided payments to former slave and forced labourers through seven partner organisations. Each partner organisation was allocated a fixed sum of the fund and was responsible for outreach, processing claims and making payments to the claimants according to criteria defined in the German Foundation Act. The work of the partner organisations was monitored by the Foundation which made sure the activities were carried out in compliance with applicable law.[155]

IV.2 Identification of potential beneficiaries

74. In the present case before the Court, the Registry has indicated that not all victims who may potentially qualify as victims of the case and wish to request reparation have presented applications to that effect, finding that 'it is very likely that other qualifying victims do exist both in the immediate area and dispersed elsewhere, including some outside the DRC.'[156] This is a common challenge that has been faced by other decision-making bodies.

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[153] Ibid.
[154] Sources in South Africa indicated that this was already used in relation to the disbursement of some State benefits.
[155] Information available on the website of the Foundation Remembrance, Responsibility and Future: https://www.bundesarchiv.de/zwangsarbeit/leistungen/direktleistungen/partnerorganisation/index.html.en.
[156] *The Prosecutor v. Katanga,* The Registry's Report on applications for reparations in accordance with Trial Chamber II's Order of 27 August 2014 (n. 5), paras. 84-85.

75. In some instances, there is an opportunity to identify additional beneficiaries at the implementation phase,[157] as is usually done following many TRC processes. In such cases, decision-making bodies usually set out specific criteria potential beneficiaries would need to satisfy to qualify and/or outline a procedure they would have to follow. This approach reflects a general acknowledgement that it would be inappropriate to limit reparation to those who have participated in earlier stages of proceedings, as has also been stressed by the ICC in the *Lubanga* case.[158]

a) Who decides who qualifies?

76. Decision-making bodies have not followed a consistent practice with regards to identifying potential beneficiaries. While some will determine themselves who is eligible,[159] others have delegated that function to separate bodies. Bodies which delegate the identification of beneficiaries will normally set criteria and principles to facilitate such identification[160] and determine the standard of proof that potential beneficiaries will have to satisfy. Such a framework helps guide the body tasked with identifying and certifying beneficiaries and also provides potential applicants with some clarity as to what is needed; thus also enhancing transparency.

b) Setting timeframes and deadlines

77. Reparation programmes are typically implemented within a set timeframe to provide justice as speedily as possible, to provide certainty and to minimise administrative costs. When the identification process relies on victims to register or file a claim, decision-making bodies have often set timeframes within which this needs to be done. The practice of TRCs and other claims processes shows that unrealistic or unduly

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[157] See, *El Mozote v. El Salvador* (n. 37), paras. 308-311.
[158] *The Prosecutor v. Lubanga*, Decision Establishing the Principles and Procedures to be Applied to Reparations, (n. 68) para. 187. Note however, that in South Africa for example, only victims recognised by the TRC were entitled to reparation. This was not made clear ahead of the conclusion of the Commission's work and as a result victims who, for a variety of legitimate reasons had not been able to engage with the TRC were excluded. As a result many victims found the process unfair. See, SACTJ, *Comments on the Draft Regulations published by the Department of Justice dealing with Reparations for Apartheid Era Victims* (n. 108).
[159] This the case for most Claims processes.
[160] In class action initiatives, the court or adjudicating body will recognise the 'class' without requiring, at the time of recognition, the full list of members. Similarly, in cases before the IACtHR, the Court has occasionally awarded reparation to victims that had not been identified at the time of the judgment. Most TRCs do not identify all victims (individual or collective) who might be entitled to reparation.

short deadlines and inadequate or poorly executed outreach are likely to result in the exclusion of the most vulnerable or marginalised victims.[161] In addition, good practice indicates that deadlines should be interpreted flexibly; there may be exceptional circumstances which merit accepting out of date filings, which decision-making bodies should be able to consider.[162] When compensation is ordered, some courts, such as the IACtHR, have addressed that challenge by ordering that Trust Funds be set up. Under that approach, in instances where beneficiaries identified by the Court do not claim the compensation awarded to them, the Court has advised the State to place the funds in trust in the victim's name for a number of years.[163]

c) Efforts to identify victims

78. Identification of potential beneficiaries has proceeded in three main ways.

i. First, decision-making bodies have encouraged victims to identify themselves to the body in charge of designing or disbursing/implementing reparation. The success of this type of approach has been contingent on the degree of outreach and all claims processes have engaged in extensive public information campaigns in multiple languages,[164] albeit with mixed success. Success is also contingent on the relative ease with which the beneficiary group can understand the process[165] and can access that body. The need to ensure that practical difficulties and cultural specificities – including low literacy or language skills; remote locations; poor access to public services; young age; gender; poverty or disability – and cultural specificities do not prevent victims from identifying themselves or filing applications for reparation with

[161] The initial deadlines set for the submission of reparation claims had to be extended in respect of reparation programmes, such as in Brazil, Morocco and Sierra Leone; Several mass claims processes also had to extend the submission deadlines, due to the perceived inadequacy of outreach and notification procedures and the detrimental impact on uninformed potential beneficiaries. See also, UNGA, *Analytical study focusing on gender-based and sexual violence in relation to transitional justice* (n. 97) 48; REDRESS, *Articulating Minimum Standards* (n. 70) para. 56.
[162] See, e.g., the practice of the UNCC which developed a procedure for evaluating out-of-date claims. UNCC, *Claims for which established filing deadlines are extended*, Governing Council Decision 12, UN Doc S/AC.26/1992/12, 24 September 1992, referred to in H.M Holtzmann and E. Kristjánsdóttir (n. 63) 159.
[163] *El Amparo v Venezuela* (Reparations and Costs) IACtHR, Ser C No.28, 14 September 1996, para. 47.
[164] UNSG Guidance Note (n. 45) 11.
[165] Application forms used by mass claims processes were often translated in numerous languages. See H.M Holtzmann and E. Kristjánsdóttir (n. 63) 223-231.

the mechanism is also recognised.[166] In addition, several reparation programmes took special steps to facilitate access to victims such as using simple registration processes but also combined registration methods (for example by giving victims the possibility to register by mail, electronically, in person or through an intermediary).[167]

ii. Second, decision-making bodies and their secretariats often play an active role in identifying eligible beneficiaries, by carrying out their own investigations or fact-finding.[168] Claims secretariats have gathered data to support claimant applications,[169] including by reviewing archives, sometimes in multiple countries and other documentation such as refugee camp records, census data, border crossing records and transport lists/manifests, battalion rosters, list of prisoners released or liberated and diplomatic records.[170]

iii. Third, intermediaries with worldwide or relevant country presences such as the IOM have been used to reach out to potential claimants.[171] Also, claims secretariats and other reparation bodies regularly work with local community leaders and civil society representatives as appropriate.[172] Relying on local groups can present certain risks - some of them may be under-funded, lack formal structures,[173] or use unscrupulous practices. Safeguards can usually be put in place to mitigate these, such as by ensuring adequate oversight and clarifying the roles of each party.

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[166] *Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation*, 21 March 2007 ("Nairobi Declaration"), Principle 1(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'): www.redress.org/downloads/publications/Nairobi%20Principles%20on%20Women%20and%20Girls.pdf. See also, ILA Procedural Principles (n. 68), Commentary to Principle 5.

[167] For example, the CRPC utilised offices in Bosnia and Herzegovina, Yugoslavia, Croatia, Denmark, Germany, the Netherlands and Norway. It also used 'mobile outreach teams to reach more isolated areas'…[which] travelled throughout the country and collected claims at fixed dates at specific locations, registering claims using laptops computers.' A similar approach was implemented by the HPCC. H.M. Holtzmann and E. Kristjánsdóttir (n. 63) 332-334.

[168] In one case, the IACtHR used information gathered during a fact-finding visit at the place where the crimes occurred to identify potential injured parties and quantify damages. *Aloeboetoe v. Suriname* (n.16), para. 40.

[169] For example, arbitrators and arbitrator panels of the Claims Resolution Tribunal for Dormant Accounts in Switzerland (CRT) were allowed to conduct 'factual and legal inquiries as may appear necessary to assess as comprehensively as possible all submitted claims,' Article 17 CRT I Rules of Procedure.

[170] See, G. Taylor, G. Schneider and S. Kagan, 'The Claims Conference and the Historic Jewish Efforts for Holocaust-Related Compensation and Restitution', in Ferstman *et al* (n. 107) 110-111.

[171] This was the case in relation to claims received by the German Forced Labour Compensation Programme.

[172] This was the approach of the Reparations Council in Peru. See, Correa, Guillerot and Magarrell in Ferstman *et al* (n. 107) 408.

[173] This assertion is based on REDRESS' work in a range of conflict and post-conflict countries.

d) Impact on reparation awards

79. Some decision-making bodies have recognised that as long as victims are "identifiable", they can benefit from reparation programmes established to respond to the harm suffered by victims already identified.[174] This approach is consistent with many mass claims procedures which have determined beneficiary classes and thereafter proceeded to issue calls for applications/registration to potential beneficiaries.

80. The IACtHR in particular has recognised that there can be impediments or severe hindrances to identifying eligible beneficiaries in any given case. Consequently, in its reparation orders, it has sometimes specified the steps to be taken (and by whom) to identify victims post-judgment, with the specific aim of enabling a wider class of potentially eligible victims to benefit from the reparation as ordered for victims already identified.[175] The respondent State is typically requested to identify those beneficiaries within a set timeframe and to present the results to the Court as part of the compliance proceedings.[176] In other instances, the IACtHR has delegated the oversight to a monitoring mechanism to be established by the State with the participation of victims, their next of kin or their representatives, to oversee not only the implementation of the reparation ordered but also 'to follow up on State actions to search and individually identify the victims and their next of kin and to ensure effective payment, within one year of notification, of the compensation and indemnification owed to the next of kin of victims as they are identified.'[177]

81. *Cy pres* remedies can also address the challenge of unidentified victims. When not all eligible beneficiaries have been identified or come forward, *cy pres* remedies allow unclaimed funds to be donated to a charitable organisation whose charitable work is connected to the substance of the case.[178] While the use of such remedy is usually limited to cases when it is not feasible to make further distributions to class

[174] As indicated above, a notable exception was the process in South Africa where only victims identified by the TRC could claim reparation.
[175] See, e.g., *Rio Negro Massacres v. Guatemala* (n. 49) paras. 48, 51; *El Mozote v. El Salvador* (n. 37) paras. 310-311.
[176] Ibid.
[177] *Mapiripán v. Colombia* (n. 17) para. 311.
[178] See footnotes 120, 121 and accompanying text.

members,[179] it has also been used in instances where the limited funds available would make individual awards insignificant.[180] In all cases, courts retain an oversight of the *cy pres* remedies and can reject remedies proposed in cases when it deems that they would benefit a group too remote from the plaintiff's class.[181]

IV.3 Dealing with the challenge of limited resources

82. The Appeals Chamber in the *Lubanga case* found that in all circumstances, reparation awards must be made 'against a convicted person.'[182] It affirmed that reparation orders are 'intrinsically linked to the *individual* whose criminal liability is established in a conviction and whose culpability for the criminal acts is determined in a sentence' adding that 'the convicted person's liability for reparations must be proportionate to the harm caused and, *inter alia*, his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case.'[183]

83. The Appeals Chamber found that a determination should be made of the monetary amount necessary to remedy the harms caused by the crimes for which an accused is convicted regardless of whether funds are available to that effect[184] and noted that the Board of Directors of the Trust Fund for Victims retained discretion as to 1) whether to advance its voluntary resources to enable the implementation of an order for

[179] *Klier v. Elf Atochem N. Am., Inc.,* 658 F.3d 468 (5th Cir.2011). See also, In *Mace v Van Ru Credit Corp* 109 F.3d 338 (7th Cir. 1997), the court stated that the use of *cy pres* remedies for leftover funds is 'ideal for circumstances in which it is difficult or impossible to identify the persons to whom damages should be assigned or distributed.' As mentioned earlier, this approach was used as part of the Swiss Bank Settlement. See, *In re Holocaust Victim Assets Lit.*, 311 F. Supp. 2d 407 (E.D.N.Y. 2004).
[180] In *Miller v Steinbach,* 1974 WL 350, the court approved a class action settlement that included a *cy pres* element and noted that: 'in view of the very modest size of the settlement fund and the vast number of shares among which it would have to be divided, the parties have agreed instead…to pay the fund to the Trustee of the BLH Retirement Plan, applying a variant of the cy pres doctrine at common law.'
[181] In *Six Mexican Workers v Arizona Citrus Growers* 904 F.2d 1301, the court considered that the choice among distribution options for unclaimed funds should be 'guided by the objectives of the underlying statute and the interests of the silent class members.' Six Mexican Workers was a class action brought against a group of fruit farmers on behalf of Mexican undocumented workers. The court awarded damages to the plaintiffs and ordered that all unclaimed funds over $50,000 were to be donated to the Inter-American Foundation for distribution in Mexico. The Appeal Court rejected this – it considered that such proposal 'benefits a group far too remote from the plaintiff class', and although it 'permits distribution to areas where the class members may live, […] there is no reasonable certainty that any member will be benefited.'
[182] *Lubanga* Appeals Chamber judgment on reparations (n. 116), para 76.
[183] Ibid, para 6; Order for Reparations (n. 92) paras. 20-21.
[184] Order for Reparations, ibid, para. 78.

reparation when the funds from the convicted perpetrator are non-existent or insufficient; as well as 2) the monetary amount it would decide to advance in that regard.[185]

84. The Appeals Chamber did not address what would happen in the event that the accumulated funds fall below the amount established as necessary to repair the harm caused by the crimes and whether and how the implementation of reparation should be prioritised as a result, save that by recognising that prioritisation may be necessary in consideration of the particular vulnerability of certain victims or their need for urgent assistance.[186] It also stated that victims should be consulted *inter alia* on issues relating to their priorities.[187]

85. Prioritisation between eligible beneficiaries or forms of reparation may be necessary when the liability for reparation is greater than the available resources at any given time. Also, prioritisation is sometimes used as a method to efficiently and expeditiously disburse reparation. Often, particular categories of vulnerable persons are prioritised on the basis of the type of vulnerability or the degree of neediness. Such an approach was taken in relation to certain Holocaust restitution programmes.[188] Neediness was also a principle basis for prioritisations in the Liberian and Rwandan contexts.[189] Other commissions have prioritised older persons, orphans, disabled persons, women and the poor.[190] Also, types of violations/crimes and the harm caused have been prioritised.[191] For instance, in its recommendations on reparation, the Kenyan Truth, Justice and Reconciliation Commission decided to prioritise in addition to extremely vulnerable people, 'groups who have suffered injustice specifically including historical land injustices, and individuals who have

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[185] *Lubanga* Appeals Chamber judgment on reparations (n. 116), para 5; Order for Reparations, ibid, para 62.
[186] *Lubanga* , Order for Reparations, ibid, para 19, referring to the *Convention on the Elimination of All Forms of Discrimination against Women* (adopted 17 July 1980, entered into force 3 September 1981) article 4; *Nairobi Declaration* (n. 166) 2.
[187] *Lubanga* , Order for Reparations, ibid, para. 32.
[188] See, Taylor, Schneider and Kagan (n. 170) 105.
[189] Discussed in *The Prosecutor v.Lubanga,* Second Report of the Registry on Reparations, ICC-01/04-01/06-2806-Conf-Exp, Registry report, 1 September 2011, paras. 40-41.
[190] Discussed in F. Capone, K. Hausler, D. Fairgrieve and C. McCarthy, *Education and the Law of Reparations in Insecurity and Armed Conflict*, British Institute of International and Comparative Law and Protect Education in Insecurity and Conflict, September 2013, 125-130.
[191] See generally *Lubanga,* Second Report of the Registry on Reparations (n. 189), paras. 34-38; This was for example the case for claims under the German Forced Labour Compensation Programme where priority was given to victims of medical experiments and claims for injury or death of children. See H.M. Holtzmann and E. Kristjánsdóttir (eds) (n. 63) 138.

been victims of violations of the right to life as well as the right to personal integrity.'[192] In addition, there is some practice of prioritising in order to maximise the impact of limited resources.[193] For example, the UN Compensation Commission which considered claims for compensation for losses and damage suffered as a result of Iraq's unlawful invasion and occupation of Kuwait in 1990-91, prioritised small claims from individuals over larger claims or claims from corporations or States.[194] It did in order to 'acknowledge, as quickly as possible, the harm that had been suffered by large numbers of individuals and to provide meaningful relief, either as full compensation or as substantial interim relief.' [195]

86. However, prioritisation can lead to the *de facto* exclusion of beneficiaries in cases where reparation measures are implemented in a phased approach whereby full implementation relies on the availability of additional funding not secured at the outset to support the later phases. In cases where further funding for the later phases is not eventually obtained, this can cast a shadow on the entire process. For example, in Sierra Leone, the TRC recommended the Government to prioritise reparation on the basis of the vulnerability of victims, identifying as particularly vulnerable amputees, war wounded, women and girls who had been subjected to sexual and other gender-based violence, war widows and children harmed by the violence or dependant on other eligible victims.[196] However, the difficulties to secure the requisite funding to underwrite the entire reparation process have meant that a significant number of victims are yet to receive reparation. As the UN Human Rights Committee has observed in the context of its review of Sierra Leone's first report on the implementation of the International Covenant on Civil and Political Rights, 'In view of the gravity and scale of the human rights violations that occurred during the civil war and the recommendations of the Truth and Reconciliation Commission (TRC), the Committee regrets that the Sierra Leone Reparations Programme, established in 2008, does not fully guarantee all aspects of the right to adequate reparation, including full reintegration of child soldiers and psychological treatment for victims of sexual

[192] KTRC, *Report of the Truth, Justice and Reconciliation Commission Kenya*, 2013, Volume IV, Ch III, para. 16.
[193] *Lubanga*, Second Report of the Registry on Reparations (n. 189), paras. 45-47.
[194] UNCC Governing Council, Decision 17, *Priority of Payment and Payment Mechanism – Guiding Principles*, U.N. Doc. S/AC.26/Dec.17, 24 March 1994, referred to in H.M. Holtzmann and E. Kristjánsdóttir (eds) (n. 63) 135
[195] L.A. Taylor, 'The United Nations Compensation Commission', in C. Ferstman et al. (n.107) 200.
[196] Sierra Leone TRC, 'TRC Final Report', Volume 2, Chapter 4, paras. 90-99.

violence, and that, thus far, a significant number of victims has not received any reparations. The Committee notes with concern that the War Victims' Trust Fund faces serious funding constraints. It is also concerned by reports that the National Commission on Social Action had difficulties registering victims living in remote and rural areas and a great number of victims were not registered and therefore do not qualify as beneficiaries (arts. 2, 6 and 7).'[197]

87. These challenges can be particularly acute when a trust fund model is used. The International Law Association has underscored that '[t]here is a risk of donor fatigue under the *ad hoc* replenishment system: while States are often willing to pledge money during the early stages of a mechanism, this commitment typically wanes over time and it may be difficult to maintain the required level of funding'.[198] It has suggested that a 'fixed-sum system can avoid these difficulties' where 'the total sum of a fund is defined in advance' can avoid such difficulties, but such a system 'has to give the priority of payment to the urgent categories of needy claimants and/or to confine actual payments to a percentage of the full amount determined for their losses.'[199] What this underscores is the need to maintain a constant emphasis on fund replenishment in order to ensure that most eligible beneficiaries do not end up losing out, through fundraising as well as asset search and recovery.[200]

88. Equally important is involving and consulting potential beneficiaries in discussions about priorities. Prioritisation may greatly impact victims' access to reparation and thus, the criteria developed by decision-making bodies may negatively influence victims' perceptions of the legitimacy and fairness of the process, which may possibly be mitigated by their active engagement in the process.[201] For example, survivor groups in South Africa have indicated that some victims opposed differentiations which suggest that some crimes may be more important than others and instead preferred to receive the same award for all victims.[202] Further, in the Swiss Bank Settlement, the greatest percentage of Looted Assets Class funds were allocated to

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[197] UN Human Rights Committee, *Concluding observations on the initial report of Sierra Leone*, UN Doc. CCPR/C/SLE/CO/1, 17 April 2014, para. 8.
[198] ILA Procedural Principles (n. 68), Principle 10.
[199] Ibid.
[200] Ibid.
[201] *Lubanga*, Second Report of the Registry on Reparations (n. 189) para. 42.
[202] REDRESS, Interview with staff from a survivor's organisation in South Africa, April 2015.

survivors living in the former Soviet Union, who upon study were determined to be the most needy of the large pool of needy survivors around the world. This allocation method was challenged by certain survivors and representatives though the reasoning was upheld by the appellate court.[203] While it would be difficult to achieve consensus positions amongst all survivors, experience of interactive consultations demonstrates that satisfaction levels can improve when there has been adequate consultation, regardless of the outcome. Prioritisation based on maximising impact can also be problematic if it is perceived as serving third parties priorities, such a governments or donors.

Carla Ferstman
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Dated 15 May 2015,
At London, United Kingdom

Signed on behalf of:
Carla Ferstman, Lutz Oette, Gaelle Carayon (REDRESS)
Monika Hlavkova and Tibisay Morgandi
(Freshfields, Bruckhaus, Deringer – Paris Office)

[203] In June 2006, the United States Supreme Court denied certiorari. *See In re Holocaust Victim Assets Litig.*, 302 F.Supp.2d 89 (E.D.N.Y. 2004), *aff'd***,** 424 F.23d 132 (2d Cir. 2005); *cert. denied*, 126 S.Ct. 2891 (2006). Discussed in Gribetz and Reig (n.118) 137.