

**REDRESS**

**Ending Torture, Seeking Justice for Survivors**

**MOVING REPARATION  
FORWARD AT THE ICC:**

**RECOMMENDATIONS**

**November 2016**

*‘The reparation scheme provided for in the Statute is not only one of the Statute’s unique features. It is also a key feature. The success of the Court is, to some extent, linked to the success of its system of reparations.’*

*Appeal Chamber, Lubanga, 3 March 2015*

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<sup>1</sup> ICC, *Lubanga*, ICC-01/04-01/06-3129-AnxA, 3 March 2015, Amended order for reparation, para 3.

## Table of Contents

I. Introduction .....	3
II. The ICC's reparation framework.....	4
III. Overview of the ICC reparation practice to date.....	5
III.1 Reparation at an impasse: the <i>Lubanga</i> case.....	5
III.2 The <i>Katanga</i> case .....	8
III.3 The next challenge: the <i>Bemba</i> case .....	9
III.4 A model of efficiency? The <i>Al Mahdi</i> case .....	9
IV. Analysis of key challenges .....	10
IV.1 Submitting a request for reparation.....	10
IV.2 Identification of potential beneficiaries.....	12
IV.3 Vetting/assessment of claims.....	14
IV.4 Quantifying harm and Establishing civil liability .....	16
IV.5 The reparation plan.....	18

## I. Introduction

When a perpetrator is convicted of crimes before the International Criminal Court, the victims of those crimes are entitled to seek reparation for the harm they suffered. Since the entry into force of the ICC Statute in 2002 close to 20,000 victims have applied to participate in proceedings and over 15,000 victims have submitted applications for reparation.<sup>2</sup> The ICC started its first reparation procedure in 2012 in the case against Mr. Thomas Lubanga, and while some progress has been made, at the time of writing in end 2016, no court-ordered reparations had reached actual persons on the ground. In addition to the *Lubanga* case, three more accused persons have been convicted and reparation phases have started in the *Katanga*, *Bemba* and *Al Mahdi*'s cases. Thus, there is now a build-up of work.

There are a number of challenges which continue to impede the process:

- The reparations provisions in the Rome Statute and the Rules of Procedure and Evidence are vague.
- No overarching guidelines exist to assist the different Trial and Appeals Chambers to conduct efficient reparations proceedings. Each chamber has adopted a different approach, resulting in a lack of clarity amongst victims and their representatives.
- The identification of beneficiaries and the assessment of the harm they suffered is proving difficult, not only because of the large number of potential beneficiaries, but also because victims are sometimes spread over large geographical zones, may be displaced or have relocated. The resources of the Court's Registry and of the Trust Fund for Victims are overstretched and it is unclear who should be responsible to identify the beneficiaries and assess the harm.
- Neither the existing legal framework nor the jurisprudence provides certainty on which decisions and actions ought to remain within the scope of the judicial process, and which ones could be delegated with appropriate oversight, for example to the Registry or the Trust Fund for Victims.

If unaddressed, these challenges threaten to undermine the ICC's reparation system and may seriously impede the Court from delivering justice to victims. Already, discontent is growing among victims in face of the Court's apparent failure to provide them with meaningful reparation. This is particularly true in the *Lubanga* case, where the Trial Chamber issued the Court's first decision on reparation more than four years ago. However, continuous delays and what appears to be an impasse between several competent Chambers and the Trust Fund for Victims on certain aspects relating to implementation means that victims have yet to receive reparation.

As reparation proceedings are ongoing in four cases, and will be coming up in more cases in the future, there is a need to urgently clarify key steps and procedures that apply to the Court's reparation mandate. This is important to provide some level of consistency, foresight and fairness to victims and to ensure the success of the Court's reparation system. It is also important as domestic, regional and hybrid courts are being set up to prosecute ICC crimes domestically. Many of those involved in the establishment of these mechanisms are looking to the ICC as a possible model of justice – including with regards to how court-ordered reparations can be successfully processed, ordered and implemented.

Trial Chambers are already beginning to learn from some of the mis-steps in the *Lubanga* case. Progress made in the *Katanga* case, and the *Bemba* Trial Chamber's specific call for submissions on how to apply lessons learned in the *Lubanga* case are examples of such

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<sup>2</sup> ICC, *Report on activities and programme performance of the International Criminal Court for the year 2015*, ICC-ASP/15/3, 14 September 2016, p. 35

learning and reflection. This notwithstanding, it is time for the Court to consider how to better ensure effective implementation of that mandate. This paper examines the ICC's practice so far and analyses the key challenges that it faces in designing a reparation system that respects victims' rights while also taking into account the limited resources and other limitations faced by the Court. We encourage the Court to consider how to make procedures more efficient and predictable and make several recommendations in these regards. We are grateful to the Open Society Foundations human rights program for its support of the research for this report.

## II. The ICC's reparation framework

The Rome Statute and the Court's Rules of Procedure and Evidence provide only a basic conceptual framework on reparation, with much of the details left to the Court to set out.<sup>3</sup> Article 75 of the Statute provides the legal basis for reparation to victims under the ICC's mandate:

1. The Court shall establish principles relating to reparations to, or in respect of victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury of victims and will state the principles on which it is acting.
2. It may make an order against a convicted person specifying appropriate reparations; where appropriate, it may order that the award for reparations be made through the Trust Fund.
3. Before making the order, it may invite and shall take account of representations from or on behalf of the convicted person, victims, and other interested persons or interested states.

When the Court orders that a reparation award be made 'through the Trust Fund' as per Article 75 (2), the process following the reparation order involves the following steps:

- a) The Trust Fund is to prepare an implementation plan for the relevant Chamber's approval;<sup>4</sup> and
- b) The Trust Fund is to report periodically to the Chamber on the implementation of the award once the plan is approved.<sup>5</sup>

The main provisions in the Statute and Rules of Procedure and Evidence provide that:

- a) Victims can request reparation in writing and can file such applications with the Registrar at any stage of the proceedings;<sup>6</sup>
- b) Evidence relating to reparation requests can be submitted as part of the trial proceedings;<sup>7</sup>
- c) Specific reparation hearings can be convened at the Chamber's discretion;<sup>8</sup>

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<sup>3</sup> Reasons for the only basic conceptual framework in the Statute include the relatively late introduction of a provision on reparations during negotiations, and the complexity of the issues and lack of precedent for a reparation regime in an international criminal jurisdiction. France made a first proposal at the Preparatory Committee meeting of December 1997, followed by a joint proposal submitted by France and the United Kingdom at the March 1998 Preparatory Committee. This text provided the basis of negotiations in Rome, in June-July 1998. See P. Lewis & H. Friman, "Reparations to Victims," in Roy S. Lee (ed.) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001) p. 476-7.

<sup>4</sup> ICC, Regulations of the Trust Fund for Victims, Resolution ICC-ASP/4/Res.3, 3 December 2005, para. 57.

<sup>5</sup> *Ibid*, para. 58.

<sup>6</sup> In accordance with Rule 94 of the Rules of Procedure and Evidence.

<sup>7</sup> Regulation 56 of the Regulations of the Court.

<sup>8</sup> Article 76(3) provides that 'any representations under article 75 shall be heard during the further hearing referred to in paragraph 2 and, if necessary, during any additional hearing.' Rule 143 of the RPE specifies that 'Pursuant to article 76, paragraphs 2 and 3, for the purpose of holding a further hearing on matters related to sentence and, if applicable, reparations, the Presiding Judge shall set

- d) Prior to issuing a reparation order the Court may invite and take account of representations from or on behalf of the convicted person, victims, and other interested persons or interested states;
- e) A reparation order can be appealed by the Defence and by victims.

Several civil society groups including REDRESS, as well as some States Parties, had called on the competent organs of the Court to develop and adopt court-wide principles on reparation in accordance with Article 75 (1).<sup>9</sup> This could have helped to fill gaps in the ICC's basic reparation framework and helped those involved to plan ahead, collate any relevant information and communicate adequately with victims and affected communities about what is to be expected. Ultimately, it could have also served to expedite the reparations proceedings and the implementation of reparation orders. However, the Court indicated on multiple occasions that the plenary of judges had decided that instead of court-wide principles, principles would be adopted through the jurisprudence, on a case by case basis.<sup>10</sup>

When the *Lubanga* case reached the reparation stage in 2012, it became evident that key aspects of the process had yet to be decided including: what standard of proof to apply; what constituted an 'order for reparation' as per Article 75(2); whether applications for reparation received by the Court throughout the trial had to be individually assessed prior to a decision on the nature of reparation; the degree of judicial oversight and the level of independence the Trust Fund ought to retain when orders are made 'through' it as per Article 75(2).

The adoption of principles in the *Lubanga* case clarified to an extent the reparation process in that case. However, these principles do not necessarily apply to future cases and in the absence of general principles, each Chamber will ultimately decide on its own process.

### III. Overview of the ICC reparation practice to date

#### III.1 Reparation at an impasse: the *Lubanga* case

In March 2012, Trial Chamber I convicted Thomas Lubanga for the conscription, enlistment and use of children under the age of 15 years in armed conflict in relation to the conflict in Ituri, Democratic Republic of Congo (DRC), in 2002-2003. The Chamber issued on 7 August 2012 a decision on the principles and process to be applied for reparations to victims in the case (hereinafter *Lubanga* Trial Chamber Reparation Decision). It ordered the Trust Fund for Victims to operationalise those principles and that reparation should be awarded 'through' the Trust Fund in accordance with Article 75 (2) of the Statute.<sup>11</sup> It also left it to the Trust Fund to identify potential beneficiaries, measure the extent of the harm suffered and decide on the specific types of reparation that would be implemented in this case with the help of experts, as appropriate.<sup>12</sup>

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the date of the further hearing. This hearing can be postponed, in exceptional circumstances, by the Trial Chamber, on its own motion or at the request of the Prosecutor, the defence or the legal representatives of the victims participating in the proceedings pursuant to rules 89 to 91 and, in respect of reparations hearings, those victims who have made a request under rule 94.'

<sup>9</sup> ICC, *Report of the Bureau on victims and affected communities and the Trust Fund for Victims, including reparations and intermediaries*, ICC-ASP/12/38, 15 October 2013, para. 9. ICC, *Report of the Court on principles relating to victims' reparations*, ICC-ASP/12/39, 8 October 2013, para. 4; REDRESS, *Justice For Victims: The ICC's Reparations Mandate, 20 May 2011*, p 24-28; Victims' Rights Working Group, *Establishing effective reparation procedures and principles for the International Criminal Court*, September 2011.

<sup>10</sup> The plenary of judges met twice to discuss the possible adoption of principles on reparation by the Plenary in 2006 and 2008.

<sup>11</sup> For a more detailed summary of the decision see: REDRESS, *Lubanga Case - Q & A on ICC Landmark Decision on Reparations for Victims*, 14 August 2012.

<sup>12</sup> The Chamber ruled that reparation in the case could take the form of restitution, compensation and rehabilitation measures, as well as symbolic and other measures.

This was the Court's first ever reparation decision and after almost six years of proceedings, it was welcomed. It affirmed international standards on reparation and recognised a number of important principles, including the need for reparation to be accessible to victims and to ensure that victims, together with their families and communities are able to participate throughout the reparations process, and are provided with adequate support.

At the same time, the decision failed to address a number of important aspects. The Chamber ruled that reparation would be implemented 'through' the Trust Fund but remained silent on how the Trust Fund could apply the principles it had identified. It also failed to clarify the Chamber's role in overseeing the Trust Fund's implementation of the reparation awarded. In addition, the Chamber did not consider individual applications for reparation submitted throughout the trial. It did not publicise a timeframe to allow more victims to come forward to submit applications for reparation, notwithstanding the relatively small number of victims who had been identified at that stage.<sup>13</sup> The lack of clarity of the decision left victims and representatives wondering whether the ruling was even a decision on reparation.

The representatives of the participating victims and the Defence appealed the decision.<sup>14</sup> The Appeals Chamber ruled on the appeal only on 3 March 2015, once it had confirmed Mr. Lubanga's conviction upon appeal. It found that the Lubanga Trial Chamber Reparation Decision contained errors as a result of which the order for reparation needed to be amended.<sup>15</sup> The Appeals Chamber clarified that only collective reparation had been ordered and instructed the Trust Fund to present a draft implementation plan for collective reparations to Trial Chamber II (to which the implementation of the awarded reparation was referred) no later than six months from the 3 March 2015 judgment. It requested the Fund to 1) compile a list of victims potentially eligible for reparation; 2) assess the extent of the harm suffered by victims; 3) make proposals regarding the modalities and forms of reparation to be awarded; 4) identify the anticipated amount corresponding to Mr Lubanga's liability for the harm suffered by victims; and 5) identify the amount that the Fund would potentially advance from its own funds collected through voluntary contributions.

The Appeals Chamber's decision set out clearly what an order for reparation ought to contain and gave the Trust Fund instructions on what was broadly required as next steps. However, the Appeals Chamber's decision did not give instructions to the Fund as to what its draft implementation plan ought to include.

The Trust Fund submitted a draft implementation plan in November 2015<sup>16</sup> which Trial Chamber II rejected. The Chamber noted that the Trust Fund had not complied with the Appeals Chamber's orders: its plan did not identify victims and instead proposed that victims be identified when seeking to access reparation programmes. The plan also did not

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<sup>13</sup> 126 victims were admitted as participants in the trial proceedings while it is now estimated that potential beneficiaries of reparation in this case could amount to 3,000 individuals.

<sup>14</sup> For a summary of arguments please see: REDRESS, *Q & A – Conclusion of the appeals in the Lubanga case*, June 2015.

<sup>15</sup> The Appeals Chamber clarified that the order for reparations must:

- Be made against the convicted person, in this case Mr Lubanga;
- Establish and inform Mr Lubanga of his financial liability and that, exceptionally, the Trust Fund for Victims should undertake that assessment;
- Specify the type of reparations, individual, collective or both that are awarded.
- Define the types of harm that can be repaired bearing in mind that there needs to be a link between the harm suffered and the crimes for which Mr Lubanga was convicted;
- Identify the victims eligible to benefit from reparations or set out the criteria of eligibility.

This summary is extracted from REDRESS, *Q & A – Conclusion of the appeals in the Lubanga case*, June 2015.

<sup>16</sup> ICC, *Lubanga*, ICC-01/04-01/06-3177-AnxA, 3 November 2015, Trust Fund for Victims Draft Implementation Plan for collective reparations to victims and ICC, *Lubanga*, ICC-01/04-01/06-3177-Red, 3 November 2015, Filing on Reparations and Draft Implementation Plan.

include an estimate of Mr. Lubanga's financial liability, stating that ultimately this should be the responsibility of the Chamber.<sup>17</sup> The Chamber also found that the reparation plan did not provide sufficient detail as to the locations where reparation activities would take place, nor who would implement those activities or their specific costs to enable sufficient oversight and thus endorsement by the chamber. The Chamber requested the Fund to submit 1) by 7 May 2016, detailed terms of reference for each of the proposed reparation programmes with a clear estimate of the corresponding costs and more details as to how monitoring would be undertaken and 2) by end of 2016 information on location and identity of victims interviewed to assess the harm suffered for potential beneficiaries of the reparation programmes.<sup>18</sup> The Trust Fund sought to appeal Trial Chamber II's order arguing, *inter alia*, that the ruling reversed the roles envisaged by the Appeals Chamber with regards to who should ultimately decide on victims' eligibility to obtain reparation. Leave to appeal was rejected on the basis of the Trust Fund's lack of *locus standi*.<sup>19</sup>

In response, the Trust Fund reported in May and again in June 2016 that it had started to identify and interview potential beneficiaries. It stressed that the individualised identification process required by the Chamber was not only cumbersome and expensive but also re-traumatising for victims.<sup>20</sup> It requested the Chamber to reconsider its position indicating it would not proceed with further identifications until the Chamber ruled on its request.

In response, the Chamber expressed its own concern with the Trust Fund's position and inability to comply with the Chamber's orders. It ordered the Registry to assist the Legal Representatives of Victims (LRV) and the Trust Fund to identify potentially eligible victims and called for submissions (also from organisations outside of the proceedings) on collective reparation projects that could be implemented in the case.<sup>21</sup> On 15 July 2016, the Chamber also requested that the Trust Fund consider the feasibility of implementing symbolic collective reparations.<sup>22</sup> On 16 August 2016, the Trust Fund reported that: 'the Board remains concerned that the current procedure is legally and systemically flawed, unnecessarily cumbersome, very resource intensive in terms of staff time and costs, not in the interests of victims and not conducive to meaningful redress through collective reparations awards to eligible victims.'<sup>23</sup>

Two hearings took place on 11 and 13 October 2016 to discuss the proposals received. On 21 October 2016, Trial Chamber II approved a plan for symbolic reparation submitted by the Fund.<sup>24</sup> On the same day, it also ordered that the Trust Fund continue with the identification of victims together with the Office of the Public Counsel for Victims (OPCV).<sup>25</sup>

More than four years after the Lubanga Trial Chamber Reparation Decision, and close to ten years after the first victims had submitted their request for reparation, the situation

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<sup>17</sup> ICC, *Lubanga*, ICC-01/04-01/06-3198, 9 February 2016, Order instructing the Trust Fund for Victims to supplement the draft implementation plan.

<sup>18</sup> *Ibid.*

<sup>19</sup> ICC, *Lubanga*, ICC-01/04-01/06-3202-tENG, 18 April 2016, Decision on the request of the Trust Fund for Victims for leave to appeal against the order of 9 February 2016.

<sup>20</sup> ICC, *Lubanga*, ICC-01/04-01/06-3208, 31 May 2016, First submission of victim dossiers and ICC, *Lubanga*, ICC-01/04-01/06-3209, 7 June 2016, Additional Programme Information Filing.

<sup>21</sup> ICC, *Lubanga*, ICC-01/04-01/06-3218, 15 July 2016, Order instructing the Registry to provide aid and assistance to the Legal Representatives and the Trust Fund for Victims to identify victims potentially eligible for reparations.

<sup>22</sup> ICC, *Lubanga*, ICC-01/04-01/06-3219, 15 July 2016, Request Concerning the Feasibility of Applying Symbolic Collective Reparations.

<sup>23</sup> ICC, *Report to the Assembly of States Parties on the projects and the activities of the Board of Directors of the Trust Fund for Victims for the period 1 July 2015 to 30 June 2016*, ICC-ASP/15/14, 16 August 2016, para 35.

<sup>24</sup> ICC, *Lubanga*, ICC-01/04-01/06-3251, 21 October 2016, Order approving the proposed plan of the Trust Fund for Victims in relation to symbolic collective reparations.

<sup>25</sup> ICC, *Lubanga*, ICC-01/04-01/06-3252, 21 October 2016, Ordonnance relative à la requête du Bureau du conseil public pour les victimes du 16 septembre 2016.

appears to have come to a near standstill, with the proceedings at an impasse. As expressed by one of the LRV who took the floor during the reparation hearings on 11 October 2016, these further delays are difficult to justify, in particular for victims, some of whom have expressed growing dissatisfaction and a loss of confidence that the Court will ever deliver meaningful reparation to them.<sup>26</sup>

### III.2 The *Katanga* case

On 7 March 2014, Mr. Katanga was convicted of one count of crimes against humanity (murder) and four counts of war crimes (murder, attacking a civilian population, destruction of property and pillaging) in relation to an attack on Bogoro (Ituri, DRC) on 24 February 2003.

In August 2014, prior to rendering a decision on reparation and prompted by the victims' legal representative, Trial Chamber II ordered the Registry to report on applications for reparation already received during the trial. It also requested the Registry to contact applicants, in collaboration with the legal representative, with a view to obtain additional and up to date information on the harm suffered and the reparation sought. The Chamber also indicated at that point that sufficient time to file new applications for reparations would be granted. In January 2015, the Registry filed its report in which it stressed 1) victims' clear preference for economic development or financial measures of reparation; 2) victims' limited interest in (and for some, express rejection of) more symbolic measures; 3) the fact that a number of victims were still unidentified and/or no longer living in the area where the crimes were committed.

In May 2015, Trial Chamber II set a timeline for the receipt of additional information on existing victims' claims as well as for the submission of any new applications: before the end of 2015, the LRV was to consolidate applications already received and include information on the scope of the harm suffered and on the link to the crimes for which Mr. Katanga had been convicted. Following an extension, the LRV filed a comprehensive report on 13 May 2016, detailing his findings and including a table on the harm suffered by each of the 304 victims he had identified.<sup>27</sup> The LRV proposed different categories of harm that should be recognised based on his field consultations and taking into account the expert evidence on the impact of the crimes on vulnerable children. In July 2016, the Chamber called on victims, the defence and the TFV, to make observations on the monetary 'value' that would be equitable to attribute to each 'type' of harm identified by the victims in order to assist in its determination of Mr. Katanga's financial liability.<sup>28</sup>

The Chamber has yet to issue a decision on reparation in this case and it is too early to know what, if any, implementation challenges will arise thereafter.<sup>29</sup> However, the process in the lead up to a reparation decision has been relatively smooth, in particular if compared to the process in the *Lubanga* case. Some delays notwithstanding, the Registry and LRV managed to identify hundreds of victims, and to submit to the Chamber concrete proposals on how to quantify the harm suffered by victims in financial terms.<sup>30</sup> The process allowed

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<sup>26</sup> Remarks by Luc Walleyne during reparation hearing on 11 October 2016: ICC, *Lubanga*, ICC-01/04-01/06-T-367-ENG ET WT, 11 October 2016, Reparation hearing, p.42-44. This was also reported by civil society representatives in DRC interviewed by REDRESS, September 2016.

<sup>27</sup> ICC, *Katanga*, ICC-01/04-01/07-3687, 13 May 2016, Rapport sur la mise en œuvre de la Décision n°3546, en ce compris l'identification des préjudices subis par les victimes suite aux crimes commis par G. Katanga.

<sup>28</sup> ICC, *Katanga*, ICC-01/04-01/07-3702, 15 July 2016, Ordonnance enjoignant les parties et le Fonds au profit des victimes à déposer des observations sur la valeur monétaire des préjudices allégués.

<sup>29</sup> There is no indication as to when it may do so.

<sup>30</sup> ICC, *Katanga*, ICC-01/04-01/07-3711, 30 September 2016, Defence Observations on the Monetary Value of the Alleged Harm; ICC, *Katanga*, ICC-01/04-01/07-3713, 30 September 2016, Observations des victimes sur la valeur monétaire des préjudices allégués;

victims to come forward and specify their reparation claims ahead of the reparation award, allowing the Trial Chamber to take victims' views into account.

### III.3 The next challenge: the *Bemba* case

On 21 March 2016, Trial Chamber III found Mr. Bemba guilty of two counts of crimes against humanity (murder and rape) and three counts of war crimes (murder, rape, and pillaging), committed in Central African Republic ("CAR") from October 2002 to March 2003.<sup>31</sup> He was sentenced in June 2016 to 18 years' imprisonment.<sup>32</sup> He has appealed both the conviction and the sentence and appellate proceedings are underway. In July 2016 the Chamber called for submissions on the principles and procedure to be applied to reparation.<sup>33</sup> It requested submissions on, *inter alia*: whether the reparation principles applied in the *Lubanga* case should be amended for this case and what criteria and process should apply to the identification of harm and the assessment of Mr. Bemba's liability.

This request for information prior to issuing a 'reparation order' is welcome. Over 5,000 victims participated in the *Bemba* trial suggesting that the number of potential beneficiaries of reparation will be much higher than the *Lubanga* or *Katanga* cases.<sup>34</sup> The high number of potential beneficiaries may make individual identification and harm assessment more difficult, also in light of the displacement of large parts of the population as a result of the conflict,<sup>35</sup> and in light of the precarious security situation which has made large parts of the country inaccessible without a strong security escort.<sup>36</sup> Also, contrary to Mr. Lubanga and Mr. Katanga who were determined to be indigent, a significant amount of assets/funds belonging to Mr. Bemba have been identified and frozen. In *Lubanga*, one of the arguments regularly advanced by victims to suggest that the accused should not have access to their identities or that detailed harm assessments are not required is the fact that the accused will not be paying for reparation and, as a result, a lesser level of scrutiny could apply.<sup>37</sup> While this argument has so far been rejected by Trial Chamber II, it is an argument that is likely to ultimately succeed in later cases, given both the efficiency and protection concerns. Even though some of Bemba's funds may be applied to reparations, the bulk might nevertheless still come from Trust Fund voluntary resources.

### III.4 A model of efficiency? The *Al Mahdi* case

Following his surrender to the ICC on 26 September 2015 and subsequent admission of guilt, Ahmad Al Faqi Al Mahdi was convicted on 27 September 2016 of the war crime of intentionally directing attacks against historic monuments and buildings dedicated to religion in Timbuktu, Mali, between the end of June 2012 and early July 2012. Eight victims participated in his trial. On 29 September 2016, Trial Chamber VIII issued a decision setting the Reparations Phase

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ICC, *Katanga*, ICC-01/04-01/07-3714-Red, 30 September 2016, Observations in response to the Trial Chamber's order of 15 July 2016.

<sup>31</sup> ICC, *Bemba*, ICC-01/05-01/08-3343, 21 March 2016, Judgment pursuant to Article 74 of the Statute.

<sup>32</sup> ICC, *Bemba*, ICC-01/05-01/08-3399, 21 June 2016, Decision on Sentence pursuant to Article 76 of the Statute.

<sup>33</sup> ICC, *Bemba*, ICC-01/05-01/08-3410, 22 July 2016, Order requesting submissions relevant to reparations.

<sup>34</sup> Entitlement to reparation before the ICC is not preconditioned on participation in the proceedings. As a result, a number of victims may have yet to come forward in relation to the crimes for which Mr. Bemba was convicted. In *Lubanga*, the Trust Fund estimates that 4,000 individuals could be potential beneficiaries of reparation. In *Katanga*, the number of reparation beneficiaries identified so far is only in the hundreds.

<sup>35</sup> ICC, *Bemba*, ICC-01/05-01/08-3448, 17 October 2016, Observations by the Redress Trust pursuant to Article 75(3) of the Statute and Rule 103 of the Rules, para. 36-39.

<sup>36</sup> In contrast, while tensions persist in Ituri, DRC, many zones concerned by the charges in both the *Lubanga* and *Katanga* cases are fairly accessible and/or have not known active conflict in recent years of the scale seen in CAR as recently as 2015.

<sup>37</sup> Mr Lubanga's defence challenges that interpretation. ICC, *Lubanga*, ICC-01/04-01/06-3196-Red2, 2 February 2016, Version publique expurgée des « Observations de la Défense de M. Thomas Lubanga relatives au « Filing on Reparations and Draft Implementation Plan », daté du 3 novembre 2015 », déposées le 1er février 2016 (ICC-01/04-01/06-3196- Conf), para. 13 ; ICC, *Lubanga*, ICC-01/04-01/06-3221, 25 July 2016, Réponse de la Défense de M. Thomas Lubanga relative à la « Second submission of victim dossiers » déposée par le Fonds au profit des victimes le 14 juillet 2016.

Calendar<sup>38</sup> in which it 1) instructed the Registry to identify, in consultation with the parties and the Office of the Prosecutor, one or more experts;<sup>39</sup> 2) set the deadline for the filing of applications for reparations; 3) invited the parties to file general submissions on reparation and 4) invited interested organisations to file requests for leave to intervene on the issue.

The *Al Mahdi case*, so far, can appear as a model of efficiency and promptness (albeit taking into account the particular circumstances of the guilty plea): it took only a year for the Court to conduct both pre-trial and trial proceedings following his surrender to the Court and all final submissions on reparation are due on 10 February 2017.

However, the Prosecutor has acknowledged that the destruction of the nine mausoleums and one mosque had an impact ‘on the people of Timbuktu’<sup>40</sup> and were of wider importance to potentially many more including society as a whole.<sup>41</sup> As a result, ‘victims’ of Mr. Al Mahdi’s crime will undoubtedly extend to a larger number than the eight victims who participated at trial – undoubtedly it will not only involve individuals but also defined groups. It is unclear how any relationship between the individuals and potential groups who make up ‘the people of Timbuktu’ will be characterised; the less than three month timeframe granted by the Chamber to file applications for reparation could prove insufficient to ensure that potential beneficiaries are informed of the process and assisted with filing their application, as appropriate.

## IV. Analysis of key challenges

### IV.1 Submitting a request for reparation

Victims can file applications for reparation at any point in the proceedings and such applications are not contingent on a conviction of the accused. Past cases suggest that some victims will apply to participate in the proceedings as soon as an accused is transferred to the Court. As part of their application to participate, many also submit a request for reparation at the same time.

The Court initially developed a standard application form for victims seeking to participate in proceedings. Part of the form also included a section on requests for reparation. This not only encouraged victims to request reparation, it also created expectations that those requests would be considered in one way or another. Experiences in all four cases that reached the reparation stage to date suggest that a filled-in form is insufficient for a Chamber to progress requests for reparation – more detail is required.

Trial Chamber II noted in the *Katanga* case that the victims’ requests for reparation included “limited information as to the harm suffered as a result of the crimes and the reparations measures sought by applicants.” As a result, “the Chamber considers it necessary to receive additional and up-to-date information concerning these topics.”<sup>42</sup> The Chamber asked the Registry and LRV to compile individual files for each claimant and indicated the type of information that ought to be provided.

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<sup>38</sup> ICC, *Al Mahdi*, ICC-01/12-01/15-172, 29 September 2016, Reparations Phase Calendar.

<sup>39</sup> Ibid., para. 2(i). These include ‘the importance of international cultural heritage generally and the harm to the international community caused by its destruction; the scope of the damage caused, including monetary value, to the ten mausoleums and mosques at issue in the case and (c) the scope of the economic and moral harm suffered, including monetary value, to persons or organisations as a result of the crimes committed’.

<sup>40</sup> ICC, *Al Mahdi*, ICC-01/12-01/15-139-Red, 22 July 2016, Public redacted version of “Prosecution’s submissions on sentencing”, 22 July 2016, ICC-01/12-01/15-139-Conf, para. 24-29.

<sup>41</sup> All save one were recognised as being of ‘outstanding universal value’. ICC, *Al Mahdi*, ICC-01/12-01/15-139-Red, 22 July 2016, Public redacted version of “Prosecution’s submissions on sentencing”, 22 July 2016, ICC-01/12-01/15-139-Conf, para. 24.

<sup>42</sup> ICC, *Katanga*, ICC-01/04-01/07-3508, 27 August 2014, Order instructing the Registry to report on applications for reparations, para 7.

In the *Lubanga* case, despite receiving a number of requests for reparation throughout the proceedings, the Chamber decided not to consider or review those requests while the trial was still ongoing. Instead, it ruled that they would be transmitted to the Trust Fund to inform the design by the Trust Fund of the reparation plan.<sup>43</sup> When, at this point many years later, the reparation phase was handed over to Trial Chamber II following the appeals judgment,<sup>44</sup> Trial Chamber II requested the Trust Fund to compile individual files for potential beneficiaries containing, amongst other elements, harm assessments and supporting documentation. It also required that the files be made available to the defence.

Victims who had completed the initial standard form to apply for participation and request reparation were not made aware at the time of filing that they might need to provide additional information and/or complete additional forms. The standard form has been revised and now includes a disclaimer which informs victims that '[the] form may not be the one in use in some proceedings' and that 'to enquire about the applicable form for specific proceedings' or to 'learn how to apply for reparation as a victim or assist someone in applying to for reparation', one should first contact the Victims Participation and Reparations Section of the ICC.<sup>45</sup> However, the VPRS is unable to assist victims with their applications without clear instructions from the relevant Chamber on which form will be used and what information will be required.<sup>46</sup>

Clarity on the process for the consideration of reparation requests early on in the proceedings is important for several reasons:

- Victims may wish to submit their request for reparation early on in the proceedings in parallel to their request for participation, when an intermediary or counsel is present to assist with that application and to help secure the relevant information.<sup>47</sup>
- In countries with ongoing conflict, it might be easier for victims who are in flight or at risk of further attack to file information and accompanying evidence quickly, or else they may lose it in the melee of the conflict. However, the opposite might also be true. Victims may not be concerned with reparation or have time to be concerned, until they have a general sense of security at the end of a conflict.<sup>48</sup>
- The lack of clarity impedes victims and those working with them to submit all relevant information, when they wish to do so at an early stage – which is their right. More clarity on the reparation procedure and an indication of minimum documentation requirements to assess requests could allow relevant actors, including the Registry and LRV, to gather such information throughout the duration of the case and *ensure* it is readily available at the outset of the reparation phase, reducing delays.<sup>49</sup> Alternatively, reassurance should be given that victims and those

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<sup>43</sup> Provided victims agreed to the transmission.

<sup>44</sup> Trial Chamber II took over the case after the mandates of the three judges composing Trial Chamber I expired.

<sup>45</sup> Application form for participation and reparation, available on the ICC website at <https://www.icc-cpi.int/iccdocs/vprs/VPRS-StandardApplicationForm-DISCLAIMER-ENG.pdf>.

<sup>46</sup> This issue has arisen in many cases before the Court in relation to victim participation: while many victims are keen to apply to participate as soon as an accused is transferred to the Court, the VPRS is unable to provide information and assist victims prior to a ruling by the Chamber on the process and form that participation will take, in that particular case. A similarly fragmented approach applies to reparation.

<sup>47</sup> This was noticed by REDRESS' staff during missions in Ituri between 2009-2012 with many victims having been keen to apply for reparation for fear of missing out at some later stage.

<sup>48</sup> In countries such as CAR which has seen new conflict since the opening of the *Bemba* case, it may prove difficult for victims of the case who have been displaced by new violence to locate documents evidencing harm if later required.

<sup>49</sup> In *Katanga*, the LRV had to request a number of extensions in order to comply with the request to identify potential reparation beneficiaries and compile information. Similarly, the Trust Fund in *Lubanga* has indicated that the process to review 31 victims' files was cumbersome and time consuming and the Defence has expressed surprise at the fact that some files related to victims who had been participating in the proceedings for many years. See Reparation hearing transcript 11 October 2016.

working with them will be provided with sufficient time and assistance to file their applications with relevant documentation when the time comes.<sup>50</sup>

## IV.2 Identification of potential beneficiaries

Whether potential beneficiaries should be identified before or after the reparations order is issued may depend on the circumstances of the case.

International standards recognise that victims should be consulted and have a voice in all phases of reparation processes<sup>51</sup> and adequate consultation with victims is an integral component to the design and development of reparation programmes.<sup>52</sup> These standards are also reflected to an extent in the Rome Statute, which provides in article 68(3) that victims can have their views and concerns heard at various stages of the proceedings. Pursuant to regulation 86(3) of the Regulations of the Court, the application for participation should be filed 'before the start of the stage of the proceedings in which [victims] want to participate.' This suggests that potential beneficiaries should be identified prior to the issuance of a reparation order, as this would allow the relevant Trial Chamber to take victims' views and concerns into account.<sup>53</sup> Once identified, beneficiaries should be consulted throughout the next steps of the reparation process. In addition, before making a reparation order, Chambers can reach out to a variety of actors to get insights from victims on reparation. Article 75(2) of the Statute provides that 'before making [a reparation order] the Court may invite, and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.' So far it has been used in all reparation proceedings before the Court.

The Trust Fund has argued in the *Lubanga* case that, when only collective reparation is ordered, the identification of potential beneficiaries is best done after the reparation plan has been approved and the specific modalities of reparation have been agreed by the Chamber. In such a scenario, victims can know exactly what kind of reparation is potentially available to them before deciding to engage in the process. The Trust Fund's view is that such an approach avoids creating unrealistic expectations and also avoids potential re-traumatisation of victims who would otherwise be asked to go through an application process without knowing what they are applying for.

However, it is difficult to reconcile both the approach taken by the Trial Chamber and the one recommended by the Trust Fund in the *Lubanga* case, with the consultation standards outlined above. The lack of early identification prevented the Trial Chamber from taking

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<sup>50</sup> This issue arose for example in the context of the Habré case. The Chamber did not provide guidance on what civil party claims needed to contain to be granted, including what supporting documentation would be required. This only became clear in the actual decision on reparation, with no extra time provided for the submission of additional documents for those who had failed to supply what was indicated as required. This led to the exclusion of many victims on the ground that they had failed to submit sufficient documentation to establish their claim. As at the time of writing on 27 October 2016, this point is under appeal. EAC, *Chambre d'Assise, Ministère Public v. Hissain Habré*, 29 July 2016, Décision sur les intérêts civils, para 43-53.

<sup>51</sup> International Law Association, *Declaration of Procedural Principles for Reparation Mechanisms*, adopted at the 76th ILA Conference (Washington, Resolution 1/2014) (hereinafter ILA Procedural Principles), Principle 2; ICC, *Lubanga*, ICC-01/04-01/06-2904, 7 August 2012, Decision establishing the principles and procedures to be applied to reparations, para. 202-206.

<sup>52</sup> UN Secretary-General, *Guidance Note of the Secretary-General, Reparations for Conflict-Related Sexual Violence*, June 2014 (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 serious violations of international law*, UN Doc A/69/518, 14 October 2014, paras 74-80.

<sup>53</sup> In *Lubanga*, some applications for participation in the proceedings were transmitted to Trial Chamber I at the very end of the trial phase. The Chamber did not rule on their admissibility indicating that their applications would instead be decided upon should the accused be convicted, for the purposes of the sentencing and reparation phase. However, the applications were never ruled upon and as a result these victims were not represented in the submissions around principles and procedure on reparation in the case. REDRESS, *The Participation of Victims in International Criminal Court Proceedings A Review of the Practice and Consideration of Options for the Future*, October 2012, p. 21. In *Katanga*, the Chamber had already sought and received significant submissions in relation to which principles and modalities of reparation should apply in the case when it ordered the Registry and LRV to identify potential new victims.

into account views and perspectives of a large number of victims at the time it rendered its Reparation Decision. It prevented a large number of victims from participating in the process leading up and contributing to that decision.<sup>54</sup> This is particularly important as participation in the reparation proceedings can in and of itself be empowering for victims, give them agency over the process and contribute to the reparative value of the process as a whole: victims are not just ‘beneficiaries’ but actors of the reparation provided by the Court. In addition, it is not clear how the Trust Fund can develop a detailed reparation plan (which would include specific locations for reparation activities) without knowing first the needs and locations of potential beneficiaries.<sup>55</sup> In *Al Mahdi*, only eight victims are currently participating in the proceedings. While the Chamber has called for the submission of new applications for reparation, it has refrained from directing the Registry or any other body from pro-actively identifying potential additional beneficiaries. In addition, the deadline set for the receipt of new applications (16 December 2016) is also close to the one set for all final submissions on reparation in the case (10 February 2016) and may not leave much time to ensure that these ‘new’ victims are adequately consulted and have a voice in the reparation process.

Early identification of potential beneficiaries is thus important for two main reasons: it allows the Trial Chamber and the Trust Fund to adequately take into account victims’ views and perspectives when issuing a reparation order or developing an implementation plan respectively. At the same time, it allows victims who wish to do so, to participate in the process.

Early identification should not, however, be a pre-condition for reparation, and victims should be able to submit a request for reparation also at the implementation stage. This would also be in line with the Trust Fund’s regulations, which envisage that unidentified victims can be identified at the implementation stage.<sup>56</sup> This approach is consistent with that of some decision-making bodies which have recognised that ‘as long as victims are “identifiable”, they can benefit from reparation programmes established to respond to the harm suffered by victims already identified.’<sup>57</sup> It is also consistent with many mass claims procedures which have determined beneficiary classes and thereafter proceeded to issue calls for applications/registration to potential beneficiaries. The Inter-American Court of Human Rights for instance has recognised that there can be impediments or severe hindrances to identifying eligible beneficiaries in any given case and has sometimes specified the steps to be taken to identify victims post-judgment, with the specific aim of enabling a wider class of potentially eligible victims to benefit from the reparation as ordered for victims already identified.<sup>58</sup>

## **RECOMMENDATIONS**

While REDRESS takes note of the Court’s position that reparation principles will be adopted on a case by case basis, we submit that it is essential that clear guidance (in the form of principles or otherwise) be provided at the least, ahead of the start of the reparation phase in each case. We recommend in particular that Trial Chambers:

- indicate as early as possible how victims can apply for reparation and how such requests will be considered;

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<sup>54</sup> Around 120 victims participated in the proceedings when the Trust Fund is now estimating potential beneficiaries to reach 3,000. ICC, *Lubanga*, ICC-01/04-01/06-3177-Red, 3 November 2015, Filing on Reparations and Draft Implementation Plan.

<sup>55</sup> This is relevant as the right to reparation is not conditional on the victims being located in a particular area. ICC, *Katanga*, ICC-01/04-01/07-3554, 15 May 2015, Redress Trust observations pursuant to Article 75 of the Statute, para. 55.

<sup>56</sup> ICC, *Regulations of the Trust Fund for Victims*, ICC-ASP/4/Res.3, 3 December 2005, Section II, para. 60-61.

<sup>57</sup> ICC, *Katanga*, ICC-01/04-01/07-3554, 15 May 2015, Redress Trust observations pursuant to Article 75 of the Statute, para. 79.

<sup>58</sup> See, e.g., IACtHR, *Rio Negro Massacres v. Guatemala*, Series C No. 250, 4 September 2012, paras. 48, 51; IACtHR, *El Mozote v. El Salvador*, Series C No. 252, 25 October 2012, paras. 310-311.

- set out what supporting documentation will be required to evidence harm; this could be established in the form of a list of possible supporting documents accepted in light of the particular context in a case. It could be updated during the proceedings;
- clarify who will be responsible for assisting victims to file a request for reparation in line with the Chamber's instructions. Clarifying this aspect will be essential to ensure that the relevant entity/person can seek and access sufficient funding to undertake the work in a timely manner.<sup>59</sup> We suggest that for victims already participating in the case, that task would be best undertaken by their legal representative. For unrepresented victims/non participants, the primary entity with a mandate to assist is VPRS.<sup>60</sup> In the alternative the Office of Public Counsel for Victims (OPCV) might also be tasked with assisting in that regard;
- direct an appropriate court organ or LRV to identify potential reparation beneficiaries, to the extent possible, prior to the issuance of a reparation order;
- specifically recognise the possibility for unidentified victims to come forward within a reasonable time at the implementation stage following the issuance of a reparation order;
- direct the Registry to conduct an early mapping of the victim population following the opening of all cases to ensure that potential challenges to reach victims are identified early and adequate strategies are designed to inform them effectively when the time comes about the possibility to claim reparation before the ICC. This could be particularly relevant in cases where victims no longer live in the areas where the crimes were committed and have relocated either within their countries or abroad.<sup>61</sup>

### IV.3 Vetting/assessment of claims

The vetting and assessment of reparation claims is another area which is proving challenging for Chambers. There is a challenge to find the right balance between a process that is sufficiently individualised and meaningful to victims and assists with the establishment of the actual liability of the convicted person while at the same time acknowledges the limited resources available to do so as well as the potentially large number of claimants. Also, on a principled level, the question also arises as to whether the level of scrutiny applied to the assessment of claims ought to be proportional to the type of reparation ordered: when only collective reparations have been ordered, Chambers should arguably not require a highly individualised and detailed assessment with cross examination by the Defence. Finally, the issue of which entity/body is best placed to undertake the vetting is also open for debate.

In the *Lubanga case*, Trial Chamber I delegated the task of assessing claims to the Trust Fund. Trial Chamber II was tasked with overseeing the reparation phase following the Appeals judgment on reparations. Trial Chamber II rejected a full delegation of the assessment of claims to the Trust Fund, insisting that a more individualised approach be implemented, similar to what was being done in *Katanga*.<sup>62</sup> In *Katanga*, TC II assessed

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<sup>59</sup> In light of strict budgetary limitations at the ICC, the lack of clarity as to whose responsibility it is to reach out to victims and facilitate the filing of a complete application for reparation will likely lead to delays as legal representatives for example, will need sufficient legal aid to undertake the work, as would the OPCV or Registry, or indeed the Trust Fund.

<sup>60</sup> ICC, *Regulations of the Registry*, ICC-BD/03-03-13, 4 December 2013, Regulation 110.

<sup>61</sup> In *Katanga*, this was one of the issue the Chamber sought submissions on, following the Registry's finding that some reparation beneficiaries may no longer live in the area where the crimes were committed. In *Bemba*, the persisting violence and conflict over the last decades has likely led to the displacement of potential reparation beneficiaries. ICC, *Bemba*, ICC-01/05-01/08-3448, 17 October 2016, Observations by the Redress Trust pursuant to Article 75(3) of the Statute and Rule 103 of the Rules, para. 36-39.

<sup>62</sup> ICC, *Lubanga*, ICC-01/04-01/06-3198-t-ENG, 9 February 2016, , Order instructing the Trust Fund for Victims to supplement the draft Implementation, para.14: 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

reparation claims itself, and requested the LRV and Registry to compile individual files for each victim detailing the harm suffered as well as information relevant to assessing their claim. So far, this has not posed major challenges. The victims' legal representative was able to meet with over 300 victims to verify their claims and establish harm. In contrast, the Trust Fund in *Lubanga* has reported significant challenges with assessing the harm suffered by victims.<sup>63</sup> It also argued that such assessments, prior to the approval of a reparation plan, were 'premature, harmful and re-traumatizing'.<sup>64</sup>

That is not to say, however, that individualised approaches would never be appropriate or possible. Many courts and other decision-making bodies award individual reparation to often extremely large numbers of victims. The experience of mass claims bodies 'demonstrates that the potential size of the beneficiary class is not an insurmountable obstacle to awarding individualised reparation'.<sup>65</sup> They tend to rely on specific techniques to address that obstacle which include: grouping claims into classes then adjudicated through standardised approaches; processing of claims through simplified procedures such as computerised matching of claims and verification of information, and sampling and statistical modelling.<sup>66</sup>

In addition, ICC Chambers have so far failed to clarify the level of documentation required to establish eligibility. While in *Katanga*, the Chamber has set out the type of information that ought to be provided, it did not specify the threshold victims needed to meet for their claims to be valid. In *Al-Mahdi*, the Chamber only stated that new applications for reparation could be submitted before a set deadline. It did not specify what documentation may be required to enable a positive assessment of the claims.

Victims will often lack standard or typical evidence to prove the harm they suffered: few will have a medical certificate. To require in depth medico-legal reports for thousands of victims in countries where relevant facilities to prepare such reports are non-existent or inaccessible, would likely be impossible or an extremely costly exercise. Property may not always be registered nor receipts available to justify economic loss. Loss of earnings will be difficult or impossible to calculate for each of the thousands of victims in countries with limited accurate demographic data. Chambers may thus want to consider lowering the standard of proof, as other decision-making bodies have done at the reparations phase. It could also direct the Registry or other appropriate bodies to play a more proactive role in the gathering of evidence, including through the use of cooperation requests to States and other agencies.<sup>67</sup> The secretariats of most claims processes have actively participated in the gathering of evidence.<sup>68</sup> Some human rights courts have also recognised the need for States to proactively assist victims with access to evidence to prove their entitlement to reparation.<sup>69</sup>

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has had the opportunity to submit its observations on individual victim files which should include an assessment of harm and interview notes as appropriate.

<sup>63</sup> ICC, *Lubanga*, ICC-01/04-01/06-3208, 31 May 2016, First submission of victim dossiers, para.60.

<sup>64</sup> ICC, *Lubanga*, ICC-01/04-01/06-3208, 31 May 2016, First submission of victim dossiers, para.8-9.

<sup>65</sup> ICC, *Bemba*, ICC-01/05-01/08-3448, 17 October 2016, Observations by the Redress Trust pursuant to Article 75(3) of the Statute and Rule 103 of the Rules, para. 18. 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).

<sup>66</sup> For a more detailed discussion of techniques used to process reparation claims by mass claims bodies see ICC, *Bemba*, ICC-01/05-01/08-3448, 17 October 2016, Observations by the Redress Trust pursuant to Article 75(3) of the Statute and Rule 103 of the Rules.

<sup>67</sup> For example, data in relation to demobilization of child soldiers could be requested from relevant UN/other agencies; data collected through commissions of inquiries and Truth and Reconciliation processes, when applicable and with adequate protection of privacy and security, could be used to match claims.

<sup>68</sup> 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. As referred to in ICC, *Bemba*, ICC-01/05-01/08-3448, 17 October 2016, Observations by the Redress Trust pursuant to Article 75(3) of the Statute and Rule 103 of the Rules.

<sup>69</sup> In the *Case of the "Las Dos Erres" Massacre v. Guatemala*, owing to the remote location of some of the victims and the difficulties for the victims' legal representatives to reach some of the heirs and beneficiaries and the difficulties for them to access data to prove eligibility because some records had been destroyed or were badly preserved and it was proving impossible for the victims to

Finally, while each victim will have suffered harm on a personal level and experienced it in a different way, a more generalised use of categorisations, as was done in *Katanga*, may assist with claims assessment. In *Katanga*, the LRV proposed categories of harm and suggested reparation amounts corresponding to each harm. Such an approach has been applied by a number of reparation programmes.<sup>70</sup> It also was applied by a number of mass claims processes which used it to award reparation to large groups of victims within a limited time frame.<sup>71</sup> This was for example recommended by the victims' lawyer in the Habré case who submitted that victims could be broadly divided in categories and then requested that the chamber allocate different amounts to each of these groups based on an analysis of the types of harm suffered by each.<sup>72</sup> Early mapping and understanding of the potential victim population in a particular case could thus allow the ICC's Chambers to select a representative sample of the victim population for which a fuller harm assessment would be undertaken and used to extrapolate findings to specific categories of victims.<sup>73</sup> The use of experts may be critical in that regard as could timely requests for cooperation issued to humanitarian and other agencies with relevant information.<sup>74</sup>

## **RECOMMENDATION**

REDRESS suggests that Chambers:

- Issue detailed instructions on the type and level of documentation that victims will need to submit to support their reparation claims.<sup>75</sup>
- Consider using mass claims techniques to simplify the process of identifying victims and the harm they suffered.
- Clarify as early as possible who will be in charge of assessing/reviewing claims and consider tasking specific court organs or external bodies as appropriate with assisting in that regard.
- Consider issuing cooperation requests to relevant States, international and other agencies likely to possess information/data relevant to the identification of claimants and the harms they suffered.

## **IV.4 Quantifying harm and Establishing civil liability**

In the *Lubanga* case, the Appeals Chamber ruled that a significant element missing from the original Trial Chamber's decision on reparation was the establishment, in financial terms, of Mr. Lubanga's financial liability in relation to the harm caused by his crimes. The Appeals Chamber found that while such a decision ought to fall within the responsibility of the Trial

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.' See, *IACtHR, Case of the "Las Dos Erres" Massacre v. Guatemala, Series C No. 211*, 4 September 2012, para. 20-21. As referred to in ICC, *Bemba*, ICC-01/05-01/08-3448, 17 October 2016, Observations by the Redress Trust pursuant to Article 75(3) of the Statute and Rule 103 of the Rules.

<sup>70</sup> See for example, the prioritisation of different categories of victims proposed by the Truth, Justice and Reconciliation Commission in Kenya, in which the Commission suggests that the 'most vulnerable' victims be given the highest priority. *Report of the Truth, Justice and Reconciliation Commission in Kenya*, 2013, Volume IV, at 102ff.

<sup>71</sup> This was the case for example at the United Nations Compensation Commission which determined claims based seven categories/types of claims. The Kosovo Housing and Property Claims Commission was similarly empowered to categorize claims. The German Forced Labour Compensation Program Property Commission was also able to categorise claims.

<sup>72</sup> As referred to in EAC, *Chambre d'Assise, Ministère Public v. Houssein Habré*, 29 July 2016, Décision sur les intérêts civils, para 2 and 5.

<sup>73</sup> We note that a concern expressed by the Trust Fund in *Lubanga* was that the victims who participated in the proceedings were not representative of the victim population and thus harm assessment (and consultations) based on them alone would not be adequate.

<sup>74</sup> For example, in the Habré case, while individual harm assessments did not exist and limited data was available as to the specific psychological harm suffered by victims in the case, reports and testimonies by medical/psychological experts – submitted as evidence in the case – were useful in drawing presumptions as to the impact of the crimes not only on direct victims but also on their children. EAC, *Chambre d'Assise, Ministère Public v. Houssein Habré*, 10 June 2016, Conclusions aux fins de demande de réparation des parties civiles Abaifouta et consort.

<sup>75</sup> As noted in the *Lubanga* case, a Trial Chamber can "adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings." Article 64(3)(a) of the Statute; ICC, *Lubanga*, ICC-01/04-01/06-2904, 7 August 2012, Decision establishing the principles and procedures to be applied to reparations, para 289.

Chamber, in the particular circumstances of the case, the Trust Fund should be directed to do it. In *Katanga*, the process of establishing the financial liability of the convicted person is led by the Chamber which ordered the parties, participants and Trust Fund to file submissions on ‘the monetary “value” that would be equitable to attribute to each “type” of harm identified by the victims in order to assist in its determination of Katanga’s financial liability.’

These are the first times the ICC is considering the ‘price tag’ attached to the crimes. Ultimately, the true cost of harm suffered for war crimes, crimes against humanity and genocide will be impossible to calculate to its full and exact extent. The competent Chamber will therefore have to adopt a methodology to approximate a monetary figure which is fair, accounts for limited or unavailable evidence and as close as possible to the true extent of the harm suffered.

Participants and parties in the *Lubanga* case have so far been reluctant to set, in concrete terms, amounts that correspond to the harm caused by Mr Lubanga. In contrast, in *Katanga*, both the Defence and victims have made recommendations with regards to the monetary value of each of the categories of harm identified as resulting from Mr Katanga’s crimes. The LRV argued in favour 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.<sup>76</sup>

Valuating harm is a difficult exercise. But it is not impossible. And, as noted by others,<sup>77</sup> assets belonging to criminals may take time to be identified and/seized and as result, indigence may be temporary for some. Establishing full financial liability will thus allow the Court to seek to retrieve any funds/assets that will be identified following the reparation decision and allocate these to the benefit of victims. The convicted person’s indigence or insufficient funds should not militate to reduce his/her financial liability. This approach has also been adopted by the East African Chambers. In its judgment on reparation in the Habré case, the EAC set out compensation amounts for each category of victims without consideration of issues relating to indigence or inability to pay.

As each Chamber will need to rule based on the specific circumstances of the case before it, difference in awards between Chambers are likely to arise. REDRESS notes that such differences may send a message that the violation of the rights of 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.<sup>78</sup> The ICC may thus want to consider setting benchmarks or clarifying factors/standards that will be taken into account to calculate liability for similar harm. For example, in *Katanga*, the LRV suggested that the chamber rely on French, Belgian and Congolese law, adapted for the local context of Bogoro.<sup>79</sup> This could ensure, if not constancy between cases, at least some level of transparency, and aligns in some way with general rules on how many domestic jurisdictions approach civil claims when the facts straddle several legal jurisdictions.

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<sup>76</sup> ICC, *Katanga*, ICC-01/04-01/07-3713, 30 September 2016, Observations des victimes sur la valeur monétaire des préjudices allégués (Ordonnances ICC-01/04-01/07-3702 et ICC-01/04-01/07-3705), para 10 -11.

<sup>77</sup> ICC, *Katanga*, ICC-01/04-01/07-3716, 14 October 2016, Réponse aux observations de la Défense et du Fonds au profit des victimes sur l’évaluation monétaire du préjudice subi par les victimes, para.18.

<sup>78</sup> P. de Greiff, “Justice and Reparations” in P. de Greiff (ed), *Handbook of Reparations* (Oxford University Press, 2008), p 458, as discussed in ICC, *Bemba*, ICC-01/05-01/08-3448, 17 October 2016, Observations by the Redress Trust pursuant to Article 75(3) of the Statute and Rule 103 of the Rules.

<sup>79</sup> ICC, *Katanga*, ICC-01/04-01/07-3713, 30 September 2016, Observations des victimes sur la valeur monétaire des préjudices allégués (Ordonnances ICC-01/04-01/07-3702 et ICC-01/04-01/07-3705), para 7-8.

## IV.5 The reparation plan

Where the Court orders that an award for reparations against a convicted person be deposited with the Trust Fund or that an award be made through the Trust Fund in accordance with Rule 98(2) to 98(4) of the Rules of Procedure and Evidence, the Secretariat of the Trust Fund for Victims is to prepare a draft implementation plan, to be approved by the Trial Chamber.<sup>80</sup> However, the regulations of the Fund provide little clarity as to what, exactly a reparation plan should contain, stating simply that the plan should 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.’ In the *Lubanga* case, neither the original reparation decision nor the appeals judgment provided much clarity on what the Trust Fund was to include in the plan.

In November 2015, the first draft reparation plan ever drafted by the Trust Fund was submitted to a Chamber in the *Lubanga* case. The Fund indicated that the plan had been designed following an expert meeting and consultations in 22 locations with 1340 victims over a 3 month period. It also indicated that 1) the plan only corresponded to reparation amounting to 1 million euros, the amount the Fund was able/willing to contribute, 2) implementation would take place in Ituri only,<sup>81</sup> and that 3) implementation would span over 3 years including an outreach phase. The draft Plan proposed a comprehensive reparation programme whereby all beneficiaries would receive psycho-social support (therapy) and also be directed to other forms of reparation available (sped up schooling, income generating activities, training, livelihood support, medical rehabilitation etc...). The Fund did not provide details as to the exact locations where reparations would be implemented, nor the specific programmes beneficiaries would be able to access. This prompted the Chamber to seek from the Fund specific terms of reference for each programme, costings, and time limits for implementation pending which it refused to endorse the plan.<sup>82</sup>

If the relevant Trial Chamber issued a more precise order to the Trust Fund, this could avoid unnecessary confusion and delays in future cases. A draft plan ought to include as much detail as possible as to the specific modalities of reparation victims will receive. This is essential not only to allow the relevant Chamber to exercise its oversight function adequately but also to enable victims to formulate and express their own views on what is being proposed. It would also ensure that the implementation plan can be used as a tool against which progress on implementation can be measured.<sup>83</sup>

We understand that a challenge faced by the Trust Fund is compliance with its internal procurement rules, whereby the Fund would only be able to provide specific data on the exact projects proposed once these are approved and subjected to a tendering process. However it is difficult to foresee that a Chamber would endorse a draft plan without at least some level of detail on what is being proposed and approved, and certainly any internal procurement rules should be modified if they impede the successful resolution of Court-ordered reparations. If exact data cannot be provided at the draft plan stage, the Trust Fund should at least be in a position to submit for review to the Chamber the draft of what the call for proposals would look like should it launch a tendering process for the reparation programmes. This seems to be what was done with regards to the draft plan on symbolic reparation that was approved by Trial

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<sup>80</sup> Regulations 54 and 57 of the Regulations of the Trust Fund.

<sup>81</sup> REDRESS disagrees with the Fund’s approach in that regard which de facto conditions access to reparation to the place the victim resides. ICC, *Katanga*, ICC-01/04-01/07-3554, 15 May 2015, Redress Trust observations pursuant to Article 75 of the Statute, para. 58.

<sup>82</sup> ICC, *Lubanga*, ICC-01/04-01/06-3198, 9 February 2016, Order instructing the Trust Fund for Victims to supplement the draft implementation plan, p.12.

<sup>83</sup> An implementation plan should form part of the key management tools the Trust Fund and the Court will be able to use to ensure all stakeholders are clear on timelines for implementation and on specific steps to be taken in order to implement reparation.

Chamber II in October 2016 in *Lubanga*. It may also be worth considering whether a two-step approval process may be appropriate, as was suggested by the Trust Fund during the reparation hearings in *Lubanga*.<sup>84</sup> It proposed that a draft plan could be endorsed without details as to locations, implementing partners or other details; The Fund would seek the Chamber's approval again once specific projects had been identified/formulated. This would ensure that decisions such as prioritising victims or location of programmes are adequately monitored and subjected to judicial oversight.<sup>85</sup> This is particularly important as once a reparation plan is approved by a relevant Chamber, there is little in the legal texts of the court as to the level of oversight Chambers ought to exercise or what would happen should a Chamber – or victims - not be satisfied with the way implementation is undertaken.<sup>86</sup>

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<sup>84</sup> The TFV during the 11 October 2016 hearing on reparation proposed a two-step adoption process whereby the Chamber would first adopt the draft plan and then projects would be submitted to it for adoption when ready as a second approval step. ICC, *Lubanga*, ICC-01/04-01/06-T-368-Red-ENG, 13 October 2016, Reparation Hearing, p.20, lines 14-23.

<sup>85</sup> In the draft reparation plan submitted by the Trust Fund it is proposed that only victims in specific locations in Ituri will benefit from reparation and that priority will need to be given to vulnerable victims in light of the limited resources available.

<sup>86</sup> The Trust Fund will be required to update the relevant Chamber on progress; once the implementation period is complete, it shall submit a final narrative and financial report to the Chamber. Regulation 58 of the Regulations of the Trust Fund.



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