Avocats Sans Frontières

ASF

Principles on court-ordered reparations:

A guide for the International Crimes Division of the High Court of Uganda

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Founded in Belgium in 1992, Avocats Sans Frontières (ASF) is an international NGO specialising in the defence of human rights and support for justice in countries in fragile and post-conflict situations. For more than 20 years, ASF has been implementing programmes which improve access to justice for persons in vulnerable situation.

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1. Introduction: Background and Conceptual

This report relates to principles and standard guidelines for court ordered reparations' proposed for use by the International Crimes Division of the High Court of Uganda (ICD). The ICD is responsible for the prosecution of international crimes linked to the armed conflict in the North of the country, which wrought much suffering over 20 years. These guidelines and standards on reparations were developed as part of ASF's project, "Promoting national accountability processes for mass atrocities in Uganda" which aims, partly, to ensure that the transitional justice mechanisms proposed by the Juba Peace Agreement (JPA) are rendered operational in keeping with principles of international criminal justice. An attempt is made to locate these mechanisms, in particular how they work and the principles and methods they apply, within mainstream international criminal justice while taking into consideration the need to respond to local imperatives.

This study, and principles and guidelines it proposes, build on several studies and consultations conducted by ASF around the Juba Agreement on Peace and Accountability signed between the Government of Uganda and the LRA, and the draft transitional justice policy it spawned in June 2013. In particular, it builds on the views expressed by victims on the transitional justice policy in formal consultations[1] and subsequent research conducted to explore, in comparative perspective, linkages between the transitional justice mechanisms proposed in the policy.[2] More recently, ASF has published a paper aimed at empowering victims in Uganda with knowledge of the International Criminal Court (ICC) victims' participation scheme in light of the *Ongwen Case* at the ICC.[3] This report also reinforces important work done in Uganda by other organizations to capture, advocate and represent the concerns expressed by victims as well as operationalize their rights in the transitional justice process.[4]

In terms of the international legal context, since the inclusion in the Rome Statute of the International Criminal Court of a freestanding right of victims to reparations,[5] and subsequent judicial interpretation that now firmly anchors such a right in the criminal justice process acknowledging it as a key interest of victims to be protected, national criminal law and *ad hoc* processes created to address mass atrocity have a new legal benchmark to measure up to. Long before the Rome Statute, various human rights tribunals had interpreted the right to an effective remedy included in instruments such as the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights as entailing the right of victims to receive reparations. Indeed, while disparities exist in treatment of the issue by national law, many national criminal justice systems recognize a victim's right to reparations (in addition to a general civil law right to sue a perpetrator), while a smaller number of states provide for a state-funded right to compensation, at least for victims of the most serious crimes.[6]

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1 ASF, *Victims' views on the Draft Transitional Justice Policy for Uganda: Acholi Sub-Region victim consultation* held on 5 June 2013, available at <http://www.asf.be/wp-content/uploads/2013/06/ASF_UG_TJPolicy_VictimsConsultation.pdf> (accessed on June 15, 2016).

2 ASF, *Towards a comprehensive and holistic transitional justice police for Uganda: Exploring linkages towards transitional justice mechanisms*, available at <http://www.asf.be/wp-content/uploads/2014/05/ASF_UG_TJ-Linkages-Paper_201308.pdf> (accessed on May 10, 2016).

3 ASF, *Victims' choice Vs. Legal aid? Time for the ICC to Re-think victims' participation as a whole,* May 31, 2016 available at <http://www.asf.be/wp-content/uploads/2016/05/ASF_VictimsParticipationAsAWhole_20160526_EN.pdf > (accessed on June 15, 2016).

4 See for instance AYINET, *Victims voices in transitional justice: On behalf of the victims - by the victims*, April 2014, available at <http://www.africanyouthinitiative.org/assets/victims-voices-on-transitional-justice--2014-report.pdf > (accessed on July 12, 2016). See also Uganda Human Rights Commission and OHCHR, *The Dust Has Not yet Settled: Victims' views on the right to remedy and reparation a report from the Greater North of Uganda*, 2011, available at <https://www.jlos.go.ug:442/index.php/document-centre/transitional-justice/reparations/205-th-dust-has-not-yet-settled-victims-views-on-the-right-to-remedy-and-reparation/file> (accessed on June 23, 2016).

5 Article 75 Rome Statute and Art 79 on the Trust Fund for Victims.

6 See generally Godfrey M Musila, *Rethinking International Criminal Law: Restorative Justice and the Rights of Victims in the International Criminal Court* (Lap Lambert, 2010).

Based on this overview of the law and Uganda's legal and policy framework outlined below, this report teases out of international criminal justice as well as select national experiences with mass atrocities, principles and standards on reparations that may be applied by the ICD in respect of court-ordered reparations. Relevant decisions of human rights tribunals such as the Inter-American Court on Human Rights and the African Court on Human and peoples' Rights referred to.

There are perfectly good reasons why the ICD should look at international law, or more aptly, to align its practice on reparations with international law and international best practice. These were captured eloquently by the Inter-American Court on Human Rights in the *Garrido and Baigorria Case* when reiterating its longstanding approach thus:

> "The obligation to make reparation established by international Courts is governed, as has been universally accepted, by international law in all its aspects: scope, nature, modality and determination of beneficiaries, none of which the respondent state may alter by invoking its domestic law."[7]

These guidelines relate to the full gamut of issues relating to court ordered reparations that could be implicated in the work of the ICD including, but not limited to: basis for reparations; definition of a victim; definition of reparations and clarification of its constituent elements (including restitution, compensation and rehabilitation); relationship between reparations and assistance and development; gender considerations; interim and final reparations; responsibility for payment of reparations; amnesty & reparations; assessment of quantum of reparations and; implementation (including institutions and bundling' of reparations either as individual or communal.

Theoretical Framework and Approach

The principles and guidelines proposed in this report are to inform the practice of the International Crimes Division (ICD) in relation to court-ordered reparations. The ICD, which has in the past been variously denominated "Special Division of the High Court" and "War Crimes Division", was created by the Chief Justice though the High Court (International Crimes Division) practice directions, Legal Notice No. 10 of 2011. The ICD is one of the thematic divisions of the High Court established for "administrative convenience and efficiency". The other divisions are the Criminal Division, Commercial Division, Land Division, Family Division and Anti Corruption Division which adjudicate cases in respective areas of law.[8]

This report pertains only to court-ordered reparations, which are reparations orders made during the criminal trial (usually in post conviction proceedings). Court-ordered reparations should be distinguished from administrative reparations, civil law damages for various torts or delicts as well as constitutional damages obtained through petitions adjudicated by courts designated by law to perform this function (the High Court in the case of Uganda) for violations of human rights protected in the Bill of Rights, international law and statutes.

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[7] *Case of Castillo-Páez v. Peru, Judgment of November 27, 1998 (Reparations and Costs) available at <http://www.corteidh.or.cr/docs/casos/articulos/seriec_43_ing.pdf> (accessed on July 23, 2016) para 49.*

[8] See *Respondent State's Observations on the Merits of the Communication to the African Commission on Human and Peoples Rights in the Matter of Kwoyelo v Uganda*, Communication/UGA/431/12, para 51, available at <http://www.ijmonitor.org/2016/07/kwoyelo-trial-postponed-again-in-ugandan-court-causes-and-ramifications> (accessed on July 25, 2016).

In our analysis of the relevant legal framework and in making proposals on principles and guidelines respecting court ordered reparations, restorative justice is adopted as the theoretical framework.

Restorative justice, which is conceived as principles and practices/methods that inform the activities of the criminal justice system is adopted because it centralizes victims in the criminal justice process, affirming their role as a key party.[9] Other than excluding or marginalizing victims from the criminal justice process primarily because the state is the guarantor of law and order and thus "owns" the crime, this approach harkens back to a state in which victims were viewed as part "owners" of the wrong they suffered and which is sought to be remedied through criminal law. It is recognized thus that while the state is primarily interested in maintaining law and order (and prosecutors are invariably driven by this imperative), victims have interests specific to them, and should therefore be afforded a status fitting to the protection of those interests. The principles that underpin restorative justice are participation, healing, restoration, making amends, reconciliation and guarantees against repetition of crimes. Some of these principles are said to characterize traditional justice systems including those deployed to resolve conflicts in several communities in Northern Uganda such as *Mato Oput* (Acholi), *Culo Kwor* (Langi and Acholi); *Tonu Ci Koka* (Madi); *Kayo Cuk* (Langi); and *Ailuc* (Iteso).[10]

Although it is true only for a few criminal justice systems where restorative justice plays a greater role as an organizing principle, victims play a heightened role in the process and may enjoy rights to participate as victims, to make victim impact statements that influence sentences or be a key party in the implementation of mechanisms such as circles, victim–offender mediation and conferencing that are institutionalized in some criminal justice systems such as South Africa,[11] Canada, Australia and New Zealand within, as an alternative to, alongside prosecution or in the diversion of cases from the criminal system.[12] Traditional justice mechanisms in Greater Northern Uganda (includes Teso Sub-Region) do apply some of these methods for resolving disputes.

In Uganda, the Sentencing Guidelines published in 2013 by the Chief Justice[13] provide for victim impact statements, which in some systems where victims usually only participate as witnesses, was introduced as an attempt to involve victims more. A victim impact statement is defined under Ugandan law as a written or oral account of the personal harm suffered by the victim.[14] It is doubtful, however, whether in general statements that victims are allowed to make during sentencing – usually to urge for a stiffer sentence – actually impact decisions by magistrates and judges. In any case, such statements tend to be limited to the criminal sanction, and do not extend to reparations because victim impact statements are the most extensive right accorded to victims in these systems. There is scope in the case of Uganda for questions of reparations to be determined definitively during sentencing. In terms of Form A contained in the Schedules to the Sentencing Guidelines, the victim impact statement made by a victim also includes their arguments and requests on what they would like the court to do in relation to reparations. The form contains elements for eliciting information on damage or loss incurred by victim including loss of income, job, medical expenses; physical and emotional harm suffered and property lost, which suggests that the Sentencing Guidelines envision reparations as a key part of the sentencing stage. In addition, the provision in Form B of the Schedules to the Sentencing Guidelines, for "community impact statement", provides scope for the court to elicit input from community members on the broader impact of the crime and therefore to make appropriate orders relating to communal reparations.[15]

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[9] United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (2002). The Basic Principles include the following definition of a restorative process: "[A]ny process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles."

[10] ASF, *Linkages*, at 18; G. Musila, *Rethinking ICL*, 13-14. See also <http://www.iccnow.org/documents/ApproachingNationalReconciliationInUganda_07aug13.pdf>.

[11] On the integration of restorative justice within the criminal justice South Africa, see Department of Justice, Restorative justice: *The road to healing* (2011) available at <http://www.justice.gov.za/rj/2011rj-booklet-a5-eng.pdf>; A. Skelton and M. Batle, *Restorative Justice: A Contemporary South African Review*, *Acta Criminologica* 21(3) 2008 available at <http://repository.up.ac.za/dspace/bitstream/handle/2263/9597/Skelton_Restorative%282008%29.pdf?sequence=1&isAllowed=y>.

[12] See generally H Zehr, *Retributive justice, restorative justice* (1985); C Cunnen, *Reparations and restorative justice: responding to gross violations of human rights* in H Strang & J Braithwaite, *Restorative Justice and Civil Society* (2001) 83-98 93.See also J Braithwaite & H Strang *Introduction: Restorative Justice and Civil Society* in H Strang & J Braithwaite, *Restorative Justice and Civil Society* (2001).

[13] See generally, The Constitution (Sentencing Guidelines fir Courts of Judicature) (Practice) Directions, 2013 available at <https://www.jlos.go.ug:442/index.php/document-centre/sentencing-guidelines/264-sentencing-guidelines/file (June 15, 2016)>.

[14] Guideline 14, Uganda Sentencing Guidelines and Form A, First Schedule to the guidelines.

[15] The Sentencing Guidelines define ''community impact statement" as a written or oral account of the general harm suffered by members of a community as a result of the offence'.

2. Overview of Legal and Institutional Framework in Uganda

This part details and describes the legal and institutional framework (mechanisms) relating to reparations for victims of gross violations of human rights and international crimes in general, with specific reference to the law and institutions established to respond to crimes arising out of the Ugandan armed conflict involving LRA and UPDF. A reading of the Juba Peace Agreement concluded between the government of Uganda and the Lord's Resistance Army (LRA) and the Draft Transitional Justice Policy adopted subsequently, lead one to conclude that the parties intended that the *existing* criminal justice system be deployed to establish accountability for crimes committed during the conflict.[16] In this regard, the parties affirmed that Uganda had both the formal and informal institutions, mechanisms, laws, customs and usages, which, with necessary modifications were capable of addressing the crimes and human rights violations committed.[17]

One of the modifications mandated by the Juba Peace Agreement required government to adopt new legislation to introduce alternative penalties and sanctions to remedy crimes and violations committed by non-state actors and these alternative penalties and sanctions would include provision for payment of reparations to victims.[18] Given the centrality of existing institutions to the accountability project, this section also provides an overview of relevant case law from the courts and the Uganda Human Rights Commission (UHRC). Other than the courts, the peace agreement recognized that both the UHRC and the Amnesty Commission established under the Amnesty Act of 2000 could be deployed to implement relevant aspects of the peace agreement.[19] Before this, we provide a brief background of the Ugandan criminal justice system in order to sketch the legal and institutional terrain in which victims' rights to reparation claimed, adjudicated and exercised.

2.1. The Ugandan Criminal Justice System

The rights of victims are claimed, adjudicated and exercised in a particular legal and institutional context. It is important to understand this context chiefly because it speaks to various elements relating to the rights of victims in general, and the right to reparations in particular. The legal system has a bearing on whether victims' rights to reparations and participation are recognized, and to what extent such rights may be claimed and enjoyed. It may also carry a hint on the outlook of courts as well as the posture judges are likely to adopt when faced with questions of reparations during the course of criminal or other relevant proceedings in which decisions on reparations are to be made.

The criminal justice system in Uganda is based on inherited Common Law, which is codified in the Constitution and key statutes, in particular the Penal Code, Criminal Procedure Code, Trial on Indictment Act, the Sentencing Guidelines and the Judicature (High Court) (International Crimes Division) Rules, 2016 (ICD Rules of Procedure), the relevant parts of which are detailed and discussed below. Other relevant criminal statutes are the International Criminal Court Act 2010 and the Geneva Conventions Act of 1964 which respectively incorporate the Rome Statute of the International Criminal Court and Geneva Conventions into Ugandan law. In terms of institutions,

[16] See Draft Transitional Justice Policy, para 11 (affirming that the Constitution of the Republic of Uganda provides the overall legal framework for accountability and reconciliation).
[17] See the Legal and Institutional Framework, part 5 and 6 of the Juba Peace Agreement on Accountability and Reconciliation Between the Government of the Republic of Uganda and the Lord's Resistance Army (LRA) signed in Juba on June 29, 2007.
[18] Juba Peace Agreement, paras 6.4 and 6.5.
[19] Juba Peace Agreement, Legal and Institutional Framework, para 5.5.

the criminal justice system entails the ministry of justice,[20] the hierarchical court system from the Supreme Court to the Magistrates' Courts, prosecution services under the Director of Public

Prosecutions as well as the police, which enforces criminal law and performs specific roles of investigations and prosecution of crimes under the direction of the DPP.[21] For our purposes, the Human Rights Commission, which is mandated to receive, adjudicate complaints relating to human rights violations from the public and to make orders relating to reparations is part of the criminal justice system in so far as some of the complaints it adjudicates relate to proscribed acts.[22]

2.2. Legal and Institutional Framework

Other than the *lex specialis* (special rules) on court-ordered reparations for gross violations of human rights and international crimes outlined and analyzed in comparative context below, there are other general rules and at least one quasi-judicial institution that is relevant to an adjudicative process in which reparations are determined: constitutional rules and those drawn from both civil and criminal law.

With respect to general rules, Article 28(1) of the Constitution of Uganda entitles every aggrieved person or a person charged with a criminal offence to the right to a fair, speedy trial before an independent and impartial court or tribunal established by law. Article 50(1) provides a constitutional basis for the right to an effective remedy, which includes compensation. It enacts that

> "Any person who claims that a fundamental or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a rights and competent court for redress which may include compensation."

In addition to the substantive provisions on the right to compensation, Article 126(1)(c) enacts, as one of the principles by which judicial power should be exercised, the award of adequate compensation to victims of wrongs. Article 50(4) obliges Parliament to make laws for the enforcement of rights protected in the Bill of Rights. The traditional mode of bringing claims is by petition, although civil law also provides an avenue for victims to vindicate their rights where the complaint pertains to complaints that can be addressed under that body of law. As is evident from the discussion below on *lex specialis* on reparations, criminal law offers an additional route for victims of crime to obtain reparative justice within a criminal process.

While defence rights are a special category that should not be confused with victims' rights, defense rights are integral to a fair criminal process and should be of concern to the ICD. In this regard, it is important to note that a claim of compensation can be brought against prosecuting authorities by an accused who is aggrieved by the conduct of a prosecution. Article 23 (7) of the Constitution provides that:

> "[a] person unlawfully arrested, restricted or detained by any other person or authority, *shall be entitled to compensation* from that other person or authority whether it is the State or an agency of the State or other person or authority (emphasis added)."

This provision, which mirrors Article 85 of the Rome Statute, seeks to remedy miscarriage of justice, which includes what is sometimes described as *malicious* prosecution. The principles and guidelines proposed in this report on quantum and types of compensation should apply with equal force to compensation due to an accused unlawfully arrested, detained or prosecuted by the ICD and other criminal courts.

Other than courts, the constitution creates the Uganda Human Rights Commission (UHRC) to which victims may turn when their rights are violated. The UHRC is one of few national Human Rights bodies in the world to be invested with the power to order the payment of compensation under Article 53(2) of the Constitution.[23] The Commission has established a strong tradition in this regard, and routinely orders the payment of compensation to victims after organizing a trial (the tribunal process) involving victims and respondents that include state agencies.[24] The tribunal process is one

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[20] On the role of the AG and justice Minister in comparative perspective, see generally Godfrey Musila, *The role of the Attorney General in East Africa: Protecting public interest through independent prosecution and quality legal advice* in ICJ *Reinforcing judicial and legal institutions: Kenya and East African perspectives* (2007) 21-41.

[21] Office of the Director of Public Prosecutions is established under Art 120 Constitution of Uganda.

[22] For a brief overview of the Ugandan legal system, see generally Brenda Mahoro & Lydia Matte, *Uganda's Legal System and Legal Sector* available at <http://www.nyulawglobal.org/globalex/Uganda1.html> (Accessed on July 5, 2016).

[23] Article 53(2) Constitution of Uganda.

[24] See for instance, UHRC, *17th Annual Report of the Uganda Human Rights Commission to the Parliament of the Republic of Uganda* (2014) p 31 (detailing cases where compensation was ordered and those that are pending). Report available at <http://www.uhrc.ug/sites/default/files/ulrc_resources/UHRC%2017th%20Annual%20Report%202014.pdf (accessed on July 14, 2016)>.

of the mechanisms through which the commission fulfills its mandate, the others being investigations, mediation, counseling, giving advice and making referrals to other agencies.[25] The UHRC also recommends the payment of compensation to victims of violations and their families through Parliament under Article 52(1)(d) of the Constitution.

2.3. Penal Code and Criminal Procedure Code

The Penal Code and Criminal Procedure Code (CPC) make no provision for a general right to compensation for victims of crime. This lacuna in the law necessitated law reform, which led to the adoption of the Trial on Indictment Act, of which relevant provisions are outlined below. The Magistrates Courts Act, which governs the activities of Magistrate courts in Uganda that try the bulk of criminal offenses contains provisions on compensation, restitution and fines.[26] The Law Revision (Fines and other Financial Act 14 Amounts in Criminal Matters) Act 2008 provides a framework for standardizing fines due to disparities in provisions relating to fines in various legislation as well as the depreciation of the value of the Ugandan currency (shilling) over decades during which relevant legislation have been in force (Penal Code since 1951). The relevant provisions in these laws are discussed below under the specialized law on reparations.

In the Penal Code, compensation is provided for as a penalty attached to a small list of crimes in addition to imprisonment. Compensation applies particularly to crimes involving loss of property or theft but is not generally sanctioned in case of "personal crimes" or crimes that touch on the personal integrity of a person and in which the individual suffers personal harm, injury or is killed. One instance in which compensation may be ordered for personal harm is defilement, in respect of which section 129B of the Penal Code Amendment Act, Act 8 of 2007 enacts that:

> "Where a person is convicted of defilement or aggravated defilement under section 129, the court may, in addition to any sentence imposed on the offender, *order that the victim of the offence be paid compensation by the offender for any physical, sexual and psychological harm caused to the victim by the offence."*

The Court of Appeal has ruled that this provision authorizes compensation only in cases of defilement, and not rape.[27] Defilement is defined under section 129 as unlawful sexual intercourse with a child under the age of eighteen.

In several other cases where compensation has been ordered, the court appears to conflate compensation with restitution, which entails the refund/return of stolen property.[28] Other than property crimes and defilement, compensation attaches to two other crimes proscribed in the Penal Code that could be of interest, in part because they have been widespread during the LRA conflict: the forceful taking or abduction of girls and women by LRA fighters into sexual slavery. In particular, sections 127 and 154 of the Penal Code entitle an aggrieved person to compensation in cases of elopement and adultery respectively. The court could adopt a creative interpretation of the forceful taking of girls and women for "marriage" as elopement, which in the case of married women would result in adultery where carnal knowledge is involved. It is only in this way that these provisions of the Penal Code can be the basis for a right to compensation, based on existing case law on sections 127 and 154. Other than this, the Sentencing Guidelines as well as ICD Rules should act as a separate basis for compensation in relation to crimes proscribed under sections 127 and 154.

2.4. The special Law on Reparations in the Criminal Process

Above, the general law relating to the work of the ICD and the rights of victims of international crime was outlined. With respect to reparations, this section discusses the *lex specialis* – the set of special rules that provide for the substantive right and govern the *reparations in the criminal process*. These are contained in the Trial on Indictment Act (TIA), ICD Rules of Procedure and the International Crimes Act of 2010. This legal regime on reparations for both ordinary crimes and international crimes is new in Uganda, and case law is non-existent. The main provision, which establishes in law the victim's right to compensation by a convicted person is section 126 enacted in Part IX of the Trial on Indictment Act as amended in 2008. It is notable that section 126 of the TIA reproduces word for word section 197 of the Magistrates Act. Section 126 (1) of TIA states that:

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[25] UHRC, above, p 13.

[26] In 2014, comprehensive sentencing guidelines were adopted as subsidiary legislation. See The Law Library of Congress, Global Legal Research Center, *Sentencing Guidelines in Australia, England and Wales, India, South Africa and Uganda* (2014) available at <https://www.loc.gov/law/help/sentencing-guidelines/sentencing-guidelines.pdf> (accessed on July 10, 2016).
https://www.loc.gov/law/help/sentencing-guidelines/sentencing-guidelines.pdf (accessed on July 13, 2016).

[27] *Otema David v Uganda*, Criminal Appeal No. 155 of 2008 arising from HCT-02-CR-SC-0042 of 2002 at Gulu.

[28] See for instance *Uganda v Waiswa & Others (criminal session case no 420 of 20103)* [2010] UGCCRD 51 October 1, 2013 ; *Juuko v Uganda* (criminal Appeal No. 058 of 2013) [2014] UGHCCRD 92 (October 2014).

> "When any accused person is convicted by the High Court of any offence and it appears from the evidence that some other person, whether or not he or she is the prosecutor or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed, the court may, in its discretion and in addition to any other lawful punishment, order the convicted person to pay to that other person such compensation as the court deems fair and reasonable (emphasis added)."

Rule 48(1) of the ICD Rules of Procedure reproduces verbatim Section 126(1) of the TIA. This provision empowers the court to order compensation in criminal cases in which an accused is convicted. For its part, Rule 48(2) expands the orders that may be made against an accused to fines and "any reparation", which category would include restitution, rehabilitation, satisfaction and guarantees of non-repetition. Rule 48 ICR Rules of Procedure is supplemented by the non-binding Sentencing Guidelines published in 2013 by the Chief Justice,[29] which provides that "the prosecution shall apply for ancillary, compensatory and confiscation orders in all appropriate cases[30] and includes compensation, restitution and forfeiture in the list of orders that a court can make when sentencing an offender."[31] Judges and magistrates have cited these guidelines with approval in several cases.

Section 129 of the TIA provides for restitution, but not necessarily in reference to return of proceeds of crime. It enacts that:

> "Where, upon the apprehension of a person charged with an offence, *any property* is taken from him or her, the High Court may order that the property or a part of it be *restored to the person who appears to the court to be entitled to it* and, if he or she is the person charged, that it be restored either to him or her or to such other person as he or she may direct."

For its part, section 130(1) and (2) TIA provides for restitution of stolen property to the lawful owner or representative. Such property would have been stolen in an isolated act (see relevant parts of Penal Code ss 253-284), which under section 9 of the International Court Act of 2010 would amount to the war crime of pillage or as part of a course of conduct in which other crimes are committed. Sections 129 and 130 of the TIA reproduce section 200 and 201 of the Magistrate Courts Act.

Section 128(2) of the TIA, which mirrors section 199 of the Magistrates Courts Act enacts that that the court may order compensation to be made out of fines paid upon conviction. It stipulates that:

> "Whenever the High Court imposes a fine, or a sentence of which a fine forms part, the court may, when passing judgment, order the whole or any part of the fine recovered to be applied— *in the payment to any person of compensation for any loss or injury caused by the offence when substantial compensation is, in the opinion of the court, recoverable by civil suit* (emphasis added)."

There is recognition that fines in a particular case are likely to be set very low, and not much money can be raised from fines to pay compensation which depending on the loss or injury suffered by the victim could be substantial. Incidentally, the Penal Code did not make provision for a fine as part of sentence for the major crimes likely to be tried by the ICD. Philosophically, this spoke to a legal tradition where a victim is alienated from the crime, which is fully appropriated by the state that satisfies itself with imprisoning convicted persons, and when a fine is paid, it goes to the state rather than the victim. The passing of the Law Revision (Fines and other Financial Act 14 Amounts in Criminal Matters) Act 2008 has made it possible for imposition of substantial fines on convicts, from which courts have ordered that compensation payable to victims should be defrayed in some cases.[32] Irrespective of whether orders to pay a fine referred to in section 126 is that made against an accused or not, it is evident that the court only applies this provision – to order compensation from fines – where the bulk of compensation will be obtained from civil suit at a later date.

When section 128(2) is read with section 126 of the TIA, an interesting scenario emerges. It is unclear why on a cursory reading of the law the court cannot dispose of the issue of reparation in the criminal trial, since section 126 does not impose conditions as to when reparations orders can be made in the main criminal trial rather than being left to a law suit brought by the victim subsequent to the conviction. Section 128(2) creates a situation where the judge has two options

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[29] See generally *Sentencing Guidelines*. For a wide-ranging analysis of the guidelines, see generally Hanibal Goiton, *Uganda* in Library of Congress, *Sentencing Guidelines: Australia, England and Wales, India South Africa and Uganda* (2014) 45-56 available at <https://www.loc.gov/law/help/sentencing-guidelines/sentencing-guidelines.pdf> (accessed at July 15, 2016).

[30] Sentencing Guideline 58(1).

[31] Sentencing Guideline 11.

[32] *Isale Paul and Oluka Milton v Republic* Criminal Appeal 22 OF 2013 [Arising from Ngora Criminal Case135 of 2013, decided on August 27, 2014].

on how to approach reparations after convicting an accused: a) determine issues of reparations in the criminal process and make an order of reparation under section 126 or b) make a limited order of compensation from the fine imposed then the victim can sue the convict in civil court.

From the perspective of victims, option one appears more favorable in the sense that it avoids another lengthy and expensive legal proceeding post-sentencing of an accused. Anecdotal evidence shows that victims rarely bring civil suits after an accused is convicted and section 126 must have been intended to remedy the situation and to ensure that "complete justice" is done in one forum.

Indeed, by making it possible for Victim Impact Statements made at sentencing to include detailed information on harm suffered the Sentencing Guidelines bear this view out. In all likelihood, indigent victims are usually unable to bring or almost never file suits or are even unaware that they have this right. In the absence of state-funded compensation scheme for a victim of crime, the misfortune of being a victim can spell economic doom for victims where injury sustained is such that they lose the ability to work and to earn a living. Consideration should be given to proposing amendments to section 182 of the TIA to create a fund based on fines paid in criminal cases to finance compensation for victims of crime, beginning with serious crime.

Section 64(2)(a) of the International Crimes Act of 2010 does not create a right to reparations but provides for the enforcement in Uganda of reparations orders made by the ICC and its Trust Fund for Victims. When authorization is given by the Minister for the enforcement of a reparation order by the ICC, the Minister having satisfied himself/herself that no appeal is pending and the order can be enforced in the form requested by the ICC, section 64(2)(a) of ICA enacts that enforcement of the reparation which requires monetary payment (compensation) is done as if the order were made by a Ugandan court under section 126 of the Trial on Indictment Act.[33] Equally, where the order by the ICC relates to restitution of assets, property or other tangible items, Ugandan authorities [the Attorney General] shall proceed as if the order were made under section 129 of the Trial on Indictment Act, and necessary steps will be taken to given effect to it.[34] The same applies to ICC orders relating to any other remedy under Article 75 of the Rome Statute (such as rehabilitation) as well as order of fines made under Article 77(2)(a) Rome Statute. Ugandan authorities shall enforce orders of a fine made by the ICC as if such an order were imposed on conviction under section 110 or 111 of the Trial on Indictments Act.[35]

In other words, an order of compensation, restitution or any other relevant remedy under Article 75 of the Rome Statute or fines made by the ICC under Article 77 should receive similar treatment as an order of the ICD under Rule 48 Rules of Procedure and the Trial on Indictment Act. In all likelihood, the ICC will make reparation orders for enforcement in Ugandan where individuals are put on trial at the ICC for crimes committed in Uganda or where beneficiary victims reside in Uganda in case of crimes committed abroad.

[33] Section 64(2)(a) provides that: "in a case where the order requires a monetary payment, take such steps as are necessary to enforce the order as if it were a sentence of compensation imposed under section 126 of the Trial on Indictments Act."

[34] In this regard, section 64(2)(b) provides that: (b) "in a case where the order requires the restitution of assets, property or other tangible items, take such steps as are necessary to enforce the order as if it were an order for the restitution of property made under section 129 of the Trial on Indictments Act."

[35] Section 65(2)(a) of Trial on Indictment Act enacts that Ugandan authorities shall "enforce the order [of fines] as if it were a fine imposed on conviction under section 110 or 111 of the Trial on Indictments Act "

3. Overview Comparative Experiences with Reparations for Mass Atrocities

This part selectively reviews comparative experiences with reparations for mass atrocities. In particular, it discusses the experience of post apartheid South Africa, Rwanda and Sierra Leone. At the international level, the law and jurisprudence of the International Criminal Court on reparations is sketched. The review of comparative experiences is not a full-blown comparative study: a quick summary highlighting key issues is provided. Lessons teased out of these experiences inform the principles and guidelines set out for the ICD in part four of this study.

3.1. National Experiences: South Africa, Rwanda and Sierra Leone

This section reviews national experiences with *administrative reparations* rather than court-ordered reparations for international crimes, in respect of which few examples exist in mass atrocity settings outside the DRC where reparations orders made by military courts totaling USD 1million have gone unimplemented.[36] In Kenya, courts have made orders granting compensation under the Constitution adopted in 2010 to victims of torture perpetrated in the 1980s – all of which also remain unimplemented – but these were initiated by constitutional petitions for violation of rights protected under the Bill of Rights. These experiences with administrative reparations we review below are not without relevance for Uganda and the ICD: Uganda faces mass atrocity situation (with many victims) in the interim period, and it may become necessary, in terms of institutional design, for reparations orders made by the court to be implemented "outside the court" but under its supervision. Equally, these examples offer a myriad of other lessons on reparations generally that are worth exploring.

Of the known national attempts to grapple with legacies of gross human rights violations, mass victimization undemocratic rule, the South African experience with the Truth and Reconciliation has been held out as a model for addressing mass atrocity while building firm foundation for stability and post conflict reconciliation.[37] Emerging as it did from decades of exclusionary white minority rule characterized by gross human rights violations, post Apartheid South Africa had to device a modality for addressing the multiple concerns of victims for justice, reconstructing and documenting its tortured and fractured history while at the same time building the foundations for an open and democratic society based on freedom, equality and human dignity. One of the key features of the South African Truth and Reconciliation Commission (TRC) rightly praised for its role in facilitating a peaceful transition to majority rule was conditional amnesty. It became the device for extracting truth from perpetrators about incidents of human rights violations that would otherwise remain unknown, thus permitting the establishment of individual and state responsibility for human rights violations and facilitating closure and healing for victims and their relatives. This was done in part by providing information about the fate of loved ones that were killed, tortured or disappeared. Out of approximately 22,000 victims that applied for reparations, just over 16,000 designated by the TRC's Reparations committee based on the seriousness of violations suffered would eventually receive reparations in the form of a once-of payment from the state, but the process was beset by multiple challenges attracting criticisms from many, including the former Chair of the TRC Desmond Tutu.[38] The grant of amnesty extinguished all claims, freeing not only the beneficiaries from criminal

[36] On the challenges facing implementation of court ordered reparations in the DRC, see generally, Sharanjeet Parmar and Guy Mushiata, *Judgement denied: The Failure to Fulfill Court-Ordered Reparations for Victims of Serious Crimes in the Democratic Republic of the Congo* available at <https://www.ictj.org/sites/default/files/ICTJ-Briefing-DRC-Reparations-2012-ENG.pdf> (accessed on August 23, 2016).

[37] Traggy Maepa, *Truth and reconciliation as a model of restorative justice* in T Maepa (ed.), *Beyond Retribution: Prospects of Restorative Justice in South Africa* (ISS, 2005) available at <https://www.issafrica.org/uploads/Mono111.pdf> (accessed on June 16, 2016).

[38] T Maepa, *Truth and Reconciliation*, above pp 66-68.

and civil liability but also government from civil liability.[39]

Although the South African TRC experience is regarded as one of the most successful experiments with restorative justice, it has sustained piercing criticisms on several grounds, which are important to take note of. The violations perpetrated in South Africa undoubtedly amounted to war crimes and crimes against humanity. The amnesty law that constituted a key pillar of that experience would in all likelihood fail to pass the muster of international criminal justice today, given the firm stance adopted by the international community's rejection of amnesty for international crimes. Although the TRC received praise as a model for restorative justice, in part because of the balance it struck between amnesty and reparations,[40]some commentators have rejected the idea that the South African experience should be seen as restorative justice at all: one has argued that restorative justice was a crutch used by the TRC to provide moral justification for its work, particularly the amnesty clause that would become subject of litigation in the *Azapo Case*[41] and that what the TRC did, and the outcome of its work fell short of restorative justice practices.[42] Indeed, one of the key failings of the TRC with which commentators have taken issue as one of the most problematic aspects of the process was the TRC's reduction of the conflict to one pitting perpetrators against particular victims. They argue rightly that while violence experienced individually was an important prism through which to analyze apartheid, the TRC's adoption of this narrow focus led to its failure to tackle the structural underpinnings of apartheid, which were pervasive. As a consequence, economic injustice that wrought untold suffering, material dispossession and dehumanization of millions of non-whites received scant attention from the commission.[43] Equally, the reparations program eventually implemented by the government was done slowly and inadequately served only a small proportion of victims designated by strict criteria applied by the TRC.

The government created the President's Fund in terms of section 42 of the Promotion of National Unity and Reconciliation Act, (Act No 34 of 1995) with R800m for reparations in 2003, and reportedly all but 13 of the more than 16,000 victims recommended for individual reparations by the TRC would receive a once-off payment of R 30,000.[44] This was significantly lower than the TRC's recommendation of an annual average of R21,000 over 6 years. Subsequently, the program floundered under the weight of waning political will alimented by the stance that was unsupportive of individual reparations. This objection rested on the view that "all black people were victims' and development should be prioritized to benefit all without distinction."[45] In spite of the slow pace of disbursement and the obvious need among victims that were left out of the TRC process, it is reported that the President's Fund had accumulated over R1billion by 2014.[46] It is perhaps for

[39] Section 79(a) TRC Act provided that: "No person who has been granted amnesty in respect of an act, omission or offence shall be criminally or civilly liable in respect of such act, omission or offence and no body or organisation or the State shall be liable, and no person shall be vicariously liable, for any such act, omission or offence."

[40] T Maepa, *Truth and Reconciliation*, p 66.

[41] See *Azanian Peoples Organisation and Others v President of the Republic of South Africa and Others* 1996 (4) SA 671 (CC). *[AZAPO]* and In re Apartheid in the USA under the Alien Tort Claims Act

[42] See for instance, Stuart Wilson, *The restorative justice myth: Truth, reconciliation and the ethics of amnesty. South African Journal on Human Rights* 531-562.

[43] Tembeka Ngcukaitobi, *Searching for the Truth after the Truth and Reconciliation Commission in South Africa: Lessons for Kenya*, in Godfrey Musila and Waruguru Kaguongo (eds) *Addressing Impunity and Options for Justice in Kenya: Mechanisms, Issues and Debates* (2009) 61-101.

[44] Department of Justice, *President's Fund Annual Report 2014/2015* available at <http://www.justice.gov.za/reportfiles/other/presfund-anr-2014-15.pdf> (accessed on July 201, 2016).

[45] T Maepa, *Truth and Reconcilitaion*, 68.

[46] Mary-Anne Gontsana, *Over R1 billion in fund - yet apartheid victims still await compensation,* November 2013, available at <http://www.groundup.org.za/article/over-r1-billion-fund-yet-apartheid-victims-still-await-compensation> (accessed on July 20, 2016).

these reasons that some think that the TRC as restorative justice was oversold, or the very idea of restorative justice in this context is simply a myth. In 2014, the Department of Justice reported that it was embarking on communal reparations which would benefit communities particularly hard hit by apartheid by providing basic services and infrastructure. The government identified only 28 of the 128 communities designated by the TRC in its report in its plan it terms of which each would receive R30million.[47] As of March 2015, the Department of Justice and Constitutional Development that oversees the President's Fund reported that implementation has started and individuals have benefited from scholarships for education, assistance with healthcare and payment of exhumation and reburial of victims. On rehabilitation of communities, needs analysis has been conducted in some provinces within designated communities and is to be finalized in others.[48]

In Rwanda, where an estimated 800,000 people were killed during the genocide in 1994, to say that the post genocide government of an impoverished country faced an insurmountable burden of establishing accountability for these international crimes is an understatement. At the request of the government, the United Nations Security Council responded by establishing the International Criminal Tribunal for Rwanda (ICTR) at the request of the government, months after doing the same in the case of the Former Yugoslavia.[49] Charged with prosecuting those who bore the greatest responsibility for the genocide as the ICTR was not an adequate response to the mass atrocity witnessed in Rwanda. Although one of its expressed objectives was to provide justice for victims, justice is to viewed in a narrow retributive sense as the statute of the ICTR did not include a right to reparations. The right to restitution provided for in Rule 106 ICTR's Rules of Procedure and Evidence was limited to the return of stolen property to be ordered as part of the sentence. Although the statute preserved victims' right to claim and obtain reparations through other avenues, opportunities would not be abundant.[50]

Rwanda's internal response to the genocide was multi-pronged. In addition to mounting prosecutions in ordinary criminal courts amid numerous challenges related to lack of human and financial resources, it adopted legislation that revived, reformed and formalized *gacaca,* a traditional conflict resolution mechanism that had been used in pre-colonial Rwandan society. *Gacaca* would become a key feature of Rwanda's post genocide justice, reportedly processing over 1million perpetrators by the time they closed in 2012.[51] The Organic Law that established *gacaca* created a framework for trying perpetrators by their fellow lay citizens in communities where crimes occurred and provided for referral of cases classed by gravity of alleged crimes and role of perpetrators to ordinary criminal courts (category 1 crimes). Gacaca tried categories II, III and IV.[52] The sentencing options included community service and compensation. The main criticism leveled against g*aca*ca was that they violated human rights, notably a range of fair trial guarantees, including lack of legal representation.[53] It is important to note that imperfect as they were, *gacaca* made an important, even vital contribution to post genocide justice in Rwanda. A government report concludes that over 1 million perpetrators had been tried by *gacaca* when the courts closed in 2012.[54]

Widespread indigency was such that survivors could not expect compensation from perpetrators and in addition, survivors derived little, if any personal benefit from community work which entailed the reconstruction of public buildings, houses they destroyed and cleaning public spaces. Survivors of genocide derived little, if any personal benefit from community work. In response to the plight of survivors of genocide, particularly widows and orphans, or which there were thousands, the government established a reparations program *Fonds d'Assistance pour Rescapés du Génocide* (FARG) for survivors in 1998 funded by 5% of national revenue and 1% contribution from the salary of public servants.[55] A report published in 2012 suggests that FARG provided scholarships for close to 40,000 children. Of this, over 5,000 completed university and another 4000 were pursuing university degrees. Over 40,000 houses had been constructed for survivors while another 164,000 had received health insurance coverage.[56] IBUKA, an NGO founded by survivors had provided

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47 Simon Allison, *The President's Fund: Where is the money for Apartheid victims actually going?.*

48 See Department of Justice, *President's Fund Annual Report*, report of the finance officer pp 5-6

49 On the ICTR, see UNSC Resolution 955 (1994) *Daily Maverick* Oct 14, 2014 available at http://www.dailymaverick.co.za/article/2014-10-14-the-presidents-fund-where-is-the-money-for-apartheid-victims-actually-going/#.V7iHCmUvZFI

50 UNSC Resolution 955 noted that 'the work of the International Tribunal shall be carried out without prejudice to the right of victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law.

51 See Ministry of Justice, *National Service of Gacaca Courts Gacaca Courts in Rwanda* (2012) a Report of the Ministry of Justice available at <http://www.minijust.gov.rw/uploads/media/GACACA_COURTS_IN_RWANDA.pdf (accessed on July 12, 2016)>.

52 Article 51, Loi Organique Portant sur les jurisdictions Gacaca, 2001

53 Human Rights Watch, *Justice Compromised*: The Legacy of Rwanda's Community-Based *Gacaca* Courts (2011) 27-64 available at <https://www.hrw.org/sites/default/files/reports/rwanda0511webwcover.pdf> (accessed on July 12, 2016).

54 Rwanda Ministry of Justice (n 56 above) 200.

55 FARG was created Law No 2/1998 (as modified by Law No 69/2008 relating to the establishment of the Fund for the support and assistance to the survivors of the Tutsi Genocide and other crimes against humanity committed between 1st October 1990 and 31st December 1994, and determining its organisation, powers and functioning).

56 RNA Reporter, *Le Fonds d'Assistance pour Rescapés du Génocide a soutenu 39 418 enfants*, April 8, 2012 available at http://www.rnanews.com/health/5944-le-fonds-dassistance-pour-rescapes-du-genocide-a-soutenu-39-418-enfants?format=pdf

emergency assistance to over 23,000 and survivors had been placed in a program *Girinka,* in which individuals would receive a heifer which they raised for milk production. IBUKA was also reported to have supported 12,000 children through secondary school.

In Sierra Leone, a reparations program was implemented between 2008 and 2013, following recommendation of the Truth and Reconciliation Commission in 2004. The program was designed and implemented by the Directorate in the National Commission for Social Action (NaCSA) and International Organization on Migration (IOM).[57] Reviews of the reparation program funded with assistance from the UN Peacebuilding Fund (USD 3million) and the IOM are mixed, with onecommentator noting that on the whole, it failed to achieve set objectives, and was shunned by some victims.[58]

Although the initial five-year plan was to provide pensions, healthcare and education to beneficiaries, due to limited funds, the program prioritized amputees, war wounded civilians, war widows, orphans and victims of sexual abuse were singled out for priority payment of USD 100 as individual reparations. The UN Peace-building Fund would donate an additional 1.45million in 2011 and 2013, while UNWomen provided r1million for a skills training and USD 500 per person start up kit for 650 women and girls to the tune of 1million while an additional 2.5 million USD were allocated by the UN Multi-Partner Trust Fund for reparations in Sierra Leone 2013.

3.2. General Lessons from RSA, Rwanda and Sierra Leone

More specific lessons are referred to in different sections below, here, only the broad lessons from the overall experience with reparations are highlighted:

- These experiences show that approach adopted to implement reparations is critical and that an attempt must be made to address both individual victimization and structural underpinnings of repressive regime to benefit wider public and to guarantee non-repetition.
- All experiences inform that it is critical to establish institutions suited to the job, and that long-term planning is necessary because of limited resources which have to be mobilized over time, implementation of reparations in mass atrocity situations takes time. In both RSA and Rwanda, implementation is ongoing, having started in late 1990s and for RSA, the Reparations and Rehabilitation Committee took 6 years to complete its work, three years after TRC handed in its Final Report.
- It may be ideal to domicile the implementation mechanism within government structures with close proximity to executive power, because it can cause system-wide focus and mobilize relevant ministries and agencies that one needs to implement various aspects of reparations e.g. health, housing. However, the experiences demonstrate, particularly RSA, that political will is critical, irrespective of where the mechanism is located.
- The case of RSA informs that political settlements shape the terrain in which reparations process, including court-ordered reparations evolve. These of RSA, the political settlement between the ANC and the National Party that was embodied in the TRC Act ousted victims' rights to seek recourse in courts, as demonstrated by the *Azapo Case* and would necessitate the fling of law suits against multinationals in the USA.
- Individual reparations are important, but communal reparations that benefit a greater number of people while remedying structural injustices are key to reaching more victims, especially where the reparations fund applies strict and narrow criteria that exclude a majority of victims. Development programs that are well funded can address the legacy of victimization, but they tend not to be targeted at particular individuals and communities, therefore communal reparations are critical.
- The need for closure and finiteness of resources dictate that when reparations programs are implemented, the process should definitively deal with an issue … and allow for moving on. However, such should not extinguish right of victims to pursue reparations through other avenues, for instance, once they benefit from orders made by ICD. In RSA, the ouster of other options led to mobilization to file cases against multinationals the USA under the Alien Tort Act. The cases eventually collapsed after years of litigation, but a small number of litigants secured a settlement from General Motors.[59]

[57] On the Sierra Leone Reparations Program, see IOM, *Support to the Implementation of the Sierra Leone Reparations Programme (SLRP)* available at <https://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/Support-to-the-Implementation-of-the-Sierra-Leone-Reparations-Programme-SLRP.pdf> (accessed on August 20, 2016)

[58] Eva Ottendörfer *The Fortunate Ones and the Ones Still Waiting: Reparations for War Victims in Sierra Leone*, available at <http://www.hsfk.de/fileadmin/HSFK/hsfk_downloads/prif129.pdf> (accessed on September 20, 2016).

[59] David Smith, *General Motors settles against victims of apartheid regime*, *The Guardian*, March 2 2012. See <https://www.theguardian.com/world/2012/mar/02/general-motors-settles-apartheid-victims> (accessed on July 12, 2016).

3.3. Reparations at the International Criminal Court

The adoption of the Rome Statute for the ICC marked an important development in international law: the ICC is the first international criminal tribunal to make provision for victims to participate in the proceedings in their capacity as victims and to receive reparations. Participation is premised on three conditions: that they are victims, meaning that they have suffered harm, injury or loss arising from the crimes charged; they have an interest to protect in the proceedings (such as seeking the truth to be revealed about what happened and, where appropriate, seeking the ICC to officially declare the suspect guilty; seeking public acknowledgment of what happened to them and seeking reparations in the end; protecting and promoting victims' rights beyond the mere case) and; that their participation is not prejudicial to the rights of the defence to an expeditious trial and efficient discharge of justice by the court.[60] The ICC's chambers have confirmed victims right to participate at all stages of the proceedings and held that only the modes of participation – to make opening and closing statements, to make written or oral representations, add facts and evidence to the case, to pose questions during hearings, make observations and submissions, to be represented bycounsel –, will vary, as adapted to every stage of proceedings. In *Lubanga*, victims were allowed to participate in the confirmation hearing in spite of the fact that Article 61 Rome Statute, which governs these proceedings makes no provision for such a role.[61] This is now a common feature of confirmation of charges hearings at the ICC.

In Uganda, there is an expressed aspiration to align the practice of the ICD with that of the ICC, and the ICC's law and jurisprudence on participation could find relevance. Although in the general criminal justice process, Rule 51 of ICD Rules of Procedure states that one of the Registrar's responsibilities is "to assist victims in participating in the different phases of the proceedings." However, provision is not made for a substantive right to participate akin to Art 63(8) of the Rome Statute, and no procedural rules are detailed yet to facilitate such participation. This is significant in a legal system based on the Common Law, and in which victims' participation has been so far limited to filing Victim Impact Statements. It is thus not clear how the right to participate at all stages of the proceedings at the ICD, if such is implied, will be exercised. Further rules that take into consideration the experience of the ICC will have to be developed.

What is important to recall, is that the right to participation has instrumental value: it is critical to reparations in at least two ways detailed below: victims and their representatives communicate important information to the court about harm, loss and injury suffered and; it facilitates victims' role in the design and implementation of reparations.[62] Equally, it must be recalled that the right to participation is meaningless when victims lack information to facilitate decision-making and forcedly, access to information is a critical right both to participation and reparations. For this reasons, the legal framework that governs investigations, confirmation of charges, trial and appeals at the ICC make provision for the right of victims to be informed of developments in the proceedings.

The Rome Statute, RPE and Regulations (of the Court and VTF) detail various aspects of reparations. There are two "focal points" for the right to reparations – the Court in terms of Article 75 and the Trust Fund for Victims (TFV) established under Article 79 of the Rome Statute.[63] Article 75 of the Statute establishes the right to reparations providing that "*the Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation*."[64] For its part, Article 79 creates the TFV for the benefit of victims of crimes within the jurisdiction of the Court, and for the families of such victims. The Court is required to "*determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting*."

Following the conviction of *Lubanga*, the Trial Chamber issued a decision on August 12, 2012 stipulating principles on reparations.[65] The Appeals Chamber issued a decision amending the TC's decision thus further developing the court's jurisprudence on reparations following an appeal by the defence and prosecutor.[66] Since then, the principles set out by the Appeals Chamber are considered as a point of reference by other Chambers dealing with reparations.[67] To be sure, the Appeals

[60] Art 68(3) Rome Statute.

[61] The court derived the right by reading several provisions - Arts 57(3) (c), 61(5), 61(7), 67 and 68(3) Rome Statute and Rules 87, 88, 89(1), 121 and 122 ICC RPE. See *Situation in the Democratic Republic of Congo*, *The Prosecutor v Thomas Lubanga Dylo,* Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, 22 September 2006.

[62] Express mention of participation in reparations is in Articles 75(3) and 82 (4) Rome Statute.

[63] L Taylor 'Thoughts on victims' reparation and the role of the Office of the Prosecutor' (2003) Available at <http://www.icc-cpi.int/library/organs/otp/taylor.pdf > (accessed on 15 Jan 2008).

[64] Art 75(1) Rome Statute; For a history of the provision, see D Donat-Cattin 'article 68' in Triffterer *Commentary on the Rome Statute of the International Criminal Court: observer's notes article by article* (1999) 965-1014.

[65] *Prosecutor v Thomas Lubanga Dylo*, *Decision establishing the principles and procedures to be applied to reparations* No.: ICC-01/04-01/06 of August 7, 2012 available at <https://www.icc-cpi.int/CourtRecords/CR2012_07872.PDF> (accessed on June 3, 2016).

[66] *Prosecutor v Thomas Lubanga Dylo,* Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2 No. ICC-01/04-01/06 A A 2 A 3 of March 3, 2015 available at https://www.icc-cpi.int/CourtRecords/CR2015_02631.PDF (accessed on June 2, 2016).

[67] See Jean-Pierre Bemba Case, Order requesting submissions relevant to reparations, decision of July 22, 2016 available at <https://www.icc-cpi.int/CourtRecords/CR2016_05353.PDF>.

Chamber held that there are five essential elements (which represent the five core principles) that must be addressed in a Reparations Order:[68]

- It must be directed against the convicted person.
- It must establish and inform the convicted person of his or her liability with respect to the reparations awarded in the order.
- It must specify, and provide reasons for, the type of reparations ordered, either collective, individual or both, pursuant to rules 97(1) and 98 of the Rules of Procedure and Evidence.
- It must define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted, as well as identify the modalities of reparations that the Trial Chamber considers appropriate based on the circumstances of the specific case before it.
- It must identify the victims eligible to benefit from the awards for reparations or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted.

In the fourth and last part of this report, we conduct a thematic discussion of relevant principles and guidelines then detail those that could be applied by the ICD on a series of issues relating to reparations taking into consideration Uganda's legal and institutional framework as well as comparative experience, including the ICC's jurisprudence.

[68] See Bemba, above, para 5.

4.
Themed Discussion and Proposals on Reparations Principles and Guidelines

In this part, the report adopts a thematic approach, setting out under subheadings particular themes relating to court-ordered reparations and discussing each in turn in comparative perspective then after this proposing consecutively numbered principles and/or guidelines.

4.1. Meaning Of Reparations: Distinguishing From Assistance And Development

The term reparations is a composite term that encapsulates all the measures taken to remedy a human rights violation, and typically include five categories of measures: compensation, restitution, rehabilitation, satisfaction and guarantees of non repetition.[69] These are elaborated below under the section "forms and types of reparations".

To further clarify the meaning of reparations, the term must be distinguished from two related terms – assistance and development – which in varying degrees can be said to yield the same social goods for victims. Assistance, which refers to programs that may be packaged as development projects, humanitarian relief, aid initiatives or subsidies that may be undertaken to address the needs (not injuries suffered) of victims of crime and human rights violations without establishing responsibility for the wrongs that necessitate assistance.

Assistance programs may be instituted by a government that is unwilling or unable to investigate and assign responsibility for crimes but finds it expedient to address (at least some) concerns of victims. The fact that such programs are instituted "in solidarity" with victims, who may not be recognized as such, means that no claim can lie as of right against any individual or government agency.[70] Reparations, particularly, court ordered reparations require the establishment of the liability of the perpetrator as well as the identification and consequently recognition of victims, who is entitled to make claims, is recognized by the court.

For its part, development, refers to the totality of processes and measures undertaken by government to grow the economy, generate wealth and thus expand access to social services and goods in general to the greatest number of its citizens as possible. One commentator has defined development as

> "… The process by which a society increases the general and individual prosperity and welfare of its citizens, building the infrastructure and institutions necessary to ensure its members the most fulfilling life possible, or at least a minimum level of income or livelihood for a life with dignity."[71]

Reparations and development programs are interrelated but different concepts. While reparations programs are targeted at particular victims of crime of human rights violations, development programs are for the common economic and social welfare of all people in a polity, although economic

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[69] See Basic Principles and Guidelines on the Right to a Remedy, 2005; for a discussion in comparative perspective, see Godfrey Musila, *Rethinking International Criminal Law*, Chapter 6.

[70] On the difference between assistance and reparations, see Peter Dixon, *Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo, International Journal on Transitional Justice* 2016 10 (1): 88-107 doi:10.1093/ijtj/ijv031.

[71] *Naomi Roht-Arriaza and Katharine Orlovsky. 'A Complementary Relationship: Reparations and Development. Research brief of the International Centre for Transitional Justice (July 2009) available at https://www.ictj.org/sites/default/files/ICTJ-Development-Reparations-ResearchBrief-2009-English.pdf (accessed on Aug 1, 2016).*

growth does not necessarily yield equal distribution of wealth as sometimes, only a few benefit from it. Given that deprivation and poverty are often the result of victimization of particular

individuals and groups and that material lack in general is one of the root causes of conflict that results in human rights violations and crime, the complementary relationship between reparations and development appears self evident.[72] It has been suggested that benefits may be derived in encouraging cooperation between actors around reparations and development, and that where there is greater participation of donors in post conflict development programs than in funding reparations, cooperation between development actors and those involved in reparations could portend benefits for the latter, including sourcing of funds and maximizing impact or reparations program.[73]

While entities including courts that adjudicate claims relating to reparations are not economic policy makers, the economic status of victims or more aptly the state of want of victims is a concern with which they are invariably confronted and must address, particularly in mass atrocity situations. This often reflects in the types of reparations ordered, with communal reparations being fashioned to address or call attention to the marginalization of victims from economic development. The modalities chosen by the court, commission or reparations fund link reparations with the wider idea of economic development. In South Africa, development projects are being implemented among designated victim communities to improve access to infrastructure, health facilities and housing. Rwanda's FARG has a similar objective. The Inter-American Court, which has developed an extensive jurisprudence on reparations, has often made orders pertaining to socio-economic development, obliging states to undertake specific developmental measures disguised as communal reparations. In *Plan De Sanchez v Guatemala*, the Court ordered the state to implement within five years, various development projects (in addition to the public works financed by the national budget allocated to that region or municipality): maintenance and improvement of the road systems; sewage system and potable water supply; supply of teaching personnel and; the establishment of a health center in the village of Plan de Sánchez with adequate personnel and conditions.[74]

In Uganda, the Peace, Recovery and Development Plan launched for Northern Uganda by the government in 2009 was not sold as a reparations program, but rather, a development program for the war ravaged region of Uganda. Run by the Ministry for Karamoja Affairs domiciled in the Office of the Prime Minister and headed by the First Lady Janet Museveni, the program included a focus on education and health,[75] a housing project and an agricultural support component.[76] It was borne out of the need, as conceived by the Juba Peace Agreement, to provide access to services to people in war ravaged and impoverished Northern Uganda and as a basis for economically reintegrating in Uganda, a region long isolated and 'left behind'.

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[72] Roht-Arriaza and Orlovsky, p 2 argue that development efforts impacts reparations outcomes and that conversely, individual and collective reparation efforts may have spillover effects on aspects of development.

[73] UNWomen and UNDP, 'Reparations, development and gender' report of a consultation held in Kampala, Uganda on December 1-2, 2010 available at <http://www.unwomen.org/~/media/Headquarters/Attachments/Sections/Library/Publications/2012/10/06A-Development-Gender.pdf> (accessed on July 20, 2016).

[74] *Case of the Plan de Sánchez Massacre v. Guatemala*, Judgment of November 19, 2004 (Reparations) available at <http://www.corteidh.or.cr/docs/casos/articulos/seriec_116_ing.pdf> (accessed on 20, August 2016) para 110. See also orders of the court in Case of Aloeboetoe et al. *v.* Suriname, Judgment of September 10, 1993 *(Reparations and Costs)* available at <http://www.corteidh.or.cr/docs/casos/articulos/seriec_15_ing.pdf> (accessed on July 22, 2016)

[75] *Education gets more funds, health to get better*, Africa Business Week, Aug 20-26 available at <http://janetmuseveni.org/jmk_cms/images/issue/educ.pdf> (accessed on August 20, 2016).

[76] See generally, *Interventions bolstering Karamoja development*, Africa Business Week, Aug 20-26, 2012 available at <http://janetmuseveni.org/jmk_cms/images/issue/intervations.pdf> (accessed on August 20, 2016).

A detailed review of the development program is beyond the scope of this report, but preliminary review suffices for our purposes. The overarching conclusion, upon a cursory review, is that views of the recovery program range from negative to trenchant criticism. Concerns include the emphasis placed on crop agriculture in a region where herding has been the mainstay of economic activity, likely for millennia. Questions have also been raised in relation to aspects of the implementation of the farming projects aimed at increasing food production and ending perennial famine in the region. Allegations of corruption have also dogged the project, in particular the 'tractor hire scheme', and the 'modern villages' or collectivized housing project in three locations of Karamoja. It was reported that billions of shillings was lost: as of September 2016, several officials in the Office of the Prime Minister are on trial for embezzlement, corruption and abuse office. A reported USD 6million (21 billion UGSh) was stolen and the government was forced to return to donors a reported USD 11million (UGsh 38 billion) earmarked for the PRDP.[77] The school-feeding program through which food was grown by the Uganda Prison Service on land allegedly acquired without compensation from 300 families in Namalu Sub County in Nakapiripirit district, and Kautakou village in Ngoleriet Sub County in Napak district, sparked a controversy following the death of 50 evicted members. A campaign was launched by members of the community against the acquisition.78

4.2. Forms or Types of Reparations

When viewed within the national criminal justice system, there are strictly speaking three types of reparations: restitution, compensation and rehabilitation. The UN Principles however list in addition two other forms of reparations: satisfaction and guarantees of non-repetition, which are not exclusive to, but tend to have greater application in transitional settings and situations of mass atrocity such as Northern Uganda.[79] Rule 48 ICD Rules of Procedure arguably authorizes the Chamber to make orders relating to all five forms of reparations. While 48(1) refers to compensation, sub-rule 2 provides for 'any reparation', which should be interpreted as including the other forms of reparations.

Restitution as a term does not lend itself to easy definition and may in some respects overlap with compensation, which is defined below. In essence, restitution or *restitutio in integrum* entails the restoration of a victim to the *status quo ante*, that is, to a state before the harm, injury or loss complained of was sustained. According to some commentators, the duty to pay restitution is a form of liability founded on unjust enrichment, but not on tort or contract.[80] For our purposes, restitution would include: *restoration of liberty; enjoyment of human rights identity, family life and citizenship [where these were denied or restricted]; return to one's place of residence; restoration of employment and; return of property*. [81]Affirming this view, Appeals Chamber in *Lubanga*, noted that restitution is directed at 'restoration of an individual's life, including a return to his or her family, home and previous employment; providing continuing education; and returning lost or stolen property'.[82]

Where unjust enrichment arose from a criminal activity, for instance property stolen from a victim of assault or a group that committed a war crime (say by attacks on civilians) and in the process stole property (pillage, which is a war crime in its own right), a court may order for the proceeds of crime to be forfeited, and returned to the victims. This is the scope of Article 77 of the Rome Statute, which in addition to imprisonment, prescribes fines and forfeiture of proceeds of crime as sentences that can be meted out by the ICC. [83] A survey of case law from Ugandan courts under the Penal Code and Trial on Indictment Act shows that Ugandan courts have taken a similar approach and ordered *refund* of stolen property (sometimes in addition to imprisonment), which they however improperly denominate '*compensation'.*

On the definition of restitution set out here, it should be clear that a majority of Ugandan cases reviewed that involve return of stolen property, refund of embezzled monies (in cases of corruption) or value of stolen property are in fact about restitution rather than compensation as referred to in the decisions. If the accused were required in addition to pay for "emotional distress" caused to owners or for lost earnings for instance, then this portion of reparations would be compensation.

For its part, compensation as a form of reparation is the payment for loss, damage or injury resulting from or which is a consequence of crime or a violation of human rights. In other words,

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[77] Edward Anyoli, *OPM Scandal: How Sh21B World Bank anti-poverty cash was stolen*, Kampala, *Sunday Vision* September 25, 2016.

[78] See Karamoja Development Forum, *Take Anything, Leave our land* (2015) report available at <http://www.celep.info/wp-content/uploads/2015/03/Take-anything-leave-our-land.pdf> (accessed on August 20, 2016).

[79] Principle 18, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005 (Basic Principles 2005).

[80] For a deeper treatment of the subject, see Godfrey Musila, *Rethinking ICL,* pp 179-183.

[81] Principle 19, Basic Principles 2005

[82] Annex A to Appeals Chamber Reparations Decision in *Lubanga*, para 35.

[83] Article 77 as part of punishment, court may order a term of imprisonment, a fine and; forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

it is the payment, in monetary terms, of any harm resulting from the commission of a crime or violation of human rights that is capable of economic assessment. In terms of Principle 20 of the Basic Principles and as affirmed by the Appeals Chamber in *Lubanga*,[84] the forms of harm can be classed as: physical harm, including causing the individual to lose capacity to have children; material damage, including lost earnings and the opportunity/potential to work; loss of, or damage to, property; unpaid wages or salaries; other forms of interference with an individual's ability to work; and the loss of savings; lost opportunities, including employment, education and social benefits; material damages and loss of earnings, including loss of earning potential and interference with the individuals legal rights; moral and non-material damage resulting in physical, mental and emotional suffering; the costs of legal, medical, psychological and social services. The Appeals Chamber stipulated three factors to be considered as to whether compensation is the appropriate form of reparation. It noted that compensation should be considered when:[85]

- The economic harm is sufficiently quantifiable.
- An award of this kind would be appropriate and proportionate (bearing in mind the gravity of the crime and the circumstances of the case).
- In view of the availability of funds.

Rehabilitation includes measures undertaken to restore the physical and psychological wellbeing of a victim in order for them to resume or adjust to normal life after the trauma occasioned by violations or crime.[86] This includes medical care, psychological and psychiatric services including counseling and other forms of psychosocial support.[87]

Satisfaction or moral reparations takes various non-material forms including official acknowledgement of wrong, apology, judicial and administrative sanction of perpetrators (prosecutions and lustration), disclosure of the details of the offence, service to the victim or a cause chosen by them. Satisfaction may be fulfilled by more elaborate ways of 'telling the story' including an undertaking to memorialization.[88]

Guarantees of non-repetition or non-recurrence entails preventive measures that guarantee victims that they will not be victimized again.[89] This can be achieved through institutional and legal reform, and promoting mechanisms to prevent and monitor future social conflict. In his report of 2015, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence discusses the following as precondictions for guaranteeing non-recurrence of violations: security for all; legal identity; existence of a protective legal framework (eg. treaties, legislation); legal and institutional (constitutional, security sector, judicial) reforms.[90] Recommendations detailed in the report are of relevance to the conflict in Northern Uganda.

4.3. Defining Beneficiaries: Who is a 'Victim'?

The Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 defines a victim as:[91]

> "Persons who have individually or collectively suffered harm including physical or mental injury, emotional suffering, economic loss, or substantial impairment of their fundamental rights, through acts or omissions that constitute serious violations of are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power."

For their part, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles 2005), define victims as:

> "Persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization."

[84] Annex A to Appeals Chamber Reparations Decision in *Lubanga,* para 40.
[85] Annex A to Appeals Chamber Reparations Decision in *Lubanga*, para 37.
[86] Principle 21, Basic Principles 2005.
[87] Annex A to Appeals Chamber Reparations Decision in *Lubanga*, paras 41 and 42.
[88] Principle 22, Basic Principles 2005.
[89] Principle 23, Basic Principles 2005.
[90] See Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, September 15, 2015 available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/202/04/PDF/G1520204.pdf> (accessed on August 2, 2016).
[91] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by General Assembly resolution 40/34 of 29 November 1985.

The difference between the 1985 and 2005 principles is that the former references national law, while the latter extends the legal regime providing for rights to international human rights and humanitarian law. Equally, the Basic Principles 2005, which represents the modern conception of victim, extends the status of victim to immediate family or dependants of the direct victim as well as those that suffer harm while intervening to prevent victimization. Indeed, this is the definition of 'victim' in Rule 85 of the ICC's Rules of Procedure and Evidence. Under Rule 85, a victim may be both a natural persons or legal persons. Legal persons will be:

> "Organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes."[92]

Ugandan law is in keeping with international law on the subject. Rule 3 of the ICD Rules of Procedure defines victims as follows:[93]

> "… Persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute crimes under the jurisdiction of the Division and may include the immediate family or dependents of the direct victim or persons who have suffered harm in intervening to assist victims in distress or to prevent victimization or organizations; or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes."

4.4. Who is responsible?: Obligation to pay Reparations

One of the most basic principles in international law is that an internationally wrongful act engages the responsibility to pay reparations in an adequate form. In the *Chorzow Factory Case*, the Permanent Court of International Justice restated this fundamental principle thus:

> "It is a general principle of international law, and indeed even a general conception of law, that any breach of an engagement involves a responsibility to make reparation."[94]

Although this pronouncement was made in the context of the law of state responsibility, the principle applies in the private sphere. It operates to oblige states to ensure that individuals that suffer human rights violations receive reparations from the party responsible. Criminal law is the state's part response to its obligation to make good an internationally wrongful act.

It is important to note that although states refused to take on responsibility to pay reparations for international crimes under the Rome Statute (ICL), states have undertaken to respect protect and fulfill human rights under international human rights law (IHRL) and are consequently obliged to provide an *effective remedy* when rights are violated by its agents, private individuals and entities.[95] When the state fails to ensure respect of human rights by private entities, and to effectively protect individuals from harmful conduct of perpetrators, its responsibility to provide an effective remedy – which includes prosecutions and reparations – is engaged.[96] This is thus the legal basis for state-funded reparations schemes under both national law and IHRL.

As noted, state responsibility for crimes is excluded in international criminal law (ICL), and as confirmed in *Lubanga Case*, only the accused may be held liable to pay reparations in addition to imprisonment, fines and forfeiture of property derived from criminal activity.[97] Even in cases where the accused is indigent, he/she may still be required to make symbolic reparation in the form of an apology. This was the Appeals Chamber's view in *Lubanga*.[98]

Rule 48(1) of the ICD Rules of Procedure affirms the principle expressed in *Lubanga* thus:

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92 Rule 85 (ii) ICC RPE
93 The Judicature (High Court) (International Crimes Division) Rules, 2016
94 Case Concerning the Factory at Chorzów (Germany v Poland) (Claim for Indemnity) (1928). PCIJ
95 Article 2(3) ICCPR; Article 2 African Charter on Human and Peoples Rights; *Vicente v Colombia*, Communication No. 612/1995, P 10 (1997); *Chonwe v Zambia*, (Communication No. 821/1998) para 7 (2000)
96 See generally Godfrey Musila, *The Right to an Effective Remedy Under the African Charter on Human and Peoples' Rights*, 2006 (6) *African Human Rights Law Journal*; *Norbert Zongo & Others v Burkina Faso Communication* 13/2011 Decision on Reparations June 2014 of the African Commission on Human and Peoples Rights available at <http://en.african-court.org/images/Cases/Ruling%20on%20Reparation/Application%20No%20013-2011%20-%20Beneficiaries%20of%20late%20Norbert%20%20Zongo-Ruling%20on%20Reparation.PDF>.
97 See Rule 98(1) Rules of Procedure and Evidence and Articles 75; 177 Rome Statute.
98 *Prosecutor v Lubanga, Appeals Chamber Decision on Reparations*, para 241.

> "When *any accused person is convicted* by the High Court of any offence and it appears from the evidence that some other person, whether or not he or she is the prosecutor or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed, the court may, in its discretion and in addition to any other lawful punishment, *order the convicted person to pay to that other person such compensation* as the court deems fair and reasonable (emphasis added)".

4.5. Definition of "Harm"

Harm is a generic term denoting the damage, prejudice and loss suffered by a victim of crime or human rights violations. For the Appeals Chamber in *Lubanga* case, 'harm' denotes 'hurt, injury or damage' and it need not to have been direct, but it must have been personal to the victim.[99] Damage could be physical or psychological while loss includes loss of property, earnings and future prospects. Harm or loss may be classified as pecuniary (financial) or non-pecuniary, under which psychological or moral harm would fall. Physical harm/injuries may be varied and could include loss of limb(s) or dismemberment, disfigurement, loss or limitation of use of a body organ, member, function or system, including sexual/ reproductive health problems.[100] In this regard, reference may be made to "grievous harm", defined under section 2 of the Uganda Penal Code:

> "Any harm which amounts to a maim, or dangerous harm, or seriously or permanently injures health or likely to injure health. It extends to permanent disfigurement, or permanent injury to any external or internal organ or sense."

When interpreting this provision in *Lomodo Francis v Uganda*,[101] Justice Wolayo of the Court of Appeal found that a healed 3-inch cut above the eye together with abrasions on the knees and other parts of the body sustained in an attack did not amount to 'grievous harm' but amounted to the crime of 'assault occasioning bodily harm' suggesting that under Ugandan law, 'assault occasioning bodily harm' would ordinarily amount to harm that is assessed as 'not serious', the accused would still be liable to pay compensation if convicted.

'Other material loss' includes damage or loss of property, medical expenses, income and losses connected to employment and future prospects or the idea of 'life's project', which is the plan for the future of the direct and indirect victim of crime. In this regard, the Inter-American Court has awarded reparations in cases where the victim's life project – the plan of fulfilling their dreams for instance raising a family, developing a career or improving their material situation has been cut short, derailed, unduly disrupted or radically altered by the violation(s) suffered.[102]

Psychological or moral harm is usually captured by the terms 'mental pain and anguish' and can manifest in varied ways. Human rights tribunals presume mental pain and anguish whenever an individual suffers *any* violation of protected rights. In cases of disappearances for instance, human rights tribunals, in particular the Inter-American Court and Commission, have found that survivors have suffered mental pain and anguish arising from not knowing the fate of a loved one that has been disappeared. Death of a loved one, as well as the challenges faced by surviving victims in accessing justice in contexts where impunity is entrenched is presumed to cause *severe* psychological harm. In such cases, the Inter-American Court and the African Court on Human and Peoples Rights (see *Norbert Zongo Case*) operate a presumption in favor of victims.

At the ICC, reliance on principles of international law (including from the case of human rights monitoring bodies) is justified under Article 21(1) (b) Rome Statute, which establishes principles of international law, including those drawn from IHL as a source of the law of the ICC after the Rome Statute, Rules of Procedure and Evidence and Elements of Crime. The ICC is also mandated under Article 21(3) to ensure that application and interpretation of law is consistent with internationally recognized human rights. ICC chambers consistently cite decisions of human rights bodies on relevant issues, especially defence and victims' rights. In Uganda, where both the Judicature Act[103] which lists sources of Ugandan law and the Constitution neither make express provision for international law as a source of law nor stipulate how it would apply, when judges apply international law, they use it primarily as a interpretive tool.[104] Following this practice, ICD judges can apply case law from human rights bodies.

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[99] Annex to the Appeals Chamber Reparations Decision in *Lubanga*, para 10.
[100] See ICC Reparations Form-1, available at <https://www.icc-cpi.int/NR/rdonlyres/D670BB98-0F00-4E01-BA39-0BECC411B83F/0/SAFOrganisationEng.pdf> (Accessed on June 30, 2016).
[101] Criminal Appeal 13 or 2013 arising from Kaabong-Kotido Criminal Case 38 of 2013.
[102] See for instance in *Caracazo v Venezuela*, Inter-American Court of Human Rights, Judgment of August 29, 2002 (Reparations and Costs), para 40 et seq.
[103] Judicature Act (Cap 13), section 14(2).
[104] On the application of international law see Busingye Kabumba, *The application of international law in Ugandan judicial system: a critical enquiry* in M Killander (ed) *International law and domestic human rights in Africa* (2010) available at http://www.pulp.up.ac.za/pdf/2010_17/2010_17.pdf (Accessed on October, 10 2016).

Psychological harm may manifest as 'emotional problems' such as anxiety, anguish and guilt, shame, sadness, nightmares, irritability and anger, defeat and apathy, feeling overwhelmed; as mental problems such as intrusive images and thoughts, slowing of thought process, concentration problems, memory dysfunction, confusion; as physical reactions and behavioural changes such as aches and pains, sleep disturbances, excessive sweating, breathing problems, increased heart rate and; pain and complaints related to experiences of particular violations such as sexual violence.[105]

4.6. Methodology for assessing harm, damage and loss

When considered in totality, a court reviews or entertains complaints relating to three forms of harm: *physical damage* or injury, *psychological harm* (both to the person of the victim) and *economic loss,* which may relate either to property or money lost or expended on various items as necessitated by the damage or injury suffered.

Physical damage or injury is perhaps the easiest to ascertain, as it may be ascertained by a layperson (including the victim) or the specialized services of medical experts by conducting a physical examination of the victim then preparing a report. Incidents are preferably reported as soon as they occur, as the lapse of time could result in contamination, or disappearance of proof of harm. Under normal circumstances, when an incident is reported to the police in Uganda, a particular form – Police Form 3, sometimes known as P3 – is prescribed for use by the examining medical practitioner to record the harm sustained, and must be produced in evidence to substantiate a claim. In any case, a medical report detailing injuries or damage suffered may be necessary to provide proof. Even when not required by law, such evidence is likely to carry greater probative value than evidence by a layperson. A court may establish extent of injury, or corroborate reports through examination, or other types of evidence such as pictures.

How does one prove or establish psychological or moral harm? Psychological harm could be much more difficult to assess, as it does not always manifest outwardly. Testimony of the victim and those close to the victim as well as reports prepared by specialists may be used. The Inter-American court has stated, with respect to psychological or moral harm, that a presumption exists that when the violation of rights is proved, moral harm is presumed to have occurred and need not be proved because, 'violation of human rights and a situation of impunity regarding the violation causes grief, anguish and sadness in the victim and next of kin'. [106] To establish the full extend of harm suffered with respect to particular victims, the Court should take evidence from victims and consult experts. Where standard forms are used to obtain a comprehensive profile of the victim and the harm suffered, specific elements for eliciting information on psychological harm should be included.

With respect to the 'economic aspects of harm', these have to be specifically proved.[107] As noted above, compensation relates to every harm capable of economic assessment – in monetary terms. This ranges from value of property lost to, medical expenses, legal fees, psychological support, lost income and/or prospects (based on a life plan). The court may require particular documents as proof, but must be careful not to impose onerous demands, and should consider all contextual factors including the fact that during conflict, displacement and the turmoil associated with such social events results in loss of relevant documents. It is also important to take note of the standard of proof applicable, which should not be such that it leads to the exclusion of useful evidence that doesn't meet high thresholds.

4.7. Standards and Burden of Proof

According to the AC in Lubanga, the burden of proof in relation to harm suffered and how that harm is connected to crimes charged lies with the victim. However, the court must be careful not to impose onerous demands in relation to proof of facts, and should consider all contextual factors including the fact that during conflict, displacement and the turmoil associated with such social events results in loss of relevant documents. It is also important to take note of the standard of proof applicable should not be such that it leads to the exclusion of useful evidence, that doesn't meet high thresholds. In Lubanga, the AC stated that standard is less than that applicable to conviction, 'beyond reasonable doubt'.[108]

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[105] Adapted from the ICC Reparations Form available at <http://www.vrwg.org/downloads/publications/05/FormReparation1_en.pdf>.

[106] *Caracazo v. Venezuela*, para 50.
Judgment of August 29, 2002 *(Reparations and Costs)* available at <http://www.corteidh.or.cr/docs/casos/articulos/Seriec_95_ing.pdf>.
This position was endorsed by the African Court in *Norbert Zongo v Burkina Faso*, para.

[107] In *Norbert Zongo*, the African Court declined to grant orders in respect of transport costs and related expenses that were not receipted, considering these unproven.

[108] Annex A to Appeals Chamber Reparations Decision in *Lubanga, para 22.*

4.8. Standard of Causation

Once harm suffered by a victim is established, the next step is to link the harm to the accused. The fact that an accused is liable to be ordered to pay reparations requires that the accused is found criminally responsible for the crime for which he or she must be made to pay once convicted. Where charges are vacated before conclusion of trial as in the *Ruto and Sang Case*, or the accused is ultimately acquitted, victims lose their right to make a claim for reparations.[109] In case of a conviction, victims must attribute the damage, loss or injury suffered to conduct for which an accused is convicted. On causation, the AC held 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."[110]

The need to establish the existence of a causal link between an accused and the crime is essential for reparations.[111] The question as to whether an accused may be liable in respect of damage, harm or loss suffered by a victim of a crime speaks to standard of causation, which is not provided for in either the Rome Statute or Rules of Procedure and Evidence. What standard do we apply? Is it a standard of directness, proximate cause or foreseeability?

To adopt a standard of directness – that is requiring direct link between specific impugned conduct and harm, damage or loss – would be an exacting standard, and can be difficult to prove in mass atrocity situations, where for example, conduct can produce a 'domino effect' and it may be difficult to attribute conduct to one perpetrator where there are many. In *Lubanga*, the Trial Chamber sought to avoid the use of directness standard, stating that

> "Reparations should not be limited to 'direct' harm or the 'immediate effects' of the crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in the hostilities, but instead the Court should apply the standard of 'proximate cause'."

On proximate cause, the T.C. in *Lubanga* stated that, the VTF that will determine issues of reparations should be satisfied at the very least, that 'but for' the criminal conduct, the damage, harm or loss would not have occurred. In other words, the criminal conduct was the *sine qua non* of the damage, harm and loss. However, the crimes for which an accused is convicted need not be the direct cause of the harm: the crimes need only be the proximate cause of the harm for causation to be established.[112] This finding was upheld by the Appeals Chamber which decided in turn to apply the same standard of causation.[113]

A third standard, which the ICC chambers are yet to consider, is one of foreseeability. Indeed, both the Trial Chamber and the Appeals Chamber left open the possibility that another standard may be applied. In this regard, the Trial Chamber noted that 'there is no settled view in international law on the approach to be taken to causation'.[114] While a deeper treatment of the subject is beyond the scope of this section, we offer that, broadly, causation should be considered as established, where one can foresee that particular conduct could produce a probable harm, with the only consideration being that the harm is not so remotely linked to criminal conduct. For instance, where one attacks a church with a bomb intending to destroy it and those within, which then triggers a landslide in a neighboring village that kills innocent civilians, a causal link between harm suffered by the villagers and the crime is established.

4.9. Evidentiary Standard Relating to Reparations

The evidentiary standard to be used in proving particular issues related to reparations eg victim status, harm, loss or damage suffered, quantum of reparations due to each victim is an important factor. It could determine the ease with which victims can make a case for reparations, or if they can obtain reparations at all. Evidentiary standard is essentially 'threshold of proof' that one must reach to consider a particular fact as proved. In turn, the threshold of proof is directly related to the 'amount of evidence' that one must adduce to prove a fact.

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[109] Prosecutor v William S Ruto and Joshua Sang, Decision on the Requests regarding Reparations, ICC-01/09-01/11-2038, 01 July 2016 available at <https://www.icc-cpi.int/CourtRecords/CR2016_04798.PDF> (accessed on October 12, 2016).
[110] Annex A to the AC Reparations Decision, para 11.
[111] On some of the challenges relating to establishing causation, see Godfrey Musila, *Rethinking ICL*, 197-199.
[112] Lubanga Trial Chamber, para 250.
[113] Lubanga, Appeals Chamber, para 82 and Annex A, para 59.
[114] Lubanga Trial Chamber, para 248.

The evidentiary standard applicable to reparations is lower than in criminal cases, and is the same as that applicable in civil cases. To be sure, there are four evidentiary standards applicable to the criminal part of the process of the ICC: reasonable basis for believing under Article 15 (requests to investigate and opening an investigation), reasonable grounds for believing under Article 58 (issuance of arrest warrants and summonses to appear); substantial grounds for believing under article 61 (confirmation of charges) and; beyond reasonable doubt under article 77 (conviction). The evidentiary threshold increases in that order. None of these standards is applicable to reparations.

In *Lubanga,* the Trial Chamber stipulated, and the Appeals Chamber has endorsed, a standard of *balance of probabilities* (also referred to as preponderance of proof or balance of probability).[115] This standard is a loose standard, entailing the weighing of the totality of factors and elements of evidence adduced to provide proof of a particular issue. The court determines as proved a particular point or fact if, when taken together, these factors and elements of evidence tend towards showing that the same is true. The Trial Chamber endorses the definition proposed in Black's Law Dictionary, which defines balance of probabilities as:

"Reparations should not be limited to 'direct' harm or the 'immediate effects' of the crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in the hostilities, but instead the Court should apply the standard of 'proximate cause'."

"The greater the weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, *though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other* (emphasis added)."[116]

It is also important to note that the need for proof may be dispensed with if the adjudicator, in this case the ICD applies presumptions in appropriate cases for example that, moral harm is presumed to have been suffered once a violation is proved. As noted above this is the position adopted on this issue in the jurisprudence of the Inter-American Court and Commission. When harm is presumed, the adjudicator would proceed to deal with other issues, in particular the quantum of damages for particular victims.

The court must be careful not to impose onerous demands in relation to proof of facts, and should consider all contextual factors including the fact that during conflict, displacement and the turmoil associated with such social events results in loss of relevant documents. It is also important to take note of the standard of proof applicable, which should not be such that it leads to the exclusion of useful evidence that doesn't meet high thresholds. To their credit, both the Trial Chamber and the Appeals Chamber in *Lubanga* recognized that the 'difficulty victims may face in obtaining evidence in support of their claim due to the destruction or unavailability of evidence' is one several factors that inform adoption of an appropriate standard of proof.[117]

4.10. Quantum of Reparations

The most important principle when assessing the quantum of reparations is proportionality. Rule 48(2) ICD Rules of Procedure stipulates that 'the Trial Judge or Trial Panel may, *proportionate to the gravity of the crime*, in sentencing the accused person, impose a fine and any reparation order deemed fit and proper against the convicted person.' Superior courts in Uganda already employ proportionality both of the criminal sentence and compensation as a key principle in cases where judges have discretion and where 'the circumstances of the case' have a bearing on this determination. Although it applies only to the crime of defilement, section 129B(2) of the Ugandan Penal Code espouses the principle of proportionality in the following terms:

The amount of compensation shall be determined by the court and the court shall take into account *the extent of harm suffered* by the victim of the offence, *the degree of force used by the offender* and *medical and other expenses incurred* by the victim as a result of the offence"

When applied, proportionality principle, which was affirmed in *Lubanga*[118] means that reparations paid should be commensurate with the harm, injury or harm suffered, and an attempt must be made to return the victim to a state they would be in had violations not occurred. As a starting point, the aim would be restitution in full, or *restitutio in integrum*, but this is often not easy to achieve in all cases, even when there are sufficient funds (if reparations are state funded) or the perpetrator is able to pay.

[115] Lubanga TC para 253-254; Lubanga AC, para 85-86.
[116] Lubanga TC para 253; *Black's Law Dictionary, Eighth Edition, Gamer (ed.),* 2004, page 1220.
[117] Lubanga TC, para 252; Lubanga AC, para 80.
[118] Lubanga AC Reparations Decision para 118, and Annex A of AC Decision in Lubanga, paras, 21,37, 40, 44 & 45.

To determine the quantum of reparations, one would start of by establishing the types of harm suffered – whether physical, psychological or economic – then proceed with itemizing the damage/ harm before valuing it. As noted above, it is likely to be easier to value physical harm and economic damage that psychological harm, unless it manifests physically, and the victims expends money to manage the situation.

In mass atrocity settings such as Northern Uganda, whether or not such elaborate steps are to be taken is partly dependent on availability of resources, particularly when the claims are to be made against the state. The court should require that claimants prepare detailed claims, if only to prove with a degree of detail the harm suffered by them. Should resources be insufficient, the court or such other entity it may delegate the function of parceling out and implementing reparations to may need to operate a based on the rules of *fairness and equity*.

The idea of fairness and equity are not self evident, and pose challenges in definition. In essence, it entails the exercise of discretion, and where a general guideline is provided, applying it uniformly without discriminating to all claimants or to a category of claimants. Fairness, and we might add pragmatism, may dictate that the ICD develop criteria for classifying violations in terms of severity and to direct initial efforts to implementing individual reparations in favor of those that meet this threshold, subject to availability of funds.

Whether or not resources are limited, the ICD can legitimately adopt an approach where the most vulnerable groups are prioritized in the implementation of reparations. Comparative experience shows that this approach has been adopted by some truth commissions in favour of older persons, orphans, widows and persons with disabilities.[119] In Rwanda, the FARG, the fund created to support survivors of genocide prioritized widows and orphans after the genocide.

Prioritization may also be based on urgency of need. For instance, women and girls that have been subjected to sexual and based violence (SGBV) may need urgent care and reconstructive surgery, which in some cases could be essential in preserving child-bearing capability. In this case, urgency coincides with severity of harm suffered and strengthens the argument in favour of *urgent interim reparations.* It is important to add a rider here, to the effect that urgent reparations generally form part of *administrative reparations* in transitional justice settings or to a lesser extent court ordered reparations where a fund for victims exists and from which such may be drawn, for instance to provide medical care for a victims of sexual violence.

These individualized forms of reparations may then be coupled with communal reparations, those that benefit the wider community in which victims live.

4.11. Mechanisms and Procedures for Implementing Reparations Orders

Under the Trial on Indictment Act, the trial court may proceed to consider issues relating to reparations once an accused is convicted. Indeed, the court is envisioned as the *only* focal point for reparations, in the absence of a specialized body operating alongside the court system. The question is whether, in mass atrocity situations, a court would be the appropriate body to consider reparations demands from multiple victims that could run into thousands in any particular case or tens of thousands in a particular situation. Comparative experience offers interesting lessons for consideration. In "normal cases" involving a few victims, the task of evaluating various issues necessary to adjudicate a reparations claim eg who is a victim, the harm suffered, quantifying restitution and compensation and consulting experts do not impose heavy burdens on the court, which is often grappling with backlogs and long cause lists.

At the ICC, there are two focal points for reparations: the Court, under Article 75 and the TFV established by Article 79 of the Statute. As noted already, Article 75 of the Statute establishes the right to reparations providing that "the Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation."[120] For its part, Article 79 creates the TFV for the benefit of victims of ICC crimes.

The Court is required to "determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting." The court is then empowered to make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims. In appropriate cases, the Court may order that such an award be made through the Trust Fund.[121] Rules 94 to 99 ICC RPE set out the procedures for reparations to victims. In

[119] See on the case of Peru and Guatemala see Francesca Capone et al *Education and the law of reparations in insecurity and armed conflict* (XX) cited at 125 available at <http://www.geneva-academy.ch/docs/reports/BIICL%20PEIC%20Reparations%20Report.pdf> (Accessed on September 20, 2016).
[120] Article 75(1) Rome Statute.
[121] Article 75(2) Rome Statute.

particular, Rule 91 stipulates that 'reparations may be granted by the Court upon request of victims or based on a motion of the Court itself' and the Court may invite to the reparations hearings, not only victims and convicted persons but also other interested persons or interested States whose properties could be affected by the rulings on reparations.

As argued by commentators,[122] the creation of two focal points on reparations created practical challenges in terms of how they would operate, and the legal framework did not provide solutions. At the moment, the indigence of *Lubanga*, the ICC's first convict has complicated the relationship between chambers and the TFV and the reparations progressed at a slower pace than is ideal.

In *Lubanga*, having received and entertained wide-ranging submissions from the parties, victims and well as civil society groups appearing as *amici curiae,* the Trial Chamber rendered a decision on reparations, setting out key principles in terms of Article 75 to which reference has been made in preceding sections. On appeal by the parties, the Appeals Chamber rendered another decision, which affirms and augments parts of the decision of the TC but pronounces *de novo* on other important parts. As noted already, the decision of the Appeals Chamber and the five principles it sets out stand today as the authoritative statement of the law of reparations. In sum, the TFV was requested by the court to take all necessary measures to implement the decision, with the reconstituted Trial Chamber remaining in close supervision, reserving the right to decide on "contentious issues" arising out of the work of the TFV in accordance with Article 64(2) and (3)(a) of the Statute. [123] The TFV was to implement its five-point reparations plan with the assistance of experts. The court decided not to examine the individual application forms for reparations but decided to transmit the same to the TFV for possible consideration as part of its broader reparations plan to be funded from voluntary contributions. On one of the key issues that were up on appeal, the Appeals Chamber declined to issue a decision on the scope of Lubanga's liability to pay reparations. It was its view 'that the imposition of liability on a convicted person, including the precise scope of that liability, should be done by the Trial Chamber in the order for reparations'.[124] It its view, an amendment of the impugned decision on this score required assessment of additional information, a task for which the Trial Chamber was better suited. The Appeals Chamber however provided detailed guidance in the form of principles contained in Annex A of its decision.

4.12. Overarching Considerations and Principles

4.12.1. Lesson for the ICD from the ICC

For purposes of administering global claims arising out of the conflict in the North, it would be prudent for the ICD to appoint an expert(s), if the legal framework is not reviewed to provide for the creation of a fund. The court would have to delegate appropriate powers to the team of experts, who should operate independently of the court, but remaining under its supervision. The danger with this modality, as demonstrated by *Lubanga*, is that the involvement of experts could be expensive and inefficient. It is perhaps better for the ICD to perform these functions itself, and make minimal use of experts.

The potential role of traditional justice and conflict resolution mechanisms and its inbuilt restorative justice principles and practices should be explored, as foreseen in the Juba Peace Agreement and the Transitional Justice Policy. In practical terms, traditional justice mechanisms in use in Northern Uganda can fit very well, in the implementation of communal reparations, and would play the same role as an organization would play were it selected to help in implementing reparations orders. It is wholly possible that the ICD could order that elders from the relevant community should supervise or attend the presentation of reparations to victims, where apologies could be tendered accompanied by performance of rituals. Such rituals could also be performed during the inauguration of monuments and community projects whose choice, design and implementation is done with active participation of community leaders.

Experience from Rwanda, Sierra Leone has shown that NGOs and associations of victims can play critical roles in reparations such as mobilization and registration of victims; implementation of aspects of reparations orders such as provision of psycho-social support to victims during ICD hearings (including those related to reparations) and; rehabilitation orders made by ICD (interim or final). An attempt must be made to address wastage of misappropriation of funds, which can divert limited resources from programs that benefit victims. In Rwanda, victims associations such as IBUKA were included as members of the FARD administrative structure, and have played a critical role in directing the fund and implementing reparations, in part because they have a national

[122] M Wierda & P de Greiff, *Reparations and the International Criminal Court: A Prospective Role for the Trust Fund for Victims' International Center for Transitional Justice* (2005) 1.
[123] Lubanga TC Decision on Reparations, para 260.
[124] Lubanga AC, para 237-241.

network of membership and affiliate organizations. In terms of Rule 98(4) of the ICC RPE, 'the Court may order that an award for reparations be made through the Trust Fund to an intergovernmental, international or national organization approved by the Trust Fund'. This provision is yet to be applied, but it foresees the role of national NGOs in the implementation of reparations.

4.12.2 Judicial reparations vis a vis other options

As a starting point, a critical principle to take note of is that the right to receive court-ordered reparations from ICD does not extinguish victims' rights to pursue and obtain reparations under other systems of law namely civil law, constitutional law (constitutional petitions) and traditional justice. For this reason, the ICD should not, when pronouncing itself on reparations to which victims might be entitled through the court, prejudice the rights of victims to obtain a remedy under civil law, constitutional petition, traditional justice or international law.

However, when assessing quantum of damages in a case before it, ICD may rightly take into consideration any compensation obtained by the victim through civil law. This view is supported by the logical interpretation of S 126(3) TIA, and by taking into consideration, availability of limited resources.

Rule 48 ICD Rules of Procedure; Section 126(3) of the Trial on Indictment Act, which applies to civil proceedings subsequent to a criminal case in which compensation was ordered (eg before the ICD) provides in this regard that:

> "At the time of awarding any compensation in any subsequent civil suit relating to the same matter, the court hearing the civil suit shall take into account any sum paid or recovered as compensation under this section."

In addition to the law, the demands of fairness and equity may be such that when called to prioritize limited resources in the face of mass atrocity, the ICD may take into account reparations awards that a victim may have been obtained through other avenues when deciding on the quantum of an award or whether a particular victim should be placed at the front of the queue in the case of urgent interim reparations.

4.12.3 Non-discrimination and equality

According to international Human Rights law, and the Ugandan Constitution, discrimination is the process by which individuals are distinguished on prohibited grounds listed in major human rights treaties and constitutions such as sex, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability and such other listed grounds with respect to access to rights or benefits. [125] Such a distinction can be express and direct or covert and indirect in which case a law, policy that is on the face of it not discriminatory has a discriminatory effect when applied.

In practical terms, the application of this principle demands that the ICD should:

- Ensure the recognition of all victims as defined in the Rules of Procedure.
- Facilitate fair and effective access to the Chamber [ICD] and the opportunity to apply for reparations through mechanisms and procedures adopted by the court. Various rules recognize the participation of victims, by making of provision for notice by the Registrar in unspecified, and presumably all proceedings (Rule 51.1.a); trial judge to give notice to all participants (Rule 31.3.1); notice and opportunity to respond to protective measures ordered (Rule 36.6) and to make submissions (Rule 36.10); judge to take into action victims views on fines and reparation. (Rule 48.3).
- Recognize that victims are not similarly placed, have different experiences (even when linked by same violations or incidents; and some could have benefited from a measure of recourse from a range of other available options) and that this may justify differentiation (affirmative action measures that prioritize some victims based on some criteria) particularly when the ICD distributes limited resources.

[125] Article 20, Constitution of Uganda 1995; Article 2 ICCPR; General Comment 20, Committee on Economic, Social and Cultural Rights, 2009 and; General Comment 16 on Equal enjoyment of rights between men and women by Committee on Economic, Social and Cultural Rights.

4.12.4 Gender considerations and reparations

Women and girls experience violence differently than men, and while they are often subjected to SGBV, efforts aimed at establishing accountability, and providing a measure of justice for victims must address other violations to which they are subject. The ICD should adopt a gender-sensitive approach to reparations and the ICC has reiterated as much.[126] This means that gender should be factored into all aspects of reparations including definition of reparations together with the different forms/types, standard of proof, definition of beneficiaries, prioritization of beneficiaries, institutional design and operational procedures for reparations mechanisms among other things.

Several key issues are worth highlighting.[127] Because of the unique ways in which women and girls experience violence and the prevalence of SGBV and other violations against women during conflict, gender must constitute a factor for considering a group as vulnerable, and of heightened need. Equally, this status, together with the impact of violations to which they are subjected should entitle them to prioritized distribution of benefits, when the ICD or the implementing agency has to allocate limited resources to a multitude of victims. The ICD should endeavor to understand the socio-economic and cultural environment in which it operates as well as that in which a majority of victims exist, particularly the factors that weigh against enjoyment of rights of women and girls and particular ways in which the conflict impacted them.[128] Having done so, the ICD should adopt and deploy reparative measures as a transformative tool to uproot entrenched prejudices, which may be perpetuated by law or customs. This partly demands a gendered view of different forms of reparations. For instance, restitution is defined to mean undertaking measures that return a victim to the status quo ante, yet for women, this could mean a state of oppressive laws, polices and customs that discriminate and exclude. In practical terms, women often cannot own or transact freely in land or real property, which has devastating economic and social impact on their lives. Reparative measures that aim to empower women and girls economically in a primarily agrarian society must address the question of ownership and title to land.

4.12.5 Role and participation of victims

As noted already, until the adoption of the Rome Statute, victims had limited rights of participation in international criminal law, a state that mirrored many national criminal justice systems. Developments in both ICL afford victims of crime and human rights violation the right to participate in proceedings in which violations that they have suffered are addressed, and a right to be informed at all stages of the proceedings. The adjudication of claims relating to reparations, as a distinct stage of the criminal justice cycle is not subject to different rules: it must be a victim-centered process.

The existing law, procedure and practice in Uganda already provide a basis for a victim centered reparations process by the ICD. In the discussion of the relevant parts of the Sentencing Guidelines, it was shown that at sentencing stage of proceedings, victims can present a Victim Impact Statement in which they detail the harm they have suffered and how it has impacted them and their communities. The ICD could opt to use the prescribed forms in TIA, which are fairly comprehensive or develop new ones, to be annexed to the Rules of Procedure. Although provision is not made for when victims deposit forms detailing harm, this is done (presumably at or before the commencement of trial), victims complete the fairly detailed and comprehensive Form A and Form B annexed as Schedules to the Sentencing Guidelines outlined above. Rule 46(3) of the ICD Rules of Procedure and Evidence oblige the Registrar to inform victims that have indicated their intention to participate of the date fixed for sentencing. Where there are several victims, Rule 46(4) of the ICD Rules of Procedure makes provision for appointment of common counsel or legal representative by victims. Common counsel or representative has a right to participate in sentencing proceedings, and to present evidence.

To apply this to a larger reparations process, victims should have access at all stages of the process, and be involved in the design and implementation of awards in ways proposed elsewhere in this report. A general right to participate could be read in Rule 51(1)(c) which lists as one of the functions of the registrar as, 'assist[ing] victims in participating in the different phases of the proceedings'.

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[126] See Nairobi Declaration on the Right of Women and Girls to a Remedy adopted on March 21, 2007.

[127] UNSG, *Guidance Note of the Secretary general on Reparations for conflict related sexual violence* available at <http://www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune-2014.pdf>; Annex A of Appeals Chamber Reparations Decision in Lubanga, para 18.

[128] UN Women, *A Window of Opportunity: Making Transitional Justice Work for Women*, available at <http://www.unwomen.org/~/media/Headquarters/Attachments/Sections/Library/Publications/2012/10/06B-Making-Transitional-Justice-Work-for-Women.pdf> (accessed on July 30, 2016).

4.12.6 Resources and Reparations

The question of adequacy or resources, and by extension sources of resources for mass atrocity claims such as in Northern Uganda is a critical question to be addressed. Under current law, orders are made against the convict: the receipt of reparations is dependent on the conviction of the accused (Rule 48 ICD Rules of Procedure). Section 128(2) of the Trial on Indictment Act provides that the court may order compensation to be made out of fines paid upon conviction. It stipulates that:

> "Whenever the High Court imposes a fine, or a sentence of which a fine forms part, the court may, when passing judgment, order the whole or any part of the fine recovered to be applied— *in the payment to any person of compensation for any loss or injury caused by the offence when substantial compensation is, in the opinion of the court, recoverable by civil suit* (emphasis added)."

In the recent case of *Isale Paul and Oluka Milton v Republic*,[129] the Court of Appeal cited the Sentencing Guidelines and substituted a sentence of payment of a fine a compensation order in favor of victims imposed on an imprisoned convict for bodily harm suffered from an attack with one deemed to be less excessive and ordered the reduced compensation amount to be defrayed from the fine while the appellants remained in jail or to be paid separately within months of their release from prison. In these cases, the court may have been persuaded that the convict could not afford, which raises a question that continues to dog international criminal law: indigence of a convict. Where the convict can pay, what remains is for the court to work out the modalities. In all likelihood, the court has to worry about the availability of funds, which will impact its thinking in terms of other aspects of reparations.

As noted above, the passing of the Law Revision (Fines and other Financial Act 14 Amounts in Criminal Matters) Act 2008 has made it possible for imposition of substantial fines on convicts, from which compensation payable to victims has been defrayed in some cases.[130] Yet this does not solve the indigence problem, and current Ugandan law does not offer any answers. The problem of source of funds will be even more acute in mass atrocity situations.

Comparative experience could offer some lessons. In Kenya, the Protection of Victims Act of 2014 creates a Fund for Victims of Crime, which will derive funds from a levy on fines imposed on convicts in criminal cases. In essence, what it does is to create a pool of fines from which reparations awards will be drawn.[131] The Kenyan example, which offers few lessons because it is yet to be implemented is established for, and suited to reparations program for victims of crime in non-mass atrocity situations. Rwanda offers perhaps the most elaborate and the most relevant example of a national effort to raise resources on a long-term basis for administrative reparations to address an intricate mass atrocity situation in which millions were victimized. The highly successful FARG program established in favour of the survivors of genocide in 1998 authorized the pooling of resources from multiple sources namely:[132]

- State allocation of 5% of the State's ordinary budget
- Sale of abandoned and forfeited property
- Donations;
- Indemnification from abroad to Rwanda because of the genocide and massacres;
- Money equivalent to 2% of indemnification related to genocide and massacres
- Contribution of 100 Rwandan Francs from every salaried Rwandan. Contribution from every Rwandan citizen aged 18 puts, being at least 1% of his or her annual salary.
- At least 10.000 Rwandan francs annually from every non profit making organisation operating in Rwanda
- Annual contribution of 50,000 Rwandan Francs from every professional
- Annual contribution of 10,000, 50,000 and 100,000 Rwandan Francs respectively for every retailer, wholesaler and for manufacturers, importers and international transporters.
- Annual contribution of 20,000 Rwandan Francs for every limited company which put at least 20.000
- Contribution of 100,000 Rwandan Francs for every public establishment, parastatal establishment, commercial company other than limited company (collective named company, limited partnership company, company with limited liability)

[129] Criminal Appeal 22 OF 2013 [Arising from Ngora Criminal Case135 of 2013, decided on August 27, 2014].
[130] *Isale Paul and Oluka Milton v Republic* Criminal Appeal 22 OF 2013 [Arising from Ngora Criminal Case135 of 2013, decided on August 27, 2014].
[131] Kenya's Protection of Victims Act of 2014 which provides for a 'victim surcharge levy' on fines paid to the state in criminal cases.
[132] Article 12 1998 Law.

As far as court ordered reparations go, Rwanda is not particularly relevant but such a scheme could be developed for Northern Uganda, which has been devastated by decades of conflicts and neglect. The program should diversify sources of funds and plan for the long-term. This partly reflects the need to sell the idea of contributing to the welfare of victims by imposing as light a burden as possible on contributors but also aligning resource-mobilization with the types of the needs of victims and consequently the types of reparations to be implemented (requiring long-term commitments such as pensions, educations scholarships, health insurance and economic empowerment through mentorship programs, small business loans and skills development).

The alternative approach is to create a Trust Fund for Victims of Serious crime which could be accomplished by amending section 128(2) TIA. Fines would be the main source of funds for the Fund.

4.12.7 Reparations and Amnesty

Under international law, states have an obligation to provide an effective remedy for victims of human rights violations, which includes the duty to investigate (and to facilitate the discovery of truth about violations, prosecute at least the most serious violations and provide reparations.[133] Amnesty laws that extinguish any of correlative victims' rights – to an investigation, prosecution and reparations – fall afoul of international law. In the case of Uganda, the legal effect of the grant of amnesty under the Amnesty Act 2000 was to extinguish all crimes and human rights violations committed by beneficiaries of amnesties. In addition, it protected the beneficiary from all civil claims and thus operated as a blanket amnesty.[134] In its opinion published in April 2012 on the Amnesty Act, the Transitional Justice Working Committee of the JLOS lamented the fact that the Amnesty Act presented "an obstacle to the State's capacity to fulfill its duty to pursue justice and accountability of war crimes and gross human rights violations."[135] The working group also endorsed the demands of victims for reparations noting that victims have "a right to justice and an effective remedy for harm suffered".

The Amnesty law is likely to present a significant challenge to the ICD, primarily because it would arguably bar the prosecution of those that received amnesty but it would also provide protection of accused from civil claims. No such concerns exist in the case Kwoyelo, whose trial is due to commence before the ICD, the Supreme Court overturned in April 2015 an earlier decision of the Constitutional Court[136] paving the way for his trial. The Constitutional Court had ruled that Kwoyelo, a former commander of the LRA was improperly excluded from benefiting from amnesty. [137]

4.12.8 Reparations and Reconciliation

Ordinarily, criminal courts do not pursue reconciliation as a goal. Indeed, reconciliation does not feature as an objective of criminal law in most criminal justice systems, which in varying degrees and contexts extends to retribution (punishment), deterrence (including incapacitation), restoration (of balance in public order) and rehabilitation (of the accused). It is however notable that reconciliation in all its guises – inter-personal reconciliation (between perpetrator and victim), inter-group reconciliation, and national reconciliation – has become one of the main goals, and pursuits of transitional justice projects in post conflict societies faced with gross violations of human rights. It is in such a context – one in which mass atrocities were committed by both sides to the conflict in Northern Uganda – that the ICD is established to operate, at least in the short-term period when its focus is on crimes linked to the LRA conflict. In *Lubanga*, both the Trial Chamber and the Appeals Chamber held that reconciliation should be pursued as a goal of reparations, and that reparations should secure, whenever possible, reconciliation between the convicted person, the victims of the crimes and the affected communities.[138]

It is highly likely that a criminal case in which a suspect is charged with crimes implicate several if not tens or hundreds of victims. This scenario, although unfolding in a criminal court will demand creative approaches to handling the concerns of victims relating to participation and reparations, and mass atrocity settings in other post conflict settings some of which are reviewed in this report could offer useful lessons.

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[133] See ICCPR, Art 2; African Charter; Godfrey Musila, *Whistling Past the Graveyard*; Inter-American Court.
[134] JLOS, *The Amnesty Law (2000) Issues Paper: A review by the Transitional Justice Working Group* available at <http://www.judiciary.go.ug/files/downloads/JLOS-Amnesty%20Issues%20Paper.pdf> (accessed on July 25, 2016).
[135] JLOS Amnesty Issues Paper, 3.
[136] *Thomas Kwoyelo vs Uganda, Constitutional Petition* No. 036 of 2011.
[137] Constitutional Appeal No. 01 of 2012 - Thomas Kwoyelo alias Latoni v. Uganda, Supreme Court available at <https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=20E1082342C75A5AC1257ED60046A45B&action=openDocument&xp_countrySelected=UG&xp_topicSelected=GVAL-992BU6&from=state> (accessed on October 10, 2016).
[138] Lubanga TC, para 193; 244; Lubanga AC, Annex A, para 72.

5. Recommendations: Summary of Principles and Guidelines

The following is a distillation of principles and guidelines on various aspects of court-ordered reparations. These context-sensitive proposals take into account the national legal and institutional framework as well as comparative experience but are in keeping with the ordering normative framework provided by international law on the subject.

5.1. On Applicable Law

1. The ICD should apply Rule 48 of its Rules of Procedure, the Trial on Indictment Act as the base law on reparations not only for war related crimes, but also for other crimes triable by the ICD. The ICD should construct a coherent legal framework on provisions spread out in the Penal Code, TIA, the Law Revision (Fines and other Financial) Act and Sentencing Guidelines, 2013 which provide a good framework, particularly on operational aspects of reparations.

2. ICD should also apply international law, in line with constitutional rules on the application of international law, taking into consideration the fact that the obligation to pay reparations is a customary norm in international law. Equally the chamber should align its jurisprudence on reparations with international law in keeping with Uganda's commitments under international human rights treaties.

5.2. On Overarching Principles and Issues

3. *On restorative justice as preferred view of justice and approach*: The ICD should adopt restorative justice conceived as principles, values and practices as the framework for its operations and implementation of reparations. The principles that underpin restorative justice are participation, healing, restoration, making amends, reconciliation and guarantees against repetition of crimes. Although Uganda has not institutionalized the use of key restorative justice practices such as circles, victim-offender mediation and conferencing in its criminal justice system, these practices are deployed in traditional justice and conflict resolution mechanisms in use in Northern Uganda and elsewhere. There is scope to explore their use, particularly if the transitional justice policy is adopted. This sill facilitates the active involvement of elders in all aspects of reparations including mapping, design, implementation, monitoring and evaluation of reparations in some of the ways proposed elsewhere in this report.

4. In view of the goals of restorative justice, the conceptual and practical links between reparations and reconciliation, effort should be made to create conditions for reparations to secure reconciliation between the convicted person, victims of the crimes and the affected communities.

5. *On the definition of a victim and beneficiaries*: Rule 3 of the ICD Rules is in keeping with international law on the subject. The ICD should read the rule together with Rule 85 of the International Criminal Court's Rules of Procedure and Evidence (ICC RPE), which reflects the position in international law, particularly the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles 2005).

6. In line with a purposive interpretation of section 126(3) of the TIA and reference to Article 75(6) Rome Statute, the right to receive court-ordered reparations from ICD does not extinguish victims' rights to pursue and obtain reparations under other systems of law namely civil law, constitutional law (constitutional petitions), traditional justice and international law. For this reason, the ICD should not, when pronouncing itself on reparations to which victims might be entitled through the court, prejudice the rights of victims to obtain a remedy under other bodies of law. Account may be taken by the ICD however, of awards obtained by victims from other sources when prioritizing allocation of limited resources and when taking measures to avoid discrimination.

7. *Dignity*: According to the AC decision in *Lubanga*, all victims must be treated in keeping with the dictate that all have equal dignity, and that they all are entitled to be treated with care and concern, irrespective of factors that differentiate them. Ultimately, reparations are aimed at restoring the dignity of victims who are dispossessed, victimized and dehumanized both by perpetrators and their resulting circumstances of want and victimhood. The ICD shall treat all victims with due consideration of their humanity, and shall implement measures to ensure their safety, wellbeing (physical and psychological) and privacy.

8. *Non-Discrimination*: Non-discrimination is one of the key principles stipulated by the TC and AC in *Lubanga*. The ICD should not distinguish among victims based on any ground listed in Article 20 of the Constitution of Uganda and human rights treaties ratified by Uganda. In spite of this, the ICD or the implementing entity can, in the implementation of reparations, legitimately take prioritization measures in favour of the most vulnerable, those impacted the most by violations and/or based on severity of crimes and violations suffered. These include children, orphans, victims of SGBV, widows and persons with disability.

9. The ICD should adopt a transformative vision in the implementation of reparations, guard against replicating the discriminatory practices of the past while having as a goal the transformation of the legal, policy and cultural structures of discrimination and exclusion.

10. *Access to information and participation*: Victims of crime and as appropriate their families and communities have a right to participate in the reparations process, beginning with the formal sentencing stage (if this is distinct from reparations) in which they present victim impact statements and community impact statements. In terms of participation, victims should participate in the in the conception, mapping, design, implementation, monitoring and evaluation of reparations. To facilitate their participation, victims should have a right to information, should benefit from appropriate and culturally sensitive outreach programs and be kept informed by the court of developments in the proceedings.

11. *Gender considerations, SGBV and children*: Given that women and girls experience violence differently than men, and while they are often subject to SGBV, efforts aimed at establishing accountability, and providing a measure of justice for victims must address other violations to which they are subject. In accordance with the decisions of the Trial Chamber and the Appeals Chamber in *Lubanga*, the ICD should adopt a gender-sensitive approach to reparations in terms of gender should be factored into all aspects of reparations including definition of reparations together with the different forms/types of reparations, standard of proof, definition of beneficiaries, prioritization of beneficiaries, institutional design and operational procedures for reparations.

12. The ICD should implement measures that respond to the unique challenges faced by women, girls and children in terms of access to justice to facilitate their participation at all stages of the reparations process.

13. When dealing with children and designing measures in favour of children, the ICD should apply the normative framework and the core principle of "best interests of the child" provided for in relevant international human rights treaties including the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.

14. *Scope and Modes/Types of Reparations*: Both international law and national law recognize a victim's right to seek and receive reparations for crimes and human rights violations they suffer. The reparations, which come in different forms, may be awarded individually or as part of a group or collective or both. Collective reparations should benefit victims as individually and as a group.

15. When viewed within the national criminal justice system, there are strictly speaking three types of reparations: restitution, compensation and rehabilitation. Other forms of reparations recognized in international law are satisfaction and guarantees of non-repetition. They are not exclusive to, but tend to have greater application in transitional settings and situations of mass atrocity such as Northern Uganda.

16. *Restitution*: In line the Appeals Chamber's decision in *Lubanga* and with principle 19 of the basic principles, restitution or *restitutio in integrum* entails the restoration of a victim to the *status quo ante*, that is, to a state before the harm, injury or loss complained of was sustained. The duty to pay restitution is a form of liability founded on unjust enrichment, but not on tort or contract. Restitution would include: *restoration of liberty; enjoyment of human rights to identity, family life and citizenship [where these were denied or restricted]; return to one's place of residence; restoration of employment and; return of property*.

17. *Compensation*: In keeping with the Appeals Chamber's decision in *Lubanga* and principle 20 of the Basic Principles, compensation is the payment for loss, damage or injury resulting from or which is a consequence of crime or a violation of human rights. In other words, it is the payment, in monetary terms, any harm resulting from the commission of a crime or violation of human rights that is capable of economic assessment. The forms of harm quantified for compensation are: physical harm; mental harm; lost opportunities, including employment, education and social benefits; material damages and loss of earnings, including loss of earning potential; moral damage; the costs of legal, medical, psychological and social services.

18. *Rehabilitation*: Rehabilitation includes measures undertaken to restore the physical and psychological wellbeing of a victim in order for them to resume or adjust to normal life after the trauma occasioned by violations or crime. This includes medical care, psychological and psychiatric services including counseling and other forms of psychosocial support.

19. *Satisfaction*: Satisfaction or moral reparations takes various non-material forms including official acknowledgement of wrong, apology, judicial and administrative sanction of perpetrators (prosecutions and lustration), disclosure of the details of the offence, service to the victim or a cause chosen by them. Satisfaction may be fulfilled by more elaborate ways of "telling the story" including an undertaking to memorialization.

20. *Guarantees of non-repetition*: Guarantees of non-repetition or non-recurrence entails preventive measures that guarantee victims that they will not be victimized again. This can be achieved through institutional and legal reform, and promoting mechanisms to prevent and monitor future social conflict.

21. *On establishing harm*: The concept of harm consists of damage, prejudice, injury or loss occasioned by crime. Harm may be physical, psychological/moral or economic/material.

22. *On causation*: Causation is the link relational link between harm suffered and action or activity attributable to an accused. For an accused to be held liable to pay reparations, he/she must be found criminally responsible for the crime or violations that occasioned the harm complained of. Procedurally, once harm suffered by a victim is proved, the next step is to establish the existence of a causal link between the harm and the crime an accused is responsible for.

23. When establishing the causal link between harm and criminal conduct, it should consider three possible standards or relationships between the two phenomena: directness, proximate cause and foreseeability.

24. Directness requires a direct link between specific impugned conduct and harm, damage or loss suffered. With respect to the second, while the court should satisfy itself that as a minimum, the harm would not occurred if the crime had not been committed ("but for" test), the crimes for which an accused is convicted need not be the direct cause of the harm: the crimes need only be the proximate cause of the harm for causation to be established. With respect to foreseeability, causation should be considered as established, where one can foresee that particular conduct could produce a probable harm, with the only consideration being that the harm is not so remotely linked to criminal conduct.

25. *Evidentiary Standard of Proof*: The evidentiary standard applicable to reparations is lower "beyond reasonable doubt" applicable in criminal cases, and is the same as that applicable in civil cases: balance of probabilities.

26. The standard of balance of probabilities is a loose standard, entailing the weighing of the totality of factors and elements of evidence adduced to provide proof of a particular issue. The court determines as proved a particular point or fact if, when taken together, these factors and elements of evidence tend towards showing that the same is true.

27. The need for proof may be dispensed with if the adjudicator, in this case the ICD applies presumptions in appropriate cases derived from long practice and established jurisprudence. When harm is presumed, the adjudicator would proceed to deal with other issues, in particular the quantum of damages for particular victims. The ICD can draw some lessons from the Inter-American Court, which has established a rich practice in this regard. An example of a presumption is that moral harm is presumed to have been suffered once a violation is proved.

28. The court must be careful not to impose onerous demands in relation to proof of facts, and should consider all contextual factors including the fact that during conflict, displacement and the turmoil associated with such social events results in loss of relevant documents and dispersal of witnesses. It is also important to take note of the standard of proof applicable, which should not be such that it leads to the exclusion of useful evidence that doesn't meet artificially high thresholds.

29. Quantum of Reparations (proportionality and adequacy): The most important principles when assessing the quantum of reparations are proportionality and adequacy: reparations paid should be commensurate with the harm, injury or harm suffered, and an attempt must be made to return the victim to a state they would be in if violations had not occurred. As a starting point, the aim would be restitution in full, or *restitutio in integrum*, but this is often not easy to achieve in all cases, even when there are sufficient funds (if reparations are state funded) or the perpetrator is able to pay.

30. Given the different ways in which victims are impacted by crime and violations of human rights, adequacy of reparations is usually achieved through a mix of the different modes of reparations: restitution, compensation and rehabilitation.

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