Cour Pénale Internationale

International Criminal Court

SEPARATE OPINION OF

JUDGE LUZ DEL CARMEN IBÁÑEZ CARRANZA

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PROLEGOMENA

The Appeals Chamber delivered its judgment concerning reparations in the case of The Prosecutor v. Thomas Lubanga Dyilo on 18 July 2019 ('Common Judgment'), confirming the amount of liability set by Trial Chamber II (the 'Trial Chamber') and amending it so that the victims who were found ineligible to receive reparations may seek a new assessment of their eligibility. While I agree with the principal findings and the outcome reached in the judgment delivered, I find the need to provide further analysis on some important aspects of reparation proceedings in the case at hand.

Given the broad scope of victimhood to be repaired, and the different types of damages they suffered, the *Lubanga* case is of utmost importance in terms of reparations. It must be stressed that this is the first case in which the Court was called upon to address the fundamental issue of reparations to victims of atrocious and massive crimes. It is precisely because of the significance of the matter and the existence of some misappreciations, lack of clarity and misunderstandings, both in the submissions of the parties and in some of the procedures followed by the Trial Chamber, that I feel compelled to write this separate opinion (the 'Opinion') to go in depth into those matters. Furthermore, there are some lines of argumentation in the Common Judgment on which I have a different point of view as it will be elaborated upon in this Opinion.

This Opinion addresses in particular: the nature of reparations proceedings before this Court and the nature and scope of reparations for crimes under the Court's jurisdiction; the scope and extent of damages and harm, and the scope of victimhood to be repaired; and the adequate, appropriate and effective reparations vis à vis the amount of liability of the convicted person. The ultimate aim of this Opinion is to strengthen the Common Judgment and improve the reparations proceedings, especially during the implementation stage.

The right to reparations is a human right that belongs to the individual whose human rights were egregiously violated as a consequence of the atrocious crimes. Reparation must produce redress and remedy. Its content is reflected in the principle of *restitutio in integrum* with its five key elements: restitution, compensation,

rehabilitation, satisfaction and guarantees of non-repetition. In each concrete case, reparations must address the specific harm suffered. Economic compensation is not the most important aspect of reparations. The ultimate goal of reparations consists of restoring human dignity and restructuring the human being both in his or her individual and social dimensions.

Given the special nature of atrocious crimes under the jurisdiction of this Court, which entails gross violations of human rights, reparations proceedings must be conducted in light of a broad spectrum of international human rights law, principles, standards and best practices that converge and interplay with the provisions contained in the Rome Statute and other statutory documents. In the case at hand, the direct victims were children. Therefore, the specific damage to their project of life must be adequately considered and repaired, restoring opportunities and capacities aimed at enabling them to reconstruct themselves as complete and fulfilled human beings.

The scope of victimhood to be repaired in cases of mass criminality is broad. It includes direct and indirect victims, as well as collective victims. In the case at hand, there are also 'potential victims' whose scope has been defined on the basis of geographical and temporal criteria, and other factual parameters established in previous decisions of the Court. The possibility to award reparations to potential victims is provided for in the legal framework of the Rome Statute.

It is fundamental to realise that given the extremely difficult situation in which victims are immersed in contexts of ongoing conflict or post-conflict environments, they are often prevented from obtaining evidence sufficient to prove their status as victims, the harm suffered and/or the link of causation. It is on this basis and in light of human rights principles and standards that the burden of proof must be shared jointly by the victims together with the system established in the Rome Statute, and ought to be approached by the Court in an institutional manner. It is of utmost importance that future reparations proceedings are conducted objectively and with the assistance of experts and professionals, thereby allowing the concerned parties full exercise of their procedural and human rights, in particular those of the convicted person.

Victims are at the heart of international justice. As recognised in the Rome Statute, it was precisely by acknowledging the unimaginable suffering caused to victims as a result of the atrocities constituting the serious crimes under the jurisdiction of this Court that the international community as a whole finally reached an agreement in Rome to establish this Court in order to put an end to impunity for such crimes. The preamble of the Rome Statute illustrates the dual purpose of establishing this International Criminal Court: (i) to investigate, prosecute and eventually punish the perpetrators of the most serious crimes of concern to the international community as a whole; and (ii) to bring justice to victims for the atrocities they suffered. Therefore, it is vital to improve the system of reparations before this Court. This reinforces the ultimate goal of the Rome Statute: to prevent the further commission of atrocities, and in that way contribute to global peace and security.

It is my hope that this Opinion will also provide guidance to all the stakeholders involved in the implementation of reparations in this case. During this stage, it is important to ensure the materialisation of the victims' right to see their harm fully repaired and their dignity restored. Victims must always be regarded and considered with humanity.

Reparation is not charity. It is not assistance. It is justice.

KEY FINDINGS

i. The process of reparations before this Court is inherently judicial in nature and emerges from the perpetrator's conviction whose liability is linked to the type, scope and extent of the harm and damage to repair, as well as to the type and scope of victims whose damages need to be repaired. Reparations for atrocious crimes are always restorative of dignity and humanity and they must restructure the human being in its total integrity and in its individual, communitarian and social dimension. Reparations must produce remedy and redress.

ii. Due to the complex nature of the crimes under the jurisdiction of this Court, which entails egregious violations of core human rights, the damage and harm caused by them are complex. It comprises the harm caused by the criminal offences, which

breaks the criminal prohibition, and the harm caused by the grave violations of fundamental rights. Therefore, reparations must address the harm caused to the victims as a result of the infringement of the criminal prohibition and also the specific harm suffered by victims because of the resulting gross human rights violations.

iii. The system and model of the Rome Statute provides for the existence of the Trust Fund for the benefit of Victims ('TFV'). This is an administrative organ dependent on the Assembly of States Parties ('ASP') and has two different roles *vis-à-vis* the victims. Under its first role, it plays a complementary and supportive role within the judicial reparations proceedings, where an order of reparations has been issued. Such supportive role is composed of two aspects: specifically, (i) in situations where the TFV may be approached by a trial chamber to complement the amount of an award; and (ii) in the implementation stage in cases of the award of collective reparations. The TFV's activity under this first role is subject to judicial decisions and determinations.

The second role is to exercise its assistance mandate, to directly help the victims; it is not dependant on any judicial order of reparations. Such activity directly provides rehabilitation for physical and psychological harm suffered by direct victims and their families, and grants them material help. However, this help does not amount to reparations. When acting under its assistance mandate, the actions are based on the directions and determinations of the Board of Directors.

The activities conducted by the TFV through these two roles are different, although it is possible that the TFV could act under its two different roles in one case. Regardless, those two roles must not be confused.

iv. The human right to reparations is unique, comprehensive, indivisible and it belongs to the person who has been harmed by an atrocious crime such as those under the jurisdiction of this Court. It is immaterial whether it is claimed individually or collectively. What is important is that reparations are adequate, appropriate and efficient. They reflect the principle of *restitutio in integrum* and redress the victims.

v. Integral reparations (*restitutio in integrum*) comprise the following five key elements: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. They are not only modalities of reparation; they are components of

adequate, appropriate and effective reparations. Therefore, there must not be a choice between these components; they must all be incorporated in the measures of reparations.

vi. In order to achieve a correct basis for integral reparations and to repair adequately and effectively, it is fundamental to determine the type and extent of the harm to repair prior to setting an adequate amount of liability for the perpetrator. This requires approaching in a plural and differential way the distinct types of harm suffered by the different types of victims (direct, indirect and, if applicable, collective victims). In the instant case concerning 'child soldiers', besides the multiple harms already described in the previous judicial decisions, it is crucial to address, among others, the specific damage caused to the project of life for those who, at the time of the crimes, were children or young adolescents, who lost opportunities, capacities and perspectives of personal development and fulfilment as valuable human beings both for themselves and their community.

vii. It is also necessary to determine the scope and extent of victimhood. In massive and systematic international crimes, they are complex and include direct, indirect, collective, and potential victims. In the case at hand, there are victims who have already been identified and found eligible by the Trial Chamber. These victims include direct and indirect victims. In addition, the Trial Chamber has awarded reparations for potential victims. This category may include direct, indirect and, residually, collective victims. The potential victims are determined by the temporal, geographic, and other relevant criteria as set out in the conviction, sentencing and reparations decisions in this case. They only need to be localised and identified to be beneficiaries of the measures and programmes for reparations, and that will be done at the implementation stage.

viii. The process of locating and screening victims is also complex and extremely difficult in massive cases relating to crimes under the jurisdiction of this Court. Certainly, the process must be guided in its methodology by the relevant principles and standards existing in international human rights law and the jurisprudence of specialised courts, which interplay with the provisions of the Rome Statute. One of them is the *pro homine* principle which applies when weighing different rights,

enabling that preference be given to the right of the person whose human right has been violated.

ix. The determination of the harm and the eligibility of victims is not a subjective process. To the contrary, it is completely objective. The process should be implemented in a multidisciplinary and scientific manner. It should involve a team of forensic and specialised professionals, such as physicians, psychologists, psychiatrists, anthropologists, archaeologists, to be in charge of searching and screening victims with technical certainty. By virtue of article 21(3) of the Rome Statute and considering that the crimes under the jurisdiction of the Court amount to serious human rights violations, the process should be guided by the objective standards existing in specialised international instruments, *inter alia*, the United Nations Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('Istanbul Protocol'). The further production of expert reports should contain technical findings regarding the type, scope and number of victims, the scope and extent of harm and damages, and other evidentiary matters. These reports must be presented as technical evidence to chambers dealing with reparation proceedings.

x. Full consideration must be paid to the specific context where victims are immersed, namely contexts of ongoing conflicts or post-conflict situations in which cities and towns are often destroyed and societies de-structured. This makes it extremely difficult and most of the time impossible for the victims to obtain the necessary documentation and evidence to prove the harm suffered and the link to the crimes that form the basis of the conviction. For these reasons, the burden of proof ought to be shared amongst the victims and the system of the Rome Statute, and must be approached in an institutional manner by the Court, through, *inter alios*, the Registry, TFV and specialised professionals, in order to achieve the objectives and ultimate aim of the Rome Statute. In addition, issues regarding the burden of proof must be interpreted and applied in a manner consistent with human rights principles and standards.

xi. In light of the abovementioned, the victims who were declared ineligible by the Trial Chamber due to inconsistencies, formalities and lack of information during the screening process have the right to reapply to reparation programmes during the

implementation process based on pre-established, clear and concrete rules. Their applications have to be evaluated under international human rights law and standards. These victims could residually be considered as part of collective victims in order to be awarded reparations.

xii. Reparations can be granted in an individual or collective form. These forms are not mutually exclusive and can be ordered jointly. Even collective reparations may entail individual measures. The concept of collective reparations must not be confused with the notion of collective victim, in order to negate, in this context, individual measures.

xiii. In cases of atrocious crimes and massive criminality such as those under the jurisdiction of the Court, the cost of repair is only the basis to determine the amount of liability, and is formed by the consideration of the following factors: (i) the scope and extent of harm suffered by the victims; (ii) the broad scope of victimhood; (iii) the appropriate measures to ensure a reparation that reflects the principle of *restitutio in integrum*; and (iv) in case of collective reparations, the reparation programmes. The cost of repair does not automatically reflect the amount of liability. A trial chamber must weigh the cost of repair in light of, *inter alia*, the concrete circumstances of the case, the degree of participation of the convicted person in the crimes and in the harm caused, and the needs and interests of the victims. This allows for the determination of a reasonable and objective amount of liability of the convicted person.

xiv. Reparation programmes for victims who are already identified must be prioritised and should include individual measures in a way that differentiates the approach to the harm and the appropriate reparation between direct and indirect victims. It is also necessary to consider age, gender and the specific harm suffered by child soldiers, such as the harm to their project of life. Moreover, the harm suffered by child victims (female or male) must be approached in an integral manner, including but not limited to physical and mental harm and having due regard to the principle of the best interest of the child. In this sense, consideration must be paid to the trauma that the victims may have suffered as a result of possible sexual attacks facilitated by the violent context to which they were exposed in relation to the crimes that formed the basis of Mr Lubanga's conviction. This should be done at the implementation

stage through the TFV's reparations programmes and eventually complemented by its assistance programmes.

xv. The amount of liability the Trial Chamber attributed to Mr Lubanga was not necessarily incorrect. The inclusion and consideration of the potential victims was correct. The scope of potential victims was already determined and settled by the requisite criteria fixed by Trial Chamber I, and their location and identification is still to be completed during the implementation stage. This has to be done as early as practicable, with the aid of the professional work of experts, subject to the ruling of the Trial Chamber. This could include residually collective victims (namely, communities). Additionally, it must be guaranteed that the totality of the amount granted in this case will be invested in all possible programmes of reparation that will ensure adequate, appropriate and effective reparations for victims in accordance with the principle of *restitutio in integrum*.

xvi. None of the above-mentioned considerations affect Mr Lubanga's rights, *inter alia*, to due process of law, which he can exert in accordance with the provisions of the Rome Statute. Furthermore, if he wishes to do so, Mr Lubanga can also voluntarily exercise his right to participate in the reparation measures of satisfaction, for instance, through a public declaration of apology to the victims. This amounts to the restoration of both the humanity of the victims as well as that of the convicted person.

xvii. Adequate and integral reparations ultimately aim for reconciliation, sustainable peace, and eliminating the violent context which could lead to further international crimes and atrocities. This will realise the objectives and ultimate aim of the Rome Statute.

I. INTRODUCTION

1. As mentioned above, on 18 July 2019, the Appeals Chamber delivered its judgment concerning reparations in this case, confirming the Impugned Decision and amending it so that the victims who were found ineligible to receive reparations may seek a new assessment of their eligibility by the TFV with the Trial Chamber's

approval.[1] This Opinion concurs with the main findings and the outcome of the Common Judgment.

However, this case has raised a series of misunderstandings, misappreciations and lack of clarity in concepts and procedures to be used in reparations as it appears from the submissions advanced by the parties and even in some of the procedures followed by the Trial Chamber and the TFV in the implementation stage. Additionally, there are some lines of argumentation in the Common Judgment, in relation to which I have a different point of view. Some issues intrinsically linked to the efficacy of the reparation proceedings have not been addressed in detail in the Common Judgment thereby leaving unresolved uncertainties concerning the application of the law and best practices to ensure effective, efficient and meaningful reparations to victims of atrocious crimes.

2. It is on the basis of the foregoing that this Opinion finds it necessary to clarify and elaborate in depth on various fundamental issues, concepts, practices and aspects of reparations for harm caused by atrocious crimes. This is done with the ultimate goal of strengthening the Common Judgment, assisting in the understanding of the latter's determinations and orders, and providing guidance for reparation proceedings in general and in the case at hand.

3. The overarching question before the Appeals Chamber in this case goes beyond the issue of Mr Lubanga's scope of liability for reparations. It includes issues related to the nature and content of reparation proceedings before this Court, the methodology followed by the Trial Chamber to calculate such liability, and the eligibility assessment of victims as well as the objectives of reparations and the content of the amount of liability of the convicted person. This relates to the different types of victims who suffered distinct damages, and the way to differentially and comprehensively provide them with the appropriate, adequate and effective reparations, considering both their individual and collective capacities, as well as the content and sense of *restitutio in integrum*.

[1] Common Judgment, operative part 2.

4. Furthermore, it seems that the clear criteria given in the *Lubanga* Amended Reparations Order have not been properly understood and followed by the relevant actors in the reparation proceedings. Therefore, it is imperative to provide clarification regarding the reparations process that the Trial Chamber is carrying out with the TFV's administrative support. In particular, the arguments of the parties on appeal indicate that it is necessary to clarify the role of the TFV in assisting the judicial assessment of eligibility of victims and the implementation of judicial reparations orders. Likewise, lack of clarity as to the criteria on the basis of which the eligibility of victims were to be assessed appears to have given rise to issues regarding the supporting documentation and evidence they needed to submit as well as the burden of proof they were required to bear. On the basis of the foregoing, this Opinion considers it necessary to expand and go in depth into the broad spectrum of principles, standards, law and best practices underpinning these important matters.

5. Mr Lubanga has raised six grounds of appeal[2] and Victims V01 have raised three grounds of appeal.[3] This Opinion addresses matters relevant to the first, second and fourth ground of Mr Lubanga and the three grounds of appeal of Victims V01. These grounds of appeal lead this Opinion to discuss the following three issues: (1) the nature of reparations proceedings before this court and the nature and scope of reparations for crimes under the Court's jurisdiction; (2) the scope and extent of damages and harm, and the scope of victimhood to be repaired; and (3) adequate, appropriate and effective reparation *vis à vis* the amount of liability of the convicted person. To tackle each of these issues, this Opinion proposes questions and matters that are analysed and answered in the text.

6. To develop these issues, this Opinion will set out in Chapter II the context of these appeals, including the main findings in the Impugned Decision, the outcome of the Common Judgment in relation to the relevant grounds of appeal discussed in this Opinion, and the issues arising from the relevant grounds of appeal.

[2] The grounds of appeal raised by Mr Lubanga relate to the legal basis for granting reparations, the standard of proof and redactions in requests for reparations, the cost of repair, the apportionment of liability and the application of the *non ultra petita* rule.

[3] The three grounds of appeal raised by Victims V01 concern the Trial Chamber's eligibility assessment of victims and the role of the TFV thereof.

7. In Chapter III, this Opinion will address the first issue, namely the judicial nature of reparations proceedings and the nature and scope of reparations for crimes under the jurisdiction of this Court. To address this issue, the Opinion will elaborate on the nature of reparation proceedings and their characteristics; the nature and scope of reparations for crimes under the Court's jurisdiction, which entail violations of core human rights; the need to include international human rights law in the interpretation and application of the Rome Statute, especially in reparations proceedings before this Court; and the supporting role of the TFV in judicial reparations proceedings.

8. In Chapter IV, this Opinion will focus on the second issue, namely the scope and extent of damages and harm, and the scope of victimhood to be repaired. To that end, the Opinion will address the questions of what are the damages and harm that need to be repaired in atrocious crimes both generally and with respect to the specific crime for which Mr Lubanga was convicted; who are the victims of atrocious crimes; and the possibility of considering potential victims and their future identification and assessment. Special focus will be placed on issues of evidence and the way in which the burden of proof must be approached in cases of atrocious and mass criminality, which result in serious human rights violations.

9. Subsequently, in Chapter V, this Opinion will discuss the third issue, namely how to adequately, appropriately and efficiently repair the harm *vis à vis* the content of the amount of liability. To that end, the Opinion will address the questions of what are the characteristics, objectives, content and the ultimate aim of reparations, and what is the content of the amount of liability of the convicted person in general and in the case at hand.

10. This Opinion provides answers to the questions and matters posed, thereby addressing the three issues raised. In Chapter VI, this Opinion will recapitulate the main points reached under each issue and set out a number of final conclusions. It is the hope of this Opinion to assist in the improvement of reparations proceedings in this case and future cases to come before this Court.

II. RELEVANT BACKGROUND AND ISSUES AT STAKE

A. Impugned Decision

11. On 15 December 2017, the Trial Chamber issued the Impugned Decision. The Trial Chamber noted that the crimes for which Mr Lubanga was convicted require potentially eligible victims for reparations to have been direct or indirect victims.[4] When assessing a victim's eligibility, the Trial Chamber verified: (i) the identity of the victim, (ii) a direct victim's status as child soldier or (iii) an indirect victim's 'close personal relationship' with the direct victim, then (iv) whether the direct or indirect victim meets the balance of probabilities standard for harm and (v) the 'causal nexus between the harm alleged and the crimes of which Mr Lubanga was convicted'.[5]

12. After assessing the 473 dossiers before it, the Trial Chamber concluded that 425 of the 473 potentially eligible victims met the balance of probabilities standard and are eligible for reparations.[6] The 425 victims 'constitute such a group, which was subjected to harm as a consequence of the crimes […] even though each individual did not suffer the same harm'.[7] The Trial Chamber awarded service-based and symbolic collective reparations.[8] The Trial Chamber noted that 'the persons who presented dossiers are not the sum-total of the victims who suffered harm as a consequence of the crimes of which Mr Lubanga was convicted, but are a sample of potentially eligible victims'.[9] The Trial Chamber reiterated that 'it must strike a fair balance between the rights and interests of the victims and those of the convicted person'.[10] Bearing this in mind, the Trial Chamber invited the TFV 'to study the possibility of continuing to seek and identify potentially eligible victims with their

[4] Trial Chamber II, *The Prosecutor v. Thomas Lubanga Dyilo*, Corrected version of the "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable", 21 December 2017, ICC-01/04-01/06-3379-Red-Corr-tENG ('Impugned Decision'), para. 66.
[5] Impugned Decision, para. 67.
[6] Impugned Decision, para. 190.
[7] Impugned Decision, para. 194.
[8] Impugned Decision, paras 194, 288.
[9] Impugned Decision, para. 191. *See also* para. 212 ('the number of victims who suffered harm as a consequence of the crimes of which Mr Lubanga was convicted far exceeds the 425 persons who have established that they are victims for the purposes of reparations and that there are hundreds and possibly thousands more victims').
[10] Impugned Decision, para. 234.

assistance, before the implementing partners are selected and the Chamber approves the second phase of the implementation of the service-based collective reparations'.[11]

13. The Trial Chamber ultimately determined that the sum of reparations owed by Mr Lubanga was USD 10,000,000 which accounts for his liability to the 425 victims (USD 3,400,000), as well as liability to potentially eligible victims who might later be identified (USD 6,600,000).[12]

B. Common Judgment's outcome on the relevant grounds of appeal

14. As noted above, Victims V01 raise three grounds of appeal while Mr Lubanga raises six of them. This Opinion will focus on all three grounds of appeal raised by Victims V01 and Mr Lubanga's first, second and fourth grounds of appeal.

15. In their first ground of appeal, Victims V01 argue that the Trial Chamber erred by individually assessing the eligibility of identified victims, in breach of rules 97(1) and 98(3) of the Rules of Procedure and Evidence ('Rules'), and by exceeding the Appeals Chamber's mandate.[13] In their second ground of appeal, Victims V01 aver that the Trial Chamber made an error of law by assessing eligibility for collective reparations on the basis of different procedures.[14] Under the third ground of appeal, Victims V01 submit that the Trial Chamber erroneously rejected the requests of some victims for having provided insufficient detail in relation to some factors.[15]

16. Under his first ground of appeal, Mr Lubanga argues that the Trial Chamber erred by making an award for reparations 'on its own motion' to, or in respect of, the unidentified victims who had not made a request for reparations, without having established that there were 'exceptional circumstances'.[16] In his second ground of

[11] Impugned Decision, para. 296.
[12] Impugned Decision, paras 279-281, p. 111.
[13] Public Version of the Corrigendum to the Appeal Brief against the "*Décision fixant le montant des réparations auxquelles Thomas Lubanga est tenu*" Handed Down by Trial Chamber II on 15 December 2017, ICC-01/04-01/06-3396-Conf, 5 April 2018, ICC-01/04-01/06-3396-Corr-Red-tENG ('Victims V01's Appeal Brief'), paras 14-32.
[14] Submissions pursuant to the Order of 2 January 2019, 30 January 2019, ICC-01/04-01/06-3436-tENG ('Victims V01's Submissions Following the Appeals Chamber's Questions'), para. 19.
[15] Victims V01's Appeal Brief, para. 46.
[16] Public Redacted Version of the "Appeal Brief of the Defence for Mr Thomas Lubanga Dyilo against the '*Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu*' handed down by Trial Chamber II on 15 December 2017 and Amended by the Decisions of 20 and 21 December 2017" Filed on 15 March 2018, 15 March 2018, ICC-01/04-01/06-3394-Red-tENG ('Mr Lubanga's Appeal Brief'), paras 20-28.

appeal, Mr Lubanga argues that the Trial Chamber found a number of victims eligible for reparations on the basis of accounts that, despite being uncorroborated, it considered to be 'coherent and credible'.[17] Under his fourth ground of appeal, Mr Lubanga argues that the Trial Chamber set the reparations award against him on the basis of the aggregate individual harm, without assessing the actual cost of the reparations ordered.[18]

17. The first, second and fourth grounds of appeal raised by Mr Lubanga and the first, second and third grounds of appeal advanced by Victims V01 essentially challenge the system of reparations and the eligibility of victims and aim to determine the amount of liability.

18. The Appeals Chamber rejected Mr Lubanga's first, second and fourth grounds of appeal and the first ground of appeal of Victims V01. On the other hand, the Appeals Chamber granted Victims V01's second ground of appeal.[19] Finally, having granted Victims V01's second ground of appeal, the Appeals Chamber dismissed their third ground of appeal as moot.[20]

19. The outcome of the Common Judgment was to confirm the Impugned Decision amending it so that the victims who were found ineligible to receive reparations may seek a new assessment of their eligibility by the TFV with the Trial Chamber's approval.[21] This Opinion concurs with the principal findings and the outcome of the Common Judgment but finds it necessary to provide greater depth and clarification regarding the issues defined in the next section.

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[17] Mr Lubanga's Appeal Brief, para. 53.
[18] Mr Lubanga's Appeal Brief, paras 208-220. As for the other grounds of appeal, which are not addressed in this Opinion, in his third ground of appeal, Mr Lubanga avers that the Trial Chamber erred in law or misappreciated the facts in finding that he had sufficient information to challenge the evidence brought despite the extensive redactions it allowed to be applied in the victims' requests for reparations. *See* Mr Lubanga's Appeal Brief, para. 157. He argues, in his fifth ground of appeal, that the Trial Chamber erred in holding him liable in full for the victims' harm, regardless of the existence of other co-perpetrators who contributed to such harm, and in failing to consider his mode of participation in the commission of the crimes. *See* Mr Lubanga's Appeal Brief, paras 229-254. He also argues, in his sixth ground of appeal, that the Trial Chamber erred in ruling *ultra petita* by ordering reparations for USD 10,000,000 despite the fact that Victims V01 and V02, as well as the OPCV, claimed USD 6,000,000 in their submissions. *See* Mr Lubanga's Appeal Brief, para. 275.
[19] Common Judgment, para. 172.
[20] Common Judgment, para. 287.
[21] Common Judgment, operative part 2.

C. Issues arising from the relevant grounds of appeal

20. This Opinion notes a lack of clarity, various misunderstandings and misappreciations in relation to some fundamental issues that underlie Mr Lubanga's first, second and fourth grounds of appeal, as well as Victims V01's first, second and third grounds of appeal in relation to the system of reparations, and the assessment and eligibility of victims. This Opinion will address them pursuant to the issues defined in turn. In particular, this Opinion finds that the following issues arise and need to be discussed in more depth:

1. First Issue

The nature of reparations proceedings before this court and the nature and scope of reparations for crimes under the Court's jurisdiction

21. Victims V01 submit in relation to their first ground of appeal that 'within the framework of an exclusively collective reparations programme implemented by the Trust Fund, it is not the Chamber but the [TFV] that determines the beneficiaries'.[22] This Opinion notes that there exist serious misappreciations and misunderstandings regarding the nature of the reparation proceedings, the nature and scope of reparations for crimes under the Court's jurisdiction, and the nature of the TFV's role in such reparations proceedings. Therefore, this Opinion finds the need to address the following questions and matters: (a) What is the nature of reparations proceedings before this Court?; (b) what are the nature and scope of reparations for crimes under the Court's jurisdiction? (c) human rights principles, standards and law converge and apply in reparation proceedings; and (d) what is the nature of the TFV and its role *vis à vis* the Court?

2. Second Issue

The scope, extent and proof of harm and damages; and the scope of victimhood to be repaired in the case at hand

22. This issue relates to Mr Lubanga's first and second grounds of appeal, and Victims V01's second and third grounds of appeal. This Opinion notes some lack of clarity in Mr Lubanga's first ground of appeal as to the scope and extent of the victimhood in the case at hand. Likewise, from Mr Lubanga's second ground of appeal, and Victims V01's second and third grounds of appeal, in part, this Opinion

[22] Victims V01's Appeal Brief, para. 14.

notes some misunderstandings and disagreements on the evidentiary criteria regarding the burden of proof to determine the eligibility of victims. Specifically, this Opinion finds it necessary to expand on the principles to assess the evidence, namely supporting documentation and information that victims of atrocious, mass criminality are able to submit to prove their claims, as well as the burden of proof they should be required to meet. Taking into account the extreme difficulties that victims of atrocious crimes face in the context of ongoing conflicts or post-conflict situations, the burden of proof should be shared between the victims and the Rome Statute system, thereby shaping the institutional approach that this Court should take, with the assistance of experts, in determining the scope and extent of harm in such cases. To that end, this Opinion will address the following issues: (a) What are the scope and extent of the victims' damages and harm?; (b) what is the scope of victimhood to be repaired in the case at hand?; and (c) matters of evidence and burden of proof.

3. Third Issue

Adequate, Appropriate and Effective Reparations vis-à-vis the amount of liability in the case at hand

23. Regarding Mr Lubanga's fourth ground of appeal, this Opinion notes serious misunderstandings in Mr Lubanga's claim that the amount of reparations awards can be assessed only on the basis of the actual cost of repair in collective reparations *vis-à-vis* the aggregate of individualised damages purportedly used by the Trial Chamber to set Mr Lubanga's amount of liability. This misunderstanding leads this Opinion to clarify what the most adequate, efficient and appropriate way to repair the harm is in the case at hand. This Opinion thus finds the need to address the following questions: (a) What are the characteristics, objectives and ultimate aim of reparations?; (b) what is the content of reparations?; and (c) what is the content of the amount of liability of the convicted person?

III. *FIRST ISSUE*: THE NATURE OF REPARATIONS PROCEEDINGS BEFORE THIS COURT AND THE NATURE AND SCOPE OF REPARATIONS FOR CRIMES UNDER THE COURT'S JURISDICTION

24. From the submissions advanced by Victims V01, this Opinion notes serious misappreciations regarding the nature of the reparations proceedings, the nature and scope of reparations for crimes under the Court's jurisdiction, and the nature of the TFV's role in such reparations proceedings. These issues relate to the first ground of

appeal of Victims V01. This Opinion notes with concern that Victims V01 are under the impression that 'within the framework of an exclusively collective reparations programme implemented by the Trust Fund, it is not the Chamber but the [TFV] that determines the beneficiaries'.[23] While the Common Judgment clarified that any of the TFV's recommendations as to eligibility of victims 'shall be subject to the approval' of the Trial Chamber,[24] a statement with which this Opinion agrees, it seeks to further clarify matters underlying the need for the Trial Chamber to make final judicial determinations concerning the TFV's actions. The referred misappreciations as to the TFV's role in reparations call for a more thorough consideration of the nature of the reparations proceedings before the Court and the nature of the TFV's functions. Being of a complex nature, these proceedings are subject to the statutory framework and international human rights law. Moreover, within the framework of judicial reparations proceedings, the role of the TFV, in assisting the chambers of this Court, is complementary and the nature of its actions is administrative. Thus, there are a number of questions and matters under this issue that require further consideration:

a. What is the nature of reparations proceedings before this Court?

b. What are the nature and scope of reparations for crimes under the Court's jurisdiction?

c. Human rights principles, standards and law converge and apply in reparation proceedings; and

d. What is the nature of the TFV and its role *vis à vis* the Court?

A. The judicial nature of reparations proceedings before this Court

25. The nature of reparations proceedings at this Court is judicial, not administrative. Once the criminal responsibility of a person is established, the convicted person shall be responsible for repairing the harm and damages caused by his or her crime. Punishment is not alternative to, nor does it substitute, the convicted persons' obligation to repair harm caused from their actions. Once a conviction decision is rendered, this triggers two different types of proceedings. On the one hand,

[23] Victims V01's Appeal Brief, para. 14.
[24] Common Judgment, operative part 2.

sentencing proceedings stipulated in article 76 of the Rome Statute are the conclusion of *ius puniendi*, which aims to punish perpetrators for their criminal conduct. On the other hand, reparation proceedings triggered by article 75 of the Rome Statute have the ultimate goal of awarding reparations to redress the harm that victims suffered as a consequence of the atrocious crimes that form the basis of the conviction.

26. Given that a convicted person is held criminally liable and is sentenced by a trial chamber, the proceedings to determine the convicted person's liability for reparations are judicial too. Article 75 of the Rome Statute vests the judges of the Court with the mandate to order the convicted person to repair the harm and damages, just as article 76 vests them with the mandate to determine his or her sentence.

27. In the context of judicial proceedings, making a determination as to the liability of the convicted person for reparations as well as the eligibility of victims is the responsibility of judges. Determining who is and who is not a victim is part of the power of judges. This is because, within the framework of the Rome Statute, the task of adjudicating on the condition of a person who is legally recognised as a victim entitled to reparations is to be performed only by the elected judges, who were vested by the international community with international jurisdiction and powers to adjudicate these matters. Being a judicial proceeding, the convicted person has, as much as the victim, the right to challenge the process settling his or her liability for reparations.

1. Reparations are always related to the criminal conviction

28. As stated above, once a person is found criminally responsible for a crime under the jurisdiction of this Court, that person is responsible for repairing the harm caused by his or her crime. That is the link between the conviction and reparations proceedings. Indeed, there is a legal obligation that rests upon the convicted person to repair the full extent of the harm suffered by the full spectrum of victims. In line with the findings made in the Common Judgment,[25] the scope of harm suffered by victims

[25] Common Judgment, para. 78, referring to Appeals Chamber, *The Prosecutor v. Germain Katanga*, Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute", 08 March 2018, ICC-01/04-01/07-3778-Red 09-03-2018 ('*Katanga* Judgment on Reparations'), para. 70 ('[…] a trial chamber should, generally speaking, establish the types or categories of harm caused by the crimes for which the convicted person was convicted, *based on all relevant information before it*, including the decision on conviction, sentencing

must be established on the basis of all relevant information before the chamber, particularly the conviction and sentencing decisions.

29. When it comes to the effects of the conviction, there is nevertheless an important distinction between the convicted person's obligation to serve a sentence and his or her obligation to repair the harm that his or her conduct caused to others. The obligation to repair the harm caused by the criminalised conduct is not a form of punishment. It is a legal consequence stemming from a criminal conviction.[26] Reparations should be proportional to the heinous crime, its gravity and the seriousness of the human rights violation, and the degree of responsibility of the perpetrator.[27]

30. In the case at hand, the obligation of Mr Lubanga to repair the full extent of the harm and damages caused by his conduct stems from his conviction under article 8(2)(e) of the Rome Statute, namely the conscription, enlistment and the active use of children under the age of fifteen years in hostilities.

2. Nature of Reparation Proceedings

31. Reparations proceedings are in essence different from the proceedings which determine the criminal liability of an accused. As such, a broad spectrum of principles, standards and better practices converge and apply to the reparations process whereby criminal and human rights law integrate and interplay with each other. In this regard, it is important to clarify the difference between criminal and reparations proceedings.

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decision, submissions by the parties or *amici curiae*, expert reports and the applications by the victims for reparations') (footnote omitted, emphasis added).

[26] John Locke, *Second Treatise of Government*, 1689 ('*Second Treatise of Government*'), section 10 (in John Locke's view, a crime violates the law and injuries particular persons. In violating the law, punishment emerges as a right of everyone in society, a public interest, while the right to seek recovery from the offender emerges as a particular interest of the person who was so injured. He states that '[b]esides the crime which consists in violating the law, and varying from the right rule of reason, whereby a man so far becomes degenerate, and declares himself to quit the principles of human nature, and to be a noxious creature, there is commonly injury done to some person or other, and some other man receives damage by his transgression: in which case he who hath received any damage, has, besides the right of punishment common to him with other men, a particular right to seek reparation from him that has done it: and any other person, who finds it just, may also join with him that is injured, and assist him in recovering from the offender so much as may make satisfaction for the harm he has suffered').

[27] *The Prosecutor v. Thomas Lubanga Dyilo*, 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, 3 March 2015, ICC-01/04-01/06-3129 ('*Lubanga* Appeal Judgment on Reparations'), para. 118.

32. First, during the criminal proceedings before this Court, which encompass the trial proceedings leading to the conviction or acquittal (article 74 of the Rome Statute) and the eventual sentencing of the convicted person (article 76 of the Rome Statute), the parties are the Prosecutor and the accused/convicted person. Throughout these proceedings, victims are participants with some limited rights. During reparations proceedings, the situation qualitatively changes: the victims and the convicted person become in fact the parties to these proceedings. The Prosecutor does not participate in reparations proceedings. The convicted person is no longer confronted with the *ius puniendi*. Moreover, reparations proceedings do not seek to punish the convicted person's behaviour. They aim to award victims integral reparations for the harm and damages caused by the criminal conduct of the convicted person.

33. Second, the objectives pursued by both criminal and reparations proceedings before this Court are different. While the object of the criminal proceedings leading to a decision under article 74 of the Rome Statute is to determine the culpability of the accused person and sentencing proceedings aim to establish the appropriate sentence (punishment), the purpose of reparation proceedings is threefold: to set the award for reparations, to set the amount of liability and to implement the award in an effective manner.

34. Third, given that the crimes under this Court's jurisdiction entail atrocities, which always violate the core human rights of victims, damages caused to their fundamental rights are not repaired simply by finding the perpetrator guilty and imposing on him or her a sentence proportionate to his or her culpability. The convicted person has the legal obligation to repair everyone who has been harmed. While the objectives of the penalty focus on the convicted person's accountability, a guilty verdict and the imposition of a punishment fall short of repairing the victims' harm for which that convicted person was found liable.

35. Fourth, during criminal proceedings, general principles of criminal law apply in their entirety. However, an additional set of principles, laws and standards converge and are applicable to reparations proceedings due to their different nature, in particular those emerging from international human rights law which integrate with and apply to the former. It is because of the heinous nature of the crimes under the Court's jurisdiction, which entail gross human rights violations, and, by virtue of

articles 21(3) and 75(6) of the Rome Statute, that principles and standards stemming from international human rights law are applicable.

36. Notwithstanding the foregoing, the fundamental rights of the convicted person are preserved throughout the proceedings before this Court, including reparations proceedings. In this regard, it is noted that rule 97(3) of the Rules provides that '[i]n all cases, the Court shall respect the rights of victims and the convicted person'.

37. During reparations proceedings, the convicted person has the ability to present a defence in respect of the victims' claims, as much as the victims are able to have their rights respected. Throughout the reparation proceedings before this Court, the procedural and human rights of the convicted person remain intact and can be exercised in the manner established in the Rome Statute. Therefore, the observance of principles stemming from international human rights law, including the standards and principles of interpretation, do not affect the rights of the convicted person as established in the Rome Statute and recognised by international human rights law.

3. Preliminary conclusion

38. The nature of reparations is inherently judicial and directly emerges from a conviction decision. In light of the specific nature of the crimes under the jurisdiction of this Court that always entail serious violations of internationally recognised human rights, the principles and standards of human rights law and the judicial practice of specialised courts converge and apply to reparations. This in line with the mandate set out in articles 21(3) and 75(6) of the Rome Statute.

B. Nature and scope of reparations for crimes under the Court's jurisdiction

1. Atrocious nature of the crimes

39. The crimes under the jurisdiction of this Court are 'unimaginable atrocities that deeply shock the conscience of humanity'.[28] It is devastating that human beings can treat one another in such execrable ways and with such brutality, as if they were less than human. The humanity of both perpetrators and victims is called into question by those egregious international crimes. As victims are treated as less than human, their core human rights are summarily derogated. The nature of such abhorrent crimes is

[28] *See* Preamble of the Rome Statute.

thus more complex than the offences under domestic criminal law. They are atrocious because of the cruelty, brutality, massiveness and systematic manner in which they are committed, and the gravity of the violation of human rights that they entail.

40. The commission of these crimes often correlates to an abuse of power by perpetrators. Such atrocious crimes are moreover committed taking advantage of the vulnerability of the victims or discriminating against them. This is the case, for instance, in crimes against children and sexual and gender-based crimes. As such, the abuse emerges from the dynamics of power and oppression between vulnerable victims and powerful perpetrators. This applies to the conscription and enlistment of children into armed groups and their use in hostilities.

41. Such dynamics of power are totally unbalanced in an unjust way when the vulnerability of victims rests on them being children, as in the case at hand. There are situations that make imagination fall short to understand the exceptional, violent, barbarous and unjust circumstances. This is the case where victims are the most vulnerable human beings, such as children conscripted or enlisted into armed forces or groups, or actively used in hostilities and subject to situations of extreme violence prone to the multiple infringements of their rights as children and human beings. The perpetrator, having been convicted, must repair the harm inflicted upon former child soldiers and their communities. In repairing their harm, not only do victims reclaim their humanity, but perpetrators also reinstate their own humanity. Together they heal.

2. Atrocious crimes entail serious violations of core human rights

42. Crimes under the jurisdiction of this Court constitute atrocious crimes and amount to gross violations of core human rights. In fact, the crimes under the jurisdiction of this Court constitute attacks to core human rights to which the international community allows no limitation at all. There are rights under article 4 of the International Covenant on Civil and Political Rights ('ICCPR') that can never be derogated, not even in times of public emergency that threaten the life of the nation.[29] In that sense, each of these rights amounts to the level of peremptory norm of international law, a level which the Vienna Convention on the Law of Treaties defines

[29] United Nations, General Assembly, article 4 of the International Covenant on Civil and Political Rights, 16 December 1966, 999 United Nations Treaty Series 14668 ('ICCPR').

as 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.[30] Most crimes under the jurisdiction of this Court result in violations of *ius cogens* norms.

43. The human right to life linked to the right to personal integrity is an example of a peremptory norm of international law that is violated in the commission of specific crimes under the jurisdiction of this Court. The right to life has been recognised as a *ius cogens* norm.[31] It is enshrined in numerous human rights instruments, such as article 3 of the Universal Declaration of Human Rights ('UDHR'),[32] article 4(1) of the American Convention on Human Rights ('ACHR'),[33] article 2(1) of the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR')[34] and article 6 of the ICCPR.[35]

44. The Genocide Convention is further illustrative of the overlap between atrocious crimes and gross human rights violations. Indeed, the treaty defines genocide as a crime under international law. It is clear from its definition that genocide violates core human rights, such as the right to life in connection to the right to personal integrity, both as an individual and as a collective right of a religious, racial, ethnic or national group.[36] As for crimes against humanity under the

[30] United Nations, Conference on the Law Treaties, article 53 of the Vienna Convention on the Law of Treaties, 23 May 1969, 1155 United Nations Treaty Series 18232.
[31] M. Tushnet et al, *International Human Rights and Humanitarian Law* (2006), pp. 34-35 ('[s]o exactly which rights and duties reflect *jus cogens*? The following represent extant or emerging global *jus cogens* obligations: prohibition of aggression; right to life; right to humane treatment; prohibition of criminal *ex post facto* laws; prohibition of genocide; prohibition of war crimes; prohibition of slavery; prohibition of discrimination on the basis of race, color, sex, language, religion, or social origin; prohibition of imprisonment for civil debt; prohibition of crimes against humanity; right to legal personhood; freedom of conscience; and the right to self-determination').
[32] United Nations, General Assembly, article 3 of the Universal Declaration of Human Rights, Resolution 217A (III), 10 December 1948, U.N. Doc A/810 ('UDHR').
[33] Organization of American State, article 4(1) of the American Convention on Human Rights, 22 November 1969, 1144 United Nations Treaty Series 17955 ('ACHR').
[34] Council of Europe, article 2(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, as amended by Protocols No. 11 and No. 14, 213 United Nations Treaty Series 2889 ('ECHR').
[35] Article 6 of the ICCPR. *See also* United Nations, General Assembly, article II of the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 United Nations Treaty Series 1021 ('Genocide Convention').
[36] *See generally* Genocide Convention.

jurisdiction of this Court, the crimes of murder[37] and extermination[38] are examples of egregious crimes that also amount to gross violations of the core human right to life. The prohibition of directing an attack against a civilian population also protects the right to life, as set out not only in article 8 of the Rome Statute, but also in articles 51 and 85 of Additional Protocol I to the Geneva Conventions, and article 13 of Additional Protocol II to the Geneva Conventions.[39] This is also the case for the crime of aggression under article 8 *bis* of the Rome Statute, the commission of which may result in violations to the right to life, among other numerous core human rights.

45. In the particular case of the crimes of which Mr Lubanga was convicted, namely conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities, the criminal conduct amounts to serious violations of, *inter alia*, internationally recognised human rights of children to life, linked to the right to develop, the right to personal integrity and the right to live with their family and in a safe environment,[40] as well as other human rights such as the right to liberty of movement and freedom to choose a person's own residence.[41]

46. In this regard, it is also important to recall that international humanitarian law as reflected in article 8 of the Rome Statute protects the most basic human rights of persons taking part in the hostilities, and those of the civil population, namely persons who do not participate in hostilities and those who no longer participate therein. Since international humanitarian law through the principle of humanity aims to protect basic internationally recognised core human rights in times of armed conflict, violations of

[37] *See e.g.*, article 7(1)(a) of the Rome Statute.
[38] *See e.g.*, article 7(1)(b) of the Rome Statute.
[39] International Committee of the Red Cross, articles 51, 85 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 United Nations Treaty Series 17512 ('Additional Protocol I to the Geneva Conventions'); International Committee of the Red Cross, article 13 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 United Nations Treaty Series 17513 ('Additional Protocol II to the Geneva Conventions').
[40] United Nations, General Assembly, article 6 of the Convention on the Rights of the Child, 20 November 1989, A/RES/44/25 ('Convention on the Rights of the Child').
[41] Article 13 of the UDHR; article 22 of the ACHR; article 2 of Protocol No. 4 to the ECHR; article 12 of the ICCPR.

its provisions also constitute grave violations of international human rights law.[42] Indeed, '[i]nternational humanitarian law is increasingly perceived as part of human rights law applicable in armed conflict'.[43] It is important to note that the main characteristic of both international humanitarian law and human rights law is the protection of human dignity in order to ensure a minimum condition of humanity.

47. Given that human rights law is based on respect for human life and wellbeing, the use of force is in itself a violation of human rights.[44] In this sense, jurisprudence and the practice adopted by human rights implementation mechanisms have stressed the importance of ensuring the observance of the so-called hard-core rights[45] even in times of armed conflict and also, in particular, the continued applicability of certain judicial guarantees that are essential in order to give effective protection to those rights.[46] The foregoing considerations show that the interplay between international humanitarian law and human rights law is thus clear.

3. Preliminary conclusion

48. Given the atrocious nature of crimes under the jurisdiction of this Court which amount to gross violations of internationally recognised human rights, it is imperative that international human rights law converges and applies to reparation proceedings stemming from those atrocities. This includes the principles enshrined in universal

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[42] L. Doswald-Beck, S. Vité, 'International Humanitarian Law and Human Rights Law' in *International Review of the Red Cross 293* (1993).

[43] L. Doswald-Beck, S. Vité, 'International Humanitarian Law and Human Rights Law' in *International Review of the Red Cross 293* (1993).

[44] United Nations, International Conference on Human Rights, Final Act of the International Conference on Human Rights, 22 April - 12 May 1968, A/CNF.32/41, p. 18 (resolution XXIII on human rights in armed conflicts notes that 'peace is the underlying condition for the full observance of human rights and war is their negation').

[45] *See* article 4 of the ICCPR. Hard-core rights include the right to life, the prohibition of torture and other inhuman treatment, the prohibition of slavery and the prohibition of retroactive criminal legislation or punishment.

[46] United Nations, General Assembly, annex VI of the Report of the Human Rights Committee, 18 September 1980, Supplement No. 40 A/35/40, p. 117, para. 15 (in *Lanza de Netto, et. al. v. Uruguay*, ('[t]he Human Rights Committee has considered whether acts and treatment, which are primafacie not in conformity with the Covenant, could for any reasons be justified under the Covenant in the circumstances. The Government has referred to provisions of Uruguayan law, in particular the "prompt security measures". However, the Covenant (art. 4) does not allow national measures derogating from any of its provisions except in strictly defined circumstances, and the Government has not made any submissions of fact or law to justify such derogation. Moreover, some of the facts referred to above raise issues under provisions from which the Covenant does not allow any derogation under any circumstances'). S*ee also* IACtHR, *Judicial Guarantees in States of Emergency*, Advisory Opinion, 6 October 1987, OC-9/87, paras 25-26, 39 ('[w]hen in a state of emergency the Government has not suspended some rights and freedoms subject to derogation, the judicial guarantees essential for the effectiveness of such rights and liberties must [b]e preserved').

treaty bodies and the jurisprudence on reparations as developed by regional human rights courts.

C. Human rights principles, standards and law converge and apply in reparation proceedings

49. The atrocious nature of crimes under the jurisdiction of the Court and the specific characteristics of the process of reparations at this Court require consideration and application of international human rights law, namely human rights principles, standards, guidelines and practices. These converge with and apply to reparation proceedings, and therefore they ought to be integrated and harmonised with the Rome Statute.

1. Rome Statute

50. The Rome Statute imposes in article 21(3) an imperative mandate. This provision stipulates that the Court, in interpreting and applying the applicable law set out in article 21, must be consistent with internationally recognised human rights. Indeed, a comprehensive understanding of reparations for international crimes extends beyond international criminal law and international humanitarian law; it further transcends into concepts of international human rights law. The harm caused by international crimes affects the core human rights of victims. Article 21(3) of the Rome Statute is a mandatory provision that applies to all proceedings before this Court, and particularly to reparations proceedings.

51. Article 75(6) of the Rome Statute further regulates the applicable law in reparations proceedings. It states that nothing in article 75 regarding reparations to victims 'shall be interpreted as prejudicing the rights of victims under national or international law'. On the basis of this article, it is clear that the interpretation and application of the provisions contained in the legal documents of the Court shall not prejudice the rights of the victims under international law. This means that the rights enjoyed by victims under international human rights law must be considered, respected and applied in the reparations proceedings before this Court.

52. Article 75(1) of the Rome Statute, which sets the fundamental regime for reparations before the Court, determines in relevant parts that '[t]he Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation'. Article

75(2) states that the Court may make an order 'specifying appropriate reparations, including restitution, compensation and rehabilitation'.

53. Relevant to the reparations proceedings, rules 94 and 95 of the Rules[47] regulate the two procedures provided in article 75 of the Rome Statute, namely, ordering reparations upon request and on the Court's own motion.[48] A victim who appears before the Court may request either to receive reparations or to not be considered in the reparations award. If the victim requests reparations, the request will be determined as if it had been brought under rule 94 of the Rules. If the victim requests not to receive reparations, then the Court will not make an individual order in respect of the victim. Rule 95(2) includes the possibility that the Court may still award reparations on its own motion to victims who did not appear before it and who have thus not made any request to be granted reparations or not.

2. Applicable law, guidelines and standards under international human rights law

54. As stated above, international atrocious crimes amount to gross human rights violations which, once a conviction is entered, triggers reparations proceedings. For the reasons set out above, and in light of the mandatory nature of article 21(3) of the Rome Statute, international human rights law must be observed in reparations proceedings. It is therefore important to set out the legal instruments, as well as the relevant laws, principles, standards, guidelines and jurisprudence under international human rights law, which are applicable to the obligation to repair and the correlated human right to receive reparations. This broad legal framework will inform the analysis of this Opinion.

(a) Universal Declaration of Human Rights

55. The UDHR imposes duties on 'every individual and *every organ of society* […] to promote respect for these rights and freedoms and […] to secure their universal and

[47] If a chamber intends to proceed on its own motion, rule 95(1) of the Rules requires the Registry to give notice to the convicted person and 'to the extent possible, to victims, interested persons and interested States'. Rule 95(2) then considers different possibilities that may independently emerge as a result of that notification

[48] *See also The Prosecutor v. Thomas Lubanga*, Decision on the admissibility of the appeals against Trial Chamber I's "Decision establishing the principles and procedures to be applied to reparations" and directions on the further conduct of proceedings, 14 December 2012, ICC-01/04-01/06-2953, para. 54.

effective recognition and observance'.[49] The UDHR establishes the right to an effective remedy by stating in article 8 that 'everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by the law'.[50]

56. The obligation to repair is a duty for everyone who violates the victims' core human rights when participating in international crimes. During the eighth plenary session of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court ('Rome Conference'), the observer for the European Law Students' Association stressed that 'where a wrong existed, there must be a corresponding judicial remedy, as stated in the Universal Declaration of Human Rights […]'.[51]

(b) Universal and regional treaties on human rights

57. The human right to a remedy in relation to harm suffered as a result of crimes such as those under the jurisdiction of this Court, has been recognised in different international treaties at the international and regional level. For example, it is reflected in article 2(3) of the ICCPR (effective remedy for persons whose rights are violated);[52] article 39 of the Convention on the Rights of the Child (measures to promote recovery and reintegration);[53] articles 13 and 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('Torture Convention') (complaint, redress, and fair and adequate compensation);[54] article 6 of the Racial Discrimination Convention (effective protection and remedies);[55] article 2(c) of the Convention on the elimination of all forms of discrimination against women (effective protection through competent national tribunals and other public

[49] Preamble of the UDHR (emphasis added).
[50] Article 8 of the UDHR.
[51] United Nations, Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, 15 June-17 July 1998, A/CONF.183/13 (Vol. II) ('Summary records of the plenary meetings'), p. 120, para. 86.
[52] Article 2(3) of ICCPR.
[53] Article 39 of the Convention on the Rights of the Child.
[54] United Nations, General Assembly, articles 13, 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, Resolution 39/46 ('Torture Convention').
[55] United Nations, General Assembly, article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, Treaty Series 660 ('Racial Discrimination Convention').

institutions);[56] articles 13 and 16(4) of the Convention on the Rights of Persons with Disabilities (access to justice and measures to promote recovery, rehabilitation and reintegration);[57] articles 5(5) and 41 of the ECHR (compensation, reparation and just satisfaction);[58] and article 25(1) of the ACHR (right to simple, prompt effective recourse).[59] These instruments guarantee both the procedural right of effective access to justice and the substantive right to a remedy.[60] The human right to reparations has further been recognised under international human rights law.[61] This right has acquired a degree of recognition as a part of customary law.[62]

(c) United Nations Convention on the Rights of the Child

58. The UN Convention on the Rights of the Child is an instrument of particular relevance to the case at hand where the direct victims of the crimes for which Mr Lubanga was convicted are children. This treaty recognises that 'the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding'.[63] The convention sets forth the rights of every child, including the right to life, survival and development, protection from violence, abuse or neglect, education that enables them

[56] United Nations, General Assembly, article 2(c) of the Convention on the Elimination of all Forms of Discrimination Against Women, 18 December 1979, Treaty Series 1249 ('Convention on the Elimination of all Forms of Discrimination Against Women').
[57] United Nations, General Assembly, articles 13, 16 of the Convention on the Rights of Persons with Disabilities, 24 January 2007, A/RES/61/106 ('Convention on the Rights of Persons with Disabilities').
[58] Articles 5, 41 of the ECHR.
[59] Article 25(1) of the ACHR.
[60] D. Shelton, *Remedies in International Human Rights Law* (2015) ('Shelton'), p. 58 ('[m]ost texts guarantee both the procedural right of effective access to a fair hearing and the substantive right to a remedy').
[61] *See e.g.* articles 2(3), 3, 9(5) of the ICCPR; articles 13, 14 of the Torture Convention; article 6 of the Racial Discrimination Convention; article 39 of the Convention on the Rights of the Child; articles 5, 41 of the ECHR; articles 10, 25, 63(1) of the ACHR; article 2(c) of the Convention on the Elimination of all Forms of Discrimination Against Women; articles 13, 16 of the Convention on the Rights of Persons with Disabilities; article 19 of the Declaration on Enforced Disappearances. *See also* ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Dissenting Opinion of Judge Cançado Trindade, 3 February 2012, ICJ Reports 2012 ('Dissenting Opinion of Judge Cançado Trindade'), paras 51, 59.
[62] C. Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (2012) ('Evans'), p. 39 ('it appears reasonable to state that this right has acquired a degree of recognition as forming part of customary law').
[63] Preamble of the Convention on the Rights of the Child.

to fulfill their potential, to be raised by, or have a relationship with, their parents, and to express their opinions and be listened to.[64]

59. In its article 3, the UN Convention on the Rights of the Child consecrates the principle of the 'best interest of the child'. It is of prominent relevance to the case at hand the mandate set out in article 39 of the treaty which provides for the obligation to 'take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim', thereby repairing the harm suffered as a result of the atrocious crimes that entail gross human rights violations.

(d) United Nations 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

60. In 2005, the UN General Assembly adopted Resolution 60/147 containing 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 ('UN Basic Principles and Guidelines on the Right to Reparation'). They state that '[v]ictims should be treated with humanity and respect for their dignity and human rights', and include three remedies for gross violations of international human rights law: 'equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; [and] access to relevant information concerning violations and reparation mechanisms.'[65] Full and effective reparations require 'restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition'. [66]

61. Under the UN Basic Principles and Guidelines on the Right to Reparation, '[a] victim of a gross violation of international human rights law or a serious violation of international humanitarian law shall have equal access to an effective judicial remedy

[64] Articles 6(1), 7(1), 9(3), 12(1), 19(1), 28(1) of the Convention on the Rights of the Child.
[65] Principles VI-VII of the UN Basic Principles and Guidelines on the Right to Reparation, paras 10-11.
[66] Principle IX of the UN Basic Principles and Guidelines on the Right to Reparation, para. 18.

as provided for under international law'.[67] Groups of victims are also entitled to present claims and receive reparations.[68]

(e) United Nations Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups

62. Adopted by the United Nations Children's Fund ('UNICEF') in 2007, the Principles and Guidelines on Children Associated with Armed Forces or Armed Groups ('UN Paris Principles') are specially relevant in the case at hand. They establish that '[t]he unlawful recruitment or use of children is a violation of their rights'.[69] The UN Special Representative to the Secretary General for Children and Armed Conflict emphasised in his report 'that all children associated with parties to conflict and encountered in security operations should be treated primarily as victims rather than as security threats'.[70] He added that '[c]hildren who have been abducted, recruited, used and exposed to violence at an early age must not be doubly victimized.'[71] According to the UN Representative, children in armed conflicts should worry the entire international community since '[p]reventing violations against children affected by armed conflict should be a primary concern of the international community. Failing to assume this collective responsibility not only further endangers the boys and girls living in insecurity, but atrocities perpetrated against children may also amplify grievances between belligerent parties and reduce their ability to overcome conflict in a peaceful manner'.[72]

63. According to the UN Paris Principles, discrimination arises 'on the basis of sex, between vulnerable groups upon reintegration and between children who were associated with different armed forces or armed groups or based on social definitions

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[67] Principle VIII of the Basic Principles and Guidelines on the Right to Reparation, para. 12 ('[o]ther remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities, and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws').
[68] Principle VIII of the Basic Principles and Guidelines on the Right to Reparation, para. 13.
[69] UNICEF, The Paris Principles: Principles and Guidelines on Children Associated With Armed Forces or Armed Groups, February 2007 ('UN Paris Principles'), para. 3.11.
[70] United Nations, General Assembly, Report of the Special Representative of the Secretary-General for Children and Armed Conflict, 26 December 2018, A/HRC/40/49 ('2019 Special Representative's Report'), para. 17.
[71] 2019 Special Representative's Report, para. 17.
[72] United Nations, General Assembly, Report of the Special Representative of the Secretary-General for Children and Armed Conflict, 30 July 2018, A/73/278, para. 15.

such as ethnicity, religion, disability or caste'.[73] The Principles assert that children should not simply be viewed within the context of crimes allegedly committed while associated with armed forces or groups.[74] Rather, they should primarily be considered victims and thus treated 'in accordance with international law in a framework of restorative justice and social rehabilitation, consistent *with* international law'.[75] Moreover, children should be encouraged to participate in truth-seeking and reconciliation mechanisms. Their participation should be voluntary and with their informed consent, as well as the informed consent of their guardian.[76] Children's rights must be protected throughout the process and special procedures should be implemented to 'minimize greater susceptibility to distress'.[77]

3. Applicable principles under international human rights law relevant to reparation proceedings

(a) The *pro homine* principle

64. The *pro homine* principle is a core element of international human rights law. This principle is also known as the *pro persona* principle or the principle of favourability to the person. According to this, the law must always 'be interpreted and applied in a way that most fully and adequately protects human beings'.[78] A commentator defines this principle as 'a fundamental criterion [that] upholds the nature of human rights in a way that extensively interprets the rules that consecrate or expand them and restricts the ones limit or restrict human rights. In this way, the principle *pro person* concludes that the immediate and unconditional enforceability of human rights is the rule and conditioning the exception.'[79] This 'principle is consistent with the fundamental objective of human rights law, *i.e.*, to always favor man'.[80]

65. The *pro homine* principle is premised on the idea that 'the dignity of the individual is of primary concern when interpreting the rights specified in international

[73] UN Paris Principles, para. 3.1.
[74] UN Paris Principles, para. 3.6.
[75] UN Paris Principles, para. 3.6.
[76] UN Paris Principles, para. 3.8.
[77] UN Paris Principles, para. 3.8.
[78] H. Victor Condä, *A Handbook of International Human Rights Terminology* (1999), p. 207.
[79] A. Melgar Rimachi, 'Is the Pro Homine Principle still relevant under the American Convention on Human Rights? Applying the most favourable interpretation for man in domestic courts' in 7 *Ave Maria International Law Journal* 22 (2018) ('A. Melgar Rachidi'), p. 43.
[80] A. Melgar Rimachi, p. 44

human rights law'.[81] In the framework of the ICCPR, members of the Human Rights Committee have noted that the interpretation of a treaty 'should be performed on the basis of the *pro persona* principle', which 'creates greater safeguards for the rights of victims of human rights violations and sends a signal to States regarding their future conduct'.[82]

66. Similarly, the *pro homine* principle is generally applied within the framework of the Inter-American human rights system.[83] The Inter-American Court of Human Rights ('IACtHR') has made extensive use of this principle when interpreting and applying the ACHR.[84] In doing so, the IACtHR has required that its applicable law 'be interpreted in favour of the individual, who is the object of international protection, as long as such an interpretation does not result in a modification of the system' based on the *pro homine* principle.[85]

67. This principle is in keeping with the dynamic evolution of the *corpus juris* of international human rights law. According to the IACtHR, '[t]he *corpus juris* of international human rights law comprises a set of international instruments of varied content and juridical effects (treaties, conventions, resolutions and declarations)', whose 'dynamic evolution has had a positive impact on international law'.[86] It has stressed that its judges 'must adopt the proper approach to consider this question in the context of the evolution of the fundamental rights of the human person in

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[81] J. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2013), p. 12. ('J. Pasqualucci')

[82] United Nations, Human Rights Committee, *José Alejandro Campos Cifuentes v. Chile*, 'Individual opinion of Committee members Ms. Helen Keller and Mr. Fabián Salvioli (dissenting)', 28 July 2009, CCPR/C/96/D/1536/2006, para. 11. *See also* S. Wheatley, *The Idea of International Human Rights Law* (2019), chapter 4.

[83] L. Burgorgue-Larsen, *The Inter-American Court of Human Rights* (2011), p. 120 ('[t]he general trend here, which is approved of by the Commission, is to apply the *pro homine* principle or rather the *pro victima* principle, which leads to a more flexible reading of the conditions to be met so that alleged "collective" victims can be recognized and participate in proceedings').

[84] IACtHR, *Atala Riffo and daughters v. Chile*, 'Judgment (Merits, Reparations, and Costs)', 24 February 2012, Series C No. 239 ('*Atala Riffo and daughters v. Chile*'), para. 84 ; IACtHR, *Mapiripán Massacre v. Colombia*, 'Judgment (Merits, Reparations, and Costs)', 15 September 2005, Series C No. 134 ('*Mapiripán Massacre v. Colombia*'), para. 106; IACtHR, *Ricardo Canese v. Paraguay*, 'Judgment (Merits, Reparations, and Costs)', 31 August 2004, Series C No. 111 ('*Ricardo Canese v. Paraguay*'), para. 181.

[85] IACtHR, *In the matter of Viviana Gallardo et al*, Advisory Opinion, 15 July 1981, Series A No. 101, para. 16.

[86] IACtHR, The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion, 1 October 1999, Series A No. 16 ('*Advisory Opinion OC-16/99*'), para. 115.

contemporary international law'.[87] The *pro homine* principle is in line with this, by enabling interpretations in accordance with the commitment of the international community to protect the interests of the person whose human rights have been violated, by preferring the interpretation most favourable to the restitution of the rights of the victims.

68. The *pro homine* principle is not an abstract or philosophical idea; it is rather a commitment of the international community and a duty imposed on judicial operators and practitioners in the field of human rights and, consequently in the field or reparations for atrocious crimes that violate core human rights.

(b) The principle of effectiveness

69. The principle of effectiveness or *effet utile* has been described by the doctrine as 'an overarching approach to human rights treaty interpretation'.[88] According to this principle, 'the interpretation of provisions should have real effect in terms of the concrete and actual lives of individuals who are recognized right-holders of human rights treaty law'.[89] The importance of this principle lies in the fact 'that interpretations that are devoid of actual effect for human rights protections do not cohere with good faith interpretations of the wording and context of human rights treaties in the light of their object and purpose'.[90] Both the European Court of Human Rights ('ECtHR')[91] and the IACtHR[92] have recognized and applied the principle of

[87] *Advisory Opinion OC-16/99*, para. 115.
[88] B. Cali, 'Specialized Rules of Treaty Interpretation: Human Rights' in D. Hollis (ed.) *The Oxford Guide to Treaties* (2012) ('Cali'), p. 538.
[89] Cali, p. 539.
[90] Cali, p. 538.
[91] ECtHR, Grand Chamber, *Loizidou v. Turkey*, 'Judgment', 23 March 1995, Application No. 15318/89 ('*Loizidou v. Turkey*'), para. 70 (there 'are provisions which are essential to the effectiveness of the Convention system since they delineate the responsibility of the Commission and Court "to ensure the observance of the engagements undertaken by the High Contracting Parties"', and '[i]n interpreting these key provisions it must have regard to the special character of the Convention as a treaty for the collective enforcement of human rights and fundamental freedoms'). *See also* ECtHR, Grand Chamber, *Demir and Baykara v. Turkey*, 'Judgment', 12 November 2008, Application No. 34503/97 ('*Demir and Baykara v. Turkey*'), para. 66 ('[s]ince the Convention is first and foremost a system for the protection of human rights, the Court must interpret and apply it in a manner which renders its rights practical and effective, not theoretical and illusory. The Convention must also be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions').
[92] IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, 'Judgment', 17 June 2005, Series C No. 125 ('*Yakye Axa Indigenous Community v. Paraguay*'), para. 101 ('[d]omestic legal provisions for this purpose must be effective (principle of the *effet utile*), and this means that the State must take such measures as may be necessary to actually comply with the provisions of the Convention'); *Ricardo Canese v. Paraguay*, para. 178 (the IACtHR noted that retroactivity should be interpreted in good faith and in accordance with the ordinary meaning of the treaty's terms. It should also be viewed in light of

effet utile. The principle applies not only to substantive provisions but also to procedural rules.[93]

(c) The principle of evolving interpretation

70. The principle of evolving interpretation is based on the understanding that 'treaties are living instruments, whose interpretation must go hand in hand with evolving times and current living conditions'.[94] The IACtHR has determined that 'this principle is consistent with [its] general rules of interpretation', and 'those established in the Vienna Convention on the Law of Treaties'.[95] Similarly, the ECtHR has applied this principle in different cases, indicating that the ECHR 'is a living instrument […] which must be interpreted in the light of present-day conditions'.[96] It has further observed that 'these provisions cannot be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago'.[97] Likewise, the Committee on the Elimination of Racial Discrimination has also applied this

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ACHR's object and purpose to effectively protect the individual, and 'by an evolving interpretation of the international instruments for the protection of human rights'); IACtHR, *Serrano Cruz Sisters v. El Salvador*, Separate Opinion of Judge A.A. Cançado Trindade, 1 March 2005, Series C No. 120 ('*Serrano Cruz Sisters v. El Salvador*'), para. 64 ('[b]y virtue of the principle *ut res magis valeat quam pereat*, which corresponds to the so-called *effet utile* (sometimes called the effectiveness principle), which has wide support in case law, the States Parties to human rights treaties must ensure that treaty provisions have the appropriate effects within their respective domestic legal systems').

[93] *Mapiripán Massacre v. Colombia*, para. 105 (the principle 'applies not only to the substantive provisions of the human rights treaties (that is, those provisions that state the rights protected), but also to procedural rules'). *See also* ECtHR, Plenary, *Klass and others v. Germany*, 'Judgment', 6 September 1978, Application No. 5029/71, para. 34 ('[t]he procedural provisions of the Convention must, in view of the fact that the Convention and its institutions were set up to protect the individual, be applied in a manner which serves to make the system of individual applications efficacious').

[94] *Atala Riffo and daughters v. Chile*, para. 83; *Mapiripán Massacre v. Colombia*, para. 106; *Yakye Axa Indigenous Community v. Paraguay*, para. 125; *Demir and Baykara v. Turkey*, para. 68.

[95] *Atala Riffo and daughters v. Chile*, para. 83; *Mapiripán Massacre v. Colombia*, para. 106; *Yakye Axa Indigenous Community v. Paraguay*, paras 125-127 ('[…] the Court deems it useful and appropriate to resort to other international treaties, aside from the American Convention […] to interpret its provisions in accordance with the evolution of the inter-American system, taking into account related developments in International Human Rights Law'). *See also Advisory Opinion OC-16/99*, paras 114-115 ('[t]he *corpus juris* of international human rights law comprises a set of international instruments of varied content and juridical effects (treaties, conventions, resolutions and declarations). Its dynamic evolution has had a positive impact on international law in affirming and building up the latter's faculty for regulating relations between States and the human beings within their respective jurisdictions. This Court, therefore, must adopt the proper approach to consider this question in the context of the evolution of the fundamental rights of the human person in contemporary international law').

[96] *See* ECtHR, Chamber, *Tyrer v. The United Kingdom*, 'Judgment', 25 April 1978, Application No. 5856/72, para. 31; ECtHR, Plenary, *Marckx v. Belgium*, 'Judgment', 13 June 1979, Application No. 6833/74, para. 41 ('[i]n the instant case, the Court cannot but be struck by the fact that the domestic law of the great majority of the member States of the Council of Europe has evolved and is continuing to evolve, in company with the relevant international instruments, towards full juridical recognition of the maxim "mater semper certa est"'). *See also Loizidou v. Turkey*, para. 71.

[97] *Loizidou v. Turkey*, para. 71.

principle, noting that 'the Convention [on the Elimination of All Forms of Racial Discrimination], as a living instrument, must be interpreted and applied taking into the circumstances of contemporary society'.[98] The ICJ has also affirmed that international law 'cannot be excessively rigid without failing to allow for the movement of life'.[99] Therefore, the Rome Statute ought to be interpreted also according to evolving situations or circumstances of current times, especially in the field of reparations.

(d) Principle of indivisibility and interdependence of human rights

71. The indivisible and interconnected nature of human rights means that states must guarantee civil, political, economic, social and cultural rights for the well-being of their citizens. Indivisibility and interconnectedness dictate that 'no human right can be fully realized without fully realizing all other human rights'.[100] Rights do not exist in a hierarchy.[101] Rather, they are all 'inextricably bound and are fundamental to the inherent dignity of the person'.[102]

72. The UN General Assembly officially endorsed the indivisibility and interdependence of human rights in the 1993 Vienna Declaration and Programme of Action. It noted that '[a]ll human rights are universal, indivisible and interdependent and interrelated' and that 'the international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis'.[103] Regardless of domestic and regional particularities, and historical, cultural and religious backgrounds, and political, economic and cultural systems, all

[98] United Nations, Committee on the Elimination of Racial Discrimination, *Stephen Hagan v. Australia*, 20 March 2003, U.N. Doc. CERD/C/62/D/26/2002, pp. 81-82, para. 7.3.
[99] ICJ, *Hungary v. Slovakia (Case Concerning the Gabcikovo-Nagymaros Project*, Separate Opinion of Judge Bedjaoui, 25 September 1997, ICJ Reports 7, para. 16. *See also* ICJ, *Case Concerning Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, ICJ Reports 1971, para. 53 ('[…] the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law […] Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation').
[100] Nickel, 'Rethinking Indivisibility: Towards a Theory of Supporting Relations Between Human Rights' in *30 Human rights Quarterly 984* (2008) ('Nickel'), p. 984.
[101] Nickel, p. 984. *See also*, United Nations, International Conference on Human Rights, article 13 of the Proclamation of Tehran, 22 April to 13 May 1968, U.N. Doc. A/CONF.32/41.
[102] United Nations, preamble of the Charter of the United Nations, 24 October 1945, 1 UNTS XVI UN; article 1 of the UDHR; V. Hamlyn, 'The Indivisibility of Human Rights: Economic, social and cultural rights and the European Convention on Human Rights' in *40 Bracton Law Journal 13* (2008).
[103] World Conference on Human Rights, article 5 of the Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23 ('Vienna Declaration').

human rights and fundamental freedoms shall be promoted and respected.[104] Inter-American organs have consistently developed jurisprudence under the indivisibility and interdependence of rights approach.[105]

(e) Principle of equality and non-discrimination

73. The UDHR stipulates that '[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law'.[106] However, the principle of equality and non-discrimination does not mean that all distinctions between people are illegal under international law. Some differentiations are legitimate and hence lawful provided that they (i) pursue a legitimate aim and (ii) are reasonable in light of their legitimate aim.[107] When applying this approach to reparations within the context of atrocious crimes that constitute serious human rights violations, the form or amount of reparations may reasonably vary by person so long as the reparations pursue the legitimate aim of adequately, effectively, and appropriately repairing the victims' harm. It should be noted that fairness and feasibility must be emphasized and every measure taken to avoid political favouritism and exclusion.[108]

4. International human rights jurisprudence

74. The role of the jurisprudence produced by regional human rights courts and universal treaty bodies is the correct interpretation of international human rights in all their broad dimension. Regarding reparations proceedings at this Court, such jurisprudence serves as guidance and is therefore remarkably important. This is because the interpretation of these courts and committees provides guidance on the content of the internationally recognised human rights with which the Court's law must be consistent, according to articles 21(3) and 75(6) of the Rome Statute.

[104] Article 5 of the Vienna Declaration.
[105] M. Feria Tinta, *Justiciability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions* in 29 *Human Rights Quarterly* 431 (2007), p. 437 ('[i]t is argued in that respect that the Inter-American organs have consistently developed jurisprudence following what may be called "the indivisibility and interdependence of rights approach') (citation omitted).
[106] Article 7 of the UDHR. *See also* article 26 of the ICCPR ('[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status').
[107] UNHCHR, 'Chapter 13: The right to equality and non-discrimination in the administration of justice' in *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (2001), p. 655.
[108] International Center for Transitional Justice, 'Reparations in Theory and Practice' (2007), p. 7.

Whereas article 21(3) requires the interpretation and application of the Rome Statute to be consistent with such rights, article 75(6) incorporates them into the reparations regime defined in article 75(1) to (5) by stating that the regime shall not 'be interpreted as prejudicing the rights of victims under national or international law'.

75. For instance, the IACtHR observed in the landmark case of *Velásquez Rodríguez v. Honduras* that '[r]eparation of harm brought about by the violation of an international obligation consists in full restitution *(restitutio in integrum*), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm'.[109] In the *Cotton Field Case*, the IACtHR added that *restitutio in integrum* 'entails the re-establishment of the previous situation and the elimination of the effects produced by the violation, as well as the payment of compensation for the damage caused'.[110]

5. Preliminary conclusion

76. In the reparations proceedings for atrocious crimes, due to the specific nature of the crimes, international human rights principles, standards and law converge and apply, especially the *pro homine* principle and likewise the interpretations made by the specialised jurisprudence. However, the abovementioned instruments and principles only constitute a sample of their broad spectrum.

D. The role of the TFV *vis à vis* the Court

77. In the case at hand, there seems to be an apparent confusion about the different roles of the Trial Chamber and the TFV. This has been notable especially throughout the implementation process before the Trial Chamber and by some of the actions undertaken by the TFV. Even the submissions of the victims seem to assume that the TFV is the organ charged with making final rulings concerning the eligibility of victims and the determination of their harm. It is due to this confusion that this

[109] *Velásquez Rodríguez v. Honduras*, para. 26.
[110] IACtHR, *González et al. ("Cotton Field") v. Mexico*, 'Judgment (Preliminary Objection, Merits, Reparations, and Costs)', 16 November 2009, Series C No. 205 ('*González et al. ("Cotton Field") v. Mexico*'), para. 450. *See also* United Nations, Committee Against Torture, *Kepa Urra Gurídi v. Spain*, 24 May 2005, CAT/C/34/D/212/2002 ('*Kepa Urra Gurídi v. Spain*'), para 6.8 (noting that reparations should not be limited to compensation, and 'that compensation should cover all the damages suffered by the victim, which includes, among other measures, restitution, compensation, and rehabilitation of the victim, as well as measures to guarantee the non-repetition of the violations, always bearing in mind the circumstances of each case').

Opinion finds it necessary to clarify the role ascribed to the TFV under the legal framework of the Court.

78. Under the Rome Statute system and legal framework, the TFV is by nature an administrative entity created by and linked to the ASP to provide direct help to victims of crimes under this Court's jurisdiction.[111] The functions and responsibilities of the TFV are set out in the Rome Statute, the Rules, and the Regulations of the TFV.[112] From this legal framework, it is clear that the TFV enjoys two differentiated roles. The first is a complementary and supportive role to the Trial Chamber's functions in judicial reparation proceedings and is linked to a reparations order. The second is the assistance mandate role designed to directly benefit victims by providing them with physical or psychological rehabilitation and material support, and is not linked to a concrete reparations order. While the TFV's acts under its complementary and supportive role in reparation proceedings are always subject to judicial control and rulings, its acts under the assistance mandate role are only subject to the decisions of the Board of Directors.

1. The supporting and complementary role of the TFV in judicial reparations proceedings

79. In judicial reparation proceedings, trial chambers are mandated to determine the scope and extent of harm and the scope of victimhood, pursuant to article 75(1) of the Rome Statute. They ultimately issue reparation orders against a convicted person pursuant to article 75(2) of the Rome Statute and rule 97(1) of the Rules. Prior to making the reparation order, a trial chamber may seek submissions from the TFV on any issues that may assist the chamber in its determination under article 75 of the Rome Statute or its decision to award collective and/or individual reparations under rule 97 of the Rules.[113] This may include assistance from the TFV, as well as from the Registry and experts, in the assessment of eligible victims and the determination of harm.[114]

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[111] *See* article 79(3) of the Rome Statute (explaining that the TFV is 'managed according to the criteria to be determined by the Assembly of States Parties').
[112] *See e.g.*, rules 98(2)-(3) of the Rules and regulations 59-72 of the Regulations of the TFV.
[113] *See* *Katanga* Judgment on Reparations, para. 72 ('[i]n assessing the cost of repair, the Trial Chamber may seek the assistance of experts and other bodies, including the TFV, before making a final ruling thereon').
[114] *See* rule 97(2) of the Rules.

80. In judicial reparation proceedings, the TFV has a complementary and supportive role and carries out two main responsibilities: (i) the Court may request the TFV to complement a reparation award subject to a reparation order,[115] and (ii) under article 75(2) of the Rome Statute and rule 98(3) of the Rules, a trial chamber may make an award through the TFV where the number of the victims and the scope, forms, and modalities of reparations make a collective award more appropriate.[116]

81. The supportive and complementary role of the TFV is meant to enforce the Trial Chamber's order for reparations in accordance with the Regulations of the TFV. For instance, under regulation 54 of the Regulations of the TFV, the TFV's Secretariat 'shall prepare a draft plan to *implement the order of the Court*' (emphasis added).[117] Regulation 55 indicates the factors to be considered by the TFV in determining the nature and size of the awards '*[s]ubject to the order of the Court*' (emphasis added).[118] Regulation 56 provides for the possibility of the TFV complementing the award for reparations.[119] In regards to the implementation plan, regulation 57 provides that the TFV shall submit to the relevant Chamber, 'the draft implementation plan for approval and shall consult the relevant Chamber, as appropriate, on any questions that arise in connection with the implementation of the award'.[120] Furthermore, regulation 58 stipulates that the TFV 'shall provide updates to the relevant Chamber on progress in the implementation of the award, in accordance with the Chamber's order' and that the TFV 'shall submit a final narrative and financial report to the relevant Chamber' at the end of the implementation period.[121]

82. Accordingly, in implementing any of the orders of the Court the TFV is subject to the final ruling of the trial chamber. Consequently, the TFV's eligibility assessment of potentially eligible victims during the implementation stage is subject to judicial review, approval and rulings.[122] This is in line with international human rights jurisprudence that provides for judicial review of the actions of administrative entities.

[115] Regulation 56 of the Regulations of the TFV.
[116] The TFV may also be seized pursuant to rule 98(4) of the Rules, but this is not discussed further here.
[117] Regulation 54 of the Regulations of the TFV
[118] Regulation 55 of the Regulations of the TFV
[119] Regulation 56 of the Regulations of the TFV
[120] Regulation 57 of the Regulations of the TFV.
[121] Regulation 58 of the Regulations of the TFV.
[122] Common Judgment, paras 163-171.

Referring to a case where the victim challenged an administrative decision, the ECtHR has found that a 'court must have the power to quash the impugned decision, and either take a fresh decision or remit the case to the same body or a different body'.[123] The final judicial rulings are subject to appeal by the parties.

2. The assistance mandate role - not linked to judicial reparations

83. Under its assistance mandate, the TFV may use funds other than those collected from awards for reparations, fines and forfeitures to directly help victims of crimes under the jurisdiction of this Court. The TFV uses voluntary contributions from donors to provide victims and their families with physical or psychological rehabilitation, as well as material support.[124] The assistance mandate of the TFV is administered after the Board of Directors has followed the procedure under regulation 50(a) of the Regulations of the TFV. It is not linked to any judicial order for reparations.

84. The TFV may use its resources for assistance and directly help victims and their families who have suffered harm separately from, and prior to, a conviction by the Court.[125] In this respect, the TFV may provide 'assistance' that goes beyond the scope of the charges in any one particular case.[126] Indeed, the TFV administers programmes in relation to grave crimes, without the need of judicial proceedings and regardless of whether or not a conviction decision has been entered, including situations where there have been acquittals.

85. In this regard, the TFV has administered programmes, as in the Uganda situation, benefitting *inter alia* survivors of sexual and gender-based violence, former

[123] ECtHR, Grand Chamber, *Ramos Nunes de Carvalho e SÁ v. Portugal*, 'Judgment', 6 November 2018, Application Nos. 55391/13, 57728/13 and 74041/13, para. 184.
[124] Chapter 1, section III of the Regulations of the TFV, para. 48 ('[o]ther resources of the Trust Fund shall be used to benefit victims of crimes as defined in rule 85 of the Rules of Procedure and Evidence, and, where natural persons are concerned, their families, who have suffered physical, psychological and/or material harm as a result of these crimes'). *See generally* chapter II of the Regulations of the Trust Fund for Victims.
[125] Regulations 47-48, 50(a) of the Regulations of the TFV; Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Public Redacted Version of ICC-01/04-01/06-2803-Conf-Exp-Trust Fund for Victims' First Report on Reparations, 1 September 2011, para 121; Assembly of State Parties, Report to the Assembly of States Parties on the projects and the activities of the Board of Directors of the Trust Fund for Victims for the period 1 July 2017 to 30 June 2018, 23 July 2018, ICC-ASP/17/14, p 10.
[126] *See Lubanga* Appeal Judgment on Reparations, para. 215 ('[t]he meaningfulness of reparation programmes with respect to a community may depend on inclusion of all its members, irrespective of their link with the crimes for which Mr Lubanga was found guilty').

(male and female) child soldiers, girls formerly associated with armed groups, disabled persons and amputees, disfigured and tortured persons, and other vulnerable children and young people, including orphans.[127] In the *Bemba* case, the TFV announced the acceleration of its assistance programme in the wake of the accused's acquittal.[128] The TFV said that it would consider all of the harms suffered by victims, regardless of the acquittal. In fact, such assistance will even reach victims who were not admitted to participate in the *Bemba* case, but who nonetheless suffered harm as a result of crimes under the jurisdiction of the Court in CAR during the relevant dates.[129]

86. The assistance mandate is distinct to the role assigned by the Rome Statute to the TFV in reparation proceedings. It is not linked to a conviction. It does not entail reparations. The key difference between the assistance and reparations mandates is that reparations are linked to accountability, arising from individual criminal responsibility of a convicted person, whereas the assistance mandate is not.[130] Thus the Court's judicial reparations and the TFV's assistance may be complementary, but never substitutable.

3. Preliminary conclusion

87. The TFV is an administrative entity separate from the Court. Under the Rome Statute system, it has two differentiated roles: (1) a complementary and supportive role in judicial reparation proceedings, and (2) an assistance role that is not linked to judicial proceedings or an order for reparations. In performing the first role, the actions of the TFV are always subject to judicial review, control and rulings. In the second role, the acts of the TFV under its assistance mandate are only subject to the determinations of the Board of Directors. The judicial process of reparations and the assistance mandate of the TFV are separate. It may be possible that in a concrete case,

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[127] TFV, *Annual Report 2016* (2016).
[128] TFV, Statement from the Trust Fund for Victims' Board of Directors, 13 June 2018.
[129] Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Final decision on the reparations proceedings, 3 August 2018, ICC-01/05-01/08-3653, para. 6.
[130] Rule 98 of the Rules; Assembly of States Parties, Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, 9 September 2002, ICC-ASP/1/Res.6. *See also* A. Dutton and F. Ni Aoliin, 'Between Reparations and Repair: Assessing the Work of the ICC Trust Fund for Victims Under Its Assistance Mandate' in *19 Chicago Journal of International Law 490* (2019), p. 494 ('[t]he Trust Fund has a dual mandate: first, to deliver general assistance to conflict victims without prejudice to ongoing proceedings of the Court, and second, to enforce the reparations orders of the Court').

given the complex nature of the damage caused by the crimes and the massive nature of criminality, both roles could coincide. However, the acts performed further to each role are governed by the specific applicable legal rules.

88. In the case at hand, the role performed by the TFV in the process of screening and assessment of eligibility of the victims was supportive and complementary to the role and function of the Trial Chamber. Therefore, such acts were subject to judicial control. As such, the Trial Chamber did not err in making the final determination of eligibility. Accordingly, the arguments advanced in this regard by Victims V01 are without merit.

E. Chapter conclusions

89. Reparations proceedings are judicial in nature and are always linked to a criminal conviction. In light of the mandate imposed by article 21(3) of the Rome Statute, this Opinion maintains that international human rights law, standards, guidelines and principles must be considered and applied in reparations proceedings given that the crimes under the jurisdiction of this Court entail gross human rights violations.

90. Given the judicial nature of reparations proceedings, the convicted person enjoys all of his or her procedural and human rights throughout the proceedings, which can be exercised in accordance with the provisions set out in the Rome Statute.

91. Because of the judicial nature of reparations proceedings, the TFV fulfils a complementary and supportive role whereby it: (i) complements the award of reparations, and (ii) implements the order for collective reparations. In carrying out these activities, it is always subject to judicial review, control and rulings. Under the assistance mandate, the TFV provides direct help to victims of atrocious crimes under the jurisdiction of this Court and is not linked to a reparation order. It is only subject to the determination of its Board of Directors.

IV. *SECOND ISSUE:* THE SCOPE AND EXTENT OF HARM AND DAMAGES, AND THE SCOPE OF VICTIMHOOD TO BE REPAIRED

92. This issue relates to Mr Lubanga's first and second grounds of appeal, and Victims V01's second and third grounds of appeal. Under his first ground of appeal,

Mr Lubanga argues that the Trial Chamber erred by making an award for reparations 'on its own motion' to, or in respect of, the unidentified victims who had not made a request for reparations, without having established that there were 'exceptional circumstances'.[131] In his second ground of appeal, Mr Lubanga argues that the Trial Chamber found a number of victims eligible for reparations on the basis of accounts that, despite being uncorroborated, it considered to be 'coherent and credible'.[132] In their second ground of appeal, Victims V01 aver that the Trial Chamber made an error of law by assessing eligibility for collective reparations on the basis of different procedures.[133] Under the third ground of appeal, Victims V01 submit that the Trial Chamber rejected the requests of some victims for having provided insufficient detail in relation to some factors.[134]

93. This Opinion notes a misappreciation of the scope and extent of harm and the victims in Mr Lubanga's first ground of appeal. Likewise, from Mr Lubanga's second ground of appeal, and Victims V01's second and third grounds of appeal, in part, this Opinion notes some misunderstandings and disagreements on the evidentiary criteria regarding the burden of proof to determine the eligibility of victims. Specifically, this Opinion finds it necessary to expand on the applicable principles and standards to assess the supporting documentation and evidence that victims of mass, atrocious criminality are able to submit to prove their claims, as well as the burden of proof they should be required to bear and the institutional approach that this Court can take, with the assistance of experts, in determining the scope and extent of harm and victimhood, as well as other evidentiary aspects. To that end, this Opinion will address the following matters:

a. What are the scope and extent of the victims' damages and harm, and how to prove them?

b. What is the scope of victimhood to be repaired in the case at hand?

c. Matters of evidence and burden of proof.

[131] Mr Lubanga's Appeal Brief, paras 20-28.
[132] Mr Lubanga's Appeal Brief, para. 53.
[133] Victims V01's Submissions Following the Appeals Chamber's Questions, para. 19.
[134] Victims V01's Appeal Brief, para. 46.

94. The Common Judgment found, *inter alia*, that 'the situation of indirect victims in this case must be addressed in an appropriate manner, again appreciating the difference in needs that such victims have, as they most likely require reparations that differ from those required for direct victims'.[135] It further held that '[i]t is also important that, in any eligibility assessment for reparations programmes, appropriate questions are posed enabling indirect victims to be fairly assessed for participation in those programmes, and not requiring them to have knowledge of events or information that they could not reasonably be expected to have'.[136] The Common Judgment recalled that a trial chamber should find the scope of the harm in 'the decision on conviction, sentencing decision, submissions by the parties or *amici curiae*, expert reports and the applications by the victims for reparations'.[137] While this Opinion agrees with these findings, it considers it necessary to further elaborate on the issues underlying them as identified above.

A. What are the harm and damages to be repaired in atrocious crimes?

1. What are the harm and damages to repair?

95. As a result of the commission of the egregious crimes under the jurisdiction of this Court, the harm and damages caused are complex. On one hand, the commission of an atrocious crime affects the public interest protected by the prohibition of the criminal offence. Such public interest is twofold: (i) the international public interest to punish the infringement of the criminal provision; and (ii) the international public interest to protect the legal entitlements of the victims object of the criminal offence. Due to the manner in which these crimes are committed and the fact that they are prone to affect human dignity, atrocious crimes cause other important harm and damages. As stated above, those crimes entail serious human rights violations and therefore cause harm and damages to core internationally recognised human rights. The commission of an atrocious crime triggers the obligation of the convicted person to repair the damage caused in all its complexity.[138]

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[135] Common Judgment, para. 39.
[136] Common Judgment, para. 39.
[137] Common Judgment, para. 78, referring to *Katanga* Judgment on Reparations, para. 70.
[138] *Second Treatise of Government*, section 10 (although not necessarily in the context of atrocious crimes, John Locke similarly wrote: '[b]esides the crime which consists in violating the law, and varying from the right rule of reason, whereby a man so far becomes degenerate, and declares himself to quit the principles of human nature, and to be a noxious creature, there is commonly injury done to

96. Article 75(1) of the Rome Statute provides that what must be repaired is the damage, loss and injury. In setting out the definition of a victim, rule 85 stipulates that victims are persons 'who have suffered harm' and principle 8 of the UN Principles explains that 'harm, include[es] physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights'.

97. From the viewpoint of criminal and civil law, there are two types of damages to be repaired: (1) physical or pecuniary damages comprised of actual damage (*damnum emergens*) and loss of future income (*lucrum cessans*) and (2) non-pecuniary damages, which encompass, *inter alia*, moral damages or damages for pain and suffering. In the case of the commission of atrocious crimes, the damages caused by serious violations of human rights must be repaired in light of the principle of *restitutio in integrum*, as it will be explained in Chapter V of this Opinion.[139]

98. Bearing in mind the obligation to consider and apply international human rights in reparations proceedings before this Court, this Opinion recalls that the physical or pecuniary damage have been defined by the IACtHR as 'the loss or detriment to the income of the victims, the expenses incurred due to the facts and the pecuniary consequences that are causally linked to the facts of the *sub judice* case'.[140] Pecuniary damages account for damages that can be appreciated physically, *i.e.* damages to a person's physical integrity and property. The IACtHR has indicated that in order to repair pecuniary damages, it is necessary to 'set a compensatory amount that will seek to compensate for the patrimonial consequences of the violations found'.[141] Actual damages *(damnum emergens*) account for every monetary loss on the assets or

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some person or other, and some other man receives damage by his transgression: in which case he who hath received any damage, has, besides the right of punishment common to him with other men, a particular right to seek reparation from him that has done it: and any other person, who finds it just, may also join with him that is injured, and assist him in recovering from the offender so much as may make satisfaction for the harm he has suffered').

[139] *See infra* Section III.

[140] *See* IACtHR, *Juan Humberto Sánchez v. Honduras*, 'Judgment (Preliminary Objections, Merits, Reparations, and Costs)', 7 June 2003, Series C No. 99, para. 162 ('[t]his Court will now determine […] the pecuniary damage, which involves the loss or detriment to the income of the victims, the expenses incurred due to the facts and the pecuniary consequences that are causally linked to the facts of the *sub judice* case, for which it will set a compensatory amount that will seek to compensate for the patrimonial consequences of the violations found in the instant Judgment').

[141] *Juan Humberto Sánchez v. Honduras*, para. 162.

property of a victim resulting from a violation.[142] Loss of future income *(lucrum cessans*), on the other hand, is understood as the future earnings that the victim ceases to gain as a result of the violation.[143] It is based on the present value of the victim's expected lifetime earnings, minus projected expenses, had he or she lived.[144]

99. With respect to non-pecuniary damages, human rights jurisprudence notes that they 'can include […] the suffering and affliction caused to the direct victims and their close relations, the detriment to the individuals' very significant values, as well as non-pecuniary alterations to the conditions of existence of the victim or the victim's family'.[145] Moral damages or damages for the pain and suffering refer to the sadness and psychological pain felt by the wronged person as consequence of the violation. Those damages are presumed for the next of kin of the direct victim.[146] According to the IACtHR, successors of the direct victim do not have the burden to prove pain and suffering since it is presumed that such damages were caused by the death of the victim and 'the burden of proof is on the other party to show that such damages do not exist'.[147] Thus, as developed by the jurisprudence of the IACtHR, in

[142] IACtHR, *Cantoral Benavides v. Peru*, 'Judgment (Reparations and Costs)', 3 December 2001, Series C No. 88 ('*Cantoral Benavides v. Peru*'), para. 51 (providing examples of pecuniary damages); *Juan Humberto Sánchez v. Honduras*, para. 166 (providing examples of pecuniary damages).
[143] IACtHR, *Bámaca-Velásquez v. Guatemala*, 'Judgment (Reparations and Costs)', 22 February 2002, Series C No. 91, para. 54 ('[t]his Court has maintained in its case law that compensation should be granted for detriment to a victim of a human rights violation who, during a given period, was unable to work, whether due to actions or omissions by agents of the State'); *Cantoral Benavides v. Peru*, para. 49 ('[t]he *lucrum cessans* will be figured on the basis of 12 monthly paychecks per year, plus the corresponding bonuses, in keeping with Peruvian norms. The value of the resulting amount must be brought current to its value as of the date of the Judgment').
[144] *See e.g.*, IACtHR, *El Amparo v. Venezuela*, 'Judgment (Reparations and Costs)', 14 September 1996, Series C No. 28 (*El Amparo v. Venezuela*), para. 28 ('[T]he Court calculated that the indemnity to be granted to each of the victims or their next of kin depended on their age at the time of death and the years remaining before they would have reached the age at which normal life expectancy is estimated in Venezuela, or the time during which the two survivors remained unemployed. […] Once the calculation was made, 25 percent was deducted for personal expenses, as in other cases. To this amount was added the interest accruing from the date of the events up to the present.').
[145] IACtHR, *Myrna Mack Chang v. Guatemala*, 'Judgment (Merits, Reparations and Costs)', 25 November 2003, Series C No. 101 ('*Myrna Mack Chang v. Guatemala*'), para. 255. *See also* IACtHR, *Bulacio v. Argentina*, 'Judgment (Merits, Reparations and Costs)', 18 September 2003, Series C No. 100 ('*Bulacio v. Argentina*'), para. 90 ('[n]on-pecuniary damage can include suffering and distress caused to the direct victims and to their next of kin, and detriment to very significant values of persons, such as non-pecuniary alterations in the conditions of existence of the victim or the victim's family').
[146] IACtHR, *Aloeboetoe et al. v. Suriname*, 'Judgment (Reparations and Costs)', 10 September 1993, Series C No. 15 ('*Aloeboetoe et al. v. Suriname*'), para. 54 ('[i]t is for this reason that national jurisprudence generally accepts that the right to apply for compensation for the death of a person passes to the survivors affected by that death').
[147] *Aloeboetoe et al. v. Suriname*, para. 54 ('[t]he damages suffered by the victims up to the time of their death entitle them to compensation. That right to compensation is transmitted to their heirs by succession').

cases of violations of human rights, other considerations for the burden of proof apply than in common civil claims for damages.

100. From a human rights perspective, it must be recalled that in cases of atrocious crimes such as the crimes of which Mr Lubanga was convicted, namely '[c]onscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities', the fundamental human rights of children were affected. As explained above, in the commission of atrocious crimes that entail serious human rights violations, in addition to moral damages, there are other kinds of non-pecuniary damages that ought to be considered in reparation proceedings before this Court. For instance, damages causing harm to life conditions (*troubles dans les conditions d'éxistence*) are awarded in some domestic jurisdictions,[148] and have also been awarded at the IACtHR as 'alterations in the conditions of existence of the victim or the victim's family'.[149]

101. Particularly, the category of damages to the personal project of life has been developed on the basis of the individual freedom of self-determination.[150] As such, 'damages to the project of life are the consequence of a psychosomatic collapse of such a magnitude that, for the victim, it means the frustration or lessening of his/her project of life', thereby 'creating an existential vacuum, a "grief invading someone who loses the source of gratification and the spectrum to develop his/her stand for life"'.[151]

102. Because of the tremendous impact of Mr Lubanga's crimes on the children's project of life, this Opinion, in light of articles 21(3) and 75(6) of the Rome Statute, will elaborate on this category of damages bearing in mind the IACtHR's jurisprudence and its applicability in reparation proceedings before this Court.

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[148] French courts have awarded reparations for these damages as a separate category in addition and different to other intangible damages such as pain and suffering. *See e.g.*, French Conseil d'État, paras 1, 9. *See also* M. Paillet, *La Responsabilidad Administrativa* (2001) ('Paillet'), p. 278.
[149] *Bulacio v. Argentina*, para. 90; Paillet, p. 278. French courts have awarded reparations for these damages as a separate category in addition and different to other intangible damages such as pain and suffering. *See e.g.* French Conseil d'État, paras 1, 9.
[150] Fernández Sessarego, ¿Existe Un Daño Al Proyecto De Vida?, 31 December 2007 ('Fernández Sessarego'), pp. 1-5.
[151] Fernández Sessarego, p. 4 (translated by author) (internal citation omitted).

2. The specific damage to the project of life

103. The Common Judgment observed that children who were conscripted or enlisted into the UPC/FPLC, or used to participate actively in hostilities, as well as indirect victims, suffered harm to their life plan or project of life.[152] The *Lubanga* Amended Reparations Order had, in this regard, noted that measures in favour of former child soldiers should guarantee the development of their personalities, talents and abilities and, more generally, reparations orders and programmes should respect human rights and fundamental freedoms.[153] These are vital attributes that children, victims of such criminal wrongdoings, are stripped of when suffering damages to their project of life. Monetary award alone is insufficient to restore these attributes, but they can be rebuilt by giving opportunities to the formerly conscripted or enlisted children, who are now adults, and by helping them improve and build capacities with a view to allowing them to deem themselves as realised, self-fulfilled individuals in their communities and in society as a whole.

104. The IACtHR has awarded damages for human rights violations that affect a victim's 'life plan' or 'project of life'.[154] It has found that some human rights violations 'seriously obstruct and impair the accomplishment of an anticipated and expected result and thereby substantially alter the individual's development'.[155] These violations alter a person's life because factors 'unfairly and arbitrarily thrust upon him, in violation of laws in effect and in a breach of the trust that the person had in government organs duty-bound to protect him and to provide him with the security needed to exercise his rights and to satisfy his legitimate interests'.[156] Damages to the victims' project of life are therefore 'an expectation that [are] both reasonable and attainable in practice' and imply 'the loss or severe diminution, in a manner that is

[152] Common Judgment, para. 38.
[153] *Lubanga* Amended Reparations Order, para. 26.
[154] IACtHR, *Loayza Tamayo v Perú*, 'Judgment (Reparations and Costs)', 27 November 1998, Series C No. 53 ('*Loayza-Tamayo v Perú*'), para. 147 ('[t]he so-called "life plan," deals with the full self-actualisation of the person concerned and takes account of her calling in life, her particular circumstances, her potentialities, and her ambitions, thus permitting her to set for herself, in a reasonable manner, specific goals, and to attain those goals'). *See e.g. Cantoral Benavides v. Peru*, para. 60 ('[i]t is obvious to the Court that the facts of this case dramatically altered the course that Luis Alberto Cantoral Benavides' life would otherwise have taken. The pain and suffering that those events inflicted upon him prevented the victim from fulfilling his vocation, aspirations and potential, particularly with regard to his preparation for his chosen career and his work as a professional. All this was highly detrimental to his "life project"').
[155] *Loayza Tamayo v Perú*, para. 150.
[156] *Loayza Tamayo v Perú*, para. 150.

irreparable or reparable only with great difficulty, of a person's prospects of self-development'.[157]

105. Assessments by the IACtHR regarding damages to the project of life of victims in specific cases are of assistance and should thereby guide the Trial Chamber and the TFV in the case at hand. In *Loayza-Tamayo v. Peru*, the IACtHR noted that in order to completely redress the injury to the victim, the specific damage caused to her project of life had to be considered.[158] It further noted that reparations to such damages would satisfy the requirements of *restitutio in integrum*.[159] Accordingly, the IACtHR noted that 'strictly speaking, the victim's claims regarding her career prospects and promotion would not be measures of restitution; it will, therefore, examine them when it evaluates the damages the victim is claiming to her 'life plan'.[160] The IACtHR ordered Peru to reinstate the victim's former teaching position, give her the same salary and benefits she had previously, and pay pecuniary damages.[161]

106. In the case at hand, the harm to the victims' project of life is more serious because it destroyed the concrete expectations and vital opportunities of children to build capacities and fully enjoy their rights. This is in contradiction with the internationally recognised principle of the best interest of the child. The Trial Chamber and the TFV shall take this into consideration for the next stages of these reparations proceedings.

3. The harm and damage in the case at hand

107. Mr Lubanga's crimes caused complex harm and damages, which include harm to the public interest protected by the criminal provision, as well as serious harm to the fundamental human rights of the victims, especially former child soldiers. The

[157] *Loayza Tamayo v Perú*, para. 150.
[158] *Loayza Tamayo v Perú*, para. 151.
[159] *Loayza Tamayo v Perú*, para. 151.
[160] *Loayza Tamayo v Perú*, para. 117. *See also Cantoral Benavides v. Peru*, Separate Opinion of Judge A.A. Cançado Trindade, paras 10-11 (Judge Cançado Trindade recalled that the Court established 'the State's duty to provide [the victim] with the means to undertake and conclude his university studies in a center of recognised academic quality' which was 'a form of providing reparation for the damage to his project of life, conducive to the *rehabilitation* of the victim. The emphasis given by the Court to his *formation*, to his *education*, places this form of reparation (from the Latin *reparatio*, derived from *reparare*, "to prepare or to dispose again") in an adequate perspective, from the angle of the integrality of the personality of the victim, bearing in mind his self-accomplishment as a human being').
[161] *Loayza Tamayo v Perú*, paras 113-117.

complexity of the harm must be regarded and addressed in considering the possible avenues available to repair it.

108. The Common Judgment observed that, 'a trial chamber should, generally speaking, establish the types or categories of harm caused by the crimes for which the convicted person was convicted, *based on all relevant information before it*, including the decision on conviction, sentencing decision, submissions by the parties or *amici curiae*, expert reports and the applications by the victims for reparations.'[162] On the basis of the foregoing, this Opinion considers it important to recall some of such relevant information. This is important because it illustrates the specific types of harm that each individual victim and each type of victim suffered in the case at stake. This information must be borne in mind by the Trial Chamber and the TFV during the implementation stage.

109. It is recalled that Mr Lubanga was convicted for the crimes of '[c]onscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities'. It is also a serious violation of the laws and customs applicable to armed conflicts, and this breach has been codified in the Rome Statute as a war crime. When confirming the Impugned Decision in the case at hand, the Appeals Chamber observed that the crimes of conscripting and enlisting children and using them in hostilities must be interpreted in light of the object and purpose of, *inter alia*, article 38(3) of the Convention on the Rights of the Child.[163]

110. In this regard, the Convention on the Rights of the Child recognises that all children have the right to life, survival and development, protection from violence, abuse or neglect, education that enables them to fulfill their potential, to be raised by, or have a relationship with, their parents, to express their opinions and be listened to.[164] It should be noted that the Convention on the Rights of the Child is the closest

[162] Common Judgment, para. 78 (emphasis added), referring to *Katanga* Judgment on Reparations, para 70.
[163] *Lubanga* Appeal Judgment on Conviction, para. 277 (the object and purpose of this provision 'is to protect children who are under the age of fifteen years from being recruited into armed forces or groups'). *See also* article 4 of the Option Protocol to the Convention on the Rights of the Child ('[a]rmed groups that are distinct from the armed forces of a State should not […] recruit […] persons under the age of 18 years').
[164] Articles 6(1), 19(1), 28(1), 7(1), 9(3), 12(1) of the Convention on the Rights of the Child.

treaty to universal acceptance, which shows international consensus regarding the protection of children's interests.[165]

111. Both article 8(2)(e)(vii) of the Rome Statute and article 38(3) of the Convention of the Rights of Child prohibit the recruitment of children under the age of fifteen years. Notably, when confirming the Judgment pursuant to Article 74 of the Statute ('Conviction Decision') in the case at hand, the Appeals Chamber observed that the crimes of conscripting and enlisting children and using them in hostilities must be interpreted in light of the object and purpose of, *inter alia*, article 38(3) of the Convention on the Rights of the Child.[166] Accordingly, this crime has harmed the children in their interests protected by criminal norms and in their specific fundamental human rights. It has caused harm and damages to the children's rights to life and development, to physical, psychological, social and moral integrity, to a family, to education, to a safe, peaceful social environment. Therefore, reparation must be integral to cover the harm and damages in their entirety.

4. Preliminary conclusion

112. Mr Lubanga's crimes caused complex damage which includes harm to the public interest protected by the criminal provision and to the fundamental human rights of children. The victims suffered two types of damages: (1) physical or pecuniary damages and (2) non-pecuniary damages, which encompass, *inter alia*, moral damages or damages for pain and suffering. Importantly, considering that the rights and interests of the children must always be prioritised, an additional category of damages must be repaired: the harm to the personal project of life.

B. Who are the victims?

113. Victims, under rule 85(a) of the Rules, 'means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the

[165] *See* Inter-American Commission, Violence, Children and Organized Crime, 11 November 2015, OEA/Ser.L/V/II, para. 262. *See also* IACtHR, Advisory Opinion, Juridical Condition and Human Rights of the Child, 28 August 2002, OC-17/2002, para. 29 (the Advisory Opinion shows broad international consensus regarding the principles and institutions set out in that instrument. It states that '[t]he Convention on the Rights of the Child has been ratified by almost all the member States of the Organization of American States. The large number of ratifications shows a broad international consensus (*opinio iuris comunis*) in favor of the principles and institutions set forth in that instrument, which reflects current development of this matter').
[166] *See infra* Chapter III, Section C.

Court'.[167] Rule 85(b) further recognises collective victims by stating that '[v]ictims may include 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'.[168]

114. Similarly, under the UN Basic Principles and Guidelines on the Right to Reparation, '[v]ictims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law', including, where appropriate, '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'.[169]

1. The broad scope of victims

115. In cases of mass criminality, there is a broad spectrum of victimhood with a very large number of victims. Those who are able and willing to come as witnesses are solely samples of such broad spectrum. It is however possible to nominally differentiate types of victims as individual victims, which include direct and indirect victims, and collective victims. This may include communities as well as other plural entities.

116. The type of harm caused by the crime defines the specific type of victim. At the same time, in order to determine the type of harm suffered, the special characteristics of the victim and the rights that have been violated by the criminal conduct must be evaluated. Reparations shall be different when victims are different.

117. In the case at hand, there have been two types of victims identified: direct and indirect victims. Also, the Trial Chamber has determined that potential victims may also be awarded reparations. The *Lubanga* Amended Reparations order observed that

[167] Rule 85(a) of the Rules.
[168] Rule 85(b) of the Rules.
[169] Principle V of the UN Basic Principles and Guidelines on the Right to Reparation, para. 8.

'[r]eparations can also be granted to legal entities'.[170] However, specific collective victims are yet to be identified in the reparation proceedings in this case. The following subsections define the different types of victims who are part of the broad scope of victims of Mr Lubanga's crimes.

(a) Individual victims in the case at hand

(i) Direct victims

118. As stated above, the direct victims are former child soldiers. Their situation is distinct and specific since such victims, having been victimised in their childhood, were by nature more vulnerable than adults, and their rights thus protected under international law, especially, the Convention on the Rights of the Child.

119. While the harm, in the case at hand, emerges from Mr Lubanga's conviction of the crimes of conscripting or enlisting children under the age of fifteen years into the armed group UPC/FPLC, or using such children in hostilities, children so conscripted, enlisted or used suffered a harm different to that inflicted upon their relatives and other people within the relevant communities. Furthermore, since victims were of a different age and gender, among other relevant variables, the harm suffered by each of them ought to be carefully, individually and empathetically considered.

120. The life of the direct victims who survived the atrocious crimes in the case at hand will, sadly, never be the same regardless of any treatment. The harm they suffered is qualitatively different to that suffered by their own relatives and the relatives of those who did not survive. In such cases, survival does not only result in psychological trauma. It may also result in a very different, or even difficult life for the victim given the post-traumatic disorders they generally face as a consequence of the crimes and because their previous expectations were frustrated by the crimes.

121. The direct victims faced inhumane and cruel conditions during their conscription or enlistment into the UPC/FPLC, and/or during their actively being used in hostilities. It is especially important to recall, for assessing the eligibility of potentially eligible victims or for the implementation of any reparation programme, that the survivors may continue to be facing complex trauma and very difficult social

[170] *Lubanga* Amended Reparations Order, para. 8.

conditions that may prove to be crucial for them to decide whether or not to participate in the programmes.

122. The situation of children conscripted or enlisted into armed forces or groups is *sui generis*. This Opinion notes that the dynamics among these victims were complex both during the conscription, enlistment or use of the children in hostilities, and during the aftermath of the crime, and especially now when those children have become adults and have a role to play in their communities. The direct victims may face rejection and stigmatisation when they are identified as former child soldiers causing in this way a secondary damage and a re-victimisation.

123. To properly understand this reality, it is not only essential to comprehend the way in which the former child soldiers were victimized,[171] but also how their role had been used in hostilities that caused harm both in the children and their community.[172] Children conscripted or enlisted into armed forces or groups often suffer from rejection and stigma when they leave the armed force or group and return to their communities.[173] This rejection is due to the grief, anger or fear felt by the communities — these feelings must be addressed in order to properly respond to the rejection and stigmatization that child soldiers suffer.

124. The harm as distinctively suffered defines the different types of victims. The *Lubanga* Amended Reparations Order indicated who the victims in this case are according to the different harm each type of victim suffered. It noted that the harm was the following,

a. With respect to direct victims:

i. Physical injury and trauma;

[171] The situation of children conscripted or enlisted into armed groups is often 'clouded in ambiguity and worry'. *See* M. G. Wessells, *Child Soldiers: From Violence to Protection* (2006) ('M. G. Wessells'), p. 181 ('[t]hese concerns are particularly poignant for children who have never lived outside an armed group. For them, "reintegration" is a misnomer implying they are going back to a situation they experienced previously, when in fact they are entering uncharted terrain').
[172] M. G. Wessells, p. 181 ('[u]ncertainties about identity, jobs, and role are among the greatest life stresses for many former child soldiers, who want above all to be normal and like other children').
[173] L. Steinl, *Child Soldiers as Agents of War and Peace: A Restorative Transitional Justice Approach to Accountability for Crimes under International Law* (2017) ('L. Steinl'), p. 29 ('child soldiers are frequently rejected and stigmatized upon their return from an armed force or group. This behavior of receiving communities often roots in feelings of grief, anger, or fear').

> ii. Psychological trauma and the development of psychological disorders, such as, inter alia, suicidal tendencies, depression, and dissociative behaviour;
> iii. Interruption and loss of schooling;
> iv. Separation from families;
> v. Exposure to an environment of violence and fear;
> vi. Difficulties socialising within their families and communities;
> vii. Difficulties in controlling aggressive impulses; and
> viii. The non-development of "civilian life skills" resulting in the victim being at a disadvantage, particularly as regards employment.[174]

125. In the Decision on Sentence Pursuant to Article 76 of the Statute ('*Lubanga* Sentencing Decision'), Trial Chamber I further described the harm suffered by victims in this case. It observed that children who are used in hostilities are at risk of being wounded or killed and that a substantial number of the children who gave interviews suffered from post-traumatic stress disorder as a consequence of their exposure to the traumatic experiences as child soldiers.[175] Trial Chamber I relied on the testimony of expert witness Ms Elisabeth Schauer who testified on post-traumatic stress disorder.[176] The expert noted that post-traumatic stress disorder and further harmful effects of the crimes in the instant case generally continue, potentially for the rest of their lives and that 'the response to war-related trauma by ex-combatants and child soldiers in countries directly affected by war and violence is complex and frequently leads to severe forms of multiple psychological disorders'.[177]

126. Trial Chamber I also noted that a substantial part of former child soldiers who were under the expert's analysis had problems with the use of drugs and alcohol and that they suffered from depression and dissociation and some of them showed suicidal behaviour.[178] Trial Chamber I specifically quoted that '[r]esearch shows that former child soldiers have difficulties in controlling aggressive impulses and have little skills to handle life without violence. These children show ongoing aggressiveness within their families and communities even after relocation to their home villages'.[179]

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[174] *Lubanga* Amended Reparations Order, para. 58.
[175] *Lubanga* Sentencing Decision, para. 40.
[176] *See* Expert Report of Ms Schauer, 'The Psychological Impact of Child Soldiering', 25 February 2009, ICC-01/04-01/06-1729-Anx1 (Expert Report of Ms Schauer).
[177] *Lubanga* Sentencing Decision, para. 40.
[178] *Lubanga* Sentencing Decision, para. 41 ('[a] significant percentage of the former child soldiers who were the subject of the study had abused drugs or alcohol; they suffered from depression and dissociation; and some demonstrated suicidal behaviour').
[179] *Lubanga* Sentencing Decision, para. 41.

Additionally, it observed that after being child soldiers for a significant period of time, children are usually missing 'civilian life skills', they have problems socialising, they missed out on schooling and, therefore, they are marginalised and disadvantaged, especially in regards to employment and loss of productivity.[180]

127. This Opinion notes that, according to the *Lubanga* Amended Reparations Order, it may be possible that during the time that they were being conscripted, enlisted or used in hostilities, the direct victims (both men and women) could have suffered sexual attacks.[181] In this regard, it must be noted that when a boy or a girl suffers this type of violence, the child is prematurely introduced into interactions to which he or she is too young to consent. This may have amounted to traumatic experiences affecting the child's personal integrity, both physically and mentally. If during the implementation phase, it were to become apparent that some children may have suffered trauma emerging from sexual attacks linked to the violent context to which they were exposed, appropriate measures ought to be put in place to tackle this specific harm.

128. In the *Lubanga* Amended Reparations Order, the Appeals Chamber did not find Mr Lubanga responsible for gender-based crimes, but it noted that the TFV could appropriately consider 'the possibility of including victims of sexual and gender-based violence in the assistance activities undertaken according to its mandate under regulation 50 (a) of the Regulations of the Trust Fund'.[182] It submitted further that the draft implementation plan could include 'a referral process to other competent NGOs in the affected areas that offer services to victims of sexual and gender-based violence'.[183] This could be an appropriate form to comprehensively approach the trauma suffered by the direct victims in the case at hand.

(ii) Indirect victims

129. The indirect victims are typically the next of kin of the direct victim. In looking into the preparatory works of article 75 of the Rome Statute, this Opinion notes that

[180] *Lubanga* Sentencing Decision, para. 42 ('Ms Schauer also pointed out that children who have been child soldiers for a significant period of time usually do not demonstrate "civilian life skills" as they have difficulties socialising, they missed schooling, and as a result they are at a disadvantage, particularly as regards employment').
[181] *Lubanga* Amended Reparations Order, para. 64.
[182] *Lubanga* Amended Reparations Order, para. 64.
[183] *Lubanga* Amended Reparations Order, para. 64.

the Preparatory Committee on the Establishment of an International Criminal Court included a footnote explaining that '[this] provision refers to the possibility for appropriate reparations to be granted not only to victims but also to others such as the victim's families and successors (in French, "ayant-droit")'.[184] To this end, the committee further reflected that, in defining the terms 'victims' and 'reparations', it is possible to resort to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the Basic Principles and Guidelines on the Right to Reparation.[185] Such definitions are not limited to the persons directly affected by the crime or abuse, namely, direct victims, but it further includes the immediate family or dependants of the direct victim.[186]

130. The *Lubanga* Amended Reparations Order defined the indirect victims as 'the family members of direct victims'; 'anyone who attempted to prevent the commission of one or more of the crimes under consideration'; 'individuals who suffered harm when helping or intervening on behalf of direct victims'; and 'other persons who suffered personal harm as a result of these offences'.[187]

131. Considering that the different harm, as suffered by each victim, defines the type of victim, this Opinion notes that the *Lubanga* Amended Reparations Order described the harm of indirect victims as follows:

> b. With respect to indirect victims:
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> > i. Psychological suffering experienced as a result of the sudden loss of a family member;
> > ii. Material deprivation that accompanies the loss of the family members' contributions;

[184] United Nations, General Assembly, Report of the Preparatory Committee on the Establishment of an International Criminal Court, 14 April 1998, A/CONF.183/2/Add.1 ('Preparatory Committee Report'), p. 116, n. 22.
[185] Preparatory Committee Report, p. 116, n. 22. ('[f]or the purposes of defining "victims" and "reparations", reference may be made to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (General Assembly resolution 40/34 of 29 November 1985, annex) and the revised draft basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law (E/CN.4/Sub.2/1996/17)').
[186] *See* United Nations, General Assembly, Annex to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 29 November 1985, A/Res/40/34, p. 214, para. 2; UN Basic Principles and Guidelines on the Right to a Remedy, para 8.
[187] *Lubanga* Amended Reparations Order, para. 6.

> iii. Loss, injury or damage suffered by the intervening person from attempting to prevent the child from being further harmed as a result of a relevant crime; and
> iv. Psychological and/or material sufferings as a result of aggressiveness on the part of former child soldiers relocated to their families and communities.[188]

132. According to the *Lubanga* Amended Reparations Order, family members may suffer harm, material or non-material, from the loss of another family member as a result of the crimes for which a conviction has been entered.[189] It also indicated that a close personal relationship 'exists between a child soldier and his or her parents'.[190]

133. This Opinion notes that the *Lubanga* Amended Reparations Order did not pose a strict limitation to the type of relative that may claim reparations as an indirect victim, but rather deferred to the local understanding of the concept of 'family', considering that it may have many cultural variations.[191] It noted that 'the Court ought to have regard to the applicable social and familial structures'.[192]

(b) Collective victims in the case at hand

134. The *Lubanga* Amended Reparations Order observed that '[r]eparations can also be granted to legal entities'.[193] However, specific collective victims have not yet been identified in the reparation proceedings in this case.

135. While a collective victim or various collective victims may still be identified in the case at hand, this Opinion notes that the concept of collective victim corresponds to a separate entity that should not be confused with a group of potential individual victims yet to be identified. They are distinct types of victims and this distinction is rooted in the different types of harm suffered by them. Collective victims suffer harm in their collective rights and interests.

136. Jurisprudence from the IACtHR, relevant by virtue of articles 21(3) and 75(6) of the Rome Statute, serves to exemplify the different human rights to which a

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[188] *Lubanga* Amended Reparations Order, para. 58.
[189] *Lubanga* Amended Order for Reparations, paras 6, 58.
[190] *Lubanga* Amended Order for Reparations, para. 63, referring to *Lubanga* OA9 OA10 Judgment, para. 32.
[191] *See* *Lubanga* Amended Order for Reparations, para. 7.
[192] *See* *Lubanga* Amended Order for Reparations, para. 7.
[193] *Lubanga* Amended Reparations Order, para. 8.

community is entitled, as opposed to those that its members are entitled to. It is important to recall that the IACtHR has previously allowed communities to claim their right to collective ownership over their ancestral lands[194] and, thereby, 'their oral expressions and traditions, their customs and languages, their arts and rituals, their knowledge and practices in connection with nature, culinary art, customary law, dress, philosophy, and values'.[195] The IACtHR has recognized and protected communities' human rights to juridical personality,[196] health,[197] economic and social rights,[198] cultural identity and religious freedom,[199] self-determination[200] as well as the right to mental and moral integrity.[201]

137. The IACtHR recognised that a community, as an entity, has rights that can be protected.[202] This is also the case in the context of the African Charter on Human and Peoples' Rights, where it has been considered that, in order to be recognized as

[194] *See* IACtHR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 'Judgment (Merits, Reparations and Costs)', 31 August 2001, Series C No. 79, paras 149, 151-155; IACtHR, *Plan de Sánchez Massacre v. Guatemala*, 'Judgment (Reparations)', 29 April 2004, Series C No. 105 ('*Plan de Sánchez Massacre v. Guatemala*'), para. 85; *Yakye Axa Indigenous Community v. Paraguay*, paras 124, 131; IACtHR, *Saramaka People v. Suriname*, 'Judgment (Preliminary Objections, Merits, Reparations, and Costs)', 28 November 2007, Series C No. 172 ('*Saramaka People v.Suriname*'), paras 80-84, 87-97; Inter-American Commission, *Maya indigenous community of the Toledo District v. Belize*, 'Merits', 12 October 2004, Report No. 40/04 ('*Maya indigenous community of the Toledo District v. Belize*'), para. 113.

[195] *Yakye Axa Indigenous Community v. Paraguay*, para. 154.

[196] *Saramaka People v. Suriname*, paras 168-174.

[197] *Yakye Axa Indigenous Community v. Paraguay*, para. 164-165, 168.

[198] *Yakye Axa Indigenous Community v. Paraguay*, para. 167.

[199] *See e.g.* IACtHR, *Sawhoyamaxa Indigenous Community v. Paraguay*, 'Judgment (Merits, Reparations and Costs)', 29 March 2006, Series C No. 146, para. 187; *Yakye Axa Indigenous Community v. Paraguay*, para. 216; IACtHR, *Comunidad Indígena Xákmok Kásek v. Paraguay*, 'Judgment (Merits, Reparations, and Costs)', 24 August 2010, Series C No. 214 ('*Comunidad Indígena Xákmok Kásek v. Paraguay*'), paras 171-182, 261-263; *Maya Indigenous Community of the Toledo District v. Belize*, para. 155.

[200] *Saramaka People v. Suriname*, para. 93.

[201] *Comunidad Indígena Xákmok Kásek v. Paraguay*, para. 244.

[202] *See Yakye Axa Indigenous Community v. Paraguay*, para. 83 ('[t]he indigenous Community has ceased to be a factual reality to become an entity with full rights, not restricted to the rights of the members as individuals, but rather encompassing those of the Community itself, with its own singularity. Legal status, in turn, is a legal mechanism that grants them the necessary status to enjoy certain basic rights, such as communal property, and to demand their protection when they are abridged'); IACtHR, *Kichwa Indigenous People of Sarayaku v. Ecuador*, 'Judgment (Merits and Reparations)', 27 June 2012, Series C No. 245 ('*Kichwa Indigenous People of Sarayaku v. Ecuador*'), para. 284 ('[u]nder Article 63(1) of the American Convention, the Court considers the injured party to be the Kichwa Indigenous People of Sarayaku, who […] are therefore considered beneficiaries of the reparations that it orders'); *Saramaka People v. Suriname*, para. 169 ('[…] a recognition of the right to juridical personality of the Saramaka people as a whole would help prevent such situations, as the true representatives of the juridical personality would be chosen in accordance with their own traditions, and the decisions affecting the Saramaka territory will be the responsibility of those representatives, not of the individual members').

'peoples', four criteria must be met: 'the occupation and use of a specific territory; the voluntary perpetuation of cultural distinctiveness; self-identification as a distinct collectivity, as well as recognition by other groups'.[203] Collective victims can be further identified by the harm they suffer to the social fabric that keeps them in cohesion.

138. Although collective reparations must not be confused with collective victims, this Opinion notes that the *Lubanga* Amended Reparations Order observed that '[w]hen collective reparations are awarded, these should address the harm the victims suffered on an individual and collective basis'.[204] A community becomes a collective victim whenever the collective rights that such community enjoys are harmed because of the commission of the atrocious crime.

139. Such harm may affect the social fabric of communities to the extent that it violates their collective rights. The atrocious crime may prospectively harm the communities' right to self-determination and development, as defined in article 1 of the ICCPR. Even if the communities manage to survive as peoples, the violation may continue to affect the communities' development.[205] This is especially the case when the crime targets the youngest generation of the communities, such as the conscription or enlistment of children under the age of fifteen years into armed groups or forces, or the active use of such children in hostilities.

140. Considering that the harm as suffered by each victim defines the type of victim, harm that affects collective interests of a community would define a separate type of victim: the collective victim. While each victim, whether direct or indirect, was harmed by the same events at an individual level, they may have also found their role, dynamics and relationships within their community affected.

141. The conscription and enlistment of children under the age of fifteen years into armed groups or forces and their having been actively used in hostilities damage those

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[203] African Commission on Human and People's Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya African Commission*, 25 November 2009, Communication No. 276/03 ('*Endorois Welfare Council v. Kenya African Commission*'), paras 150-151.
[204] *Lubanga* Amended Reparations Order, para. 33.
[205] Collier *et al*, 'Breaking the Conflict Trap: Civil War and Development Policy' in *World Bank Policy Research Report 56793* (Collier *et al*), pp. 104-105.

children, as well as their communities. The harm transcends to impact the relatives of those children as well as the social fabric, cohesion and future of their communities. Indeed, by harming children, who represent a community's youngest generation, the crimes may harm those expected to be in charge of the community in the future.

142. But for Mr Lubanga's crimes against the children in the case at hand, each community where such children belong could have at the very least avoided a loss on productivity and development, or even had important gains from a better use of the children's abilities. That is the community's opportunity cost, as it could have devoted the children's potential to productive activities instead of war. It is therefore not unreasonable to assume that had these children not been harmed, their role in the community would not have been affected, and life in the community would have unfolded differently.[206]

143. A prevailing, troubling and continuing harm caused by the conscription or enlistment of children into armed groups or their use in hostilities affects the role, identity and cohesion of each of these children within their communities.[207] When harming the youth of a community, the perpetrator harms the community's future and source of development. The perpetrator not only harms children individually, causing damages to their integrity, their lost childhood, but also, by truncating their education, the perpetrator creates a loss in productivity and development in the community and further prevents it from benefitting from the individual gains that these children would have brought. Therefore, the crimes affect the children and the community.

[206] Collier *et al*, p. 104 ('[t]his is the conflict trap: a country that first falls into the trap may have a risk of new war that is 10 times higher just after that war has ended than before the war started. If the country succeeds in maintaining postconflict peace for 10 years or so, the risk is considerably reduced, but remains at a higher level than before the conflict. This legacy of war seems to take a long time –a generation or two– before withering away').

[207] L. Steinl, pp. 23-24 ('[t]he participation in atrocities is a predominant reason for the stigmatization and rejection of former child soldiers because it can lead to feelings of fear, grievance, and anger, as well as a desire for revenge in receiving communities. This has even resulted in attacks by communities on rehabilitation camps for child soldiers as a form of revenge for the atrocities committed by child soldiers against the communities. The situation is particularly difficult in cases where child soldiers committed atrocities, either forcibly or voluntarily, against their own communities, and when certain child soldiers are known for having committed crimes, especially particularly heinous crimes. In addition to feelings of anger and resentment, the stigmatization and rejection of former child soldiers is often also based on feelings of fear and mistrust. Child soldiers can be seen as dangerous, immoral, and permanently damaged, and are thus viewed as exerting a bad influence on other children. Moreover, in some cases, there is an added spiritual connotation to this fear as child soldiers are perceived as spiritually unclean and ill, or as being possessed by evil spirits. This spiritual illness goes beyond the directly affected former child soldier and is seen as potentially harmful for the family and the whole community').

144. While the Trial Chamber has not yet found a community itself eligible as a collective victim, it can do so in the current stage of the proceedings, taking into account the definitions of collective victims provided in the *Lubanga* Amended Reparations Order and in this Opinion.

(c) Potential victims in the case at hand

145. Concerning potential victims, the 2015 *Lubanga* Appeal Judgment on Reparations noted the possibility to include such victims in any reparations programme upon implementation.[208] When victims are not identified, a reparations order must set the criteria for eligibility for reparations.[209]

146. This Opinion notes that the *Lubanga* Conviction Decision set the temporal and territorial parameters under which a significant number of children were victimised. It noted that victims were taken between September 2002 and 13 August 2003 to UPC headquarters in Bunia and military training camps in Rwampara, Mandro and Mongbwalu.[210] It further noted that children were used to participate in combat in Bunia, Kobu and Mongbwalu.[211] The *Lubanga* Conviction Decision further notes testimony on the deployment of children as soldiers in Bunia, Tchomia, Kasenyi, Bogoro and elsewhere, and that they took part in fighting, including at Kobu, Songolo and Mongbwalu.[212] In that way, the geographical, temporal and other factual parameters to identify the potential victims were clearly defined in the *Lubanga* Conviction Decision.

147. To find, localise and identify such potential victims is a duty of the Trial Chamber, with the support of the TFV, according to the abovementioned parameters included in the *Lubanga* Conviction Decision. They must be assessed under the criteria that the Impugned Decision thereafter set to qualify victims eligible for reparations.[213]

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[208] *Lubanga Appeal Judgment on Reparations*, para. 167.
[209] *Lubanga Appeal Judgment on Reparations*, para. 205.
[210] *Lubanga* Conviction Decision, paras 811, 815, 819, 912.
[211] *Lubanga* Conviction Decision, para. 834.
[212] *Lubanga* Conviction Decision, para. 915.
[213] The Trial Chamber's criteria for eligibility was different for direct and indirect victims. *See* Impugned Decision, para. 67 ('[s]o, in the case of a potentially eligible direct victim, the Chamber verifies (1) identity and looks at (2) the direct victim's child-soldier status. In the case of a potentially eligible indirect victim whose identity it has verified, the Chamber looks at (3) the child-soldier status

148. In the case at hand, given the massive nature of the crimes, it is important to determine, in addition to the individual victims, the community or communities affected by the crimes of which Mr Lubanga was convicted, namely those collective victims that have suffered a specific type of harm different to that individually suffered by the direct and indirect victims. To this end, the Trial Chamber, with the TFV's support, shall extend the criteria to further identify the communities to which such direct and indirect victims belong and thereafter consider them as collective victims.

149. The number or quantity of potential victims shall be determined during the implementation process. Such quantity should include individual and collective victims. In doing so, the Trial Chamber, supported by the TFV, should conduct the search and screening process of potential victims in a technical and professional manner with the participation of experts who can assess the harm under rule 97(2) of the Rules.

2. Inclusion of potential victims as per the conviction and sentencing decisions, and the burden of proof of the victims

150. The scope and extent of victimhood caused by Mr Lubanga's crimes include potential victims who are yet to be identified. The inclusion of potential victims was indeed foreshadowed by those previous judicial decisions that determined the criminal responsibility of Mr Lubanga and the harm caused as a result.

151. In the *Lubanga* Conviction Decision, Trial Chamber I, without giving a total number of victims, determined the temporal and territorial parameters where they were victimised.[214] It stated that there was a widespread recruitment, conscription,

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of the direct victim and whether there was a close personal relationship between the direct and the indirect victim. Where the direct victim's child-soldier status is established and, in the case of an application from an indirect victim, where the close personal relationship with the direct victim is established, the Chamber then considers (4) whether the potentially eligible direct or indirect victim has established on a balance of probabilities the existence of the harm alleged and (5) the causal nexus between the harm alleged and the crimes of which Mr Lubanga was convicted').

[214] *Lubanga* Conviction Decision, paras 811, 815, 819, 912 (noting that victims were taken between September 2002 and 13 August 2003 to UPC headquarters in Bunia and military training camps in Rwampara, Mandro and Mongbwalu). *See also* paras 834 (noting that children were used to participate in combat in Bunia, Kobu and Mongbwalu), 915 (noting testimony on the deployment of children as soldiers in Bunia, Tchomia, Kasenyi, Bogoro and elsewhere, and that they took part in fighting, including at Kobu, songolo and Mongbwalu).

enlistment and use of children in the UPC/ FPLC.[215] It further noted that '[o]nly those who suffered harm as a result of the crimes charged may be considered victims in the case' and that applicants 'need to demonstrate a link between the harm they suffered and the crimes faced by the accused, and they should demonstrate in written applications that they are victims of these offences'.[216]

152. In 2015, the Appeals Chamber stated that a trial chamber may determine the scope of damage and extent of loss or injury to, or in respect of, victims,[217] with or without the assistance of experts under rule 97,[218] and that it may define the harm and establish the criteria which the TFV should apply when assessing the extent of harm.[219]

153. Following Mr Lubanga's conviction, the Trial Chamber issued the *Lubanga* Reparations Decision. In that decision, the Trial Chamber held that '[g]iven the uncertainty as to the number of victims of the crimes in this case […] and the limited number of individuals who have applied for reparations, the Court should ensure there is a collective approach that ensures reparations *reach those victims who are currently unidentified*'.[220] In the *Lubanga* Appeal Judgment on Reparations, the Appeals Chamber indicated that in the draft implementation plan to be prepared by the TFV and approved by the Trial Chamber, the TFV were to provide 'the anticipated monetary amount that it consider[ed] necessary *to remedy the harms caused by the crimes for which Mr Lubanga was convicted,* based on information gathered during the consultation period leading up to the submission of the draft implementation plan'.[221]

154. In light of the foregoing considerations, as confirmed in the Common Judgment,[222] it is clear that consideration of the harm suffered by potential victims for the determination of the scope and extent of the harm caused by Mr Lubanga's crimes and the eventual award of reparations to those victims was foreshadowed in the

[215] *Lubanga* Conviction Decision, paras 1234, 1271, 1351, 1354, 1355.
[216] *Lubanga* Conviction Decision, para. 14, iv.
[217] *Lubanga* Appeal Judgment on Reparations, para. 183.
[218] *Lubanga* Appeal Judgment on Reparations, para. 183.
[219] *Lubanga* Appeal Judgment on Reparations, para. 183.
[220] *Lubanga* Reparations Decision, para. 219 (emphasis added).
[221] *Lubanga* Appeal Judgment on Reparations, para. 240 (emphasis added).
[222] Common Judgment, paras 78, 84, 92.

previous judicial decisions rendered by the Court. By considering and awarding reparations to potential victims, the Trial Chamber was implementing the judicial mandate set out in those decisions.

155. The Trial Chamber found that the specific circumstances of the case at hand impacted the number of victims who requested reparations.[223] According to the Trial Chamber, those specific circumstances arose from, *inter alia*, 'the scattering of victims across large geographical areas', the 'fact that victims may have been displaced or may have settled elsewhere', the 'fact that unrest, stigmatization and discrimination may have prompted their departure', 'social and cultural factors deterring a significant number of victims from disclosing their child-soldier past on account of the attendant stigmatization and social pressure', the 'fact that young girls and women wish to be inconspicuous', and 'the fact that some potential victims belong to at-risk groups, for instance, persons with disabilities or severe mental trauma'.[224]

156. As a result, in light of the previous judicial decisions and concrete and specific circumstances of the case at hand, the Trial Chamber had a sufficient basis to include potential victims in the determination of Mr Lubanga's liability for reparations and the amount of the award thereof. Consequently, there was no need to resort to exceptional circumstances, as submitted by Mr Lubanga. Therefore, the Trial Chamber was correct in including potential victims, as it has been stated in the Common Judgment.

3. Preliminary conclusion

157. In this case, the victims identified are direct and indirect victims; the direct victims being children under the age of fifteen years and the indirect victims being, *inter alios*, their relatives. Furthermore, it may be possible during the implementation stage to identify collective victims. In addition, potential victims were included in determining the award for reparations. Previous decisions in the case at hand foreshadowed the extent of harm suffered by the victims of Mr Lubanga's crimes as well as the temporal and geographic parameters to determine of the scope victimhood.

[223] Impugned Decision, paras 235-236.
[224] Impugned Decision, paras 235-236.

Consequently, the Trial Chamber was correct in including potential victims, without the need to find exceptional circumstances.

C. Matters of evidence and burden of proof

158. Considering the nature of the crimes in the instant case, and the extremely difficult contexts in which the victims currently live and where they are located, the burden of proof must be interpreted and applied in light of international human rights law and standards. This Opinion notes that the Common Judgment rejected Mr Lubanga's argument under his second ground of appeal that the Trial Chamber applied the wrong standard of proof.[225] It also notes that, in granting part of Victims V01's second ground of appeal, the Common Judgment found that the Trial Chamber erred in failing to ensure equal conditions for all victims when ruling on the victims' eligibility for reparations.[226] The Common Judgment held that this error materially affected the Impugned Decision, as some of the victims concerned might have been found eligible or allowed to supplement their dossiers with documents or information.[227] The Common Judgment noted that, in the exercise of its discretion, a trial chamber may consider that a victim's account has sufficient probative value in light of the totality of the evidence so as to find that the allegations therein satisfy the burden of proof, even in the absence of supporting documents.[228]

159. This Opinion welcomes the Common Judgment's determinations on these issues and finds it appropriate to further provide some guidance as to some evidentiary issues, especially with respect to the burden of proof in reparations proceedings stemming from mass, atrocious criminality. This guidance may assist the Trial Chamber, with the support of the TFV, in its future screening and assessment of eligibility of potential victims.

160. Moreover, while this Opinion agrees with the Common Judgment's finding that estimates regarding the amount of the reparations award should have a strong evidentiary basis, this Opinion considers that, in determining those estimates, objective proceedings must be followed and relevant principles and standards

[225] Common Judgment, para. 198.
[226] Common Judgment, paras 168-169.
[227] Common Judgment, paras 168-169.
[228] Common Judgment, para. 203.

stemming from international human rights ought to be applied, in particular the *pro homine* principle. The observance of objective proceedings and human rights principles would allow a chamber to consider the difficulties that victims may have in situations of mass criminality and the extremely difficult environments of ongoing violent conflicts or post-war conflicts, so that an interpretation be made in favour of the victims. In weighing the rights of the convicted person *vis-à-vis* the rights of the person whose human rights have been abhorrently violated, those of the latter carry more weight and ought to be preferred given that they are core human rights (non-derogable), the context of mass criminality, the seriousness of the crime and the human rights infringed as a result.

1. Burden of proof in light of human rights principles and standards

161. In the case at hand, as in other cases involving heinous crimes and gross human rights violations, victims are confronted with extreme difficulties to prove the allegations concerning, *inter alia*, the harm they suffered and the link of causation with the crime; and, in the case of indirect victims, their relation to the direct victims. Moreover, sometimes the information they provide may seem to contain some uncertainties and lack of coherence. This could be a cause for them to be excluded from being eligible for reparations, which is unfair and runs contrary to the duties imposed upon the Court by the Rome Statute.

162. In order to understand the reasons underlying such apparent contradictions, one must consider that victims were subjected to highly traumatic experiences that continue to have an impact on the victims and their communities. Generally, victims of these crimes have lost everything within their respective communities. Indeed, victims often live within societies whose structure has been affected in an extremely negative way by the conflict and its consequences. Victims find themselves living within communities facing problems arising from ongoing conflicts or post-conflict situations and State structures may have been destroyed, including archives and civil registries. In addition, victims may not have the economic means to obtain, for example, the necessary documents or other evidence. It is on the basis of the foregoing that it is extremely difficult and sometimes impossible for the victims to easily find the necessary elements of proof required in a common civil claim for damages; therefore, the burden of proof in those cases ought to be shared between the

victims and the system of the Rome Statute, and approached by the Court in an institutional manner.

163. It is unfair that the victims of this type of crimes have to exclusively bear the burden of proof. It ought to be implemented and applied in light of the human rights principles, as well as standards stemming from specialised and technical tools for the evaluation of victims and harm arising from cruel and inhumane treatment such as the Istanbul protocol. This is in keeping with the mandate imposed in article 21(3) of the Rome Statute. This approach will enable the Court to successfully determine the harm and re-instate the human rights violated and to do so in keeping with standards, rules and principles of international human rights law.

164. When assessing the eligibility of victims in reparation proceedings, the allocation of the burden of proof must take into consideration the difficulties that victims may face when searching and producing evidence in contexts of armed conflict or protracted violence. Relevant principles and rules on evidence stemming from the broad spectrum of the specialised tools, standards, principles and practices of international human rights law must be applied. This Opinion notes that, in the case at hand, a group of experts made submissions on the obstacles that victims face in this case to come forward before seeking reparations:

> 13. Previous reparation programs have been sensitive to such evidentiary difficulties and have relaxed the evidentiary requirements in favour of the beneficiaries. Sufficient proof in comparable reparations programming has included the use of positive presumptions based on a matrix of time and place where victims of conflicts suffered loss, injury and violations of their rights, triangulated evidence from multiple sources to place a child and/or her parents in locales that were subject to persistent conscription (to avoid painful and repetitive re-interviewing of victims), and corroboration by available reporting, which can lessen the burdens on individual victims to satisfy a burden of proof in a collective reparation scheme that is more akin to the kind of rigor that might be found in civil proceedings. The burdens of verification for victims must be consistently guarded against, and slippage from manageable and well-intentioned procedure to highly invasive, destabilizing and stigmatizing procedure avoided at all costs, as such slippage will affect the quality of participation in and experience of the reparations process as a whole.[229]

[229] Observations of Dr. Golden, Mr. Higson-Smith, Professor Ní Aoláin and Dr. Wühler pursuant to Rule 103 of the Rules of Procedure and Evidence, para. 13.

165. This Opinion notes that article 69(3) and (4) of the Rome Statute grants the Court with ample powers to request the submission of all necessary evidence for the determination of the truth, and to rule on the relevance or admissibility of all evidence. In the same vein, rule 97(2) of the Rules allows the Court to appoint experts on its own motion 'to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations'.[230]

166. In this regard, the Court has been empowered by the system provided in the Rome Statute to undertake together with the victims the burden of proof, especially in the case of potential victims. This must be done in a scientific manner, following an interdisciplinary approach and with the assistance of experts, as provided in rule 97(2). The evidence so collected must include the so-called circumstantial evidence which is formed of several concurring and true indicia that are logically connected and that permit to infer the existence of a fact. As stated by the International Criminal Tribunal for the former Yugoslavia, circumstantial evidence consists of evidence of a number of different circumstances surrounding an event from which a fact at issue may be reasonably inferred.[231] Circumstantial evidence could have equal or more weight than direct evidence.

167. Moreover, the analysis and evaluation of the evidence collected in relation to harm (extent and scope), victimhood (extent and scope), link of causation or relationship between direct and indirect victims ought to be an objective procedure whereby the evidence must be evaluated objectively and in the light of the principles of logic, science and the rules of experience.

168. In this regard, international human rights courts 'have greater latitude to assess the evidence on the pertinent facts, in accordance with the principles of logic and on the basis of experience'.[232] The IACtHR has applied a more comprehensive standard of proof to different situations taking into account the nature, character and

[230] Rule 97(2) of the Rules.
[231] *See e.g.* ICTY, Trial Chamber, *Prosecutor v. Radovan Karadžić*, 'Judgement', 24 March 2016, IT-95-5/18-T, para. 14.
[232] IACtHR, *19 Merchants v. Colombia*, 'Judgment (Merits, Reparations and Costs)', 5 July 2004, Series C No. 109 ('*19 Merchants v. Colombia*'), para. 65; IACtHR, *Maritza Urrutia v. Guatemala*, 'Judgment (Merits, Reparations and Costs)', 27 November 2003, Series C No. 103, para. 48; *Myrna Mack Chang v. Guatemala*, para. 120; *Bulacio v. Argentina*, para. 42.

seriousness of a case.[233] The IACtHR has also noted that in order to reach a decision, it may take into account not only direct evidence such as testimonies or documents, but it should also consider circumstantial evidence, indicia and presumptions as long as 'they lead to conclusions consistent with the fact'.[234] In cases concerned with the commission of atrocious crimes, it is desirable for the Court to follow and apply this approach in the assessment of the evidence in the Trial Chamber's eligibility assessment of victims in reparation proceedings.

169. In cases of atrocious crimes such as the case at stake, generally victims are under the effects of post-traumatic stress disorder, anxiety syndromes which may include paranoia, depression and even physical disorders. Therefore, inconsistencies are common and appear when victims recount facts of atrocious crimes involving gross human rights violations. As it is known from the science of psychology, this is a normal mechanism of psychological self-defence that occurs in order to alleviate the traumatic experiences that the victims underwent and which they try to block or distort.[235] Understandably, victims do not wish to be re-victimised through the revival of the pain suffered as a result of the crime.

170. The IACtHR has acknowledged that, when recalling traumatic experiences, there may be inaccuracies in the statements provided by victims of some specific crimes, such as sexual violence.[236] This equally occurs in the case of the most vulnerable victims such as children whose natural defence mechanisms lead them to block or distort specific circumstances surrounding the crime. In cases of such inaccuracies, the IACtHR has taken into account, *inter alia*, that the statements had

[233] IACtHR, *Fairén Garbi and Solís Corrales v. Honduras*, 'Judgment (Merits)', 15 March 1989, Series C No. 6 ('*Fairén Garbi and Solís Corrales v.* Honduras'), para. 131.
[234] *Fairén Garbi and Solís Corrales v. Honduras*, para. 133.
[235] UNHCHR, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2004, UN Doc A/810 ('Istanbul Protocol'), para. 313 ('[a] child's reactions to torture depend on age, developmental stage and cognitive skills. The younger the child, the more his or her experience and understanding of the traumatic event will be influenced by the immediate reactions and attitudes of caregivers following the event. […] Children over three often tend to withdraw and refuse to speak directly about traumatic experiences. The ability for verbal expression increases during development. […] it is not usually until the beginning of the formal operational stage (12 years old) that children are consistently able to construct a coherent narrative').
[236] IACtHR, *Rosendo Cantú et al. v. Mexico*, 'Judgment (Preliminary Objections, Merits, Reparations and Costs)', 31 August 2010, Series C No. 216 ('*Rosendo Cantú et al. v. Mexico*'), para. 91. *See also* IACtHR, *Fernández Ortega et al. v. Mexico*, 'Judgment (Preliminary Objections, Merits, Reparations, and Costs)', 30 August 2010, Series C No. 215 ('*Fernández Ortega et al. v. Mexico*'), para. 107.

been given after a considerable span of time[237] and that the victims were minors at the time of the events.[238]

171. Because of the mandate imposed in articles 21(3) and 75(6) of the Rome Statute, it is important to note that the UN Human Rights Committee has previously determined that the burden of the proof cannot rest alone on the victim, especially considering that a victim does not always have equal access to the evidence.[239] The Committee Against Torture has also found that 'the burden of proof is reversed and the State party concerned must investigate the allegations and verify the information on which the communication is based' when a claimant cannot obtain documentation of torture. [240] Additionally, the Committee on Economic, Social and Cultural Rights observed that the burden of proof rests on authorities or other respondents when 'the facts and events at issue lie wholly, or in part,' within their 'exclusive knowledge'.[241] Therefore, this Opinion reiterates that in these cases, the burden of proof cannot and should not rest solely on the victims but rather ought to be shared jointly between them and the system of the Rome Statute. This would ensure the fulfilment of the highest objectives set out in the preamble of the Rome Statute.

172. Under the framework of the Rome Statute and the Rules, specifically rule 97(2), the Court may appoint experts so that the determination of the harm and victimhood is done on the basis of professional and technical evidence and similarly with an

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[237] *Rosendo Cantú et al. v. Mexico*, para. 91.
[238] *Rosendo Cantú et al. v. Mexico*, para. 91.
[239] United Nations, Human Rights Committee, *Elena Beatriz Vasilskis v. Uruguay*, 31 March 1983, Communication No. 80/1980, para. 10.4.
[240] United Nations, Committee Against Torture, General Comment No. 4, 4 September 2018, CAT/C/GC/4, para 38. *See also* United Nations, Committee Against Torture, *J.K. v. Canada*, 23 November 2015, CAT/C/56/D/562/2013, para. 10.4 ('[c]omplete accuracy is seldom to be expected from victims of torture. The Committee finds it impossible to verify the authenticity of some of the documents provided by the complainant. However, in view of the reliable documentation he has provided, […] the Committee considers that the complainant has provided sufficient reliable information for the burden of proof to shift'); United Nations, Committee Against Torture, Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 758/2016, 8 February 2019, CAT/C/65/D/758/2016, para. 9.5 ('when complainants are in a situation where they cannot elaborate on their case, the burden of proof is reversed and the State party concerned must investigate the allegations and verify the information on which the communication is based'); United Nations, Committee Against Torture, Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 841/2017, 23 January 2019, CAT/C/65/D/841/2017, para. 7.4 ('when the complainant is in a situation where he or she cannot elaborate on his or her case, the burden of proof is reversed and the State party concerned must investigate the allegations and verify the information on which the communication is based').
[241] United Nations, CESCR, General Comment No. 20, 2 July 2009, para. 40.

objective, logical and scientific evaluation of the evidence supported by expert knowledge. Attention must be paid to the specific context where victims are immersed; contexts of war and ongoing violence in which material infrastructure is often destroyed and the society is de-structured. This makes it very difficult for the victims to obtain the necessary documentation and evidence to prove the harm suffered and the link to the crimes that form the basis of the conviction. The burden of proof ought, thus, to be shared together with the victims and the system established in the Rome Statute which includes, *inter alia*, the Registry, the TFV, and chambers, which have the power to appoint experts.

173. The allocation of the burden of proof must be approached in a multidisciplinary and professional manner with the active participation of relevant experts. As it is not unreasonable that the deep traumas and the aftermath of armed conflict, systematic or generalised atrocious crimes may prevent victims from producing accurate evidence, the Court shall resort to science and the knowledge provided by experts to assess the harm suffered by the victims of such crimes. In so doing, experts shall apply standards contained in all the relevant tools existing in international human rights law such as the Istanbul Protocol, among others.

174. In the framework of the investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment, the Istanbul Protocol sets out rules, principles, techniques and procedures for the investigation, collection of evidence and specially the manner in which this evidence ought to be obtained from the victims of these crimes and wrongful acts, highlighting the importance of the manner in which the victims should be approached, adequately questioned and how their statements should be evaluated.[242] The Istanbul Protocol further sets out the manner in which the consequences of the crimes suffered ought to be established, indicating *inter alia*, ethical and clinical considerations. This Opinion notes that the Istanbul Protocol indicates that psychiatric disorder is prevalent in most cases of victims of crimes like torture, inhumane treatment and punishment.[243] It requires that a clinician makes ‘sure that the child receives support from caring individuals and that

[242] Istanbul Protocol, para. 135.
[243] Istanbul Protocol, para. 236.

he or she feels secure during the evaluation'.[244] It further requires that the clinician keeps 'in mind that children do not often express their thoughts and emotions regarding trauma verbally, but rather behaviourally'.[245]

175. It further supports the view that victims may have difficulty recounting the specific details and therefore their story may show inconsistencies, which arise from factors such as fear of placing themselves or others at risk, a lack of trust in the examining clinician or interpreter, the psychological impact of torture and trauma, such as high emotional arousal and impaired memory, secondary to trauma-related mental illnesses, such as depression and post-traumatic stress disorder, neuropsychiatric memory impairment from beatings to the head, suffocation, near drowning or starvation, protective coping mechanisms, such as denial and avoidance or culturally prescribed sanctions that allow traumatic experiences to be revealed only in highly confidential settings.[246]

176. Furthermore, concerns about re-traumatization may arise in the process of identification of victims. The required physical and psychological examinations 'may re-traumatize the patient by provoking or exacerbating symptoms of post-traumatic stress by reviving painful effects and memories'.[247]

177. In the present case, the *Lubanga* Conviction Decision noted expert testimony stating that the direct victims were exposed to 'combat, shelling and other life threatening events, acts of abuse such as torture […], witnessing loved ones being tortured or injured', etc.[248] In light of the foregoing, it is clear that the victims in this case were subject to circumstances of inhuman and cruel treatment that could have included punishment. This Opinion considers that the Istanbul Protocol should be applied in this case as it refers to facts related to the purpose, scope and objective of this protocol.

178. In light of the foregoing, it is essential that the procedure of determining the harm and the eligibility of victims is conducted in an effective way and it is done in a

[244] Istanbul Protocol, para. 311.
[245] Istanbul Protocol, para. 311.
[246] Istanbul Protocol, paras 142-143.
[247] Istanbul Protocol, para. 149.
[248] *Lubanga* Sentencing Decision, para. 39, referring to Expert Report of Ms Schauer, p. 3.

reasonable period of time, which is not excessive to the point of causing prejudice to the victim. The determination of the harm and the eligibility of victims is a process that should be implemented in a multidisciplinary and professional manner. It should involve a team of professionals (specialised forensic professionals, physicians, psychologists, psychiatrists, anthropologists, archaeologists, etc.) in charge of searching and screening victims with technical certainty by searching, receiving and evaluating the relevant information. By virtue of article 21(3) of the Rome Statute and considering that the crimes under the jurisdiction of the Court amount to serious human rights violations, the process should be guided by the objective standards existing in specialised international instruments (*e.g.*, the Istanbul Protocol), and the further production of professional reports that ought to contain, *inter alia*, the type and number of victims, the scope and extent of harm and damage and the link of causality. These reports must be presented to chambers dealing with reparation proceedings, and defended, if needed, by the experts themselves to assist in reaching a proper final judicial determination.

2. The new assessment of the eligibility of rejected victims

179. It is correct, as the Common Judgment has determined, that the victims disqualified in the Impugned Decision must be reassessed. It is therefore important to highlight that in the case at hand, in order to materialise the rights of the victims, the Trial Chamber and the TFV must bear in mind some aspects of paramount importance during the process of determination of victims, namely the participation of experts or professionals to ensure a correct collection of evidence and proper questioning of victims. In particular, psychological exams are encouraged, and they should be carried out in light of the Istanbul Protocol and other relevant instruments.

180. In this regard, it should also be considered that inconsistencies between the statements of the victims, particularly with regards to the exact date of recruitment and date of birth, should not be a factor to find them ineligible, as long as the events fall within the material time of the charges and the children were under the age of fifteen years. In this regard, rule 94(1)(g) of the Rules indicate that a victim's request for reparation shall contain '*[t]o the extent possible*, any relevant supporting documentation, including names and addresses of witnesses' (emphasis added). In reparations proceedings, when verifying whether a victim meets the requirements set

out in rule 94 of the Rules, or the requirements determined in the specific case, a chamber and the TFV shall assess the documents provided by the victims in light of the *pro homine* principle, considering the burdensome circumstances that victims of mass, atrocious criminality lived and may still be living because of the mass destruction entailed by such criminality, the harm they suffered and the traumatic consequences they may still be living.

181. As stated above, the Court ought to follow an institutional approach to determine, on the basis of expert evidence, the scope and extent of harm, and the scope of victimhood. This is due to the differences between the criminal and the reparations proceedings. In this sense, the standard of proof is different during reparations proceedings, and the convicted person is no longer being prosecuted nor penalised under the *ius puniendi*. Moreover, given that the convicted person and the victims (not the prosecutor) are in fact the parties at this stage, international human rights principles, in particular, the *pro homine* principle, apply, allowing a chamber to consider the extreme difficulties that a victim may have in collecting evidence. Those difficulties are especially considerable in situations of mass criminality and conflict or post-conflict contexts, as explained before.

182. It is of utmost importance for determining appropriate reparation measures that the expert reports indicate the circumstances in which the crime and the harm took place, as well as its seriousness and actual consequences. In the case of indirect victims, reports must also include a determination of the elements on which the findings as to the link with the direct victims are based. Such reports can remedy any inconsistency or absence of documentary evidence on the part of the victims. Psychological or psychiatric expert reports must be produced and evaluated. Regarding the geographical, temporal and social context, other expert reports could be produced and considered. All of this is based on objective and technical procedures.

183. In the case at hand, regarding the analysis of the dossiers of victims who were found ineligible by the Trial Chamber, it is possible to note that in some cases the Trial Chamber found the victim ineligible on the basis of 'non-justified inconsistencies' without taking into consideration the evaluation done by experts. The Trial Chamber may on its own motion appoint experts under Rule 97(2) to produce scientific evidence to assess the harm of the victims. In order to assess the extent of

the harm inflicted upon the victims of the crimes of which Mr Lubanga was convicted, it is necessary to appoint health professionals (physicians and psychologists trained in the field of war trauma) to provide consistent reports of the scope and extent of harm. The Chamber must evaluate those reports if a victim's request has inconsistencies, the reports of the experts could explain the origin of the inconsistencies and provide further basis than the victim's declaration to sustain the claim.

184. Finally, when collecting information from applicants through questionnaires or interviews, this must be done by specialised professionals dealing with victims, preferably specialised psychologists. Furthermore, there has to be coherence between the questions asked and the information required by the Chamber. The TFV submitted that, along with the Office of Public Counsel for Victims ('OPCV') and VPRS, it developed one model of form.[249] It appears that, the form, comprising the same questionnaire, was used for victims who suffered a different type of harm, namely, direct and indirect victims. This Opinion considers that, in the future, victims who have different types of harm should not be assessed on the basis of a one-size-fits-all questionnaire. Being different, there may be information that is only relevant for some victims and that was not provided simply because it was not asked, but this same information may not be as relevant for other victims. For instance, indirect victims may not be able to provide information about the specific facts of the conscription or enlistment into armed groups or forces, or regarding the active use of the children in hostilities, simply because the indirect victims did not necessarily witness such facts.

3. Preliminary conclusion

185. When assessing the eligibility of victims in reparation proceedings, the allocation of the burden of proof must take into consideration the difficulties that victims may face when searching and producing evidence in contexts of armed conflict or protracted violence. The burden of proof must be entertained in a multidisciplinary and professional manner with the active participation of relevant experts.

[249] First Submission of Victim Dossiers, paras 21-23, 80.

186. Moreover, it is correct, as the Common Judgment has determined, that the victims disqualified in the Impugned Decision must be reassessed. It is justified that the victims who were found ineligible in the Impugned Decision have the opportunity to be evaluated again in light of clear parameters, with the participation of professionals and following appropriate instruments.

D. Chapter conclusions

187. Because of the specific nature of crimes under the jurisdiction of this Court which always constitute gross human rights violations, the harm and damages caused as a result of the crime are complex and include the harm to the core human rights violated which must be repaired. These complex harm and damages may take different forms: pecuniary or non-pecuniary. The harm is complex for the direct and indirect victims. In the case of child soldiers, there is a specific damage, that is, the harm to the project of life, which must be repaired in a way that accounts for the opportunity costs and the victims' lost right to freedom of self-determination, and personal fulfilment.

188. In this case, the victims are the direct victims (former child soldiers), indirect victims (*inter alia*, next of kin and those who tried to prevent the harm) and potential victims. The last category is defined by temporal and geographic criteria, specific circumstances of the crime, and other relevant criteria. Potential victims can also include collective victims.

189. This Opinion agrees with the Common Judgment that the Trial Chamber correctly determined Mr Lubanga's liability in relation to the harm inflicted on his victims, including potentially eligible victims. Indeed, the Trial Chamber was correct in including potential victims on the basis of the criteria set out in previous judicial decisions such as the conviction and sentencing decisions.

190. Because of the specific nature of crimes under the jurisdiction of this Court, the process of determining and identifying harm and victims must be informed and guided by international human rights law and standards. This will ensure that the burden of proof is allocated in a more comprehensive manner, favourable or at least considerate of the victims' hardship in cases of mass criminality. The burden of proof must be approached in an institutional manner. In cases of atrocious crimes such as in

the present case, the burden of proof cannot be placed exclusively on the victims; rather, it should be shared between the victims and the system established in the Rome Statute. This must be supported by multidisciplinary and technical professionals and this can be implemented by the Court, *inter alios*, through the Registry or the TFV in its supporting role.

191. The new assessment of the disqualified victims ought to be carried out by the Trial Chamber with the support of the TFV, and must follow clear, simple and practical rules and a scientific and technical methodology previously established. It should further permit that even the victims who are found to be ineligible could be residually considered as part of the collective victims as long as the criteria for their inclusion is met. This approach shall enable the Court to more successfully repair the broad scope and extent of harm caused by the criminal offence, and to repair the highest number of victims.

V. *THIRD ISSUE*: ADEQUATE, APPROPRIATE AND EFFECTIVE REPARATION *VIS À VIS* THE AMOUNT OF LIABILITY OF THE CONVICTED PERSON

192. This issue relates to the fourth ground of appeal of Mr Lubanga under which he claims that the amount of reparations awards can be assessed only on the basis of the actual cost of the reparations programme in collective reparations. This Opinion notes a clear misunderstanding in Mr Lubanga's submissions which requires some further clarification as to what is the most adequate, efficient and appropriate way to repair the harm in the case at hand and the content of the amount of liability. This Opinion finds the need to address the following questions:

a. What are the characteristics, objectives and ultimate aim of reparations?

b. What is the content of reparations?

c. What is the content of the amount of liability of the convicted person?

193. The Common Judgment, when addressing Mr Lubanga's fourth ground of appeal, recalled the concept of 'cost of repair', and noted that, while it is appropriate to focus on such a concept, failure to do so is not an error, and that the overarching purpose of reparations is to repair the harm to achieve *restitutio in integrum*.[250] The Common Judgment further acknowledged that the Trial Chamber was not incorrect in having relied on estimates to reach the amount of liability of USD 10 million — USD 3.4 million for 425 victims and 6.6 million for potentially eligible victims.[251] Thereafter, in determining the correctness of the Trial Chamber's apportionment of Mr Lubanga's liability, the Appeals Chamber found that, contrary to Mr Lubanga's arguments in his fifth ground of appeal, the Trial Chamber took into account his degree of participation and the gravity of his crimes.[252]

194. This Opinion agrees with the outcome of the Common Judgement, particularly its incorporation of international human rights law into the Court's jurisprudence on reparations. However, this Opinion has some clarifications to make with regards to the bases on which the Common Judgment justified the correctness of the Trial Chamber's estimates about the amount of Mr Lubanga's liability. The Common Judgment considered that the Trial Chamber's estimate of USD 8,000 for individual harm, although not clearly explained in the Impugned Decision, was not incorrect, nor was its estimate of USD 3.4 million for 425 victims.[253] It further justified the correctness of the Trial Chamber's estimate of USD 6.6 million for the remainder victims.[254]

195. For the reasons that will be set out below, this Opinion considers that the reparations award ought to be determined in light of the nature, content, objectives and adequate measures of reparation, as well as the circumstances of each case, such as the personal circumstances of the convicted person, his or her role in the commission of the crimes and causation of harm, and the interests and needs of the victims.

[250] Common Judgment, para. 107; *Katanga* Judgment on Reparations, paras 2, 72.
[251] Common Judgment, paras 109-122.
[252] Common Judgment, paras 301-316.
[253] Common Judgment, paras 110-118.
[254] Common Judgment, paras 119-120.

196. Mr Lubanga argues that '[i]n the case of collective reparations, the award against a convicted person can be assessed only on the basis of the actual cost of the collective award'.[255] He argues as well that the Trial Chamber erred when it calculated the amount of the award on the basis of the aggregate of individual damages.[256] He further maintains that those concepts are mutually exclusive when determining collective reparations awards.[257] This Opinion finds the need to clarify that awarding reparations is not as simple as that. In presenting the cost of repair as an alternative to adding the amount it would take to individually compensate each victim, Mr Lubanga's argument wrongly assumes that it is either one or the other way that a trial chamber must follow to reach an amount of liability. Mr Lubanga's argumentation in this regard is fallacious as none of the two premises is in itself sufficient to determine the amount of liability. Rather, this Opinion considers that both of them are elements of the determination of the amount of liability.

197. An integral approach should rather include the broad extent of the harm, the complete scope of victims, the adequate measures of reparations, and the cost of reparations programmes; all these elements form the cost of repair. In other words, an award for reparations must reflect not only the aggregate individual harm and compensatory damages, but also the costs of specific programmes that fully repair the harm with measures that ensure *restitutio in integrum*. Moreover, a trial chamber must take into consideration the circumstances of each case, the role of the convicted person in the commission of crimes and causation of harm, and the victims' needs and interests, as this Opinion develops below when addressing the three questions proposed.

A. What are the characteristics, objectives and the ultimate aim of reparations?

198. Reparation is by nature an internationally recognised human right, and restores dignity and produces redress. To that end, victims shall individually consent, and collective victims shall be consulted. In both cases, there must be informed processes and this must be done before consent is expressed and before the consultation is accepted.

[255] Mr Lubanga's Appeal Brief, para. 211.
[256] Mr Lubanga's Appeal Brief, paras 218-225.
[257] Mr Lubanga's Appeal Brief, paras 218-225.

199. The Common Judgment stressed that the overall purpose of reparations is 'to repair the harm caused, and to achieve, to the extent possible, *restitutio in integrum*'.[258] It went on to note that 'the amount of the convicted person's liability should be fixed taking into account […] the different harms suffered by the different victims (direct and indirect) in addition to, in particular circumstances, the collective of victims'.[259] This Opinion agrees with the Common Judgement's adoption of these principles of International Human Rights Law into the Court's jurisprudence on reparations, and given their pivotal importance, this Opinion further elaborates on each of them.

1. The human right to reparations in its broad dimension

200. The victims of atrocious crimes under the Rome Statute which constitute gross violations of internationally recognised human rights have a right to obtain reparations.[260] The duty to afford reparations due to the harm caused by a breach of an international obligation is widely recognised by the jurisprudence of international tribunals.[261]

201. The human right to reparations is expressly stipulated in article 75 of the Rome Statute. Besides being a right enshrined in the Rome Statute, the right to reparations is

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[258] Common Judgment, para. 107.
[259] Common Judgment, para. 108.
[260] Shelton, p. 18 (referring to Justice Guha Roy of India: '[t]hat a wrong done to an individual must be redressed by the offender himself or by someone else against whom the sanction of the community may be directed is one of those timeless axioms of justice without which social life is unthinkable').
[261] Dissenting Opinion of Judge Cançado Trindade, paras 51, 59 ('[i]n sum, the *titulaires* of the right to reparation are the individuals concerned, the victimized human beings'); ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, paras 152-153 (noting that the consequences of state responsibility require compensating all natural or legal persons harmed by the wall, even those without a state able to institute a claim of diplomatic protection, and that the violations of primary obligations of human rights and international humanitarian law trigger the duty to compensate all those individuals whose rights were violated); United Nations, Human Rights Committee, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, CCPR/C/21/Rev.1/Add, para. 16 ('[w]ithout reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged'); United Nations, Human Rights Council, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, 21 August 2017, A/HRC/36/50 ('P. de Greiff'), para. 25 ('[o]ther international instruments and mechanisms […] provide procedural and substantive clarification, support and guidance to operationalize these requirements, in addition to a growing body of international and regional jurisprudence'); C. McCarthy, *Reparations and Victim Support in the International Criminal Court* (2012) ('McCarthy'), p. 16 ('[i]nternational human rights protections, particularly at the regional level, have been significant in providing redress to victims of egregious conduct of the sort that may also give rise to individual criminal responsibility under international law').

an internationally recognised human right that has further been categorised within customary law.[262] As such, the human right to reparations finds its foundation to be applied at this Court in article 21(1) and 21(3) of the Rome Statute, as well as article 75(6). This provision, which is preceded by the paragraphs establishing the reparations regime at this Court, reads:

> Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.[263]

202. Notably, the UN General Assembly adopted in 2005 the UN Basic Principles and Guidelines on the Right to Reparation. Principle II stipulates the obligation to respect, ensure respect for and implement international human rights law and international humanitarian law, encompassing the duty to 'provide effective remedies to victims, including reparation[…]'.[264] Importantly, Principle VII provides that '[r]emedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to […] [a]dequate, effective and prompt reparation for harm suffered'.[265] Equally relevant is Principle IX stating that '[a]dequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered'.[266]

203. Principle IX sets out the five key elements of *restitutio in integrum* as the full spectrum of the human right to reparations: 'victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation […] which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition'.[267]

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[262] Evans, p. 39 ('it appears reasonable to state that this right has acquired a degree of recognition as forming part of customary law').
[263] Article 75(6) of the Rome Statute.
[264] Principle II of the Basic Principles and Guidelines on the Right to Reparation, para. 3(d).
[265] Principle VII of the Basic Principles and Guidelines on the Right to Reparation, para. 11(b).
[266] Principle IX of the Basic Principles and Guidelines on the Right to Reparation, para. 15.
[267] Principle IX of the Basic Principles and Guidelines on the Right to Reparation, para. 18.

2. Rights to truth, justice and reparations

204. Victims' rights to truth and justice are necessary conditions for the exercise of their right to reparations.[268] The UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence recently highlighted that international human rights law and humanitarian law both impose obligations to (i) investigate, prosecute and punish those accused of serious rights violations, (ii) reveal to victims and society at large all known facts and circumstances of past abuses, (iii) provide victims with restitution, compensation and rehabilitation, and (iv) ensure repetition of such violations is prevented.[269]

205. Only then, when the truth is known and access to justice is provided, can victims fully start their process to recover from and repair their harm. To put it another way, the records of the eighth plenary session of the Rome Conference read: '[j]ustice for victims of gross violations of international humanitarian law and human rights could be achieved only when victims had access to justice in three areas: the right to know the truth, the right to a fair trial and the right to reparation'.[270]

206. Once the truth is known, justice is yet to be done. An important guarantee for victims of atrocious crimes that constitute core human rights violations is the possibility of obtaining remedies to their harm. The existence of remedial institutions and procedures to which victims of such atrocities may have access is paramount to the achievement of justice.

207. One of the most negative consequences of impunity is that it strips victims from a remedy to their harm, thereby calling into serious question their human right to access to justice and the rule of law.[271] Refusal of access to the judiciary in reparation

[268] C. Bassiouni, 'International Recognition of Victims' Rights' in *6 Human Rights Law Review 203* (2006), p. 260.
[269] P. de Greiff, para. 20 (the Special Rapporteur lists treaties which establish these rights, including the ICCPR, ICESCR, Convention against Torture, Genocide Convention, International Convention on the Suppression and Punishment of the Crime of Apartheid, Convention on the Rights of the Child, and Racial Discrimination Convention).
[270] Summary records of the plenary meetings, p. 120, para. 86.
[271] Shelton, p. 61 ('[i]mpunity that leaves human rights victims without a remedy calls into serious question the integrity of human rights guarantees and the rule of law').

proceedings is thus 'considered as a primary manifestation of the concept of denial of justice'.[272]

208. As explained by the IACtHR, 'impunity *fosters chronic recidivism of human rights violations, and total defenselessness of victims and their relatives*'.[273] When a crime goes unpunished and, worse yet, when the victims of such crimes are not heard at any court of justice, the victimising condition and the harm of the victims is perpetuated and at times normalised by society, against internationally recognised principles and human rights.

3. The restorative nature of reparations

209. Reparation must be restorative. Under the UN Basic principles on the use of restorative justice programmes in criminal matters ('UN Basic Principles on Restorative Justice'), restorative justice is a judicial practice 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'.[274]

210. The preamble of the UN Basic Principles on Restorative Justice states that restorative justice inherently respects the dignity and equality of each person.[275] It builds understanding and promotes social harmony through the healing of victims, offenders and communities.[276] More specifically, restorative justice enables victims to share their feelings and experiences in order to address their needs.[277] In doing so, restorative justice helps victims to obtain reparation, feel safer and seek closure.[278] At the same time, it allows offenders to gain insight into the causes and effects of their

[272] Shelton, p. 17 ('[t]he obligation to afford remedies for human rights violations requires, in the first place, the existence of remedial institutions and procedures to which victims may have access. Refusal of access to the tribunals of a country is considered a primary manifestation of the concept of denial of justice').
[273] IACtHR, *Paniagua-Morales v. Guatemala*, 'Judgment (Merits)', 8 March 1998, Series C No. 37, para. 173 (emphasis added).
[274] United Nations, ECOSOC, Basic principles on the use of restorative justice programmes in criminal matters, 24 July 2002, E/RES/2002/12 ('Basic principles on the use of restorative justice programmes in criminal matters'), para. 2.
[275] Preamble of the Basic principles on the use of restorative justice programmes in criminal matters.
[276] Preamble of the Basic principles on the use of restorative justice programmes in criminal matters.
[277] Preamble of the Basic principles on the use of restorative justice programmes in criminal matters.
[278] Preamble of the Basic principles on the use of restorative justice programmes in criminal matters.

behaviour and gives them the chance to take responsibility.[279] A successful restorative justice framework should enable communities to understand the underlying causes of crimes, prevent future crimes, and promote community wellbeing.[280]

211. An advantage of restorative justice is that, although monetary compensation can provide funds for basic necessities, many victims want an apology above all else.[281] Monetary compensation is often 'much less important than emotional or symbolic reparation' for litigants.[282] Thus, monetary compensation does not aptly address a person's need for 'dignity, emotional relief, participation in the social polity, or institutional reordering'.[283]

212. The IACtHR reiterated that 'the objective of international human rights law is [...] to protect the victims and to provide for the reparation of damages'.[284] It often follows this principle by ordering non-monetary remedies that respond to victims' demands for recognition, restoration, and accountability alongside monetary compensation.[285] This approach allows the IACtHR to incorporate practices of conflict resolution which 'engage victims in crafting their own means to restoration [that] are today associated with the restorative justice movement'.[286]

213. As atrocious crimes dehumanize perpetrators and victims, the process of reparation must attempt to bring their humanity back. Reparations are restorative in nature in the sense that they aim at restoring moral values, dignity and social equity. The reparations process shall focus on repairing and healing harm caused as a result

[279] Preamble of the Basic principles on the use of restorative justice programmes in criminal matters.
[280] Preamble of the Basic principles on the use of restorative justice programmes in criminal matters. *See also* D. O'Mahony and J. Doak, *Reimagining Restorative Justice* (2017), p. 42 ('[i]ts [restorative justice] strength lies in the fact that victims are able to establish an element of control over the process and offenders are encouraged to assume responsibility for their actions, whilst active community participation can strengthen the sense of community values which underpin the whole process').
[281] T. Antkowiak, 'An Emerging Mandate for International Courts: Victim-centered remedies and restorative justice' in *47 Stanford Journal of International Law 279* (2011) ('Antkowiak'), p. 284.
[282] Antkowiak, p. 284. *See also Reimagining Restorative Justice*, p. 43 ('[…] the therapeutic potential of restorative encounters tends to resonate closely with the considerable body of psychological evidence which links oral or written accounts to a reduction in feelings of anger, anxiety, and depression, to higher levels of self-confidence, and even to improved physical health') (citations omitted).
[283] Antkowiak, p. 284, referring to E. Yamamoto, *Interracial Justice: Conflict and Reconciliation in Post-Civil Rights America* (1999).
[284] IACtHR, *Godínez-Cruz v. Honduras*, 'Judgment (Merits)', 20 January 1989, Series C No. 5, para. 140.
[285] Antkowiak, p. 281.
[286] Antkowiak, p. 281.

of the commission of mass, atrocious criminality. It shall allow the convicted perpetrators to come to terms with their past, if possible, apologise and achieve reconciliation with the victims and the community.

4. Reparations as a source of remedy and redress

214. The obligation of the offender to redress a wrongdoing 'is one of those timeless axioms of justice without which social life is unthinkable'.[287] Reparations should serve as a remedy for victims of atrocious crimes under the jurisdiction of this Court and produce redress. An important guarantee for victims of atrocity crimes and core human rights violations is the possibility of obtaining remedies to their harm. The existence of remedial legal institutions and procedures to which victims of such atrocities may have access is paramount to the achievement of justice.

215. In providing reparations, this Court, according to the mandate imposed in articles 21(3) and 75(6) of the Rome Statute, shall not prejudice but instead pay heed to the different treaties enabling victims to obtain remedy, *inter alia*: article 2(3) of the ICCPR establishing the effective remedy for persons whose rights are violated;[288] article 39 of the Convention on the Rights of the Child regarding measures to promote recovery and reintegration;[289] articles 13 and 14 of the Torture Convention granting the rights to complaint, redress, and fair and adequate compensation;[290] article 6 of the Racial Discrimination Convention providing for effective protection and remedies;[291] article 2(c) of the Convention on the elimination of all forms of discrimination against women mandating effective protection through competent national tribunals and other public institutions;[292] articles 13 and 16(4) of the Convention on the Rights of Persons with Disabilities stipulating the rights to access to justice and measures to promote recovery, rehabilitation and reintegration;[293] articles 5(5) and 41 of the ECHR regarding compensation, reparation and just satisfaction;[294] and article 25(1) of the

[287] Shelton, p. 18 (referring to Justice Guha Roy of India: '[t]hat a wrong done to an individual must be redressed by the offender himself or by someone else against whom the sanction of the community may be directed is one of those timeless axioms of justice without which social life is unthinkable').
[288] Article 2(3) of the ICCPR.
[289] Article 39 of the Convention on the Rights of the Child.
[290] Articles 13, 14 of the Torture Convention.
[291] Article 6 of the Racial Discrimination Convention.
[292] Article 2(c) of the Convention on the Elimination of all Forms of Discrimination Against Women.
[293] Articles 13, 16 of the Convention on the Rights of Persons with Disabilities.
[294] Articles 5, 41 of the ECHR.

ACHR on the right to simple, prompt effective recourse.[295] These instruments guarantee both the procedural right of effective access to justice and the substantive right to a remedy.[296]

5. Other aspects to consider in order to efficiently and adequately repair the harm

216. Victims may indeed have individually or collectively suffered harm and both types of suffering should be addressed by simultaneously awarding individual and collective reparations. This was confirmed in the 2015 Amended Reparations Order, where the Appeals Chamber held that '[i]ndividual and collective reparations are not mutually exclusive, and they may be awarded concurrently'.[297] Accordingly, the Appeals Chamber in 2015 found that 'it is appropriate to award collective reparations to that community, understood as a group of victims' if there is a 'sufficient causal link between the harm suffered by the community' and the crimes of which Mr Lubanga was convicted.[298] The Appeals Chamber also noted that individual reparations should be awarded in a way that does not create tensions or divisions within a community, while collective reparations should address the harm suffered by victims on both an individual and collective basis.[299]

217. The Common Judgment recalled that a chamber may concurrently award individual and collective reparations, and went on to stress the importance of having 'this in mind when reaching determinations as to the appropriateness of particular reparations in the cases before them'.[300] The Common Judgment nevertheless did 'not attempt to set out, in an exhaustive manner, how the concept of "collective" reparations should be understood – bearing in mind the many permutations possible, which will also be dependent on the facts of particular cases', but it stressed 'that, in

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[295] Article 25(1) of the ACHR.
[296] Shelton, p. 58 ('[m]ost texts guarantee both the procedural right of effective access to a fair hearing and the substantive right to a remedy').
[297] *Lubanga* Amended Reparations Order, para. 33, referring to IACtHR, *Moiwana Community v. Suriname*, 'Judgment (Preliminary Objections, Merits, Reparations and Costs)', 15 June 2005, Series C No. 124 (*Moiwana Community v. Suriname*), paras 194, 201.
[298] *Lubanga* Appeal Judgment on Reparations, para. 212.
[299] *Lubanga* Amended Reparations Order, para. 33; Trial Chamber, Reparations Order, 17 August 2017, ICC-01/12-01/15-236 ('*Al Mahdi* Reparations Order'), paras 52-53, 67, 71, 83, 90 (the Trial Chamber ordered collective reparations given that the loss of the protected buildings 'was felt by the community as a whole' and individual reparations for those whose livelihoods exclusively depended upon the protected buildings).
[300] Common Judgment, para. 40.

awarding collective reparations to victims, this can include reparations which are individualised' and that 'collective reparations can include the payment of sums of money to individuals to repair harm suffered and the possibility for individuals to participate in particular programmes which address the specific harm that those individuals have suffered'.[301] It further 'recall[ed] that "[r]eparations are entirely voluntary and the informed consent of the recipient is necessary prior to any award of reparations, including participation in any reparations programme"'.[302]

218. This Opinion shares this view. It is true that reparations programmes must be determined on a case by case basis and that collective reparations do not necessarily exclude individual reparations. Furthermore, reparations ought to seek prior and informed consent of individual victims and carry out consultation processes with collective victims, in particular, the affected communities. With the aim of further strengthening the findings in the Common Judgment, and in line with the mandate imposed in articles 21(3) and 75(6) of the Rome Statute, this Opinion will now analyse more in depth some concepts as they have been developed under international human rights jurisprudence. It will entertain the concepts of individual and collective reparations, as well as some crucial aspects that must be taken into account.

(a) Collective reparations do not *per se* exclude individual reparations

219. At the outset, this Opinion clarifies that the concept of individual victim is not the same as individual reparations just as the concept of collective victim is not the same as the concept of collective reparations. Individuals may receive both individualised and collective reparations, and communities that have been collectively victimised are also entitled to be recognised as such and receive collective reparations. The harm produced by atrocious crimes and gross violations of human rights, such as those which constitute crimes under the jurisdiction of this Court can be collective or individual. In cases of massive victimhood, collective reparations may be appropriate in order to repair both a collective harm suffered by a community as a whole and the individual harm suffered by the individual victims who are part of that community.

[301] Common Judgment, para. 40.
[302] Common Judgment, para. 40, referring to *Lubanga* Amended Reparations Order, para. 30.

220. The Rome Statute's provisions that allow victims to participate in the Court's processes exemplify the expansion of the right to access to justice throughout international criminal law.[303] In contrast with the *ad hoc* tribunals, this Court accords victims the explicit right to reparations derived directly from their victimisers.[304] In order for the right to access to justice of these victims to be properly ensured, the proceedings must be capable of redressing the harm that was inflicted.[305]

221. Rule 85 of the Rules explains who is considered a victim. More specifically, it states that a victim is not only an individual; legal persons and groups who have suffered a collective harm may also be considered victims.[306] Accordingly, the Court may order both individual and collective reparations per rule 97(1) to both individual and collective victims. [307]

222. Human rights instruments and international courts have clarified the definitions of individual and collective reparations, and emphasised the importance of utilising various forms of reparations.[308] For example, the UN Declaration of Basic Principles

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[303] Shelton, p. 18 ('[t]he notion of access to justice has undergone expansion with the development of international criminal law and the recognition by human rights tribunals that certain violations of human rights should be penalized under national law. This implies access to procedures that will investigate, prosecute, and punish violators and includes the right of victims to participate in the investigative process and the criminal proceedings in some manner').

[304] *See* T.M. Funk and P. Masidda, *Victims' Rights and Advocacy at the International Criminal Court* (2015), p. 79 ('[t]he most innovative feature distinguishing the ICC from other predecessor tribunals and regional courts is that it formally, and comprehensively, enshrines the rights of victims to participate in proceedings, state their views and concerns, and claim reparations, including compensation, rehabilitation and restitution').

[305] Shelton, p. 18 ('[a]ccess to justice implies that the procedures are effective, i.e. capable of redressing the harm that was inflicted').

[306] Rule 85 of the Rules. *See* Appeals Chamber, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432, para. 35 ('[t]here may clearly be harm that could be both personal and collective in nature. The fact that harm is collective does not mandate either its inclusion or exclusion in the establishment of whether a person is a victim before the Court. The issue for determination is whether the harm is personal to the individual victim'). *See also* Shelton, p. 242 ('Chamber I accepted that the concept of victims in Rule 85 could include not only individuals, but legal persons and groups with collective claims').

[307] Rule 97(1) of the Rules ('the Court may award reparations on an individualized basis, or, where it deems it appropriate, on a collective basis or both').

[308] *See generally* UNHCHR, Reparations for Conflict-Related Sexual Violence, June 2014, p. 7 (noting that reparations can be awarded to: (i) 'a group of people who suffered harm as a result of violations of international human rights law and international humanitarian law', (ii) 'the particular community where a group of people described in resides', (iii) 'a group of people who are connected by cultural and ancestral bonds', and (iv) 'the particular benefit given to the group who suffered harm'). *See also* articles 19-24 of the ACHPR; *Endorois Welfare Council v. Kenya African Commission* (Kenya was recommended to provide individual measures of reparation and recognise rights of ownership to the Endorois ancestral).

states that victims are persons who individually or collectively suffered harm.[309] The UN Basic Principles and Guidelines on the Right to Reparation, in turn, state that '[i]n addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate'.[310]

223. It should be noted that the notion of collective reparations remains ambiguous. This has been confirmed by the former UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence.[311] Notably, collective reparations should be awarded whenever: 'i) they pertain to violations of a collective right or rights violations that impact a community; ii) the beneficiary is a group or a group of people; iii) the measures are not individually tangible'.[312] In this regard, the IACtHR has consistently ordered collective reparations bearing in mind 'the need to grant different measures of reparation, in order to redress the damage fully'.[313] The orders have come in different forms, including: the establishment of a housing programme,[314] a development programme,[315] the regulation of processes of prior consultation,[316] and the designation of an educational center with a name allusive to the victims.[317] These examples of collective reparation measures would not per se exclude the awarding of individual reparations. The Appeals Chamber has held, in the Amended Reparations Order, that '[i]ndividual and collective reparations are not

[309] Annex to the UN Basic Principles of Justice for Victims, para. 1.
[310] Annex to the UN Basic Principles of Justice for Victims, para. 1; UN Basic Principles and Guidelines on the Right to Reparation, paras 8, 13.
[311] United Nations, General Assembly, Promotion of truth, justice, reparation and guarantees of non-recurrence, 14 October 2014, A/69/518 ('P. de Greiff 2014'), paras 38, 40, 42 ('[c]ollective reparations of the material kind are constantly at risk of not being seen as a form of reparation at all, and as having minimal reparative capacity' because '[…] such measures do not target victims specifically') ('in order for reparation programmes to retain their distinctiveness, [c]ollective reparation programs should be organized around non-basic services').
[312] D. Odier-Contreras Garduno, *Collective Reparations* (2018), pp. 201-202.
[313] IACtHR, *Massacres of El Mozote and surrounding areas v. El Salvador*, 'Judgment (Merits, Reparations, and Costs)', 25 October 2012, Series C No. 252 ('*Massacres of El Mozote and surrounding areas v. El Salvador*'), para. 305; *Las Dos Erres Massacre v. Guatemala*, para. 226 ('[i]n view of this situation, the Court has considered the need to provide different types of reparation so as to fully redress the damages, therefore in addition to pecuniary measures, other measures such as satisfaction, restitution, rehabilitation, and guarantees of non-repetition have special relevance due to the gravity of the infringements and collective nature of the damage caused').
[314] *Massacres of El Mozote and surrounding areas v. El Salvador*, para. 346.
[315] *Massacres of El Mozote and surrounding areas v. El Salvador*, paras 336-340.
[316] *Kichwa Indigenous People of Sarayaku v. Ecuador*, para. 301.
[317] IACtHR, *'Street Children' (Villagrán Morales et al.) v. Guatemala*, 'Judgment (Reparations and Costs)', 26 May 2001, Series C No. 77, para. 95.

mutually exclusive',[318] and more recently, in the Common Judgment, that 'collective reparations can include the payment of sums of money to individuals'.[319]

224. This Opinion notes that the only way to effectively repair the damage inflicted on collective victims is to identify the specific damage suffered by the group. This process is different than identifying damage suffered individually by members of the group. Regardless, an order for collective reparations should never prejudice an individual's right to reparations; both can be awarded simultaneously.

(b) Victims' voice in individual and collective reparations

225. The *Lubanga* Amended Reparations Order noted that reparations cannot be imposed on victims.[320] It also stipulated that recipients' informed consent is required prior to their participation in a reparations programme or their receipt of an award.[321] Additionally, the Court should 'consult with victims on issues relating, *inter alia*, to the identity of the beneficiaries and their priorities'.[322]

226. This Opinion shares this view and adds that prior and informed consent is as important for individual victims, as prior and informed consultation is for collective victims. The IACtHR has developed its jurisprudence in this regard, as explained below.

(i) Individual's prior and informed consent

227. The reparation proceedings must respect the autonomy of the victims and their freedom in making the decision as to whether and in what manner they want to be repaired for the harm they suffered. In this regard, it is essential that the victims give their informed consent to have their harm evaluated during the reparation proceedings and to be part of the reparations programmes. Informed consent is imperative when

[318] *Lubanga* Amended Reparations Order, para. 33, referring to IACtHR, *Moiwana Community v Suriname*,paras 194, 201.
[319] Common Judgment, para. 40. *See also Plan de Sánchez Massacre v. Guatemala*, paras 86-87.
[320] *Lubanga* Amended Reparations Order, para. 30 (referencing principle 3.8 of the Paris Principles: '[r]eparations are entirely voluntary and the informed consent of the recipient is necessary prior to any award of reparations, including participation in any reparations programme').
[321] *Lubanga* Amended Reparations Order, para. 30.
[322] *Lubanga* Amended Reparations Order, para. 32. See also J. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2013), p. 188-240.

reparation programmes include, *inter alia*, medical, psychological or psychiatric, or psychosocial treatment.

228. Informed consent is rooted in the autonomy and self-determination of individuals; it ensures that victims have the power to weigh their options and make their own decisions without third party interference. [323]

229. In this regard, Principle 3.8 of the Paris Principles to which the Lubanga Amended Reparations Order referred, states that '[w]here truth-seeking and reconciliation mechanisms are established, children's involvement should be promoted and supported and their rights protected throughout the process. Their participation must be voluntary and by informed consent by both the child and her or his parent or guardian where appropriate and possible'.[324]

230. The IACtHR and the ECtHR have developed the notion of informed consent in the performance of any medical act,[325] and have emphasized that the consent of the victims and coordination with them through their representatives is a fundamental element for the implementation of reparation programmes.[326] In the context of medical treatment, the IACtHR has mentioned that the need to obtain informed consent not only protects the right of patients to freely decide whether or not they wish to undertake medical treatment, but that it is also a fundamental mechanism to achieve the respect and guarantee of different human rights recognized by the ACHR, such as dignity, personal freedom, personal integrity, private and family life.[327]

231. In accordance with international standards, the consent given by the victims should comply with two elements. First, it must consist of a prior decision to accept the reparations, a decision which must be expressed freely, without threats or

[323] IACtHR, *I.V. v. Bolivia*, 'Judgment (Merits, Reparations and Costs)', 30 November 2016, Series C No. 329 ('*I.V. v. Bolivia*'), para. 165.
[324] UN Paris Principles, para. 3.8.
[325] *See e.g.* IACtHR, *Poblete Vilches et al. v. Chile*, 'Judgment (Merits, Reparations and Costs)', 8 March 2018, Series C No. 105 ('*Poblete Vilches et al. v. Chile*'); *I.V. v. Bolivia*; ECtHR, Chamber, *Glass v. United Kingdom*, 'Judgment', 9 March 2004, Application No. 61827/00 ('*Glass v. United Kingdom*'); ECtHR, Fourth Section, *M.A.K. and R.K. v. The United Kingdom*, 'Judgment', 23 March 2010, Application Nos. 45901/05, 40146/06 ('*M.A.K. and R.K. v. United Kingdom*'); ECtHR, Fourth Section, *R.R. v. Poland*, 'Judgment', 26 May 2011, Application No. 27617/04 ('*R.R. v. Poland*'); ECtHR, Fourth Section, *Elberte v. Latvia*, 'Judgment', 13 January 2015, Application No. 61243/08 ('*Elberte v. Latvia*').
[326] *Massacres of El Mozote and surrounding areas v. El Salvador*, para. 353.
[327] *Poblete Vilches et al. v. Chile*, para. 170.

coercion, or improper inducement. Second, it should be manifested after obtaining adequate, complete, reliable, understandable and accessible information, provided that this information has been completely understood.[328] The term informed consent stems from the idea that full consent can only be given after obtaining and understanding comprehensive information about the proceedings upon which consent is given.[329] In brief, informed consent is the ultimate expression of an individual's liberty and allocates the utmost respect for the victims' human rights.

(ii) Prior consultation with communities

232. The communities whose members were victims of the crimes under the jurisdiction of this Court must be consulted about what they consider to be effective, adequate and appropriate reparations. Because of their nature, collective reparations generally tend to be more effective when communities or groups implement them themselves, as opposed to outside entities.[330] The procedures of prior consultation with the community, as well as the community's actual participation, must be conducted in good faith and include the preparation and planning stages of the programmes.[331]

233. The process of prior consultation has been developed by the jurisprudence of the IACtHR regarding the protection of the rights of indigenous communities.[332] The IACtHR has asserted that in order to carry out any project that could eventually have an impact on a community's land or affect essential aspects of their worldview or their life and cultural identity, the community should be previously, adequately and effectively consulted, in full compliance with the relevant international standards.[333]

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[328] *Poblete Vilches et al. v. Chile*; *I.V. v. Bolivia*; *Glass v. United Kingdom*; *M.A.K. and R.K. v. United Kingdom*; *R.R. v. Poland*; *Elberte v. Latvia*.
[329] *See e.g. I.V. v. Bolivia*, para. 166.
[330] J. Malamud-Goti and L. S. Grosman, 'Reparations and Civil Litigation: Compensation for Human Rights Violations in Transitional Democracies' in P. De Greiff (ed.) *The Handbook of Reparations* (2006) ('The Handbook of Reparations'), p. 548 ('[n]eedless to say, the approach we are defending does not guarantee that victims of human rights abuse will effectively collect the compensation awarded by the courts. Nothing can guarantee that. But for the compensation of human rights abuse to be just, it is important that it be implemented in such a way that it respects the victims' equality, and this needs to be judged with reference to the way the government treats them vis-à-vis other creditors').
[331] *Kichwa Indigenous People of Sarayaku v. Ecuador*, para. 300.
[332] *See e.g. Kichwa Indigenous People of Sarayaku v. Ecuador*, paras 298-300; *Saramaka People v. Suriname*, para. 133.
[333] *Kichwa Indigenous People of Sarayaku v. Ecuador*, para. 299. *See also* United Nations, General Assembly, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, 11 August 2008, A/HRC/9/9, para. 39.

The Inter-American Commission has noted that a process of fully informed consent requires 'at a minimum, that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives'.[334]

234. In accordance with the international standards for consultation of communities, the processes of participation and prior consultation must seek to actively consult with the interested community according to their customs and traditions.[335] There is a duty to both accept and disseminate information, in order to have constant communication between the parties of the consultation.[336] These consultations must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement.[337] Furthermore, the community must be consulted, at the initial phases of a reparations plan and not only when the need arises to obtain formal approval from the community.[338] This is because early notice provides time for internal discussion within communities and for proper feedback to the persons in charge of the programme.[339] The decision-making process of communities may have a different pace which must be respected.

235. The process of consultation of victims in the reparations process must be done in good faith and must ensure an active communication with the interested communities at every stage of the process. The way in which the community or the collective victim consider their harm is best repaired should be taken into account. This is of essential value in achieving effective, adequate and appropriate reparations.

6. Preliminary conclusion

236. Reparation is a human right. It is restorative in nature, provides remedy and produces redress. This is indeed the ultimate end of reparation proceedings. The manner in which reparations are claimed, individually or collectively, is immaterial. In reparations proceedings, prior informed consent of individual victims and prior consultation with collective victims are prerequisites.

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[334] *Maya Indigenous Community of the Toledo District v. Belize*, para. 142.
[335] *Saramaka People v. Suriname*, p. 133.
[336] *Saramaka People v. Suriname*, p. 133.
[337] *Saramaka People v. Suriname*, p. 133.
[338] *Saramaka People v. Suriname*, p. 133.
[339] *Saramaka People v. Suriname*, p. 133.

B. The content of reparations: *restitutio in integrum*

237. The Common Judgment observed that '[t]he TFV and the Trial Chamber, in the implementation process, and in formulating particular reparations programmes, should be guided by the principle of *restitutio in integrum* bearing in mind the particular circumstances of the case and the type of reparations ordered'.[340] It further stressed that the overall purpose of reparations is 'to repair the harm caused, and to achieve, to the extent possible, *restitutio in integrum*'.[341]

238. While this Opinion concurs with these guidelines, it finds it appropriate to further expand on some relevant aspects. Reparations, from the perspective of international human rights law, follow the principle of *restitutio in integrum*.[342] Full and effective reparations, under the UN Basic Principles and Guidelines on the Right to Reparation, require 'restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition'.[343] Those are the five key elements that form the *restitutio in integrum*.

239. Article 75(1) of the Rome Statute, which sets the fundamental regime on reparations before the Court, determines in relevant parts that '[t]he Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation'. In the same vein, article 75(2) states that the Court may make an order 'specifying appropriate reparations, including restitution, compensation and rehabilitation'. This wording leaves open the possibility to include other elements of reparations, such as satisfaction and guarantees of non-repetition.

240. As a commentator explains, '[t]he word "including" in Article 75(1) and 75(2) indicates that the Court may establish principles regarding modalities of reparation

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[340] Common Judgment, para. 36.
[341] Common Judgment, para. 107.
[342] Article 63(1) of the ACHR *See also* *Velásquez Rodríguez v. Honduras*, para. 26 ('[r]eparation of harm brought about by the violation of an international obligation consists in full restitution (*restitutio in integrum*), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm'). *See also* *González et al. ("Cotton Field") v. Mexico*', para. 450; *Kepa Urra Gurídi v. Spain*, para 6.8.
[343] UN Basic Principles and Guidelines on the Right to Reparation, para. 18.

other than those specifically referred to'.[344] In light of the express wording of article 75 of the Rome Statute, the Court may rely on other legal sources to complement the modes of reparations set out in the Rome Statute. Beyond restitution, compensation and rehabilitation, reparations, under the UN Basic Principles and Guidelines on the Rights to Reparation, also include satisfaction and guarantees of non-repetition.[345] In this regard, the IACtHR's jurisprudence has explained and developed the five key elements of *restitutio in integrum* in important cases such as *González Lluy et al. v. Ecuador*,[346] *Atala Riffo and daughters v. Chile*,[347] *"Las Dos Erres" Massacre v. Guatemala*,[348] and *Massacres of El Mozote and Nearby Places v. El Salvador*.[349]

241. Thus, adequate, appropriate and effective reparations under the Rome Statute are represented in measures that should be carefully conceived by a trial chamber to incorporate these five key elements. This is indeed the content of reparations. This is the only way that reparations can be approached comprehensively to give redress to victims, restore victims' dignity and restructure their humanity.

242. This Opinion agrees with the Common Judgment's incorporation of the principle of *restitutio in integrum* as a prevailing axiom in reparations proceedings.

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[344] C. McCarthy, *Reparations and Victim Support in the International Criminal Court* (2012) ('McCarthy'), p. 159.

[345] United Nations, General Assembly, 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, 16 December 2005, A/RES/60/147 ('UN Basic Principles and Guidelines on the Right to Reparation (2005)'), para. 18.

[346] IACtHR, *González Lluy et al. v. Ecuador*, 'Judgment (Preliminary objections, merits, reparations and costs)', 1 September 2015, Series C No. 298, para. 342 ('[t]he reparation of the harm caused by the violation of an international obligation requires, whenever possible, full restitution (restitutio in integrum), which consists in the reestablishment of the previous situation. […] Therefore, the Court has found it necessary to award different measures of reparation in order to redress the damage fully, so that, in addition to pecuniary compensation, measures of restitution, rehabilitation and satisfaction, and guarantees of non-repetition, have special relevance to the harm caused').

[347] *Atala Riffo and daughters v. Chile*, para. 241 ('the Court has considered the need to order several measures of reparation in order to fully redress the damage caused, and therefore, in addition to pecuniary compensation, the measures of restitution, satisfaction and guarantees of non-repetition are especially relevant').

[348] *Las Dos Erres Massacre v. Guatemala*, para. 226 ('[…] the Court has considered the need to provide different types of reparation so as to fully redress the damages, therefore in addition to pecuniary measures, other measures such as satisfaction, restitution, rehabilitation, and guarantees of non-repetition have special relevance due to the gravity of the infringements and collective nature of the damage caused').

[349] *Massacres of El Mozote and surrounding areas v. El Salvador*, para. 305 ('[t]he Court has considered the need to grant different measures of reparation, in order to redress the damage fully; thus, in addition to pecuniary compensation, measures of satisfaction, restitution and rehabilitation, and guarantees of non-repetition have special relevance owing to the severity of the effects and the collective nature of the damage').

The application of the *restitutio in integrum* principle ensures that the whole process of reparations is not centred around money. Monetary compensation is just one element of the *restitutio in integrum*. While economic compensation to victims of crimes under the jurisdiction of this Court is necessary, it is only one of the five key elements of an integral reparation. Harm is fully repaired only if all five key elements of *restitutio in integrum* are part of reparation measures and programmes implemented with the award granted to the victims.

1. Restitution

243. Restitution aims at returning victims to the *status quo ex ante*, namely, a state before the crime affected them. But in restoring such status, attention and care must be taken in order to avoid a reproduction of environments of violence and/or denial of rights, because often times such environments are precisely the conditions that enabled the commission of the crimes. Restitution should aim at restoring an environment where victims enjoy their rights freely.

244. Article 75(2) of the Rome Statute states that '[t]he Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution'.[350] While the Rome Statute does not define *restitution*, article 75(6) states that nothing in its text 'shall be interpreted as prejudicing the rights of victims under national or international law'.[351]

245. Bearing in mind articles 21(3) and 75(6) of the Rome Statute,[352] the definition of *restitution* has evolved to encompass a more holistic approach.[353] In this regard, the UN Basic Principles and Guidelines on the Right to Reparation stipulate that restitution 'should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred'.[354]

246. Of germinal importance, the Permanent Court of International Justice ('PCIJ'), more than 90 years ago, established in the *Chorzów Factory* case that 'reparation

[350] Article 75 (2) of the Rome Statute.
[351] Article 75(6) of the Rome Statute.
[352] Articles 21(3), 75(6) of the Rome Statute.
[353] *See generally* UN Basic Principles and Guidelines on the Right to Reparation, para. 19.
[354] UN Basic Principles and Guidelines on the Right to Reparation, para. 19.

must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed'.[355]

247. In the case at hand, this Opinion observes that the direct victims, being former child soldiers, today adults, have lost a precious stage of life: their childhood. While reparations measures cannot turn back time, they can restore an environment full of the opportunities they lost. Reparations aimed at restoring opportunities to the fullest extent possible should be implemented, with a view of ensuring that victims enjoy their rights freely in a positive environment where they are realised as self-fulfilled individuals and community members.

248. In the case at hand, as a way of restitution, reparation measures must address the specific type of harm to the direct victims' project of life. The Common Judgment prescribed recognition of the harm to the project of life of children who were conscripted or enlisted into the FPLC/UPC, or used to participate actively in hostilities, as well as indirect victims.[356]

249. At the implementation stage, the TFV can make comprehensive proposals including programmes that permit the victims' realisation of educational needs and vocational aspirations. This opinion notes that the OPCV submitted that, '[a]s for the education of former child soldiers (direct victims), the reparations programmes are designed to enable them to have access, depending on their personal situation, to literacy and mathematics courses, remedial courses or training modules to allow them to continue their schooling/studies whereby they can subsequently be trained in a trade corresponding to their desires and abilities'.[357] The programmes must at the very least ensure primary and secondary schooling, technical training, and ideally opportunities to access to higher education for those willing to pursue it. They should ensure freedom of thought, creativity and entrepreneurship.

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[355] Permanent Court of International Justice, *The Factory at Chorzów*, 'Judgment (Merits)', 13 September 1928, Series A No. 17, p. 47.
[356] Common Judgment, para. 37.
[357] *See* Submissions on the Evidence Admitted in the Proceedings for the Determination of Thomas Lubanga Dyilo's Liability for Reparations, 8 September 2017, ICC-01/04-01/06-3360-tENG ('Submissions on the Evidence'), para. 37.

2. Economic compensation

250. In circumstances when the re-establishment of previous conditions is not entirely possible, compensation should be granted.[358] Article 75(2) of the Rome Statute states that '[t]he Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including […] compensation'.[359] Economic compensation is the monetary quantification of the harm and damages that victims suffered due to the atrocious crime regardless of whether the harm is physical, mental or psychological, and whether the damages are pecuniary or non-pecuniary. Economic compensation is also referred to as *indemnification*.

251. Bearing in mind articles 21(3) and 75(6) of the Rome Statute, [360] the definition of *compensation* under the UN Basic Principles and Guidelines on the Right to Reparation must be given credence. The Principles stipulate that compensation 'should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law'.[361] This is the objective of economic compensation.

252. When a crime damages something that is impossible to be restored, economic compensation must be awarded. This entails the delicate task of estimating the economic value of the harm, that is, to determine what damages it has caused. Such damage can be quantified under the following categories, *inter alia*: (a) physical or mental harm, (b) lost opportunities, including employment, education and social benefits, (c) material damages and loss of earnings, including loss of potential and future earnings, (d) moral damages, and (e) costs required for legal or expert assistance, medicine and medical services, and psychological and social services.[362] In

[358] IACtHR, *Martínez Coronado v. Guatemala*, 'Sentencia (Fondo, Reparaciones y Costas)', 10 May 2019, Series C No. 376, para. 91; IACtHR, *Muelle Flores v. Peru*, 'Sentencia (Excepciones Preliminares, Fondo, Reparaciones y Costas)', 6 March 2019, Series C No. 375, para. 221.
[359] Article 75 (2) of the Rome Statute.
[360] Articles 21(3), 75(6) of the Rome Statute.
[361] UN Basic Principles and Guidelines on the Right to Reparation, para. 20.
[362] UN Basic Principles and Guidelines on the Right to Reparation, para. 20.

addition to these categories, alterations to the conditions of existence of the victim or the victim's family should also be considered.[363]

253. The principal element of economic compensation is based on the present value of the victim's expected lifetime earnings, minus projected expenses, had he or she lived.[364] Where victims were unemployed or employed in the informal sector, the IACtHR presumes that their annual income would have been equivalent to the minimum legal wage.[365] Regardless of whether the compensation is paid as a lump sum or a pension, some countries have apportioned the payments in accordance with pre-set percentages among the family members.[366] Apportioning is worth considering particularly if there are patterns of unequal treatment that affect family relations as well.[367]

254. This Opinion considers that the task of quantifying harm and damages ought to be entertained in a dignifying way for the victims. This should be done in an objective way, with the help of experts, under rule 75(6) of the Rules, and by acknowledging the categories of damages applicable under general principles of law and, most importantly, internationally recognised human rights.

255. In the case at hand, the Common Judgment recognised the possibility that 'collective reparations can include the payment of sums of money to individuals to repair harm suffered'.[368] It held as well that collective reparations can be individualised, including the payment of sums of money to individuals.[369] Due to the specific circumstances of the case at hand, individual victims should be allowed the possibility to receive economic compensation, in addition to other reparation

[363] *Myrna Mack Chang v. Guatemala*, para. 255 ('[n]on-pecuniary damage can include […] the suffering and affliction caused to the direct victims and their close relations, the detriment to the individuals' very significant values, as well as non-pecuniary alterations to the conditions of existence of the victim or the victim's family').
[364] *El Amparo v. Venezuela*, para. 28.
[365] *See* *El Amparo v. Venezuela*, para. 28; IACtHR, *Caracazo v. Venezuela*, 'Judgement (Reparation and Costs)', 29 August 2002, Series C No. 95, para. 50(d); IACtHR, *Neira-Alegría et al. v. Peru*, 'Judgement (Reparation and Costs)', 19 September 1996, Series C No. 29, para. 49.
[366] UNHCHR, 'Rule-of-Law Tools for Post-Conflict States' (2008) ('Rule-of-Law Tools'), p. 31. In Chile, a surviving spouse received 40 per cent of the benchmark figure of $537 (Rule-of-Law Tools, p. 31); The mother or, in her absence, the father received 30 per cent (Rule-of-Law Tools, p. 31); Each child of a disappeared person received 15 per cent until the age of 25 or for life if the child is disabled (Rule-of-Law Tools, pp. 31-32)
[367] Women specially stand to gain from this practice. Rule-of-Law Tools, p. 32.
[368] Common Judgment, para. 40.
[369] Common Judgment, para. 40.

measures, to compensate moral damages as well as pecuniary damages, including expenditures they have already incurred because of their harm.

3. Rehabilitation

256. Rehabilitation is a component of the *restitutio in integrum* that aims at curing the physical or psychological harm suffered by victims.[370] This form of reparation requires the adoption of measures to give adequate attention to the psychological and physical suffering and damages of the victims.[371] In all cases, psychological and physical attention must be free for the victims, and must be applied after obtaining prior informed consent and for the time necessary.[372]

257. In the context of the Rome Statute, article 75(2) states that '[t]he Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims' including rehabilitation.[373] While the Rome Statute does not define *rehabilitation*, article 75(6) notes that nothing in its text 'shall be interpreted as prejudicing the rights of victims under national or international law'.[374] Based on articles 21(3) and 75(6) of the Rome Statute, the definition of *rehabilitation* under the UN Basic Principles and Guidelines on the Right to Reparation entails that rehabilitation 'should include medical and psychological care as well as legal and social services'.[375] Rehabilitation refers to all those measures capable of restoring the person in all his or her capacities, especially, the physical and mental harm caused by the atrocious crimes and the violations of core human rights.

258. In cases where the IACtHR has ordered measures of rehabilitation, it has specified that 'when providing such treatment, the circumstances and the particular necessities of each victim shall be considered, in a manner in which they receive

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[370] C. Grossman, *et al.*, *International Law and Reparations* (2018) ('Grossman'), p. 283 ('[r]ehabilitation is a fundamental form of reparation awarded when victims require medical and psychological treatment and care as a result of the violations they suffered'); UN Basic Principles and Guidelines on the Right to Reparation, para. 21.
[371] IACtHR, *Chitay Nech et al. v. Guatemala*, 'Judgment (Preliminary Objections, Merits, Reparations and Costs)', 25 May 2010, Series C No. 212 ('*Chitay Nech et al. v. Guatemala*'), para. 255; IACtHR, *Barrios Altos v. Peru*, 'Judgment (Reparations and Costs)', 30 November 2001, Series C No. 87, para. 50.3; IACtHR, *Las Dos Erres Massacre v. Guatemala*, 'Judgment (Preliminary Objection, Merits, Reparations, and Costs)', 24 November 2009, Series C No. 211 ('*Las Dos Erres Massacre v. Guatemala*'), para. 269.
[372] *Chitay Nech et al. v. Guatemala*, para. 256.
[373] Article 75 (2) of the Rome Statute.
[374] Article 75(6) of the Rome Statute.
[375] UN Basic Principles and Guidelines on the Right to Reparation, para. 21.

family and individual treatments, according to that agreed upon by each one of them and after their individual evaluation'.[376] In relation to collective victims, the IACtHR has determined that it is necessary to set up a committee in order to assess the physical and mental condition of the victims, and the specific treatment required by each one.[377]

259. In addition to psychological and physical treatment, the IACtHR has also provided other types of reparations with the aim of rehabilitating the victim, which include programs in the areas of education, vocational training, psychological and medical care for the survivors and next of kin of the victims.[378]

260. In the case at hand, at the implementation stage the programmes of reparations must include programmes of rehabilitation that address the differentiated harm of victims. This should be done by considering how children were specifically victimised, taking into account the effects that such victimisation had in their prospective project of life, and also damages to the very core of their physical and moral integrity, including the possibility of having experienced sexual attacks as a result of the violent context to which they were exposed. Programmes shall contemplate this possibility so that treatments do not fall short of completely addressing the victims' trauma for having been recruited, enlisted or used in hostilities.

261. The *Lubanga* Amended Reparations Order lists '[p]hysical injury and trauma' and '[p]sychological trauma and the development of psychological disorders, such as, […], suicidal tendencies, depression, and dissociative behaviour', as part of the harm that the direct victims have suffered.[379] It may be possible that the trauma suffered by former child soldiers (boys or girls) may relate to sexual attacks that the children

[376] *Chitay Nech et al. v. Guatemala*, para. 256.
[377] *Plan de Sánchez Massacre v. Guatemala*, para. 108.
[378] *Plan de Sánchez Massacre v. Guatemala*, paras 93, 104-110. *See* Evans, p. 178; Amnesty International, 'Sierra Leone: Getting Reparations Rights for Survivors of Sexual Violence' ('Amnesty International'), paras 42–46, 57. *See also* W.A. Schabas, 'Reparation Practices in Sierra Leone and the Truth and Reconciliation Commission' in K. de Feyter *et al.* (eds.) *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violation* (2005) ('Schabas'), p. 300; Sierra Leone Truth and Reconciliation Commission, Final Report, volume 2, chapter 4, para. 74 ('[s]ectors of assistance provided to the ex-combatants under the NCDDR programme included vocational training, formal education, agricultural activities, public works and job placement, monthly allowances for a limited period of time, and a children's programme with provisions for educational opportunities').
[379] *Lubanga* Amended Reparations Order, para. 58.

could have experienced as a result of the violent context to which they were exposed. A direct victim participating in a reparations programme may not necessarily be able to pinpoint, divide and categorise the sources of his or her trauma; coming from a combination of traumatic experiences, such sources may include his or her having been subjected to and/or having witnessed sexual attacks.

262. This Opinion considers that reparation programmes could accordingly be prepared in such a way that treatment can address the full trauma and mental harm that victims suffered because of all the terrible experiences they faced as a consequence of the extremely dangerous environment and context of Mr Lubanga's crimes. This could be done at the implementation stage, by including programmes of rehabilitation that address the differentiated harm of victims, in a comprehensive manner.[380] Rehabilitation shall aim at completely restructuring victims as human beings in both their individual and social capacities, and considering how children were specifically victimised, including the effects that such victimisation had on the very core of their physical and moral integrity.

263. On the other hand, rehabilitation of collective victims should involve programmes aimed at healing collective damage, such as, to the social fabric of the respective communities, their collective dignity and memory.

4. Satisfaction

264. Measures of satisfaction shall aim at remedying moral or non-physical harm suffered by victims of human rights violations.[381] In this regard, those measures shall ensure that victims obtain relief for the harm they suffered, by being recognised as victims of the crimes of which the convicted person was held liable. With those measures, victims of atrocious crimes receive social recognition that the crimes occurred, were wrongdoings, and harmed them; and therefore that they were victims. Such measures are in place in order to allow victims to feel that their dignity is

[380] *See* Submissions on the Evidence, paras 39-41 (establishing 'a lump sum corresponding to fees for medical care required for almost all [the Legal Representative's] clients (direct and indirect victims). This amount is, as a starting point, USD 300 per capita, including both the normal costs of a medical consultation, […] the care administered, […] hospitalization days, and the costs of the necessary medication […]').
[381] Grossman, p. 322 ('[s]atisfaction is a form of reparation aimed at remedying moral, or non-material, harm caused by violations of human rights').

restored and that the society recognises their condition as victims. These types of measures have a high symbolic content and tend to produce remedy and redress.

265. In light of articles 21(3) and 75(6) of the Rome Statute, the explanation of *satisfaction* under the UN Basic Principles and Guidelines on the Right to Reparation should be considered. The Principles stipulate that measures to ensure satisfaction should include, *inter alia*: (a) verification of the facts and full and public disclosure of the truth; (b) search for the whereabouts of the disappeared persons; (c) search for the identities of the children who have been abducted; (d) search for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities; (e) an official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim, a public apology, including acknowledgement of the facts and acceptance of responsibility; and (f) imposition of judicial and administrative sanctions against persons liable for the violations, commemorations and tributes to the victims. [382]

266. The satisfaction of the victim for the violation of his/her human rights is required. Apologies are necessary, ideally with the participation of the perpetrator and/or authorities. This is essential for reconciliation and peace. Public ceremonies where perpetrators recognise responsibility and apologise play an important role in victims' reparation.

267. The jurisprudence from the IACtHR may be of assistance in the implementation of the projects envisioned by the TFV so that they are in compliance with the internationally recognised human rights.[383] In *Gelman v. Uruguay*, the IACtHR observed that it 'has favorably valued those acts carried out by the State that have an effect on the recovery of the memory of the victims, the recognition of their dignity, and consolation of their relatives'.[384] It required Uruguay to 'carry out a public act of acknowledgment of international responsibility regarding the facts of the […] case,

[382] UN Basic Principles and Guidelines on the Right to Reparation, para. 22.
[383] IACtHR, *Gelman v. Uruguay*, 'Judgment (Merits and Reparations)', 24 February 2011, Series C No. 221 ('*Gelman v. Uruguay*'), para. 265.
[384] *Gelman v. Uruguay*, para. 265.

addressing the violations established in the […] Judgment'.[385] The IACtHR specified that this 'must take place in a public ceremony carried out by high-ranking national authorities and in the presence of the victims,' and that the public act of acknowledgement 'should be disseminated through the means of communication'.[386]

268. Regarding also satisfaction, the IACtHR in *Yakye Axa Indigenous Community v. Paraguay* 'deems it necessary, with the aim of redressing the damage caused to the victims, for the State to conduct a public act of acknowledgment of its responsibility, one that is previously agreed upon with the victims and their representatives.'[387] Although it is primarily for the State to carry out measures of satisfaction, the affected communities should also be involved in the process. In *Xákmok Kásek Indigenous Community v. Paraguay*, the Court addressed the issue by deciding that the State should 'carry out a public act to acknowledge its international responsibility for the violations declared in this judgment. This act must be agreed upon previously with the Community. Furthermore, the act must take place at the current site of the Community, during a public ceremony attended by senior State authorities and the members of the Community, including those who live in other areas.'[388]

269. As regards the case at hand, this Opinion notes that the TFV submitted its filing regarding symbolic collective reparations projects.[389] The TFV suggests, *inter alia*, to develop and construct symbolic structures, in the form of commemoration centres that will host interactive symbolic activities, in three communities; and to develop mobile memorialisation initiatives in five additional communities that will raise awareness of the crimes and the resulting harms and promote reintegration, reconciliation and memorialisation.[390] The Trial Chamber approved the plan submitted by the TFV and directed it to undertake the necessary steps to start implementing the plan submitted in accordance with the order.[391]

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[385] *Gelman v. Uruguay*, para. 266.
[386] *Gelman v. Uruguay*, para. 266.
[387] *Yakye Axa Indigenous Community v. Paraguay*, para. 226
[388] *Comunidad Indígena Xákmok Kásek v. Paraguay*, para. 297
[389] TFV, Public Redacted version of Filing regarding symbolic collective reparations projects with Confidential Annex: Draft Request for Proposals, 19 September 2016, ICC-01/04-01/06-3223-Red, ('Filings regarding reparations projects').
[390] Filings regarding reparations projects, para. 29.
[391] Order approving the proposed plan of the Trust Fund for Victims in relation to symbolic collective reparations, 21 October 2016, ICC-01/04-01/06.

270. Considering that measures of satisfaction are aimed at publicly acknowledging that the crimes wrongly harmed the victims and that Mr Lubanga has expressed his hope 'to help identify a new form of sociology that will help the tribal groups to live together in harmony',[392] he could be invited to recognise the harm caused by his crimes. This could be done, for instance, through a public declaration of apology to the victims. Those measures ultimately aim for reconciliation, sustainable peace, and eliminating the violent context which propitiates further international crimes and atrocities.

271. This Opinion acknowledges that an order for reparations is issued against a convicted person. However, in order to make the process of reparation effective and appropriate, as well as to implement some of the satisfaction measures, it is often necessary to invite the States concerned and involve the society and the affected communities to cooperate in the implementation of those measures.

5. Guarantees of non-repetition

272. Guarantees of non-repetition are awarded to ensure that atrocious crimes, which always entail human rights violations, do not occur again. These measures have a transformative character in order to change any condition that allowed harm to the victims as a result of the crimes committed and to avoid the repetition of similar circumstances that would permit the occurrence of any future atrocities. In this sense, they address the underlying causes and the circumstances that facilitate or encourage those kinds of atrocious crimes and human rights violations.[393] This is achieved, *inter alia*, by requiring the adoption of legal, administrative and other appropriate measures necessary to transform the contexts that enabled the egregious crimes.

273. The IACtHR has noted that 'guarantees of non-repetition are of greater relevance as a measure of reparation' in cases where there has been a recurring pattern

[392] *See* Transcript of Sentence Review Hearing, ICC-01/04-01/06-T-366-Red-ENG (WT), p. 28, lines 16-17 ('I hope to help identify a new form of sociology that will help the tribal groups to live together in harmony').
[393] Grossman, p. 378 ('[g]uarantees of non-repetition are aimed at ensuring that further violations do not occur. As demonstrated by the following case excerpts, the measures ordered by the Inter-American Court of Human Rights as guarantees of non-repetition address the underlying causes of human rights violations and the circumstances that allow or encourage violations to occur').

of human rights violations in order to prevent similar events.[394] The IACtHR typically orders the liable States to perform the following measures as guarantees of non-repetition, *inter alia,*: reforms to legal provisions,[395] human rights training and education,[396] and publication of relevant parts of judgments[397]

274. Under the UN Basic Principles and Guidelines on the Right to Reparation, guarantees of non-repetition should be considered. They mandate that some of these guarantees may include, where applicable: ensuring effective civilian control of military and security forces, strengthening the independence of the judiciary, protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders, providing education on human rights and international humanitarian law, promoting mechanisms for preventing, and monitoring social conflicts and their resolution, among others.[398]

275. It is noted that this is not an exhaustive list. In particular, this Opinion notes that it is important to include measures aimed at the elimination of contexts and circumstances that could lead to discrimination on the basis of race, gender, religion or any other grounds. Furthermore, measures aimed at promoting reconciliation and achieving sustainable peace are encouraged.

276. At the implementation stage, it is possible and desirable to invite and persuade States and the affected communities where the crimes occurred to participate actively in those measures. As stated with respect to some measures of satisfaction, despite the fact that an order for reparations is issued against the convicted person, the effectiveness of reparations and some concrete measures of guarantees of non-repetition can only be attained through the participation of States and the broader community.

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[394] IACtHR, *Pacheco Teruel et al. v. Honduras*, 'Judgment (Merits, Reparations and Costs)', 27 April 2012, Series C No. 241, para. 92.
[395] IACtHR, *Radilla Pacheco v. Mexico*, 'Judgment (Preliminary Objections, Merits, Reparations, and Costs)', 23 November 2009, Series C No. 209 ('*Radilla Pacheco v. Mexico*'), paras 337-344; *'Street Children' (Villagrán Morales et al.) v. Guatemala*, para. 98.
[396] *Radilla Pacheco v. Mexico*, paras 345-348.
[397] *Radilla Pacheco v. Mexico*, paras 349-350.
[398] UN Basic Principles and Guidelines on the Right to Reparation, para. 23.

277. In the case at hand, the reparations programmes could include measures that enable change, so that the environment in which victims were recruited, enlisted or used in hostilities can never be replicated in the future. Everyone in the communities shall understand that human rights, especially those of children, shall be regarded as the highest value of humanity. The promotion, protection and respect for everyone's human rights ought to ensure lasting and sustainable peace and security.

278. This Opinion invites the DRC and the affected communities to assist in the enforcement of reparation orders, and in particular of measures of guarantees of non-repetition.

6. Preliminary conclusion

279. In terms of the content of an adequate, appropriate and efficient reparation, such reparation must reflect the principle of *restitutio in integrum* which contains the following five key elements: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. It is unwarranted to choose between these elements – the reparation process ought to seek the incorporation of all five components. The content of such reparations can only be legitimate if it is consented and consulted with the victims.

C. The amount of liability of the convicted person

280. In cases of mass criminality, as the case at hand, to adequately calculate an amount of liability, it is necessary to determine (i) the scope and extent of harm, (ii) the scope and extent of victims who suffered such harm, (iii) the most adequate and appropriate measures to effectively repair such victims, and (iv) the cost of programmes that would incorporate such measures. This forms the cost of repair. The cost of repair and these factors must all be analysed in light of (a) the concrete circumstances of the case (including the personal circumstances of the convicted persons[399]), (b) the level of participation of the convicted person in the commission of the crimes and causation of harm, and (c) the victims' needs and interests. Only after

[399] Regarding the personal circumstances of the convicted person, it might be possible that the convicted person is indigent, in which case he or she may not be able to pay. However, under the framework of the Rome Statute, that would not be a relevant consideration for the determination of the award and in such case it might be possible for the TFV to complement it. *See e.g.* *Lubanga* Reparations Decision, paras 102 *et seq*.

this process is completed, will it be possible to ascertain the concrete amount of liability of the convicted person.

1. What is the cost of repair?

(a) Determination of the scope and extent of harm

281. The type of harm that a victim has suffered defines the specific reparations that are appropriate in each case. At the same time, in order to determine the type of harm suffered, the special characteristics of the victim and the rights that have been violated by the criminal conduct must be taken into account. As explained under the second issue addressed in this Opinion, the determination of the scope, extent and type of harm must be approached in an institutional way and the burden of proof of such harm cannot be solely placed on the victims but shared together among the victims and the entities of the system established in the Rome Statute.

282. To ensure adequate, appropriate and effective reparations, it is necessary, first, to determine the scope and extent of the harm and the scope of the victims to be repaired. Subsequently, it will be possible to define the adequate and appropriate measures to effectively repair the victims in this case.

283. This process requires the Court to consider the victims' harm as determined in previous decisions of conviction, sentencing and reparations. But, equally important, this process must take into account the differentiated ways in which different victims have experienced and been exposed to such harm.

284. Reparations must be differentiated as per type of harm and victim. The special characteristics of each victim and the rights that have been violated by the criminal conduct must be taken into account. Accordingly, reparations shall be different when victims are different, namely, direct and indirect victims, as well as communities as collective victims. The realisation of this particular aspect ensures that the principle of equality materialises in its integral dimension: treat equally those persons who are equal, and treat differently those who are different.

285. As explained under the previous issue,[400] much of the harm suffered by victims, in the case at hand was already identified in previous judicial decisions, namely the *Lubanga* Conviction Decision, the *Lubanga* Sentencing Decision and the *Lubanga* Amended Reparations Order. The harm, in this case, was different for direct victims (child soldiers) and indirect victims (next of kin and those harmed in trying to prevent the crimes). In the case of child soldiers (direct victims), the specific damage to their project of life ought to be repaired. Moreover, in the implementation stage it may still be possible to identify the damage potentially suffered by the affected communities as collective victims. In the case of potential victims, although they still ought to be localised and identified, their harm has already been defined in the above-mentioned decisions.

(b) Determination of the scope and extent of victims

286. The very notion of a victim of atrocious crimes, considered from a human rights approach, is based on the premise that 'each violation of a human right causes unique harm requiring individualized remedies as a consequence'.[401] Reparations shall be different when there are different types of victims (direct and indirect victims, as well as communities as collective victims). Indeed, as the IACtHR has observed, 'not all differences in legal treatment are discriminatory as such, for not all differences in treatment are in themselves offensive to human dignity'.[402]

287. Both the nature of the violated human rights as well as the particular situation of each victim are key considerations in assessing the adequacy and appropriateness of the reparations. Victims may suffer harm both as individuals as well as members of a collective entity, their community. These harms are different.

288. The direct victims were girls and boys who, while being under the age of fifteen years, were conscripted or enlisted into the UPC/FPLC, or actively used in hostilities. Indirect victims are composed of, 'the family members of direct victims'; 'anyone who attempted to prevent the commission of one or more of the crimes under consideration'; 'individuals who suffered harm when helping or intervening on behalf

[400] *See supra* Section IV.
[401] Shelton, p. 16.
[402] IACtHR, *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion, 19 January 1984. Series A No. 4, para. 56.

of direct victims'; and 'other persons who suffered personal harm as a result of these offences'.[403] The Impugned Decision has determined that 425 out of 473 applicants are a sample of victims and has introduced estimates regarding additional potential victims.[404]

289. Potential victims include a broad scope of individuals who suffered from Mr Lubanga's crimes as well as the communities to which such individuals belong. Their legal interests were harmed by such crimes. They are defined by the criteria set out in previous judicial decisions (geographical, temporal and other factual parameters). Potential victims may thus include direct, indirect and collective victims, and they shall all be identified and repaired during the implementation stage; if not all the individual victims are identified, reparations to their communities would help repair their harm.

290. Bearing in mind that the harm suffered by each victim defines his or her type of victimhood, the Trial Chamber, as well as the TFV, must consider not only that victims can be individual, either direct or indirect victims, or collective. The Trial Chamber, with the TFV's support, must also consider that each particular victim suffered in a different manner and has different needs in the process of healing and repairing his, her or their harm. It is necessary to note that being a case of massive atrocious crimes, it is appropriate to categorise the victims by type of victim and design reparations measures by such categorisation, without ignoring their needs and that they are unique human beings. This way, reparation would effectively, adequately and appropriately address the different and specific types of harm.

(c) Determination of the most adequate and appropriate measures to effectively repair the victims' harm

291. The most adequate and appropriate measures to effectively repair the victims' harm are those that bring remedy and redress to such victims. Victims of atrocious crimes, such as those in the instant case, where their human rights have been grossly violated, are entitled to full, effective, adequate, and prompt reparation of their

[403] *Lubanga* Amended Reparations Order, para. 6.
[404] *See* Impugned Decision, paras 212, 230-231, 243-244. *See also* Annex III of the Impugned Decision, 'Summary table of calculations of the approximate number of victims', p. 2, line C23.

harm.[405] To that end, the five key elements of *restitutio in integrum* should be met. Reparations measures ought to address the specific type of harm differently suffered by each of the victims. Once reparation measures are so determined, it is possible to prepare the reparation programmes.

292. Having properly determined the scope and extent of harm and damages and the scope of victimhood in the case at hand, the next step is the determination of the most appropriate and effective measures of reparations. They ought to restore dignity and cure the concrete harm suffered, producing as a result redress and remedy. The sum of these measures, in the case of collective reparations, forms the so-called reparation programmes.

293. In the case at hand, in order to make the reparations proceedings more efficient, priority should be given to the programmes of reparations for those victims who have already been identified. They should include individual measures in a way that differentiates the approach to the harm and the appropriate reparation between direct and indirect victims. This Opinion further stresses that the programmes of reparations that address the harm to the former child soldiers' project of life must specifically be prioritised.

(d) The concrete cost of repair

294. Having appraised the victims' harm, determined the scope of victimhood, and found appropriate and adequate measures to effectively repair it under all five key elements of *restitutio in integrum*, a trial chamber must estimate the cost of reparations programmes that include such measures. This forms the cost of repair. Such cost must also reflect the operative and administrative costs of running reparations programmes. The cost of repair is the basis of the amount of liability. However these two concepts must not be confused.

[405] *The Handbook of Reparations*, p. 455 ('[t]here seems to be growing consensus among international lawyers that victims of human rights abuses are entitled to reparations'). *See also* Shelton, p. 17 ('[b]oth the right of access to justice and to substantive redress are now widely recognized. Manfred Nowak comments that "the right of victims of (gross) human rights violations to adequate reparation…is already fairly well established under present international law"'); Evans, p. 39 ('[b]ased on the above overview, which arguably indicates extensive recognition of the right of the individual to reparation in human rights and humanitarian law, as well under general international law, it appears reasonable to state that this right has acquired a degree of recognition as forming part of customary law').

295. In this regard, the cost of repair is not mutually exclusive with the sum of the individual damages to be compensated to the victims as Mr Lubanga suggests. Such sum is only the basis for the calculation of the amount of liability that needs to be assessed in light of the circumstances of the case, the convicted person's level of participation in the commission of the crimes and causation of the harm, and the victims' needs and interests. As explained in the following section, only once all of these elements are considered, can a reasonable amount of liability be reached.

2. The content of Mr Lubanga's amount of liability

296. Having determined in the case at hand (i) the scope and extent of harm, (ii) the scope and extent of victims who suffered such harm, (iii) the most adequate and appropriate measures and programmes to effectively repair such victims, and (iv) the concrete cost of repair, as explained above such factors will all be analysed in light of the concrete circumstances of the case, the degree of participation of the convicted person in the commission of the crimes and causation of harm, and the victims' needs and interests.

(a) The circumstances of the case at hand

297. In this case, the Appeals Chamber has indicated that '[a] convicted person's liability for reparations must be proportionate to the harm caused and, *inter alia*, his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case'.[406] This was duly recalled by the Trial Chamber.[407] Indeed, in light of the broad scope of victimhood, the terrible harm caused and the crucial participation of Mr Lubanga in the crimes, the amount of liability must be proportional to these specific circumstances.

298. In this regard, this Opinion recalls that the Trial Chamber observed, in the Impugned Decision, that it 'relie[d] on the gravity of the crimes in question and the fact that they were perpetrated, as earlier said, on a large scale and in a widespread manner'.[408] To that end, it recalled that Trial Chamber I, in the *Lubanga* Conviction Decision, found that the common plan of building an army to control Ituri resulted in

[406] *Lubanga* Amended Reparations Order, para. 21; *Lubanga* Appeal Judgment on Reparations, para. 118.
[407] Impugned Decision, para. 269.
[408] Impugned Decision, para. 278.

the conscription and enlistment of boys and girls under the age of fifteen years, and their use to participate actively in hostilities.[409] Specifically, it noted 'a large-scale recruitment exercise directed at young people, including children under the age of 15, whether voluntarily or by coercion'.[410]

299. This Opinion notes the massiveness and gravity of the situation. It considers that the heinous nature of these crimes consists in that they were perpetrated against very vulnerable victims, namely, children under the age of fifteen years. Therefore, the amount of liability should reflect this aberration. This Opinion observes that the Trial Chamber indeed took such situation into account in the paragraphs preceding the determination of the amount of liability.[411]

(b) Mr Lubanga's degree of participation

300. This Opinion agrees with the Common Judgment in that the Trial Chamber was correct in properly taking into account Mr Lubanga's responsibility, as it relied on his role as president of the UPC/FPLC, the essential character of his contributions to the common plan to conscript or enlist children under fifteen years into the UPC/FPLC or use them in hostilities, and the gravity of such crimes.[412] This is reflected in Mr Lubanga's high degree of participation in the causation of the broad scope of harm in the case at hand and, as such, must be considered when determining his amount of liability.

301. Moreover, the Trial Chamber was correct in finding Mr Lubanga liable for the total amount of the reparations award to the extent that it took into account his role in the commission of the crimes. In finding Mr Lubanga liable for the whole reparations award, the Trial Chamber noted that he was 'President of the UPC/FPLC and both Commander-in-Chief of its army and its political leader', that his 'contributions were essential to a common plan, which he and his co-perpetrators shared and which resulted in the conscription and enlistment of girls and boys under the age of 15 years into the UPC/FPLC and in the use of these children to participate actively in hostilities', and that the crimes in question were grave and perpetrated on a large scale

[409] Impugned Decision, para. 278, referring to *Lubanga* Conviction Decision, para. 1351.
[410] Impugned Decision, para. 278, referring to *Lubanga* Conviction Decision, para. 1354.
[411] *See* Impugned Decision, paras 268-281.
[412] Common Judgment, para. 309, referring to Impugned Decision, para. 278.

and widespread manner.[413] These circumstances are equally relevant in Mr Lubanga's liability for the causation of the full extent of the victims' harm. Consequently, Mr Lubanga was accountable for the total extent of the harm and scope of victimhood.

(c) Victims' needs and interests

302. In the case at hand, the concrete needs and interests of the victims were taken into account by the Trial Chamber when determining Mr Lubanga's amount of liability. Indeed, the Trial Chamber took into consideration the submissions of the victims as to such amount. It made express reference to the submissions of the OPCV, Victims V01 and Victims V02. In such submissions, the OPCV estimated USD 6,000,000 as the minimum sum for collective reparations for 3,000 potential victims.[414] Victims V01 submitted that they were 'in agreement that the amount to be earmarked for reparation can be evaluated at EUR 6,000,000'.[415] Victims V02, in turn, submitted that they had 'arrived at an agreed estimate of 1,000 victims' and stated that they 'believe[d] that a total amount of USD 6,000,000 [would] be sufficient to repair all the harm'.[416] Moreover, the TFV, when transmitting its third and last batch of dossiers, recalled that 'Women's Initiative for Gender Justice on 11 October 2016 at the Trial Chamber's public hearing on reparations has called the amount of €1 Million "manifestly insufficient" and suggested that instead financial resources needed to implement reparations in this case should be in the range of €4.5 to €9 million'.[417]

303. Regarding the interests and needs of the victims, the OPCV expressed, for instance, that (direct) victims primarily need education, particularly, access to literacy and primary and secondary education, training modules and remedial courses corresponding to their desires and abilities.[418] Likewise, the OPCV has expressed the victims' medical needs.[419] As for medical care, the OPCV made a *per capita* estimate

[413] Impugned Decision, para. 278.
[414] Submissions on the Evidence, paras 42, 50.
[415] Victims V01's Submissions on Evidence, para. 76.
[416] Observations of the V02 Team in Compliance with Order No. ICC-01/04-01/06-3345, 8 September 2017, ICC-01/04-01/06-3363-tENG, para. 29.
[417] Third submission of victim dossiers, 22 December 2016, ICC-01/04-01/06-3268, para. 63.
[418] *See* Submissions on the Evidence, paras 34-38.
[419] *See* Submissions on the Evidence, paras 40-41.

of USD 300. [420] Thus, the victims had an opportunity to express their needs and the Trial Chamber duly took them into account.

3. The calculation of Mr Lubanga's amount of liability

304. This Opinion notes that the Impugned Decision awarded USD 10,000,000, namely: USD 3,400,000 'in respect of the 425 victims in the sample', and USD 6,600,000 with respect to potential victims.[421] The Appeals Chamber confirmed that amount and this Opinion agrees with this outcome.

305. Below, this Opinion shall address the Trial Chamber's calculation of the amount of liability. It must be recalled the Common Judgment's determinations that (1) the calculation of the amount of liability may be based on estimates as to the number of victims, and that such estimates must be based on a sufficiently strong evidential basis;[422] and (2) any uncertainties must be resolved in favour of the convicted person, by assuming a lower number of victims, or by discounting the amount of liability.[423]

306. This Opinion agrees with the first part of this finding. As for the second part of the Common Judgment's finding that any uncertainties must be resolved in favour of the convicted person, this Opinion recalls that the determination of the victims and the harm suffered must be based on an integral approach whereby the burden of proof ought to be shared together with the victims and the system established in the Rome Statute and be guided by the principles and standards of international human rights law, especially the *pro homine* principle, according to which, in weighing the different rights at stake, the result may favour the person whose human rights have been violated.

307. Furthermore, this Opinion notes that the Common Judgment found that, although the Trial Chamber should have more clearly set out the basis on which it reached its reparations award, in the circumstances, 'it has found no error in the Trial Chamber's finding that the amount of USD 8,000 was taken into account as the average sum for each identified victim found to be eligible'.[424] While this Opinion

[420] *See* Submissions on the Evidence, para. 40.
[421] Impugned Decision, paras 279-281.
[422] Common Judgment, paras 3, 90, 223.
[423] Common Judgment, paras 3, 90.
[424] Common Judgment, para. 120.

agrees with the Common Judgment's finding regarding the allocation of USD 8,000 as an individual average, it has some observations on the methodology used by the Trial Chamber.

308. Furthermore, this Opinion observes that the Trial Chamber '[did] not see fit to engage in a separate monetary assessment of each type of harm suffered by each victim' nor 'to distinguish between direct and indirect victims for the purposes of determining the monetary value of the harm suffered'.[425] Instead, on the basis of decisions of Congolese military tribunals, ICC jurisprudence in *Katanga*, and the OPCV's submissions, it proceeded to award *ex aequo et bono* USD 8,000 as 'the harm suffered by each victim, direct or indirect'.[426] It is not apparent from the Impugned Decision that the Trial Chamber proceeded in a technical manner to reach its determination. Moreover, it did not provide an objective explanation about the methodology followed to reach its conclusion on the average amount per victim.

309. Given the complexity of this case and the varying types of victims, the Trial Chamber should have explained how it approached and assessed the different types of harm for different types of victims (direct and indirect victims), especially how it approached the specific damage suffered by child soldiers who were subjected to complex and multifaceted harm, including the harm or damage to the project of life. More specifically, the Trial Chamber should have provided its technical reasons for allocating an average amount of USD 8,000 per victim, regardless of whether they were direct or indirect victims. It should be recalled that a victim is not only a number, nor simply a quantity; they are human beings. Thus they should be considered in their concrete individuality in any procedure especially in reparations proceedings, including collective reparations. This was not observed by the Trial Chamber.

310. Pursuant to the observations presented above, the procedures and methodology used by the Trial Chamber to assess the extent of harm, as well as the scope and extent of victimhood, did not strictly follow technical and specialised procedures. This was particularly the case in terms of the collection and assessment of information

[425] Impugned Decision, paras 249-250.
[426] Impugned Decision, para. 259.

regarding the specific harm to victims. This information is critical for understanding the differences between direct and indirect victims, and among direct victims of different ages. Moreover, the Trial Chamber did not strictly follow expert technical procedures when it determined the eligibility of victims who applied for reparations, and, especially, when determining a number of potential victims, but rather preferred to rely on statistical estimates.[427]

311. Nevertheless, due to the complex nature of the case at hand, and being this the first experience of massive and collective reparations at this Court, this Opinion observes that, even if the procedure to determine the extent of harm and scope of victimhood can be improved for the future, such procedures in the case at hand have been applied with a view to making justice to a higher number of victims.

312. Regarding the cost of repair, the Trial Chamber had before it the submissions of the TFV and the OPCV addressing the nature and the cost of the reparation programmes. The Trial Chamber took into account, *inter alia*: the OPCV's *per capita* estimates on education,[428] vocational training,[429] and access to psychological[430] and medical care.[431]

313. In turn, the TFV allocated estimates for a symbolic reparations component and for the implementation of the service-based components of the collective reparations programmes.[432] The TFV noted the local institutional and professional context of the reparative measures and the prospective service-based reparations programmes. Accordingly, this Opinion notes that the Trial Chamber made an effort to incorporate within its final estimates the concepts and some amounts proposed by the OPCV and the TFV.

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[427] *See generally* Annex III to the Impugned Decision.
[428] Submissions on the Evidence, paras 35-37.
[429] Submissions on the Evidence, para. 38.
[430] Submissions on the Evidence, para. 39.
[431] Submissions on the Evidence, para. 40 (this amount included 'the normal costs of a medical consultation (from USD 3 to USD 10, depending on the *localité* and the host facility), the care administered (from USD 10 to USD 250, depending on the infrastructure available, the *localité* and the nature of the care), hospitalization days, where necessary (USD 6 to USD 11 per day, depending on the host facility and the *localité*), and the costs of the necessary medication, where applicable (whose unit prices may vary from USD 1 to USD 100, depending on the medication and the medical condition)'. It further noted that additional fees would apply, at USD 600 *per capita*, 'for victims who require help with detoxification (related to cannabis or alcohol addiction)').
[432] *See* Impugned Decision, para. 288.

314. As noted above, this being the first major case on collective reparations in this Court and given its complexity and massiveness, and the extensive time it has allocated toward this reparations process, as well as the technical difficulties that the Trial Chamber had to face to fix a reasonable amount of liability, the average sum of USD 8,000 was not necessarily incorrect.

315. Moreover, this Opinion notes that the Impugned Decision awarded USD 3,400,000 'in respect of the 425 victims in the sample', while it stipulated no number of victims for the remainder potential victims; it rather reckoned USD 6,600,000 'in respect to those other victims who may be identified during the implementation of reparations'.[433] In the concrete circumstances of this case, it was not unreasonable for the Trial Chamber to reach these estimates and quantities. Therefore, the amount of USD 10,000,000 was not necessarily incorrect.

316. Furthermore, it is appropriate to stress that measures should be taken to ensure that the total amount of liability and the award will be invested in all possible programmes of reparation that will ensure adequate, appropriate and effective reparations for the full scope of victims in accordance with the principle of *restitutio in integrum*.

317. This Opinion stresses that for future cases the procedure to set the amount of liability should rely on objective and technical procedures, as explained above. This will facilitate a better exercise of the parties' rights, thereby streamlining the reparations proceedings at this Court.

4. Preliminary conclusion

318. The amount of liability that the Trial Chamber set for Mr Lubanga was based not only on individual damages but it also incorporated the elements of the cost of repair, including the extent of harm and damages and scope of victimhood. It considered the submissions of the victims and the TFV, and it assessed these factors in light of the circumstances of the case, the victims' needs and interests, and Mr Lubanga's degree of participation in the commission of the crimes and in the causation of harm.

[433] Impugned Decision, paras 279-281.

319. The methodology that it used is not clearly explained nor was it based on technical criteria. In the future, this should be improved. Nevertheless, this being the first case of massive reparations before this Court and the extensive time that these proceedings have taken, the Trial Chamber made efforts to reach reasonable estimates and a final amount of liability. Therefore, the Trial Chamber was not necessarily incorrect.

D. Chapter conclusions

320. As to the characteristics, objectives and the ultimate aim of reparations, this Opinion considers that reparations are by nature an internationally recognised human right. They are restorative in nature, provide remedy, produce redress and restore dignity. Victims shall individually give prior and informed consent. Collective victims, being affected communities, shall be consulted through a prior and informed process.

321. As for the question of the content of reparations, this Opinion considers that, in order to adequately, appropriately and effectively repair all extent of harm in the broad scope of victimhood, reparations must reflect the five key elements of *restitutio in integrum*: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

322. Regarding the content of the amount of liability, in order to reach a reasonable determination, in cases of atrocious and massive crimes, it is first necessary to determine the scope and extent of harm and, second, the scope of victimhood. Having made these two determinations, it is then possible to find the most appropriate measures to repair *in integrum*. As for collective reparations, such reparation measures are reflected in the reparation programmes. All these factors form the cost of repair, which is the basis on which it is possible to calculate the amount of liability. These factors must all be analysed in light of (a) the concrete circumstances of the case, (b) the level of participation of the convicted person in the commission of the crimes and causation of harm, and (c) the victims' needs and interests.

323. In particular, in the case at hand, the victims of Mr Lubanga's convicted crimes faced different harms resulting in varied damages. Consequently, an assessment of harms and damages, as well as the means for reparation, must specifically account for

such variation amongst victims. In particular, in the case of child soldiers, it is necessary to consider the specific and unique harm caused to their project of life.

324. The Trial Chamber's determination of the amount of liability stemming from Mr Lubanga's conviction included the aforementioned elements within the scope of the specific circumstances of this case. Furthermore, the Trial Chamber consulted victims throughout the determination process and received the consent of participating victims. Nonetheless, it would have been desirable for the Trial Chamber to set out in detail the objective and technical elements that formed the basis of its determination regarding the amount of Mr Lubanga's liability. Ultimately, considering the complexity and great difficulties that the Trial Chamber has had to face in this case, due to the massiveness of the victimhood, the amount of liability fixed by the Trial Chamber was reasonable and not necessarily incorrect.

325. In future cases, judicial reparation proceedings should rely on technical, scientific and objective methods, the goal of which is to more effectively guarantee fair processes and to uphold the due process rights of all parties.

VI. RECAPITULATION AND CONCLUSIONS

326. This Opinion has analysed in their entirety the three issues identified at the very beginning of this Opinion, namely (i) the nature of reparations proceedings before this Court and the nature and scope of reparations for crimes under the Court's jurisdiction; (ii) the scope and extent of harm, and the scope of victimhood to be repaired, which includes some evidentiary matters; and (iii) adequate, appropriate and effective reparations *vis á vis* the amount of liability in the case at hand. As a result of the analysis in this Opinion, it has been possible to reach a number of conclusions that it is hoped will be of assistance in the implementation stage in this particular case and serve as a guide in future reparation proceedings before this Court.

327. With respect to the **first issue**, the following conclusions are drawn:

i. The nature of reparations is inherently judicial and directly emerges from a conviction decision. In light of the specific nature of the crimes under the jurisdiction of this Court that always entail serious violations of internationally

recognised human rights, international human rights law, principles, standards and the judicial practice of specialised courts converge and apply to reparations. This is in line with articles 21(3) and 75(6) of the Rome Statute.

ii. In proceedings before this Court, the TFV has two different roles. The first is a complementary and supporting role in the judicial proceedings when an order of reparations has been rendered, either when the TFV is approached by the Court to complement the amount of an award and/or to implement collective reparations. The second role of the TFV under its assistance mandate is to provide direct help to victims to obtain physical and psychological rehabilitation as well as material support. When performing this second role, the TFV depends on the decisions of its Board of Directors and it is not subject to a reparations order.

iii. The TFV's role is entirely complementary in the judicial process of reparations. In this regard, their assessments and determinations are always subject to judicial review, control and rulings. Therefore, in the case at hand, the Trial Chamber was correct in making the final rulings on the scope and extent of harm and victimhood and fixing the amount of liability of Mr Lubanga.

iv. The convicted person fully enjoys all his or her procedural and human rights during the reparation proceedings. These can be exercised throughout the proceedings in accordance with the provisions stipulated in the Rome Statute.

328. With respect to the **second issue,** the following conclusions are drawn:

i. As regards the scope of the harm and damage, given the complex nature of the crimes under the jurisdiction of this Court that amount to gross human rights violations, the harm caused is not limited to the public interest protected by the criminal provision but extends to the resulting harm to the human rights violated.

ii. The complexity of the harm must in turn be considered in its totality, including the pecuniary and non-pecuniary damages. In the case at hand, the specific

harm to the 'project of life' suffered by former child soldiers must be taken into account.

iii. The harm to the project of life of child soldiers includes loss of opportunities and capacities, and loss of their timely enjoyment of all their rights as children, including their rights to freedom of self-determination, personal development and fulfilment as a valuable, useful and complete human being both for themselves and for their community.

iv. Considering the broad and massive scope of victimhood in the case at hand, and the different types of damages, it is practical to group victims by types or categories in order to guarantee efficient reparation proceedings.

v. In the case at hand, direct victims (child soldiers) and indirect victims (*inter alia*, next of kin, and those who were harmed in attempting to prevent the crimes) have been identified. There are other potential victims, who may be direct or indirect victims, and may also include collective victims.

vi. The group of potential victims is comprised of a large spectrum of victims. It was defined by specific temporal, geographic, and other relevant criteria as set by Trial Chamber I in the conviction and sentencing decisions. Therefore, it was correct for the Trial Chamber to consider potential victims in the case at hand. Consequently, there was no need to resort to exceptional circumstances.

vii. The process of determining the harm and the eligibility of victims must be objective and guided by the law, principles, standards as well as specialised jurisprudence under international human rights law. This process should be implemented in a multidisciplinary and professional manner. The evaluation of evidence must be done following in particular the *pro homine* principle, which enables a more comprehensive and favourable treatment of the party whose human right has been violated as a result of the criminal offence.

viii. Considering the particular nature of reparations proceedings, the extreme conditions faced by victims of heinous crimes in violent contexts of conflict and post-conflict situations, and the difficult circumstances that such victims face when obtaining the relevant evidence, the burden of proof ought to be

approached in an institutional manner. The burden of proof is to be shared between the victims and the system established in the Rome Statute. The task and process of determining the harm and the eligibility of the victims must be supported by multidisciplinary and technical professionals and this can be implemented by the Court, *inter alios*, through the Registry, the TFV and, if appropriate, the collaboration of other entities.

ix. The disqualification of 48 victims was based, *inter alia*, on technical and formalistic deficiencies and the lack of sufficient information provided by the victims. Nevertheless, in light of the considerations developed in this Opinion regarding the burden of proof and the application of human rights principles, standards and law, it is warranted that these victims be afforded the right to apply again for the reparations programmes and participate in a new assessment in which the rules are clear, simple and practical. The assessment process should permit that victims found to be ineligible could nevertheless be considered as part of a potential collective victim.

329. With respect to the **third issue**, the following conclusions are drawn:

i. The right to obtain reparations is an internationally recognised human right, is restorative of human dignity and aims at restructuring the human being in all his/her dimensions. Its goal is to produce redress and remedy.

ii. The principle of non-discrimination must be observed. The right to reparations can be exercised individually or collectively. The manner in which it is claimed is immaterial. What truly matters is that reparations are adequate, appropriate and efficient.

iii. Adequate, appropriate and efficient reparations must reflect the principle of *restitutio in integrum*, which contains the following five key elements: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. It is unwarranted to choose between these elements – the reparation process ought to seek the incorporation of all five components. It is legitimate only if it is consented to, and consulted with, the victims. In cases of atrocious crimes, the victims' harm goes beyond the physical, psychological or moral suffering; it disrupts the entire human being and transcends even to the

spiritual level. Therefore, economic compensation is not the most important element of reparations.

iv. To identify the most adequate, appropriate and effective reparation, the trial chamber must determine the following: the scope and extent of the harm and damage caused by the crimes; the scope of victimhood to be repaired; and the most appropriate measures to repair the harm and damage suffered by the victims. In cases of collective reparations, as the case at hand, the determination of the reparation programmes is also required. All of these factors form the cost of repair, which is the basis of the amount of liability.

v. The cost of repair does not automatically reflect the amount of liability. A trial chamber must weigh the cost of repair in the light of the concrete circumstances of the case (massive criminality, gravity of the specific crimes, personal circumstances of the convicted person, etc.), the degree of participation of the convicted person in the crimes and the harm caused, as well as the needs and interests of the victims. The appropriate consideration and weighing of these elements allow reaching a reasonable amount of liability.

vi. In the case at hand, reparation programmes must, to the fullest possible extent, be implemented bearing in mind the differentiated harm suffered by the different types of victims. In the case of child soldiers, the harm to their project of life ought to be appropriately addressed.

vii. It is observed that the Trial Chamber's calculation of Mr Lubanga's amount of liability was not necessarily incorrect. It appears that it was fixed taking into consideration the estimated cost of the reparation programmes regarding the entire scope of victimhood and the harm to be repaired, and weighing such estimated costs in light of the specific circumstances of the case: gravity of the crimes, massive scale, the fact that the direct victims were children, etc. The Trial Chamber further considered the principal role of Mr Lubanga in both the commission of the crimes and causation of harm and damages, as well as the needs and interests of the victims as reflected in the submissions received throughout the reparation proceedings.

viii. It would have been better for the Trial Chamber to set out in detail the objective and technical elements that formed the basis of its determination of the amount of liability as elaborated in Chapter V of this Opinion. Nonetheless, due to the complex nature of the case at hand, and being this the first experience of massive and collective reparations at this Court, the calculation of the amount of liability is discernible from the circumstances.

ix. In future cases, it will be desirable for judicial proceedings on reparations to rely on technical, scientific and objective methods, to better guarantee the fairness of proceedings and to facilitate that all parties can fully exercise their rights. This will enhance reparation proceedings for atrocious crimes at this Court.

VII. FINAL THOUGHTS

The process of reparations should take into account that a victim is a human being who went through unconceivable suffering and atrocities; even those who were killed, should survive in our memory. This Court must be mindful of the reality that victims have had to endure. Consequently, reparation measures should favour the process of inter-social and intercommunal reconciliation to promote lasting and sustainable peace.

The Rome Statute must serve justice in its broad sense. Under its framework, justice not only entails the punishment of the perpetrators, but it also requires full reparation of victims. As stated in its preamble, victims are at the centre of international justice. It is the Court's onus to bring them meaningful justice.

Done in both English and French, the English version being authoritative.

Judge Luz del Carmen Ibáñez Carranza

Dated this 16th day of September 2019

At The Hague, The Netherlands