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TRIAL CHAMBER III

Before: **Judge Joyce Aluoch, Presiding Judge**
Judge Geoffrey Henderson
Judge Chang-Ho Chung

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF
THE PROSECUTOR v.JEAN-PIERRE BEMBA GOMBO

Public Document with Public Annex I and Confidential Annex II

Observations by the Redress Trust pursuant to Article 75(3) of the Statute and Rule 103 of the Rules

Source: **THE REDRESS TRUST**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. PROCEDURAL BACKGROUND

1. On 21 March 2016, Trial Chamber III issued its Judgment pursuant to Article 74 of the Statute.[1] The decision on sentence was issued on 21 June 2016.[2]

2. On 22 July 2016, Trial Chamber III requested submissions relevant to reparations.[3] On 10 August 2016, REDRESS filed its application for leave to submit observations pursuant to Article 75(3) of the Statute and Rule 103 of the Rules.[4] On 26 August 2016, the Chamber granted the request and ordered that submissions be filed by 17 October 2016.[5]

REDRESS RESPECTFULLY MAKES THE FOLLOWING OBSERVATIONS

II. PRELIMINARY OBSERVATIONS

3. These observations are based on REDRESS' knowledge and experience of reparations proceedings before national, regional and international courts, commissions and specialist claims determination bodies. They also benefit from the expertise and experience, particularly in international arbitrations, of the international law firm Freshfields Bruckhaus Deringer, which has provided assistance to REDRESS in the formulation of these observations.

4. REDRESS takes no position on any facts in dispute before the Chamber and does not represent any party to the proceedings.

[1] *The Prosecutor v. Bemba*, Judgment, ICC-01/05-01/08-3343, Trial Chamber III, 21 March 2016.
[2] *The Prosecutor v. Bemba*, Decision on Sentence, ICC-01/05-01/08-3399, Trial Chamber III, 21 June 2016.
[3] *The Prosecutor v. Bemba*, Order requesting submissions relevant to reparations, ICC-01/05-01/08-3410, Trial Chamber III, 22 July 2016.
[4] *The Prosecutor v. Bemba*, Application by the Redress Trust for leave to submit observations pursuant to Article 75(3) of the Statute and Rule 103 of the Rules, ICC-01/05-01/08-3421, Other Participant Filing, 10 August 2016.
[5] *The Prosecutor v. Bemba*, Decision on requests to make submissions pursuant to article 75(3) of the Statute and rule 103 of the Rules of Procedure and Evidence, ICC-01/05-01/08-3430, Trial Chamber III, 26 August 2016.

III. WHETHER THE "LUBANGA PRINCIPLES" ON REPARATION WARRANT ANY ADAPTION, MODIFICATION OR CLARIFICATION IN LIGHT OF THE PARTICULAR CIRCUMSTANCES OF THE CURRENT CASE

III.1 Background and suggested procedural framework for reparations proceedings and the implementation of the order for reparations

5. The principles on reparations annexed to the 3 March 2015 Appeals Chamber's Judgment in the case against *Thomas Lubanga Dyilo* (the Lubanga Principles) specify that they apply to that case only: "These principles and the order for reparations are not intended to affect the rights of victims to reparations in other cases, whether before the Court or national, regional or other international bodies."[6] Nevertheless, as this Chamber has noted, they are a useful starting point to determine principles on reparations applicable to the *Bemba* case. In future, on the basis of experience gathered in several cases before the Court, it may be advisable for general principles on reparations to be adopted outside the framework of specific case proceedings. This might assist the Registry and others involved in providing information to victims and aiding with the implementation of reparations orders to plan ahead, collate any relevant information and to communicate adequately with victims and affected communities about what can be expected. It may also serve to expedite the reparations proceedings and the implementation of reparations orders.

6. The Lubanga Principles evince general concepts only. This was underscored by the Appeals Chamber, which held that they: "must be distinguished from the order for reparations, i.e. the Trial Chamber's holdings, determinations and findings based on those principles. Principles should be general concepts that, while formulated in light of the circumstances of a specific case, can nonetheless be applied, adapted, expanded upon, or added to by future Trial Chambers."[7]

7. The Appeals Chamber amended the "Order for Reparations", which consisted of the Lubanga Principles and the Order for Reparations against Mr. Lubanga. After adopting those general principles and the order for reparations, the Appeals Chamber directed the

[6] *The Prosecutor v. Lubanga*, Order for Reparations (amended), ICC-01/04-01/06-3129-AnxA, Appeals Chamber, 3 March 2015 (***Lubanga Principles***), para 4.
[7] *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, para 3.

Trust Fund for Victims to prepare a draft implementation plan and to submit it to the relevant Trial Chamber with a view to implementing the eventual reparation award/s.

8. It is noted that the *Lubanga* case has been the first opportunity for the Court to consider and implement reparations for victims. Consequently, there have been extensive filings and procedural rulings concerning the reparations order and its implementation and there have been significant delays. Having regard to this past practice, it may be important for this Chamber to consider what further steps should be taken in addition to deciding whether to adopt and, if it considers necessary, adapt or expand upon the Lubanga Principles.

9. The procedural trajectory of the *Lubanga* case has been long and complex. In summary, a first decision on reparations was issued on 7 August 2012. On 3 March 2015, the Appeals Chamber issued its reparations judgment and amended order for reparations, in which the Trust Fund for Victims was directed to prepare a draft implementation plan and submit it to the Trial Chamber within six months of the issuance of the order – on 3 September 2015. The deadline was extended and the Trust Fund for Victims submitted its draft implementation plan on 3 November 2015. On 9 February 2016, Trial Chamber II overseeing reparations issued an order instructing the Trust Fund to supplement the draft implementation plan.[8] It noted that potential victims needed to be identified in order to determine Mr. Lubanga's liability and explained that individual victims' eligibility to benefit from reparations would be determined by the Chamber once the Defence had had the opportunity to submit its observations on individual victim files.[9] It also requested particularities of the proposed reparations programmes[10] and an evaluation of the harm caused to victims.[11] The Trust Fund requested leave to appeal the 9 February order on a variety of grounds. This request was dismissed on the basis of the Trust Fund's lack of *locus standi*.[12] Shortly thereafter, the Trust Fund requested an extension to comply with the 9 February order,[13] which was granted – to 31 May 2016.[14] On 31 May 2016, the Trust

[8] *The Prosecutor v. Lubanga*, Order instructing the Trust Fund for Victims to supplement the draft Implementation, ICC-01/04-01/06-3198-tENG, Trial Chamber II, 9 February 2016.
[9] Ibid, para 14.
[10] Ibid, para 21.
[11] Ibid, paras 25 and 26.
[12] *The Prosecutor v. Lubanga*, Decision on the request of the Trust Fund for Victims for leave to appeal against the order of 9 February 2016ICC-01/04-01/06-3202-tENG, Trial Chamber II, 18 April 2016, para 17.
[13] *The Prosecutor v. Lubanga*, Request for extension of time to submit the first transmission of potential victim dossiers, ICC-01/04-01/06-3204, TFV Filing, 23 March 2016.

Fund made its first filing in response to the February order, but in it noted that the "individual eligibility process damages and re-traumatizes victims":

> "The Trust Fund's evidence-based findings of the premature, harmful and re-traumatizing nature of the individual victim identification and harm assessment process, coupled with on-going serious legal concerns regarding the legal framework on which this process is based, lead the Trust Fund to feel compelled to respectfully request that the Trial Chamber reconsider the individual victim eligibility and harm assessment process set out in its order of 9 February 2016."[15]

In this filing, the Trust Fund indicated that, pending the Trial Chamber's response to its request to reconsider the procedure, it had suspended tentative planning of further victim identification and harm assessment missions.[16] The Trust Fund submitted further information on 7 June 2016,[17] which was responded to by the Office of Public Counsel for Victims, the legal representatives for victims and the Defence. On 15 July 2016, Trial Chamber II issued a Request Concerning the Feasibility of Applying Symbolic Collective Reparations,[18] in which it sought information from the Trust Fund on potential projects, noting that symbolic activities may be developed in parallel to other projects for victims, and do not require previous identification of beneficiaries.[19] The Chamber subsequently invited observations from States, organisations and other persons on past projects to support child soldiers and proposals for future collective projects to support the setting up of a range of collective reparation projects for the former child soldier victims of Mr. Lubanga.[20] It also organised a public hearing on the subject.

10. In order to avoid some of the above-mentioned challenges and what appears to be an impasse between the Trust Fund and Trial Chamber II on the implementation of collective forms of reparation which have individualised benefits, and taking into account that the number of potentially eligible victims in the *Bemba* case is significantly greater, this

[14] *The Prosecutor v. Lubanga*, Décision relative à la requête du Fonds au profit des victimes aux fins de prorogation du délai pour le dépôt d'un premier groupe de dossiers de victimes potentielles, ICC-01/04-01/06-3205, Trial Chamber II, 29 March 2016.
[15] *The Prosecutor v. Lubanga*, First submission of victim dossiers, ICC-01/04-01/06-3208 , TFV Filing, 31 May 2016, paras 8 and 9.
[16] Ibid, para 21.
[17] *The Prosecutor v. Lubanga*, Additional Programme Information Filing, ICC-01/04-01/06-3209, TFV Filing, 7 June 2016.
[18] *The Prosecutor v. Lubanga*, Request Concerning the Feasibility of Applying Symbolic Collective Reparations, ICC-01/04-01/06-3219, Trial Chamber II, 15 July 2016.
[19] Ibid, para 11.
[20] *The Prosecutor v. Lubanga*, Order pursuant to rule 103 of the Rules of Procedure and Evidence, ICC-01/04-01/06-3217-tENG, Trial Chamber II, 5 August 2016, para 8.

Chamber may be minded to consider the usefulness of a reparations framework that consists of two broad phases:

a) ***A procedural verification and valuation phase***. This phase could include all steps that precede a reparation order, such as identification of the pool of potential beneficiaries, identification of harm suffered, assessment of the extent of harm, consideration of appropriate forms of reparations and quantification of Mr. Bemba's scope of liability. This is consistent with the Appeals Chamber's five essential elements of a reparation order, in particular its determination that it is "beyond question" that a reparation order specify the precise monetary amount of liability of the convicted person,[21] which presupposes that the above steps have been taken such that the Trial Chamber will be in a position determine a final monetary figure for liability. Steps in this phase could include:

   (i) *The adoption of the Lubanga Principles, amended or supplemented as necessary*.

   (ii) *The establishment of procedures to guide identification of victims or criteria for the identification of victims, identification of harm suffered, assessment of the scope of harm, consideration of appropriate modalities for reparations and quantification/assessement of the scope of liability.*

      1. The *Lubanga* Trial Chamber noted that it has the power to "adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings."[22] This would include the ability to adopt detailed procedures for the reparations phase, which would help to provide it with a clear structure.

      2. These procedures might be set out in a ***procedural order***, and may address issues such as ***whether, and if so how, individual beneficiaries are identified and whether any mass claims techniques should be employed to simplify the process of identifying victims and their***

[21] *Prosecutor v. Lubanga*, Judgment on the appeals against "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 32 and 237-243.
[22] Article 64(3)(a) of the Statute; *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, para 289.

harm. This Chamber may determine, for instance, that the level of precision required to identify beneficiaries may depend on whether an element of a reparations award is "collective" or "individual"; and/or that individual verification procedures are not necessary or can be presumed for the purpose of determining or implementing collective awards.[23] It may decide on the extent to which identification can be achieved by matching and cross-checking claims data with factual findings made in the conviction and sentencing decisions at trial and external data sources such as death records, hospital records or field reports of humanitarian agencies. Similarly, it may decide, on the basis of the available evidence, that statistical sampling and modelling within claims categories is sufficient to determine the harm suffered by victims in that category.

3. At the same time, it would be appropriate for this Chamber ***to consider which areas do not need individualised scrutiny and judicial consideration by the Court and can be left to the Trust Fund to implement with general oversight***. As discussed later, one area would be the individual scrutiny of victim eligibility for collective reparations programmes.[24] If the Chamber can set with sufficient precision the policies for inclusion/exclusion for particular programmes, these should be capable of being implemented directly by the Trust Fund. Such implementation issues do not necessarily invoke the rights of the Defence.

4. Not all these steps need be undertaken directly by the Trial Chamber itself. Some could be delegated to a subsidiary reparations panel, such as one comprised of mass claims, medical or valuation experts, who might, for example, apply the mass claims techniques, evaluate the nature of the harm caused to the victims or conduct valuations to assess the anticipated liability of the convicted perpetrator.[25]

[23] See our view in section IV.1, below.
[24] See para 63 below.
[25] See section VI. The Role that Could be Played by Experts.

5. It may prove useful for this Chamber to consider developing a more ***conciliatory case management procedure*** designed to bring together all those involved in the reparations process to find solutions to practical issues. This may prove to be more efficient and also help avoid lengthy filings, cross-filings and procedural rulings.

6. Some of the steps suggested in this first phase are similar to the approach taken by Trial Chamber II in the *Katanga* case where information has been sought about the identification of the victims, the type and extent of harm suffered, forms of reparations sought, and proposals on the quantification and scope of liability of Mr. Katanga before the issuance of a reparation order.

(iii) *The issuance of a detailed reparation order.*

b) ***An implementation phase***. This phase marks the commencement of the Trust Fund's implementation mandate, which is enlivened by the making of a reparation order that is to be deposited with or made through the Trust Fund.[26] This phase might involve steps such as:

(i) *The issuance of implementation instructions or guidelines.* These could set clear timeframes for those tasked with implementation and suggest the division of tasks between relevant bodies and/or persons where appropriate, including experts.

(ii) *The Trial Chamber retaining oversight and monitoring of the implementation process*. This might involve the setting of deadlines for certain aspects of the implementation of the reparation order and ensuring that those involved in implementation report back on progress made.

(iii) *Keeping a case open until the reparation order has been implemented fully.*

11. This two-phase framework might present an opportunity for the Trial Chamber to take a more hands-on approach to decision-making in key policy areas, particularly those that involve the rights of the Defence, such as the overall liability of Mr. Lubanga, and a much

[26] Rules 98(2)-(4) of the Rules of Procedure and Evidence; Chapter II section III of the Regulations of the Trust Fund for Victims.

lighter oversight of other areas which are more operational and better-suited to field-based planning, consulting and implementation. A more rigorous approach to decision-making in key areas is consistent with the Court's reparations mandate, and the Trust Fund's implementation mandate. The Regulations of the Trust Fund stipulate that:

> "Where the Court orders that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate, in accordance with rule 98, sub-rule 3, of the Rules of Procedure and Evidence, the draft implementation plan shall set out the precise nature of the collective award(s), *where not already specified by the Court*, as well as the methods for its/their implementation. Determinations made in this regard should be approved by the Court."[27]

12. Accordingly, the Trust Fund for Victims is mandated to develop the precise nature of the collective awards(s) and to present these for approval to the Chamber only if the relevant Chamber does not do this itself.[28] Focusing the Trial Chamber's attention on decision-making and the Trust Fund's attention on implementation may also help to avoid differences of perspectives and confusion which may arise when a draft implementing plan is presented for approval, as appears to have happened in the *Lubanga* case. A clear differentiation of roles is also similar to how many other reparations bodies divide responsibilities.[29]

[27] Regulation 69 of the Regulations of the Trust Fund for Victims (emphasis added).
[28] It is noted, however, that the Trust Fund appears to suggest in certain pleadings that the use of voluntary resources contributed to the Trust Fund gives it a mandate to determine how any such funds applied to collective reparations are used. See, e.g., *The Prosecutor v. Lubanga*, Redaction of Filing on Reparations and Draft Implementation Plan, ICC-01/04-01/06-3177-Red, TFV Filing, 3 November 2015, para 129. This, however, does not appear to be supported by the statutory framework which provides that it is for "the Court" to determine reparations for victims; nor is it supported by Regulation 69 of the Regulations of the Trust Fund for Victims.
[29] For example, the UNCC, the Commission for Real Property Claims of Displaced Persons and Refugees (Bosnia and Herzegovnia), the Claims Resolution Tribunal for Dormant Accounts in Switzerland (CRT-I), the German Forced Labour Compensation Program, the Holocaust Victim Assets Program and the Kosovo Housing and Property Claims Commission are among some of the mass claims bodies that used secretariats or administrative units to process claims, particularly in situations where the decision-making tribunal or panel had established a precedent or adopted a sampling and modelling approach which could then be applied to the remaining claims in a certain category. See the detailed commentary on the operation of these bodies in H.M. Holtzmann and E. Kristjánsdóttir (eds), *International Mass Claims Processes: Legal and Practical Perspectives* (Oxford University Press, 2007), Chapters 5 and 6.

III.2 Several areas in which the Lubanga Principles could be enhanced

A. The number of beneficiaries

13. In the *Bemba* case, more than 5,000 persons were granted victim status to participate in the proceedings. The number of persons who may ultimately be eligible for reparations in the case is likely to far exceed this number.

14. Large numbers of beneficiaries usually imply extraordinary circumstances such as war or rapid displacement of populations with inherent implications for the availability of documentary evidence. The incidence of lost, stolen or destroyed evidence in contexts of great upheaval is high and creative means for circumventing these evidential obstacles are a common feature of major reparations processes. In addition, the need for speedy and efficient processing of a large volume of claims will be a concern, not only because justice delayed is justice denied, but because expediency will reduce processing costs and thereby maximise the funds available for victims.

15. Large numbers of victims also produce the challenge of finding an appropriate balance between the principles of ***timeliness***, ***fairness to the victims*** and ***to the convicted person***. In particular, it is important for victims and for the convicted perpetrator that reparations proceedings be concluded without delay. This is also important for the smooth administration of justice. Victims will have an interest in being consulted in respect of the harm suffered and their preferred forms of reparation and the convicted person will have an interest in having any liability attributed to them accurately identified upon sound legal principles.

16. There are several areas in which the general principles on reparations could better account for a large number of beneficiaries.

Inclusion of a new Principle on the relevance of mass claims techniques to cases involving large numbers of beneficiaries

17. There is currently no principle which covers this issue. Such a principle would be helpful in preserving the option for this Chamber to consider individual reparations awards, without which individual claims might be considered by some to be unwieldy or unfeasible. Such a principle is also relevant should this Chamber determine that an

individual verification procedure is necessary for the implementation of collective awards, as appears to have been decided by Trial Chamber II in the *Lubanga* case.[30]

18. 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. It is also the practice of mass claims compensation programmes including those set up by governments as part of transitional justice measures and specialised bodies set up pursuant to negotiated agreements or litigation, such as the UNCC, the Holocaust Victims Assets Claims Programme and the Claims Resolution Tribunal for Dormant Accounts in Switzerland (***CRT-I***), some of which have dealt with victims of the most serious international crimes spread over large geographical areas and with the number of claims ranging from a few thousand to 2.6 million.[31] 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 include grouping claims into several classes and introducing 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, and sampling and statistical modelling. These models have tended to rely on a central registry or secretariat to aid with the matching of claimant information against external data to verify that individuals qualify as 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.

19. The secretariats of most claims processes have themselves actively participated in the gathering of evidence.[32] Niebergall notes the need for such a proactive 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.[33] The UN

[30] *The Prosecutor v. Lubanga*, Order instructing the Trust Fund for Victims to supplement the draft Implementation, ICC-01/04-01/06-3198-tENG, Trial Chamber II, 9 February 2016.
[31] See generally the descriptions of these and other relevant bodies in H.M. Holtzmann and E. Kristjánsdóttir (eds), *International Mass Claims Processes: Legal and Practical Perspectives* (Oxford University Press, 2007), Chapter 1.
[32] H. Niebergall, "Overcoming Evidentiary Weaknesses in Reparation Claims Programmes", 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* (Martinus Nijhoff, 2009), p 153.
[33] Ibid, p 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

Compensation Commission (***UNCC***) secretariat and external consultants played an active role in gathering of evidence in respect of complex claims.[34] 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, 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 Inter-American Court of Human Rights (***IACtHR***) recognised that "the State [should] … collaborate with them in order to, through its agencies and registries, be able to gather the missing information."[35]

20. REDRESS therefore respectfully suggests the inclusion of a new Principle on the relevance of mass claims techniques applicable in cases involving large numbers of potential beneficiaries.

Revising Principle 5 on the liability of the convicted person

21. The *Lubanga* Appeals Chamber indicated that "the scope of a convicted person's liability for reparations may differ depending on, for example, the mode of individual criminal responsibility established with respect to that person and on the specific elements of that responsibility."[36] On the basis of that finding, the Appeals Chamber included a new principle: "A 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 crime for which he or she was found guilty, in the specific circumstances of the case".[37]

22. If this Trial Chamber is minded to interpret this principle of proportionality as meaning that the total amount of reparations assessed as being due to the victims of a crime must

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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."

[34] V. Heiskanen, "The United Nations Compensation Commission" (2002) 296 *Collected Courses of the Hague Academy of International Law*, pp 302-303.

[35] See, *Case of the "Las Dos Erres" Massacre v. Guatemala* (Monitoring Compliance with Judgment), IACtHR, 4 September 2012, paras 20 and 21.

[36] *The Prosecutor v. Lubanga*, Judgment on the appeals against "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, para 118.

[37] Lubanga Principles, para 21.

be reduced proportionately to the convicted person's participation in that crime (several liability), REDRESS respectfully submits that this would not align with principles of liability applicable where two or more persons are liable in respect of the same harm to a victim and such an interpretation would have the potential to seriously undermine the Court's reparation scheme. This is so for two reasons.

23. First, it would be inconsistent with international human rights law and in particular the right to an "effective remedy",[38] a component of which is the need for reparation to be adequate and appropriate. This is particularly apposite in the context of international crimes, where hundreds or thousands of persons may be culpably complicit in or have contributed to the crimes that led to the harms inflicted on the victims. It is difficult to see how the principle of reducing reparations on the basis of concurrent responsibility can be operationalised without seriously and unjustly reducing reparations to victims. To do so would also put the unduly burdensome onus on the victims to pursue all of the multiple offenders who may have played a part in the crime in order to recover full reparation for the harm suffered. Thus, adopting a principle of several liability would be inconsistent with the Court's obligation to interpret and apply its applicable law consistent with internationally recognised human rights, pursuant to Article 21(3) of the Statute.

24. Second, several liability presupposes that the relevant Trial Chamber is in a position to have a global view of the entirety of the relevant crimes, establish how many persons are concurrently responsible and, therefore, determine the convicted person's supposedly proportionate share of the liability to make reparations. Trial Chambers will not, generally, be in a position to have a global view of concurrent contributions to large scale international crimes because evidence introduced at trial is often limited to proving only the criminal responsibility of the accused person. Further, the Trial Chambers are unable

[38] Article 8 of the Universal Declaration on Human Rights; Article 2(3) of the International Covenant on Civil and Political Rights; Article 13 of the European Convention on Human Rights; Article 25(1) of American Convention on Human Rights; Article 24 of the International Convention for the Protection of All Persons from Enforced Disappearance; Article 14(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; General Comment No 9 of the UN Committee on Economic, Social and Cultural Rights; Principle 1(2) of the Basic Principles and Guidelines on Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (***UN Basic Principles***); Principle 2 of the Guidance Note of the UN Secretary General on Reparations for Conflict-Related Sexual Violence (***UNSG Guidance Note)***; International Commission of Jurists' Declaration on Access to Justice and Right to a Remedy in International Human Rights Systems; Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, para 3(E); Principle 1(d) of the Principles on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment; and Declaration of Basic Principles of Justice for Victims of Crime and Abuse, para 4.

to presume the concurrent responsibility of others. No person can be considered to be guilty of criminal conduct unless they have been convicted of a crime. Article 66 of the Statute enshrines the presumption of innocence for "everyone". For the Chamber to proportionately reduce reparations on the presumption that other persons are criminally responsible is to undermine the presumption of innocence which is a central tenet in international human rights and criminal law.[39] This too would be inconsistent with the Court's obligation to interpret and apply its applicable law consistent with internationally recognised human rights pursuant to Article 21(3) of the Statute.

25. It is true that the extent of a convicted person's participation in a crime is relevant for the purposes of sentencing,[40] but this is a different matter from its relevance to assessing reparations to victims. For reparations, the question is what needs to be done in order to repair as best as possible the effects of the crime. Once a person's conduct in contributing to the commission of the crime has been found sufficient to attract criminal liability, then the only question is whether that crime caused the harm suffered by the victim, not the extent to which the particular conduct of the convicted person caused the harm suffered by the victim.

26. REDRESS respectfully submits that the correct position is that once a person is convicted by the Court for a crime they are100% liable for the reparations assessed as being due to the victims harmed by that crime. Insofar as other persons may also be responsible for the same crime, and are subsequently convicted, it is for the first convicted person to seek contribution from the subsequently convicted persons in proportion, in whatever the relevant system of domestic law would be and in accordance with its principles. This approach is akin to joint and several liability.

27. Article 21(1)(c) of the Statute provides that, where an issue is not covered by the other sources of applicable law, "[t]he Court shall apply … general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards."

[39] See, e.g., Article 66 of the Statute; Article 6 of the European Convention on Human Rights; and Article 14 of the International Covenant on Civil and Political Rights.
[40] Rule 145(2)(c) of the Rules of Procedure and Evidence.

28. This submission does not purport to present a comprehensive survey of the national legal systems of the world as regards joint and several liability, as would be required to determine whether the principle of joint and several liability is a general principle of law. It suffices to note that there are numerous domestic legal systems of the world that apply the principle of joint and several liability, by whatever name referred to in the particular jurisdiction, including in the two States that would normally exercise jurisdiction over Mr. Bemba's crimes. In the Central African Republic (***CAR***), where the crimes took place, persons convicted of the same crime are jointly and severally liable for restitution and damages.[41] This principle also applies in the Democratic Republic of the Congo, Mr. Bemba's State of nationality.[42] The principle is also well established in French law,[43] Belgian law,[44] German law[45] and in English law.[46]

29. The principle that a convicted person is liable for the full extent of the reparations assessed as being due to the victims is not affected by whether or not the convicted person is actually able to seek, still less obtain, contributions. Since the obligation to make full reparation for the harm caused by a crime crystalises upon conviction of that crime, the fact that some other person may later be convicted of the same crime does not reduce the liability of the person already convicted. Still less could it speculatively reduce the liability of the person first convicted on the basis that some other person or persons might also later be convicted. If the conduct of a person does not cross the threshold to attract criminal liability, then they will have no obligation to pay any reparations for any crime,

[41] Article 40 of the Central African Republic Criminal Code as published in Journal Officiel de la Republique Centrafricaine, Edition Speciale Code de Procedure Penale Centrafricain, 15 January 2010.
[42] *S.A. (represented by REDRESS and Synergie pour l'assistance judiciaire aux victims de violation des Droits Humains au Nord Kivu) v. Democratic Republic of Congo*, ACHPR, Communication 502/14, 1 June 2015; Agence de Coopération et de Recherche pour le Développement, *La Protection et La Reparation en Faveur des Victimes des Violences Sexuelles et Basees sur le Genre en Droit Congolais*, juillet 2010; Avocats Sans Frontières, *Recueil de Jurisprudence Congolaise en Matiere de Crimes Internationaux,* decembre 2013.
[43] As to French criminal law, see Articles 375-2, 480-1 and 543 of the French Code of Criminal Procedure concerning joint liability for persons convicted of the same crime, felony or misdemeanor. Contribution claims by one perpetrator against other perpetrators are determined in civil courts: Crim. 26 févr. 2013: D. 2013. 772 French civil case law has developed the concept of an obligation "*in solidum*" which allows a victim to seek full damages from any and every tortfeasor. If one pays in full, they may then seek contribution from the other tortfeasors in proportion to their respective share of liability in a subsequent action: Civ. 2 e, 12 févr. 1969, Bull. civ. II, no 46; Civ. 1re, 22 avr. 1994, no 91-21.045, Bull. civ. I, no 127; and Articles 1313 and 1317 of the French Civil Code.
[44] Article 50 of the Belgian Criminal Code.
[45] Sections 403 and 406 of the German Code of Criminal Procedure (compensation for victims, order to be equivalent to a civil judgment). Contributions are to be determined in civil courts: Articles 840 of the German Civil Code. It is known as the "Gesamtschuldnerische Haftung" principle.
[46] *Clark v. Newsam* (1847) 1 Ex. 131, p 140; M.A. Jones, A.M. Dugdale and M. Simpson (eds), *Clerk and Lindsell on Torts* (Wildy & Sons Ltd, 2016), sections 4-02-411. See also s 1(1) of the Civil Liability (Contribution) Act 1978 (UK).

even if their conduct contributed to harm being suffered, including through crimes committed by others. However, once a person's conduct is sufficient to cross the threshold of criminal liability, the obligation to pay reparations for the harm caused by that crime follows, however great or small the contribution of others to the commission of that same crime may have been.

30. In light of the above, REDRESS respectfully requests that this Chamber consider revising Principle 5 of the Lubanga Principles as regards the proposition that a convicted person's liability be proportionate to their participation in the commission of the crime for which they were found guilty.

Expanding and clarifying Principle 8 on victim consultation

31. Accessibility and consultation of victims features in Principle 8 of the Lubanga Principles. Principle 8 could be expanded and clarified to address the situation of large numbers of beneficiaries, setting out the need for the Court's reparation processes to be based upon meaningful consultation with victims that reflects their diversity and different interests. Consultations should be structured in such a way as to cater to any particular disadvantages marginalised victims may face in coming forward and expressing views. In particular, victims should also be consulted on the forms and modalities of reparations.

32. Victims rarely speak with one voice. Each will typically have their own interests and will have experienced victimisation in a unique way. Experiences of mass violations are gendered, with women and girls experiencing disproportionately higher rates of sexual violence. They will also invariably experience other forms of violence differently, as individuals and as mothers, spouses, carers or dependents. Individuals' recollections of their suffering may also differ, making it difficult for a common factual narrative to be agreed amongst a large group of victims. Circumstances such as whether the victim was reintegrated in their community, or whether the victim may have relocated away from the conflict zone or outside of the country impact on the desire for, and expectations of, justice and reparation. Victims may agree on a general strategy during trial but may want different reparations. This can be the case for victims who have suffered harm at the hands of their own tribe, political party or community. Assessing whether there are common positions within the diversity and determining fundamental areas of division requires extensive consultation, not least to ensure that any diversity is not lost through a collective approach.

33. Victims who experience some form of marginalisation or discrimination may have less access to consultation processes, unless these are tailored specifically to reach such disaffected groups. It is not only outreach that must be tailored,[47] but also the modalities to receive inputs from victim communities, to ensure a diversity of perspectives, as well as processes to receive feedback throughout the procedure.

34. 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.[48] 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.[49] 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.[50] 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 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 and sufficiently specific and transparent so as to enable the effective exercise of victims'

[47] Lubanga Principles, para 31.
[48] International Law Association, International Committee on Reparation for Victims of Armed Conflict, *Declaration of Procedural Principles for Reparation Mechanisms*, adopted at the 76th ILA Conference (Washington, Resolution 1/2014), 11 April 2004 (***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.
[49] UNSG Guidance Note, p 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 UN General Assembly, Report of UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, *Report on the topic of reparations for gross human rights violations and seirous violations of international law*, UN Doc A/69/518, 14 October 2014, paras 74-80.
[50] UNSG Guidance Note, p 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-Recurrence*, July 2014 (***REDRESS, Articulating Minimum Standards***), para 42.

rights.[51] 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.[52]

35. 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[53] and tends to closely follow the preferences of the victims, as expressed in requests made. When awarding collective reparation in particular, the IACtHR 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 IACtHR, the implementation committee was to be responsible for the implementation of the collective measures of reparation following consultation with the Saramaka people.[54] 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 participation of the victims…"[55] The

[51] UNSG Guidance Note, p 1 and Principle 6; See also REDRESS, *Articulating Minimum Standards*, paras 41 and 68.
[52] UN General Assembly, Report of UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, *Report on the topic of reparations for gross human rights violations and seirous violations of international law*, UN Doc A/69/518, 14 October 2014, para 9; UN Committee Against Torture, General Comment No. 3: *Implementation of Article 14 by States Parties*, UN Doc CAT/C/GC/3, 13 December 2012, para 6.
[53] 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* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Ser C No. 270, 20 November 2013, para 411; *Norín Catrimán v. Chile* (Merits, Reparations and Costs), IACtHR, Ser C No. 279, 29 May 2014, para 414; *El Mozote v. El Salvador* (Merits, Reparations and Costs), IACtHR, Ser C No. 252, 25 October 2012, para 304; *Rio Negro Massacres v. Guatemala* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Ser C No. 250, 4 September 2012, para 247.
[54] *Case of the Saramaka People v. Suriname* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Ser C No. 172, 28 November 2007, para 202.
[55] *Operation Genesis v. Colombia* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Ser C No. 270, 20 November 2013, para 470.

African Commission has similarly recommended that States consult with victims in the implementation of collective reparation measures.[56]

B. The locations of the potential beneficiaries

36. Jean-Pierre Bemba Gombo was convicted in relation to the crimes against humanity of murder and rape; and war crimes of murder, rape and pillaging. The acts in question concerned four main geographical locations. Most victims were located in the western part of the CAR, in Bangui and PK 12, Damara, Sibut, Boali, Bossembélé, Bossangoa, Bozoum and Mongoumba.

37. In the immediate aftermath of the fighting, the massive human rights violations which took place and the constant threats of further attacks led to both internal and international displacement. It has been estimated that "after the renewed fighting in October 2002, 231,000 people were forced to leave their homes. About 105,000 of them fled from the former rebel zones in the north to former government-held areas in the south; 26,000 were refugees in southern Chad, and more than 100,000 were hiding in the bush in the north ... However, some IDPs [internally displaced persons] were able to return after troop[s] loyal to president Patassé recaptured areas controlled by Bozizé."[57]

38. Since 2013, CAR has been the theatre of fighting between Seleka and anti-balaka groups. The conflict reached a high point during the night of 4 to 5 December 2013 when the anti-balaka attacked Bangui. This renewed violence led to further internal displacement of the population. For instance, it has been reported that, in the context of revenge attacks from both sides, in "September 2013 there were already 36,000 displaced persons in Bossangoa. Two months later, 130,000 displaced Christians and Muslims in separate quarters at Bangui airport constituted the largest camp of displaced persons in the CAR".[58] According to the UN Office for the Coordination of Humanitarian Affairs, the number of internally displaced people in CAR reached 601,746 in December 2013 and increased to

[56] See, e.g., *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, ACHPR, Communication No. 276/03, 25 November 2009 (***Endorois v. Kenya***), recommendation (f).
[57] Norwegian Refugee Council, *Profile of Internal Displacement: Central African Republic*, 14 May 2003, p 4.
[58] International Federation for Human Rights (FIDH), *Central African Republic: "They must all leave or die"*, June 2014, p 8.

825,000 in January 2014.[59] In August 2016, the number of internally displaced persons was recorded as 385,750 and the number of refugees was 452,095.[60]

39. It is likely that victims of the crimes perpetrated by Mr. Bemba and his troops were impacted and may have been further displaced both inside and outside of the country. Some of these persons will have registered with refugee agencies and others may have sought asylum or been resettled in countries further afield. There will likely be additional population movements in the coming years. Some victims may eventually return to their homes. Others may be reluctant to return, for fear of ongoing insecurity or simply because they have built a new life somewhere else.

Dispersal of victims should be referenced in a revised Principle 9

40. The dispersal of victims is a relevant factor in determining whether collective reparations are appropriate[61] and, if so, in framing those reparations. The right to seek and obtain reparation is not contingent on residence in the place or State where the crime or violation occurred. However at present, the impact of dispersal is not referenced in Principle 9 and it could be usefully added to the Principles. The Principles could be clarified to set out that access to reparation is not contingent on victims' willingness to return to the communities from which they fled. This would help avoid the problem of a future draft implementation plan not incorporating dispersed victims into planned reparations programmes.[62] 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

[59] UN Office for the Coordination of Humanitarian Affairs, Key Figures, Internationally Displaced People, continuously updated, last updated October 2016.
[60] Ibid.
[61] Lubanga Principles, Principle 9 (Modalities of reparations).
[62] *The Prosecutor v. Lubanga*, Draft Implementation Plan for collective reparations to victims, Submitted to the Amended Reparations Order of 3 March 2015 in the case against Thomas Lubanga Dyilo, ICC-01/04-01/06-3177-AnxA, TFV Filing, 3 November 2015.

enforced displacement to resettle in similar conditions to those they had before the events, in the place that they freely and willingly indicate …".[63]

C. The current humanitarian context in which many potential beneficiaries find themselves

41. Victims' humanitarian needs in CAR are large and wide-ranging. Recurring violence and ongoing insecurity caused by the activity of armed groups in CAR has reduced household incomes, limited access to agricultural fields and decreased the proportion of cultivated area to harvest crops. There is a lack of access to basic services with many health facilities partially or completely destroyed and poor education and infrastructure. Attacks on aid workers have exacerbated the humanitarian situation. Internally displaced persons and other crisis-affected persons are vulnerable to illness and gender-based violence including sexual violence and HIV infection.[64]

Clarifying and expanding Principle 10 on prompt reparations

42. Given the dire humanitarian situation in the CAR, it is important for reparations to be timely. This is important in light of the humanitarian needs of victims and the fact that there is ordinarily already a long delay between the commission of the crime and any conviction and sentence. The Lubanga Principles underscore that victims should receive prompt reparations (Principle 10). This Principle could be usefully expanded to make clear that the reparation *procedure* should not be unduly protracted and that the *implementation* of the reparation order should be prompt. It should also affirm this Chamber's commitment to adequately factoring the need for promptness into how it arranges the procedure. The adverse impact of the duration of the proceedings and implementation of the reparation order on certain victims in a particularly vulnerable situation should be borne in mind.

43. By virtue of Article 21(3) of the Statute, the Court is obligated to exercise its functions consistently with internationally recognised human rights. In discharging its functions during the reparation phase, the relevant Trial Chamber must apply the Statute and Rules

[63] *El Mozote v. El Salvador* (Merits, Reparations and Costs), IACtHR, Ser C No. 252, 25 October 2012, para 345.
[64] International Rescue Committee, Central African Republic: Strategy Action Plan, June 2016; European Commission, Humanitarian Aid and Civil Protection, Central African Republic, ECHO Factsheet, September 2016.

of Procedure and Evidence consistently with the right to an effective, and therefore prompt, remedy, as described below.

44. The right to an effective remedy is explicitly guaranteed in numerous human rights instruments and soft-law declaratory texts.[65] A number of these refer explicitly to the right that the effective remedy be "prompt". Most relevant of these are the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, which make express and repeated reference to the requirement that effective remedies, including reparation, be made available and implemented promptly.[66] Similarly, the Guidance Note of the UN Secretary General on Reparations for Conflict-Related Sexual Violence and the Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation both explicitly recognise the importance of "prompt" reparations and the former emphasises that remedies must be executed "without unreasonable delay".[67] As some of the crimes for which Mr. Bemba has been convicted are of a sexual nature, instruments such as these that focus on prompt reparation for victims of sexual crimes are particularly relevant.

45. The bodies monitoring compliance with human rights instruments interpret the effective remedy provisions to require, to varying degrees, prompt access to a mechanism to determine the alleged violation and prompt implementation and enforcement of substantive remedies granted. For instance, the UN Committee Against Torture interprets Article 14 of the Convention Against Torture to require States Parties to *promptly* initiate processes to ensure victims obtain redress and that reparation measures, including compensation and rehabilitation, be *promptly* accessible.[68] The Human Rights

[65] Article 8 of the Universal Declaration on Human Rights; Article 2(3) of the International Covenant on Civil and Political Rights; Article 13 of the European Convention on Human Rights; Article 25(1) of American Convention on Human Rights; Article 24 of the International Convention for the Protection of All Persons from Enforced Disappearance; Article 14(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article 6 of the Convention on the Elimination of All Forms of Racial Discrimination; Articles 24(4)-(5) of the Convention for the Protection of All Persons from Enforced Disappearance; Principle 1(2) of the UN Basic Principles; Principle 2 of the UNSG Guidance Note; International Commission of Jurists' Declaration on Access to Justice and Right to a Remedy in International Human Rights Systems; Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, para 3(E); Principle 1(d) of the Principles on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment; and Declaration of Basic Principles of Justice for Victims of Crime and Abuse, para 4.
[66] See in particular, Principles 1(2), 11(b) and 15.
[67] UNSG Guidance Note, pp 6-7 and Principle 2 (and its commentary); Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, 19-21 March 2007, p 4 and para 3(E).
[68] UN Committee Against Torture, General Comment No. 3: *Implementation of Aarticle 14 by States Parties*, UN Doc. CAT/C/GC/3, 19 November 2012, paras 10, 13, 17, 23 and 27.

Committee[69] and the Committee on the Elimination of Racial Discrimination[70] have both required the *prompt* restitution of land or property or the payment of compensation therefor.

46. What is prompt will depend on the circumstances of the particular case, but the IACtHR in determining whether "prompt" recourse to judicial mechanisms capable of granting reparations has been granted for the purpose of Article 25(1) of the American Convention considers four criteria: (1) the complexity of the matter; (2) the procedural activity of the interested party; (3) the conduct of the judicial authorities; and (4) the adverse effect of the duration of proceedings on the judicial situation of the person involved in it. As regards the fourth criterion, the IACtHR has taken the victims' age, physical and mental health, and lack of financial means to begin to address the harm suffered into account in determining that the delay was unreasonable. With respect to the substantive right to an enforceable remedy reflected in Article 25(2)(c), the IACtHR has considered that enforcement must be regarded as the "second stage" of the proceedings, that all stages of the proceedings must be resolved within a reasonable time, and that this will not be so until the remedy, often compensation, has materialised. The formal order of a remedy is not enough; in order to be "effective" its implementation should be "complete, perfect, comprehensive and *without delay*".[71] Delay in implementing a remedy can impair the very essence of the right to an effective recourse.[72] According to the IACtHR, the right to a prompt remedy is "one of the basic mainstays, not only of the American Convention, but also of the Rule of Law in a democratic society".[73]

[69] See for example UN Human Rights Committee, *Blaga and Blaga v. Romania*, Communication No. 1158/2003, 24 April 2006, para 12 (requiring prompt resutituion of expropriated property seized during the communist regime, or compensation therefor); and UN Human Rights Committee, *Des Fours v. Czech Republic*, Communication No. 747/1997, 30 October 2001, para 9.2 (requiring prompt restitution of property seized at the end of WWII or compensation therefor).
[70] UN Committee on the Elimination of Racial Discrimination, General Recommendation No 23: *The Rights of Indigenous Peoples'*, 18 August 1997, para 5. See also as regards criticism of the delay in the provision of actual redress to the Maori in New Zealand: United Nations Commission on Human Rights "Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples" Rodolfo Stavenhagen submitted in accordance with Resolution 2001/58: Mission to New Zealand, UN Doc E/CN.4/2006/78/Add.3, 13 March 2006, paras 26-27.
[71] *Mejía Idrovo v. Ecuador* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Ser C No. 228, 5 July 2011, paras 105-106 (emphasis added); *Furlan and family v. Argentina* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Ser C No. 246, 31 August 2012, para 210.
[72] *Acevedo Jaramillo et al v. Peru* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Ser C No. 144, 7 February 2006, para 225.
[73] *Case of Mayagna (Sumo) Awas Tigni Community v. Nicaragua* (Merits, Reparations and Costs), IACtHR, Ser C No. 79, 31 August 2001, para 112.

47. In light of the above, this Trial Chamber may wish to consider supplementing Principle 10 to highlight that, in addition to victims reciving prompt reparations, the reparations proceedings should also be conducted and concluded without unreasonable delay.

D. Methods to monitor and ensure the proper implementation of the principles on reparation, including by those to whom the Chamber may delegate certain tasks relating to the implementation of its order

48. Article 75 of the Statute grants the Court the power to issue reparation orders. It does not, however, specify the body that is to oversee the reparation proceedings or monitor compliance with any ultimate reparation order. The *Lubanga* Trial Chamber considered that the reparation process is "an integral part of the overall trial process" and that consequently the responsibility for the reparations process lies with the judiciary.[74] The Appeals Chamber agreed on the basis that victims and the convicted person have a right to appeal an order for reparations under Article 82(4) of the Statute and can only do so if the reparation order is a judicial decision.[75] As a result, the Chambers can, pursuant to Article 64(3)(a) of the Statute, "adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings".

49. This is a broad power to supervise the reparation proceedings and extends beyond the issuing of the reparation order provided for in Article 75. The Chamber may be seized of any contested issues arising out of the work and decisions of the Trust Fund. The supervisory function would extend as far as the full implementation of the implementation plan.

The Lubanga Principles could usefully be supplemented with a Principle on oversight and monitoring

50. This could underscore the role of the Trial Chamber in ensuring that the reparations procedure remains expeditious and on-track. In particular, it would be important for any general principles adopted to stress that the Trial Chamber will maintain oversight and control of the proceedings throughout the entire reparations phase, from initiation under

[74] *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 260 and 289(c), referring to Articles 64(2) and (3)(a) of the Statute concerning the functions of the Trial Chamber.
[75] *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 34 and 180, referring also to Rule 97(3) of the Rules of Procedure and Evidence about respecting the rights of victims and the convicted person, such rights including the right of appeal.

Article 75 of the Statute to the full implementation of the final award/s for reparations, cognisant of the need to respect the rights of victims and the convicted person and to ensure the fair and expeditious conduct of proceedings.

51. Relevant practice from other courts and claims commissions reveals a number of options which may be useful for this Chamber to consider in order to maintain adequate oversight and supervision throughout the reparations implementation phase. Often these oversight procedures are instituted against the party against whom reparations are ordered. However, there is also practice involving the oversight of implementing agencies tasked with administering particular aspects of reparations awards. The practice is summarised as follows:

52. ***Assigning specific bodies or individuals the task of supervising compliance with and implementation of decisions*.** The Trial Chamber could, for instance, issue a decision on reparations procedure and appoint a single judge tasked with overseeing the implementation of that procedure by supervising the collection and verification of information and evidence necessary to identify beneficiaries, establishing the type and extent of the harm suffered, and determining the causal connection to the crime for which the convicted person was convicted. This is the kind of implementation oversight exercised by a US federal district court judge who established the Claims Resolution Tribunal for Dormant Accounts in Switzerland (***CRT-II***) and oversaw its operations and certification of its decisions by Special Masters of the court.[76] It is also similar to the oversight exercised by the IACtHR over its "implementation committees" referred to above.[77]

53. Many courts which have instituted complex enforcement procedures have tasked special bodies or persons with supervising compliance and implementation of decisions. This is the practice of several regional human rights courts and commissions, as well as human rights treaty bodies. It is a standard practice used in order to save court time, and to distinguish between those aspects a court must decide upon directly, and other aspects which a court can simply monitor and/or approve. For example, the Committee of Ministers of the Council of Europe is tasked with monitoring compliance with and

[76] H.M. Holtzmann and E. Kristjánsdóttir (eds), *International Mass Claims Processes: Legal and Practical Perspectives* (Oxford University Press, 2007), p 27.
[77] See above, section III.2.A., para 35.

execution of judgments of the European Court of Human Rights (***ECtHR***).[78] Similarly, the African Union Executive Council plays a role in monitoring compliance with African Court on Human and Peoples' Rights decisions.[79] Under the African Commission system, a commissioner can be designated as a rapporteur on the implementation of the African Commission's recommendations. The rapporteur reports to public sessions of the Commission on the measures the State is taking to implement the recommendations, and may take such action as may be appropriate to monitor implementation, which could act as the basis for a wide range of implementation-related activities, including holding compliance hearings.[80] In respect of United Nations treaty bodies, the Human Rights Committee, Committee Against Torture, Committee on the Elimination of Racial Discrimination, Committee on the Elimination of Discrimination Against Women (***CEDAW***), Committee on the Rights of the Child, Committee on Enforced Disappearances and Committee on the Rights of Persons with Disabilities have a permanent or *ad hoc* special rapporteur mandated to follow-up on State compliance with committee decisions.[81]

54. ***Requiring reporting on measures taken to implement decisions and setting deadlines for the submission of such reports.*** This is already something Trial Chambers do in reparations proceedings. In the *Katanga* case, for instance, there was reporting on the steps taken to comply with the Chamber's directions to collect information and compile dossiers on the victims and relevant harms. Furthermore, in the implementation phase, this Chamber may wish to set deadlines for the implementation of certain remedies, such as the paying of compensation, the implementation of collective reparations projects or publication of apologies, as appropriate. It may also wish to hold compliance hearings to track progress with implementation. To date, the deadlines set by Chambers tend to be

[78] Article 46(2) of the European Convention on Human Rights (***ECHR***).
[79] Article 29 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court of Human and Peoples' Rights (***ACtHPR***) and Rule 64(2) of the Rules of Court of the ACtHPR.
[80] Rules of Procedure of the African Commission on Human and Peoples' Rights, Rule 112; F. Viljoen, *International Human Rights Law in Africa* (2012), p 342.
[81] Rule 101 of the Rules of Procedure of the UN Human Rights Committee; Rule 72 of the Rules of Procedure of the UN Committee Against Torture; Rule 95(6)-(7) of the Rules of Procedure of the UN Committee for the Elimination of Racial Discrimination; Rule 73 of the Rules of Procedure of the UN Committee for the Elimination of Discrimination Against Women; Rule 28 of the Rules of Procedure under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure; Rule 79 of the Rules of Procedure of the UN Committee on Enforced Disappearances; and Rule 75 of the Rules of Procedure of the UN Committee on Rights of Persons with Disabilities.

restricted to dates by which filings must be made and not necessarily the deadline for the accomplishment of activities, though in practice these can be one and the same.

55. Human rights courts regularly set deadlines for the respondent States to comply with decisions. For example, the IACtHR[82] can convene compliance hearings and issue compliance orders. Prior to issuing a compliance order, the relevant State reports on the measures adopted to comply with the IACtHR's judgment, the victims make observations on the State's reports and the Inter-American Commission presents its observations on both the State's report and the victims' observations.[83] Under the ECtHR system, States are required to report to the Committee of Ministers of the Council of Europe within six months of a judgment becoming final on the individual or general implementation measures taken or that a State intends to take with an action plan specifying a timeframe for compliance.[84] In the event of a finding in a decision on an individual communication that a State has violated the ACHPR, the parties to the case have 180 days to inform the African Commission of measures being taken to implement the decision.[85]

56. ***Requiring further information and follow-up reports or taking additional corrective action.*** This is a common feature of human rights bodies' monitoring and something that the *Katanga* Chamber has done as regards requesting further evidence from the Legal Representative for the Victims on the scope of harm suffered and the causal link to the crimes. The Committee of Ministers of the Council of Europe can bring infringement proceedings against a State by referring back to the ECtHR the question of whether a State has failed to fulfil its obligation to comply with an ECtHR judgment.[86]

57. ***Keeping a case open until the reparation award/s has/have been implemented in full.*** For instance, the IACtHR does not close a case until there has been full compliance with all remedies ordered.[87]

IV. WHETHER AND, IF SO, HOW THE CRITERIA AND METHODOLODY TO BE APPLIED IN THE DETERMINATION OF ELIGIBILITY, HARM AND LIABILITY

[82] Article 69(3) of the Rules of Procedure of the IACtHR.
[83] Article 69(1) of the Rules of Procedure of the IACtHR.
[84] Rule 11 of the Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlement, .
[85] Rule 112(2) of the Rules of Procedure of the African Commission on Human and Peoples' Rights.
[86] Articles 46(1) and 46(4) of the ECHR.
[87] *Velásquez Rodriguez v. Honduras* (Merits), IACtHR, Ser C No. 7, 21 July 1989, Resolutions 1-4; D Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 2015), p 438.

SHOULD TAKE INTO ACCOUNT ISSUES SUCH AS THE LARGE NUMBER OF VICTIMS AND EXTENSIVE SUFFERING

58. The criteria and methodology to be applied to the identification of victims, verification of type and scope of harm caused by the crimes and implementation of reparation programmes should take into account victims' continued vulnerability and any continued risks they face to their physical and psychological integrity and privacy. Neither the process nor the result of reparations should be overly burdensome, cause harm or place victims or their families at increased risk of harm.

IV.1 The eligibility of victims

59. At a general level, victims will be eligible if they fall within the definition of victims set out in Rule 85(a) of the Rules of Procedure and Evidence and if the harm they suffered is causally connected in a sufficient way to the crimes for which the perpetrator was convicted.[88] The Lubanga Principles set out that "harm" denotes "hurt, injury and damage" and does not necessarily need to have been direct, but it must have been personal to the victim.[89] The Principles further indicate that "reparation is to be awarded based on the harm suffered as a result of the commission of any crime within the jurisdiction of the Court. The causal link between the crime and the harm for the purposes of reparations is to be determined in light of the specificities of a case."[90]

[88] *The Prosecutor v. Lubanga*, Judgment on the appeals against "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, para 8.
[89] Lubanga Principles, para 10. It need not be direct for natural persons. Institutions and organisations that claim to be victims must suffer direct harm, accoridng to Rule 85(b) of the Rules of Procedure and Evidence.
[90] Lubanga Principles, para 11.

A. Determining Eligibility for Collective Awards

60. When there are many potential victims who would fall within this broad sphere of eligibility, the Statute already affords the possibility, where appropriate, for the relevant Chamber to order that the award for reparations against a convicted person be made through the Trust Fund,[91] "where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate".[92] This approach was adopted in the *Lubanga* case.

61. In considering the criteria and methodology for determining the eligibility of victims when a potentially large number of victims may qualify, and when it has been determined that the award should be collective in nature, Trial Chamber II in the *Lubanga* case appears to have set out that there should be an individual verification process to determine individuals' eligibility to participate in the collective programme.[93] The Trust Fund for Victims has noted that a mandatory verification process is not required for collective reparations awards made pursuant to Rule 98(3) of the Rules of Procedure and Evidence and has argued that any individual verification process if mandated by the Court would best take place at the time of implementation, due to the operational realities on the ground.[94]

62. Some comparative practice is set out below which suggests that the level of precision of the verification process with respect to potential beneficiaries should match or best approximate the chosen forms and modalities of reparation. In other words, an award for collective reparations should include a victim eligibility verification process that is consonant with the collective nature of the reparations award. A number of claims processes have restricted individual verification to those circumstances when a collective award affords individual benefits (e.g., access to a specialised health service) or where a collective award acknowledges the suffering of victims on an individual basis (e.g., a memorial which lists the names of all victims). Where an individual verification process has been used, mass claims techniques have tended to have been used to minimise processing costs, such as through the use of presumptions and reduced evidential

[91] Article 75(2) of the Statute.
[92] Rule 93(3) of the Rules of Procedure and Evidence.
[93] *The Prosecutor v. Lubanga*, Order instructing the Trust Fund for Victims to supplement the draft Implementation, ICC-01/04-01/06-3198-tENG, Trial Chamber II, 9 February 2016, paras 12-18.
[94] *The Prosecutor v. Lubanga*, Redaction of Filing on Reparations and Draft Implementation Plan, ICC-01/04-01/06-3177-Red, TFV Filing, 3 November 2015, paras 142-150.

standards—what a recent expert filing has referred to as "light-touch verification."[95] These techniques are discussed under IV.1B: Determining Eligibility for Individual Awards, directly below.

63. For collective awards which relate to communities or groups which benefit as groups (i.e., because of their experience of harm as a group), REDRESS respectfully submits that any verification exercise should be restricted to determining the eligibility of the group as such;[96] to require members of the group to be screened individually would go beyond what is necessary to establish the eligibility of the group to benefit from reparations in its capacity as a group or community.

B. Determining Eligibility for Individual Awards

64. This Chamber may choose to make individual awards for reparations either in addition to or instead of collective awards, or, as described above, some aspects of collective awards may engender individual benefits, in which case some individual verification of eligibility may be warranted.

65. As described in section V. below, the decision as to the forms and modalities of reparation should reflect the harms suffered and aim to the closest possible extent to "repair" those harms. This is usually achieved through a combination of measures, often both individual and collective.[97] There is a tendency to presume that individual awards are too unwieldy when there are a large number of victims, however the practice shows a different picture. There are numerous examples of large-scale reparations programmes which assess and distribute individual awards to large numbers of victims. Victim eligibility in such cases has been determined in accordance with mass claims processing standards, described below.

66. A variety of individualised, technical and standardised verification procedures have been used by the bodies surveyed, such as statistical sampling and modelling, precedent-setting

[95] *The Prosecutor v. Lubanga*, Observations of Dr. Golden, Mr. Higson-Smith, Professor Ní Aoláin and Dr. Wühler pursuant to Rule 103 of the Rules of Procedure and Evidence, ICC-01/04-01/06-3240-Anx9, Registry Filing, 30 September 2016, para 12(b).
[96] The Appeals Chamber required, as a minimum, criteria for distinction between members of the eligible community or group and members of other communities or groups: *The Prosecutor v. Lubanga*, Judgment on the appeals against "Decision establishing the principles and procedures to be applied to reparations", ICC-01/04-01/06-3129, Appeals Chamber, 3 March 2015, para 214.
[97] See Section V: Methodologies to Determine the Types and Modalities of Reparations Appropriate to Address the Harm Relevant in the Circumstances in the Case, below.

and representative cases, matching against external data and individual verification. Some claims processes, such as the UNCC, employed different verification techniques for each category of claims, or within each sub-category of claims.

67. ***Statistical analysis*** allows administrators of a claims process to: (i) take a representative random sample of claims from a general or specific pool of claims; (ii) analyse the substance of those claims, that is, determine the factual and legal questions that determine eligibility for compensation; and (iii) extrapolate or apply the results of that analysis, including the use of evidentiary presumptions (see further below), to all the remaining claims in the population from which the sample was taken, i.e. to all similarly situated claimants.[98]

68. One of the UNCC panels of Commissioners performed extensive comparative analysis to show that the use of sampling techniques was an accepted practice in both domestic and international mass claims situations and explained the justification for using sampling and modelling as follows:

> "[I]n situations involving mass claims or analogous situations raising common factual and legal issues, it is permissible in the interests of effective justice to apply methodologies and procedures which provide for an examination and determination of a representative sample of these claims. Statistical methods may be used to determine the size and composition of the sample claims and to apply the results of the review of the sample to the remaining claims."[99]

69. ***Grouping and precedent setting*** are techniques used for common issue determination. They are often used in respect of large (in terms of monetary amount sought) or complex claims where matching against external databases may not be possible and statistical sampling might not be accurate. Claims are categorised into groups with common factual or legal elements and precedent-setting decisions are made in respect of one or more sample claims within that group, which are in turn applied to the remainder of claims in that category.[78] It is a less technical form of statistical sampling discussed above. Precedent-setting decisions are sometimes referred to as "representative action", a

[98] H.M. Holtzmann and E. Kristjánsdóttir (eds), *International Mass Claims Processes: Legal and Practical Perspectives* (Oxford University Press, 2007), pp 244-245.
[99] Report and Recommendations Made by the Panel of Commissioners concerning the Fourth Instalment of Claims for Departure from Iraq or Kuwait (Category "A" Claims), UN Doc. S/AC.26/1995/4, 12 October 1995, para 9 quoted in H.M. Holtzmann and E. Kristjánsdóttir (eds), *International Mass Claims Processes: Legal and Practical Perspectives* (Oxford University Press, 2007), p 245 and by V. Heiskanen, "The United Nations Compensation Commission" (2002) 296 *Collected Courses of the Hague Academy of International Law*, p 361 and fn 327.

common form of which are domestic class actions. The application of precedent-setting decisions to subsequent claims may be delegated to a secretariat/administrative support unit or may be performed by the main claims body on a case-by-case basis.

70. The UNCC used samples and modelling of representative claims for category "B" claims (personal injury and death). The Secretariat, assisted by a medical expert, grouped claims based on common factual and legal issues, analysed the claims within each group and then presented representative samples of claims to the panels for review. When the panels determined what elements were required for a claim to be approved, the Secretariat verified that those elements were present in the remaining claims in that group that had not been individually reviewed by the panels. Where there was doubt, particular claims could be submitted to the panel on a case-by-case basis for review. This more individualised form of sampling (rather than the statistical sampling discussed above) coupled with representative cases was possible due to the relatively low number (approximately 6,000 claims) in this category (as opposed to the 2.6 million claims received by the UNCC overall).[100] In the Kosovo Housing and Property Claims Commission, the UNMIK Regulation expressly authorised the Commission to make a precedent-setting decision and to then delegate the review of similar claims and evidence to the Registrar and the staff of the Housing and Property Directorate.[101] Representative cases are also used by the ECtHR in its pilot judgment procedure.[102] It is also a central feature of US class actions as a form of representative action where one or more claimants litigate on behalf of many absent class members and those class members are bound by the outcome of the representative's litigation.[103]

71. ***Matching claims against external data*** is optimal where the resolution of individual claims can be determined by limited number of relatively specific facts. External data that would be helpful for matching purposes and available for use is very much contingent on the context and might consist of official archives, property cadastral records, census material, hospital records or lists of displaced persons. For example, UNCC category "A"

[100] V. Heiskanen, "The United Nations Compensation Commission" (2002) 296 *Collected Courses of the Hague Academy of International Law*, p 362 and fn 331; H.M. Holtzmann and E. Kristjánsdóttir, *International Mass Claims Processes: Legal and Practical Perspectives* (Oxford University Press, 2007), p 249.
[101] United Nations Interim Administration Mission in Kosovo (UNMIK) Regulation No. 2000/60, UN Doc UNMIK/REG/2006/60, 23 December 2006, section 19.5(a) and (b).
[102] Rule 61 of ECtHR Rules of Court, inserted by the Court on 21 February 2011; ECtHR Factsheet, Pilot Judgments, September 2016, available at, http://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf.
[103] See generally, Rules 23(c)(2)(B) and 23(g) of the US Federal Rules of Civil Procedure.

claims (forced departure from Iraq or Kuwait) involved matching the identities of claimants with departure records kept by governments and international organisations.[104] For some situations one "hit" as a match might be sufficient to verify departure. For others, a combination of "hits" against several records was necessary for verification. Software was also used to screen out duplicate claims and characteristics rendering claims outside the UNCC's jurisdiction (such as Iraqi nationality).[105]

72. In contrast, ***in mass claims arbitration proceedings, it is more common that individual decisions are made on a case-by-case basis*** and, on the whole, mass claims techniques are not used. For example, this was the case for the Iran-US Claims Tribunal and Claims Resolution Tribunal for Dormant Accounts in Switzerland (***CRT-I***) arbitration claims.[106] Similarly, in *Abaclat v Argentina*,[107] statistical sampling was rejected in favour of an expert-led team that conducted individualised verification of the claimant database and reported back to the arbitration tribunal for the purpose of its decision on jurisdiction. Argentina supported the rejection of statistical sampling on the basis that it wanted to defend itself against each of the 60,000 claimants.[108]

73. Individual verification is expensive. In *Abaclat*, verification of 60,000 claims was budgeted to cost US$270,350 and required the lead expert, an IT specialist and 22 claims reviewers whose working week was extended beyond the standard five days. This was almost triple the estimated budget for the alternative proposal that used statistical sampling (US$92,450) and which was estimated to require one statistician, one IT specialist, one claims reviewer and the lead expert.[109] The verification report took seven months to produce. Similarly, the estimated time for three full time UNCC commissioners to determine (through individual verifications) only the category "C" (personal loss up to

[104] V. Heiskanen, "The United Nations Compensation Commission" (2002) 296 *Collected Courses of the Hague Academy of International Law*, pp 358-361.
[105] C. Gibson, "Using Computers to Evaluate Claims at the United Nations Compensation Commission" (1997) 13(2) *Arbitration International* 167, p 183.
[106] H.M. Holtzmann and E. Kristjánsdóttir, *International Mass Claims Processes: Legal and Practical Perspectives* (Oxford University Press, 2007), p 250.
[107] See *Abaclat and Others v. Argentina*, ICSID Case No Arb/07/5, Alternative Work Proposal, 22 January 2013; *Abaclat and Others v. Argentina*, ICSID Case No Arb/07/5, Procedural Order No 17, 8 February 2013, paras 10-13; *Abaclat and Others v. Argentina*, ICSID Case No Arb/07/5, Letter from the Tribunal to the Parties, 26 September 2013. The report was issued to the parties on 5 September 2013.
[108] *Abaclat v. Argentina*, ICSID Case No Arb/07/5, Procedural Order No 17, 8 February 2013, para 8(iv).
[109] Ibid, paras 6-7 and 11 (initially, 17 claims reviewers, plus the expert, Dr Wühler). The tribunal subsequently granted permission for the claims reviewers to work more than five days per week and for the recruitment of five further claims reviewers (not including a sixth reviewer as an alternate): *Abaclat v. Argentina*, ICSID Case No Arb/07/5, Procedural Order No 20, 24 April 2013.

US$100,000) claims was approximately 35 years,[110] which played a large part in the decision to adopt sophisticated mass claims techniques for the different sub-categories of "C" claims.

IV.2 The relevant harms

74. Harm is the basis upon which reparation is afforded. Reparation, whether individual or collective, material or symbolic, or some appropriate combination thereof, is premised on the existence of harm which the measures adopted are supposed to address. As the UN Basic Principles explain, "Reparation should be proportional to the gravity of the violations and the harm suffered."[111]

75. An expert filing in the *Lubanga* case underscores that: "All processes should observe the fundamental rule that no further harm be caused to the victim through the means used to assess the damage and trauma caused to that victim."[112] A detailed scrutiny of potential beneficiaries in order to assess the degree to which they suffered harm in order to determine their eligibility may cause unnecessary trauma and contribute to a re-victimisation. This was stressed by the Trust Fund for Victims in its decision to suspend individual victim identifications including detailed harm assessments.[113] This re-victimising process might be considered similar to the German indemnification legislation adopted in the 1950s in which health claims required proof of incapacitation of at least 25% and that such disability resulted from Nazi persecution with the burden of proof on the claimant.[114]

76. A review of other courts and claims commissions that have dealt with such matters reveals the following approaches to reduce the burden on victims to prove their suffering:

    a. ***Reduce the reliance on victim submissions or affirmations by using all other available data sources to substantiate victims' eligibility***. This is also a way to

[110] C. Gibson, "Using Computers to Evaluate Claims at the United Nations Compensation Commission" (1997) 13(2) *Arbitration International* 167, p 171.
[111] UN Basic Principles, Principle 15.
[112] *The Prosecutor v. Lubanga*, Observations of Dr. Golden, Mr. Higson-Smith, Professor Ní Aoláin and Dr. Wühler pursuant to Rule 103 of the Rules of Procedure and Evidence, ICC-01/04-01/06-3240-Anx9, Registry Filing, 30 September 2016, para 11(a).
[113] *The Prosecutor v. Lubanga*, First submission of victim dossiers, ICC-01/04-01/06-3208 , LRV Filing, 31 May 2016, para 21.
[114] *German Indemnification Law*, 1956. Some legal presumptions were introduced in a later amendment. See, *In Re HOLOCAUST VICTIM ASSETS LITIGATION (Swiss Banks)*, Special Master's Proposal, 11 September, 2000, Annex E: Holocaust Compensation, pp E-32 and E-35-E37.

overcome deficiencies in evidence available to the victims to substantiate their claims.[115]

b. ***Lower the standard of proof.*** In some cases, bodies have adopted several standards of proof within a single reparations process. The UNCC, for example, pioneered a relaxed standard of "demonstrating satisfactorily" that a particular claim was eligible for compensation. Different verification procedures that applied to the different categories of UNCC claims further defined applicable standards of proof. Mere "simple documentation" of facts and no documentation of loss was required for urgent category "A" (forced departure from Iraq or Kuwait) and "B" (personal injury and death) claims to which capped amounts of compensation attached. For category "C" (personal loss up to US$100,000) claims, "appropriate evidence of the circumstances and amount of the claimed loss" was required. A higher standard of proof applied to claims in categories "D" (personal loss over US$100,000), "E" (private sector claims) and "F" (governmental and international organisations' claims), namely that claims be "supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and the amount of the loss claimed".[116] In the Claims Resolution Tribunal for Dormant Accounts in Switzerland (***CRT-I***) a standard of plausibility applied.[117] For the Claims Resolution Tribunal for Dormant Accounts in Switzerland (***CRT-II***), a standard of plausibility also applied[118] and the Procedural Rules provided for a set of evidentiary presumptions which, when applicable, removed the need for proof at all.[119] The German Forced Labour Compensation Program (***GFLCP***) employs a credibility standard and makes extensive use of evidential presumptions. All that is required to establish a claim for slave labour is for a claimant to show that they were held in a concentration camp, ghetto or comparable place of confinement.[120] The Holocaust Victim Assets Program (***HVAP***), like CRT-I and CRT-II, employs

[115] E.g., see para 71 above.
[116] See H.M. Holtzmann and E. Kristjánsdóttir (eds), *International Mass Claims Processes: Legal and Practical Perspectives* (Oxford University Press, 2007), pp 213-215.
[117] Ibid, pp 216-217.
[118] Ibid, p 218.
[119] For the treatment of standard of proof in mass claims processes, see generally JJ. van Haersolte-van Hof, "Innovations to Speed Mass Claims: New Standards of Proof" in Permanent Court of Arbitration (ed), *Redressing Injustices through Mass Claims Processes: Innovative Responses to Unique Challenges* (Oxford University Press, 2006).
[120] H.M. Holtzmann and E. Kristjánsdóttir (eds), *International Mass Claims Processes: Legal and Practical Perspectives* (Oxford University Press, 2007), p 219.

a plausibility standard and makes use of extensive presumptions. A claimant need only show that they belong to a certain ethnic or other group targeted by the Nazis for persecution or that they were detained in a camp during WWII and it will be presumed that they were subject to forced labour.[121]

c. ***Introduce presumptions to aid with proving harm***. The Trust Fund for Victims requested the Court in the *Lubanga* case to consider that psychosocial harm affects all victims in the case: "For example, once it has been established that a child participated in military activities it can be presumed to have suffered some form of psychosocial harm. Or, if it has been established that a mother or a father have lost a child because it has died while it was serving with the FPLC/UPC, they can be presumed to have suffered some form of psychosocial harm."[122] This is consistent with certain international criminal law jurisprudence; even when a criminal law standard of proof is warranted (unlike a civil reparations proceeding) presumptions have sometimes been used. In the *Kunarac* case, the ICTY Appeals Chamber determined that certain acts will necessarily produce the requisite severity of pain or suffering, and in such cases there is no need for the severity of the suffering to be separately proved.[123] The *Kunarac* Appeals Chamber and *Brdjanin* Trial Chamber decisions have held for example that rape is "obviously" an act which "appears by definition to meet the severity threshold" for torture.[124]

d. ***Use external experts to collate data for use in Court***. This is set out in section VI., below.

IV.3 The scope of liability

Causation

77. Both the Appeals Chamber and the Trial Chamber in the *Lubanga* case confirmed that the causal relationship relevant for reparations is that between the *crime* (as opposed to the

[121] Ibid, pp 220-221.
[122] *The Prosecutor v. Lubanga*, Redaction of Filing on Reparations and Draft Implementation Plan, ICC-01/04-01/06-3177-Red, TFV Filing, 3 November 2015, para 271.
[123] ICTY, *The Prosecutor v. Kunarac et al.*, IT-96-23&23/1, Judgment, Appeals Chamber, 12 June 2002, para 150.
[124] Ibid, para 150; ICTY, *The Prosecutor v. Brdjanin*, IT-99-36, Trial Chamber, Judgment, 1 September 2004, para 485.

conduct of the accused) and the harm suffered.[125] This is reflected in the Lubanga Principles.[126]

78. As such, one cannot, in assessing causation for reparation purposes, go behind the criminal conviction.[127] To do so would be to undermine the reparations scheme established by the Statute, a central purpose of which is to oblige the convicted person to repair the harm caused by the *crimes* for which they are convicted.[128]

Quantification

79. The Appeals Chamber has held in the *Lubanga* case that the scope of a convicted perpetrator's liability should be determined in accordance with that person's responsibility, and should not be limited because of a perceived lack of means.[129]

80. It is recommended that the scope of Mr. Bemba's liability be determined by this Chamber in a procedure separate from (and in advance of) the award and implementation of reparations to victims. This will help to streamline and expedite the eventual reparations process, by focusing on whether a particular individual or group is eligible.

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[125] *The Prosecutor v. Lubanga*, Judgment on the appeals against "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 99 ("the obligation to repair harm arises from the individual criminal responsibility for the *crimes* which caused the harm") and 125 ("the Court's legal framework determines only in general terms the required causal link between the harm and the *crime* for which the person was convicted" and "the principles upon which the applicable standard of causation should be based are … that 'the causal link between the *crime* and the harm for the purposes of reparations is to be determined in light of the specifities of a case'"); *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 247 ("'damage, loss and injury,' which forms the basis of a reparations claim, must have resulted from the *crimes* of enlisting and conscripting children under the age of 15 and using them to actively participate in the hostilities"), 248 (referring to the "causal link between the *crime* and the relevant harm for the purposes of reparations") and 250 ("the Court must be satisfied that there exists a 'but/for' relationship between the *crime* and the harm") (emphasis added in all). See also Rule 85 of the Rules of Procedure and Evidence: victims are persons who "have suffered harm as a result of the *commission of any crime* within the jurisdiction of the Court" (emphasis added).

[126] Lubanga Principles, para 11.

[127] The criminal conviction also distinguishes liability in the reparation context from other obligations to make reparation such as, for example, in the State responsibility context, where the causal relationship for the purposes of a compensation claim is between the internationally wrongful act and the resulting damage. See, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [2007] ICJ Rep 43, para 462; and Article 36 of the International Law Commission's Articles on State Responsibility.

[128] *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, para 179; *The Prosecutor v. Lubanga*, Judgment on the appeals against "Decision establishing the principles and procedures to be applied to reparations", ICC-01/04-01/06-3129, Appeals Chamber, 3 March 2015, para 99.

[129] *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 102-105.

81. While redress for some types of harm lends itself more easily to quantification, such as pecuniary loss resulting from the destruction of property, redress for other forms of non-pecuniary harm is more difficult to quantify, even with the assistance of experts. The jurisprudence of international bodies that award compensation for human rights violations offers little reasoned analysis for why certain amounts are awarded. When dealing with non-pecuniary harm resulting from criminal acts such as sexual abuse and illegal detention, for instance, the ECtHR has assessed damages "on an equitable basis", but does not explain what factors are taken into account in determining what is "equitable".[130] The practical task of determining the cost of reparations in cases involving large numbers of victims, as is the case here, makes this quantification process even more complex.

82. There are broadly two approaches adopted by bodies dealing with the payment of compensation to large numbers of victims: the "tort" or "delictual" approach; and the "administrative" approach (together, ***mass claims approaches***).[131]

83. The "tort" or "delictual" approach reflects the domestic experience in civil liability suits ("tort" liability in common law jurisdictions and "delictual" liability in civil law jurisdictions). Courts award compensation either on the basis of proof of harm or loss suffered by each individual victim or, in some class actions, through aggregating proof of damages and permitting class recovery distribution on a per capita, average or formula basis without the need for detailed proof of individual claims.[132]

84. The "administrative" approach reflects the experience of mass claims bodies and national statutory compensation schemes. This approach groups victims' claims for reparations into certain categories and allocates fixed, capped or formula-based amounts of compensation after the verification of claims to a relatively low standard of proof. The procedure to access this type of compensation, typically, is not judicial but administrative

[130] See for example *O'Keeffe v. Ireland* (App No. 35810/09), Judgment (Merits and Just Satisfaction), ECtHR, Grand Chamber, 28 January 2014, para 201; *M.C. v. Bulgaria* (App No. 39272/98), Judgment (Merits and Satisfaction), ECtHR, First Section, 4 December 2003, para 194; *X and Y v. The Netherlands* (App No. 8978/80), Judgment (Merits and Just Satisfaction), ECtHR, Grand Chamber, 26 March 1985, para 40; and *El-Masri v. The Former Yugoslav Republic of Macedonia (*App No. 39630/09), Judgment (Merits and Just Satisfaction), ECtHR, Grand Chamber, 13 December 2012, para 270.

[131] For discussions on the administrative approach versus the tort approach, see J. Malamud-Goti and L. Grosman, "Reparations and Civil Litigation: Compensation for Human Rights Violations in Transitional Democracies" in P. de Grieff (ed), *Handbook of Reparations* (Oxford University Press, 2008), Chapter 15; and P. de Greiff, "Justice and Reparations" in P. de Grieff (ed), *Handbook of Reparations* (Oxford University Press, 2008), Chapter 12.

[132] W. Rubenstein, *Newberg on Class Actions* (Thomson Reuters, 5th ed, 2016), sections 12.15 and 12.5.

in that it does not involve individual determinations on each claim by a body exercising judicial power. This approach finds parallels in the submission by the Legal Representative for Victims (***LRV***) in the *Katanga* case, which advocated the adoption of an "equitable *ex aequo et bono* approach" characterised by the awarding of fixed or formula-based sums of compensation for certain categories of harm.[133]

85. There is no clear line between these approaches and, indeed, some mass civil litigation utilise administrative techniques. There are very good reasons for accepting these kinds of approachs in cases involving large numbers of victims. These include:

    a. *Avoiding a protracted process*: Victims do not want to move forward at any cost. They have a strong interest in and right to prompt reparations proceedings. Individual assessment of the harm suffered and reparation required to repair the harm for each victim in a case involving over 5,000 victims is likely to take a significant amount of time and resources, and may undermine the effectiveness of the Court's reparation regime.

    b. *Avoiding re-victimisation*: an individual assessment process to determine the exact harm a victim has suffered is likely to involve fairly detailed procedures to verify and assess each claim. Such procedures carry a high risk of re-victimising or further traumatising the victims, even more so if they include Defence cross-examination as to the harm suffered and the appropriate reparation in each case. The right of the convicted person to a fair and expeditious process must be borne in mind but an administrative or equitable basis would strike the appropriate balance between the duty of the Trial Chamber to protect victims and respect the rights of the convicted person.[134]

    c. *Preserving equality between victims*: Assessing reparations on a case-by-case basis naturally leads to awards of different amounts for different victims, and the difference in the awards may send a message that the violation of the rights of

[133] *The Prosecutor v. Katanga*, Observations des victimes sur la valeur monétaire des préjudices allégués (Ordonnances ICC-01/04-01/07-3702 et ICC-01/04-01/07-3705), ICC-01/04-01/07, LRV Filing, 30 September 2016, paras 10 and 11.

[134] See, e.g., Article 64(2) of the Statute. See also *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 34 and 180, where the *Lubanga* Trial Chamber referred to reparations proceedings as "an integral part of the overall trial process". The Trial Chamber also referred to Rule 97(3) of the Rules of Procedure and Evidence about respecting the rights of victims and the convicted person, such rights including the right of appeal.

some people is worse than the violation of the same rights of others, thereby undermining an important egalitarian concern and resulting in a hierarchy of victims.[135] While equity does not generally require equal treatment, this becomes a serious problem in cases where people feel that they are victims of the same abusive system and in which they are seeking redress through the same procedure more or less simultaneously, which makes them particularly likely to compare the outcomes. Even in the rare case in which respect for the equality of rights is not the real concern, disparities in the amount of the awards has a deeply divisive effect on the victims, as witnessed, for example, in the operation of the September 11 Victim Compensation Fund in the US.[136]

86. Practical steps in implementing a mass claims approach may include:

a. *Categorisation of claims into groups and setting fixed, capped or formula-based compensation sums:* As individual verification of more than 5,000 victims will be time and resource intensive, categorising claims based on common factual and legal issues may enable this Trial Chamber to handle claims in a collective manner but still recognise the individual nature of the harm caused to the victims. Categorisation could be on the basis of the type of crime, harm suffered and/or identity of the victim (e.g. institutional claimants). Where documentary evidence is scarce or non-existent, fixed or capped compensation awards coupled with lower evidential thresholds and the use of evidentiary presumptions (discussed above) are likely to be the most appropriate means of valuing large numbers of claims. Both the LRV and the Defence in the *Katanga* case suggested fixed amounts of compensation for different categories of harm because of the victims' difficulty in obtaining evidence.[137] Fixed or capped amounts of compensation can also be used with standardised valuation processes, as was done in a simple form by the LRV in

[135] P. de Greiff, "Justice and Reparations" in P. de Grieff (ed), *Handbook of Reparations* (Oxford University Press, 2008), p 458.
[136] Ibid.
[137] *The Prosecutor v. Katanga*, Defence Observations on the Monetary Value of the Alleged Harm, ICC-01/04-01/07-3711, Defence Filing, 30 September 2016, para 15; *The Prosecutor v. Katanga*, Observations des victimes sur la valeur monétaire des préjudices allégués (Ordonnances ICC-01/04-01/07-3702 et ICC-01/04-01/07-3705), ICC-01/04-01/07-3713 (VLR filing), LRV Filing, 30 September 2016, para 15.

the *Katanga* case where average prices of basic and large houses in Bogoro were used as a basis for quantifying compensation relating to property loss.[138]

b. *Utilise local and comparable law to meet victims' expectations of compensation standards:* In determining the appropriate fixed, capped or formula-based amount of compensation for each category, this Trial Chamber may consider adopting the approach advocated by the LRV in the *Katanga* case, which was to rely on French, Belgian and Congolese law, adapted for the local context of Bogoro.[139] This figure would then be multiplied by the number of claimants in that particular category, to reach the total amount of reparations to be awarded to the claimants in that category.[140] The total sums for all categories were then added to form the final amount to be awarded against Mr. Katanga in the Order for Reparations.[141]

c. *Adopt a lower standard of proof*: The *Lubanga* Trial and Appeals Chambers both recognise that a less exacting standard of proof should apply in reparation proceedings than in criminal proceedings and that, consistent with the approach of other mass claims bodies,[142] the difficulties victims may face in obtaining evidence is one factor that supports a more flexible standard.[143] The Lubanga Principles refer to "sufficient proof" and the Appeals Chamber stated that what will be sufficient will depend on the circumstances of each case.[144] These approaches echo the experience of other mass claims bodies set out at paragraph 76.b above.

[138] *The Prosecutor v. Katanga*, Observations des victimes sur la valeur monétaire des préjudices allégués (Ordonnances ICC-01/04-01/07-3702 et ICC-01/04-01/07-3705), ICC-01/04-01/07-3713 (VLR filing), LRV Filing, 30 September 2016, para 21.
[139] Ibid, paras 7 and 8.
[140] Ibid, see generally, paras 13-89.
[141] Ibid, para 89.
[142] See H.M. Holtzmann and E. Kristjánsdóttir, *International Mass Claims Processes: Legal and Practical Perspectives* (Oxford University Press, 2007), pp 213-221 as regards the UNCC, the Claims Resolution Tribunals for Dormant Accounts in Switzerland (CRT-I and CRT-II), the German Forced Labour Compensation Program and the Holocaust Victim Assets Program. The latter three adopted a "plausibility" standard and the UNCC required different evidentiary thresholds for different categories of claims.
[143] *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 250-253; *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, para 81.
[144] *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, para 81.

V. METHODOLOGIES TO DETERMINE THE TYPES AND MODALITIES OF REPARATIONS APPROPRIATE TO ADDRESS THE HARM RELEVANT IN THE CIRCUMSTANCES OF THE CASE

87. Having regard to the crimes for which the perpetrator was convicted, the suffering which resulted and the current situation of the victims, this Chamber is tasked with devising types and modalities of reparations that will be adequate and effective in redressing those harms to the greatest possible extent.

88. There may be a number of logical ways in which to break down this task and develop a schema for each crime which shows a relationship between: the crimes for which the perpetrator was convicted; direct and indirect victims of the crimes (estimated numbers, characteristics); types of harms suffered; the current situation of the victims (location, vulnerabilities, special or urgent needs); and logistical, practical and/or security challenges. A schema can be used to become acquainted with the general situation and as a basis upon which to engage in consultations with victims and affected communities, and others with relevant experience and expertise.

89. Section III.2.A above addressed the possibility of expanding and clarifying Principle 8 on victim consultation. Whether or not Principle 8 is expanded and clarified, ***a central component of the methodology to determine the appropriate type and modalities of reparations should be consultations with victims and victim groups***. The importance of ensuring in particular that women victims are able to meaningfully participate in designing, implementing and monitoring reparations programmes is stressed in a number of specific documents, including the Nairobi Declaration,[145] the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa,[146] CEDAW's General Recommendation on Women in Conflict and Post-Conflict contexts,[147] and the UNSG Guidance Note.[148] Similar considerations also apply to actively ensuring the participation of victims from vulnerable or marginalised groups, including indigenous

[145] Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, 21 March 2007, see generally Principles 1-3.
[146] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), as adopted by the Meeting of Ministers, Addis Ababa, Ethiopia on 28 March 2003, and the Assembly of the African Union at the second summit of the African Union in Maputo, Mozambique, 21 July 2003, Articles 4 and 10.
[147] Committee for the Elimination of Discrimination Against Women, General Recommendation No. 30: *Women in conflict prevention, conflict and post-conflict situations*, UN Doc CEDAW/C/GC/30, 18 October 2013, paras 42-46 and 81.
[148] UNSG Guidance Note, Principle 6 and pp 10-12.

communities, refugees, those subjected to caste discrimination, and LGBTI individuals.[149] In relation to reparations programmes, for example, the Updated Impunity Principles provide that:

> "Victims and other sectors of civil society should play a meaningful role in the design and implementation of [reparations] programmes. Concerted efforts should be made to ensure that women and minority groups participate in public consultations aimed at developing, implementing, and assessing reparations programmes."[150]

90. The ILA Procedural Principles recognise that "[v]ictims have a right to be heard, which should be respected in all phases of the reparation mechanism".[151] The UNSG Guidance Note includes as an Operational Principle that "[m]eaningful participation and consultation of victims in the mapping, design, implementation, monitoring and evaluation of reparations should be ensured".[152]

91. It is important for this Chamber to develop a consultation model which is detailed, constructive and instructive to all facets of the reparations process from beginning to end. Reparations should be victim-centred, which implies that victims should be engaged throughout.

92. The recent UN joint submission in the *Lubanga* case set out some examples of reparations programmes which had been developed with the beneficiaries:

> "The economic reintegration kits were developed on the basis of business plans that were prepared by the beneficiaries themselves during the training phase on the 'creation and management of income-generating activities (IGA)' and contained items related to their respective plans. … The five above-mentioned organisations were supervised by the JHRO project coordinator, who reinforced a synergy-based methodology in the implementation of the project through the organization of regular meetings, a system of referrals (including list verification and cross-checking) and joint planning."[153]

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[149] See UN Committee Against Torture, General Comment No. 3: *Implementation of Article 14 by States Parties*, UN Doc CAT/C/GC/3, December 2012, para 32.
[150] UN Commission on Human Rights, *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 32.
[151] ILA Procedural Principles, Principle 2.
[152] UNSG Guidance Note, Principle 6.
[153] *The Prosecutor v. Lubanga*, Joint Submission by the United Nations containing observations on collective projects for former child soldiers in the East of the Democratic Republic of the Congo pursuant to Rule 103 of the Rules of Procedure and Evidence, ICC-01/04-01/06-3240-Anx15, 5 October 2016, paras 16 and 20.

> "The local community was involved in all stages of the project, from planning, to implementation, and the eventual use of the premises."[154]

93. In determining what forms and modalities of reparations to afford, the following general considerations may provide general guidance.

94. Typically a variety of reparations measures will be required to address the different forms of harm. For instance, the IACtHR consistently awards individual reparation to individual members of communities when it finds that their individual rights have been violated while also recognising collective harm.[155] The ACHPR has often recommended collective reparation *in conjunction* with individual reparation measures when individual rights had been violated.[156] Truth and Reconciliation Commissions have also regularly recommended individual measures in addition to collective reparation.[157] A similar approach has been taken by some domestic courts.[158]

95. Types of situations in which individual reparations may tend to be important, even for large numbers of victims, include when:
    a. the victims do not perceive their suffering as collective;
    b. the relevant harms are clear and quantifiable;
    c. the victims have moved from the locations where the harm took place and would not be able to access collective reparation; and/or
    d. collective reparation programmes in the particular context reinforce stigma (though this can be problematic for individual reparations programmes as well).

96. Types of situations in which collective reparations may be appropriate and/or important include:
    a. when there have been violations of collective rights;[159]

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[154] Ibid, para 27.
[155] *Case of Sawhoyamaxa Indigenous Community v. Paraguay* (Merits, Reparations and Cost), IACtHR, Ser C No. 146, 29 March 2006, para 226.
[156] *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; *SERAC and CESR v. Nigeria*, ACHPR, Communication No. 155/96, 27 October 2001.
[157] This was the case for example, in Colombia, Kenya, Morocco, Peru and South Africa. See generally, International Center for Transitional Justice, *The Rabat Report, the concept and challenges of collective reparations*, 14 February 2009.
[158] *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.
[159] 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.*

b. to address the individualised harm of a large number of persons;[160]
c. when it is the best way to remedy the harm (e.g. treatment facilities for victims); and/or
d. when memorialisation or other forms of satisfaction and guarantees of non-repetition are what the victims really want.

VI. THE ROLE THAT COULD BE PLAYED BY EXPERTS

97. International human rights, investment and claims compensation bodies rely on experts for a variety of purposes, illustrative examples of which are set out below and which may provide assistance to this Chamber.

Recommending methodologies and procedural steps

98. In the *Abaclat v Argentina* mass-claim investment treaty arbitration involving 60,000 claims by holders of defaulted Argentinian bonds, the tribunal appointed an expert, Dr Norbert Wühler, former Chief of the UNCC's legal branch, and tasked him with proposing a Work Proposal on how to verify the authenticity of the documents submitted with the request for arbitration and determining whether they were sufficient to prove that each individual claim fell within the tribunal's jurisdiction. Dr Wühler was given approximately one month to prepare a Work Proposal and a further month to prepare an Alternative Work Proposal setting out procedural steps, team composition and an estimated budget of fees and expenses. [161]

Information gathering

99. Article 36 of the UNCC Rules provided that a panel of commissioners (who were themselves experts in fields such as accounting, loss adjustment, engineering, insurance and environmental damage assessment) could "request additional information from any …

Suriname (Preliminary Objections, Merits, Reparations, and Costs), IACtHR, Ser C No. 172, 28 November 2007; *Endorois v. Kenya*, ACHPR, Communication No. 276/03, 25 November 2009.

[160] In *SERAC and CESR v. Nigeria*, ACHPR, Communication No. 155/96, 27 October 2001 (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.

[161] *Abaclat and Others v. Argentina*, ICSID Case No Arb/07/5, Procedural Orders No 12 of 7 July 2012 (appointing the expert) and No 15 of 20 November 2012 (determining the scope, terms and conditions of his mandate). The expert did not make the actual findings as to jurisdiction, but merely assessed whether the documentation was sufficient to prove the factual matters necessary for the tribunal to make findings on jurisdiction.

source, including expert advice as necessary". This provision formed the basis of the "systematic and extensive use of expert advice [that became] one of the defining features of the Commission's proceedings".[162] The UNCC Secretariat collated information for the purpose of establishing an external database against which to "match" information provided by the claimants for categorise "A" (forced departure from Kuwait and Iraq) and "B" (personal injury and death). For categories "D" (personal claims for damages above US$100,000), "E" (direct loss, damage or injury to legal persons) and "F" (direct loss, damage or injury to governments or international organisations), the UNCC Secretariat engaged external expert consultants to conduct technical missions to claimant countries to gather additional information for the panels, including through interviewing claimants and other persons, inspecting documents and assessing damage to property and public facilities.[163]

Harm assessment (type and extent of harm)

100. There are many examples of regional human rights courts relying on expert reports to determine whether and to what extent personal harm or loss was suffered. Often such expert reports were submitted in earlier domestic proceedings or are new reports submitted directly to the regional human rights court. There are few cases in which the relevant court appoints its own experts, despite having the procedural power to do so.[164] In *Husayn (Abu Zubaydah) v Poland*, concerning so called CIA black sites in Poland, the Court decided of its own motion to hear evidence from witnesses and experts because it was unable to receive direct testimony from the applicant who was being held in Guantanamo Bay.[165] It called three experts who were rapporteurs or advisors to European Union and Council of Europe inquiries into the use of European countries as CIA black sites.[166] The ECtHR relied "to a great extent" on the testimony of the experts to establish

[162] V. Heiskanen, "The United Nations Compensation Commission" (2002) 296 *Collected Courses of the Hague Academy of International Law*, p 302.
[163] L.A. Taylor, "The United Nations Compensation Commission" in C Ferstman et al (eds), *Reparation for Victims of Genocide, War Crimes and Crimes Against Humanity* (2009), p 205.
[164] See, e.g., Rule A1 (Investigative measures) of the ECtHR' Rules of Court, 19 September 2016; Article 27(8) (power to require expert opinions at the provisional measures stage) and Article 69(2) (power to require expert opinion in connection with monitoring compliance with judgments) and Articles 40, 41 and 46 (power of the parties to call expert evidence) of the Rules of Procedure of the IACtHR; Article 45(1) of the African Court on Human and Peoples' Rights Rules of Court, April 2010.
[165] *Husayn (Abu Zubaydah) v.* Poland, Judgment (Merits and Just Satisfaction), App No. 7511/13, 24 July 2014, paras 8, 12, 118 and 397.
[166] Ibid, para 42.

the facts, including the harm the applicant suffered and the responsibility of the Polish government in failing to prevent it.[167]

101. This kind of resort to experts on general issues might be of particular use to this Chamber in light of the large numbers of victims. Expert reports on the types of harm commonly suffered by, for example, victims of sexual and gender-based violence, might be useful to the Chamber, coupled with presumptions above about the existence of harm when certain facts in respect of certain categories of victims are established.

Causation

102. There are also a number of examples of regional human rights courts relying on expert evidence in determining whether the harm suffered by the applicant was caused by acts or omissions for which the State is responsible in violation of a human rights treaty obligation.[168] The IACtHR has explicitly relied on expert evidence to establish causation. In the cases of *Velásquez-Rodríguez v Honduras* and *Godinez-Cruz v Honduras*, the expert medial evidence was relied on to find not only that the family of the victim suffered psychological harm but that such harm was caused by the disappearance of the victims. [169]

Quantification

103. In expropriation cases, human rights bodies often rely on experts to assess the fair amount of compensation reasonably related to the value of the applicant's property.[170] Quantification experts are used almost without exception in investment arbitration which involves interference with or deprivation of a foreign investor's proprietary interests

[167] Ibid, para, 400.
[168] See, e.g., *Fadeyeva v. Russia* (App No. 55723/00), Judgment (Merits and Just Satisfaction), ECtHR, First Section, 9 June 2005, paras 46, 85 and 88; *Neulinger and Shuruk v. Switzerland* (App No. 41615/07), Judgment (Merits and Just Satisfaction), ECtHR, Grand Chamber, 6 July 2010, paras 37, 46 and 143; *Kulyk v. Ukraine* (App No. 30760/06), Judgment (Merits and Just Satisfaction), ECtHR, Fifth Section, 23 June 2016, paras 30, 49 and 81-83.
[169] *Velásquez-Rodríguez v. Honduras*, Judgment (Reparations and Costs), IACtHR, Ser C No. 7, 21 July 1989, paras 4, 6 and 51; *Godinez-Cruz v. Honduras*, Judgment (Reparations and Costs), IACtHR, Ser C No. 8, 21 July 1989, paras 4, 5 and 49.
[170] See, e.g., *Papamichalopoulos and Others v. Greece* (App No. 14556/89), Judgment (Just Satisfaction), ECtHR, Chamber, 31 October 1995, paras 3-4 and 39; *Tomov and Nikolova v. Bulgaria*(App No. 50506/09), Judgment (Merits and Just Satisfaction), ECtHR, Fifth Section, 21 July 2016, paras 61-62.

resulting from the host State's failure to guarantee particular standards of investment protection.[171]

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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[171] See, e.g., the different examples of valuation techniques discussed in *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No ARB/97/3, Award, 20 August 2007, para 8.3.12.