

**VICTIM RECOGNITION AND  
SATISFACTION OF REPARATIONS**

**THIRD PARTY INTERVENTION IN  
*JANOWIEC AND OTHERS V. RUSSIA***

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**December 2012**

## I. INTRODUCTION

On 30 November 2012 the Court granted the Public International Law & Policy Group leave to intervene as a third party in the proceedings in accordance with Rule 44 of the Rules of the Court with regard to two specific points arising before the Grand Chamber in the case of *Janowiec and Others v. Russia*.<sup>1</sup> The first point concerns the issue of victim recognition and focuses, in particular, on the nature and strength of familial relationships required for a complainant ‘family member’ to be considered a victim of violations of Article 3 of the European Convention on Human Rights (ECHR). The judgment at first instance used specific criteria to categorize some of the applicants as accepted victims of the violation of Article 3, leaving some applicants outside the scope of the full recognition by the Court.<sup>2</sup> This submission provides the Court with relevant practice and developments in international law as it relates to the recognition of victims of serious violations of human rights and war crimes. The second point concerns the issue of satisfaction as reparation. Despite finding violations, the Court at first instance declined to award reparations beyond holding that the decision alone constituted sufficient just satisfaction.<sup>3</sup> This submission addresses the issue of reparations for harm suffered, drawing on international law practice, and advises that a broader interpretation of Article 41, which would allow for non-monetary reparations in the present case, is in line with past Court practice as well as international developments.

## II. VICTIM RECOGNITION

The importance of victim recognition in cases concerning serious underlying crimes by the State cannot be underestimated. Therefore, determinations on victim recognition require a thorough analysis of the facts and should be taken in line with the jurisprudence from the Court as well as international law.

### a. VICTIM RECOGNITION UNDER ARTICLE 3 OF THE CONVENTION

As noted by the Court at first instance, the test that this Court uses to assess whether or not to accept applicants as victims of an Article 3 violation includes a general test that ill-treatment must attain a minimum level of severity as well as an assessment of specific, case-related criteria, discussed below. Importantly, the victim recognition assessment should depend on all the circumstances of the case.<sup>4</sup>

In *Çakici v. Turkey*, the Court set out considerations to be assessed when deciding if family members could be considered as victims in cases concerning Article 3 violations. The relevant criteria include: the proximity of the family tie – with certain weight attaching to the parent-child bond; the particular circumstances of the relationship; the extent to which the family member witnessed the events in question; the involvement of the family member in the attempts to obtain information about the disappeared person; and, the way in which the authorities responded to those enquiries.<sup>5</sup> The Court emphasized that the “essence of such a violation does not so much lie in the fact of the ‘disappearance’ of the family member but rather concerns the authorities’ reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim to be a victim of the authorities’ conduct.”<sup>6</sup> These criteria are to be assessed together, though the importance afforded to each of these criteria has varied in the case law. Nevertheless, in the case law, there has been an increasing emphasis placed on (1) the involvement of the family member in the attempts to obtain information about the disappeared person and (2) the way in which the authorities responded to those enquiries.

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<sup>1</sup> *Janowiec and Others v. Russia*, Application Nos. 55508/07, 29520/09, Eur. Ct. H.R., Judgment, 16 April 2012, para. 15.

<sup>2</sup> *Janowiec and Others v. Russia*, Application Nos. 55508/07, 29520/09, Eur. Ct. H.R., Judgment, 16 April 2012, paras. 153-4.

<sup>3</sup> *Janowiec and Others v. Russia*, Application Nos. 55508/07, 29520/09, Eur. Ct. H.R., Judgment, 16 April 2012, para. 173.

<sup>4</sup> *Cruz Veras and others v. Sweden*, Application No. 15576/89, Eur. Ct. H.R., Judgment, 20 March 1991, para. 83; *Soering v. United Kingdom*, Application No. 14038/88, Eur. Ct. H.R., Judgment, 7 July 1989, para. 100.

<sup>5</sup> *Çakici v Turkey*, Application No. 23657/94, Eur. Ct. H.R., Judgment, 8 July 1999, para. 98.

<sup>6</sup> *Çakici v Turkey*, Application No. 23657/94, Eur. Ct. H.R., Judgment, 8 July 1999, para. 98; reaffirmed in *Orhan v Turkey*, Application No. 25656/94, Eur. Ct. H.R., Judgment, 18 June 2002, para. 358; *Luluyev and Others v. Russia*, Application No. 69480/01, Eur. Ct. H.R., (Reparations and Costs), 9 November 2006, para. 111.

For example, in *Taymuskhanov v. Russia*, the Court denied victim status to the second applicant, who was under two years old, and to the third applicant, who was not born at the time of his father's disappearance.<sup>7</sup> However, in this case, the Court emphasized a lack of their active involvement (due to their very young age) in obtaining information about their missing father, which was considered a decisive criterion for denying them victim status.<sup>8</sup> The emphasis on this criterion is logical because, while it may have precluded victim recognition in this case, it reflects the fact that family bonds (particularly the parent-child bond) can have a strong emotional impact on the victim applicant, causing anguish and harm, even when little to no contact was possible.

The Court's case law clearly demonstrates that the involvement of the family member in the attempts to obtain information about the fate of the lost relative has been important to the Court. In *Çakici*, the applicant, a brother of the missing person, was denied victim status under Article 3 since he was not very actively involved in attempts to obtain information, lived in a different town, and did not witness the events of his brothers' disappearance.<sup>9</sup> In *Musikhanova et. al. v. Russia*,<sup>10</sup> the Court reiterated the importance of making enquiries to domestic authorities regarding a disappeared relative. The Court found that three of the applicants had proved that such efforts were undertaken and they were considered as victims, while other family members had not demonstrated such efforts and were not classified as victims under Article 3.<sup>11</sup> This determination was made despite the fact that all of the applicants had witnessed their relative's detention<sup>12</sup> and none of the applicants had received any explanation or information about their missing relative.<sup>13</sup>

The active involvement of family members in attempts to obtain information about the fate of a lost relative was further emphasized in *Luluyev et. al v. Russia*<sup>14</sup> and *Taniş et. al. v. Turkey*.<sup>15</sup> In *Luluyev et. al.*, the Court considered that the parents, children, and husband of the missing person were "immediate family," with brothers also considered to belong to immediate family "to a certain extent."<sup>16</sup> Although it was "mainly" the second applicant who had the most frequent encounters with the authorities, other family members were also closely involved in the search for their missing relative. The Court considered it noteworthy that a brother of the disappeared had gone to identify her body after the discovery of the mass grave.<sup>17</sup> Similarly in *Taniş et. al. v. Turkey*,<sup>18</sup> the applicants were the father, brothers and wife of the missing. The Court emphasized the numerous efforts they had made in an attempt to find out what had happened to the disappeared man. The Court noted that the applicants' anguish concerning their relative's fate continued to the day of the judgment and held that the relatives had "personally suffered" from a violation of Art. 3.<sup>19</sup>

These cases show that it is imperative for the Court to not only look at the familiar connection and birth date of the applicant but also to consider to what extent the family member applicant undertook efforts to obtain information about the fate of their lost relative. Once the Court concludes that the applicant did in fact attempted to obtain information from authorities, it must also examine the action of those State authorities in response to the requests. Indeed, the action of State authorities in response to a disappearance has been considered by the Court to be an overriding consideration in determining violations of family members' rights under Article 3.

In *Timurtas v. Turkey*,<sup>20</sup> though the applicant had not seen his son in the two years preceding his disappearance and had not witnessed the events of his son's disappearance, the Court emphasized that the authorities' responses to the applicant's attempts to obtain information constituted inhuman and degrading treatment. The applicant made many enquiries, and his anguish was considered by the

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<sup>7</sup> *Taymuskhanov v. Russia*, Application No. 11528/07, Eur. Ct. H.R., Judgment, 16 December 2010.

<sup>8</sup> *Taymuskhanov v. Russia*, Application No. 11528/07, Eur. Ct. H.R., Judgment, 16 December 2010, para. 122.

<sup>9</sup> *Çakici v. Turkey*, Application No. 23657/94, Eur. Ct. H.R., Judgment, 8 July 1999, para. 99.

<sup>10</sup> *Musikhanova et. al. v. Russia*, Application No. 27243/03, Eur. Ct. H.R., Judgment, 4 December 2008.

<sup>11</sup> *Musikhanova et. al. v. Russia*, Application No. 27243/03, Eur. Ct. H.R., Judgment, 4 December 2008, para. 81.

<sup>12</sup> *Musikhanova et. al. v. Russia*, Application No. 27243/03, Eur. Ct. H.R., Judgment, 4 December 2008.

<sup>13</sup> *Musikhanova et. al. v. Russia*, Application No. 27243/03, Eur. Ct. H.R., Judgment, 4 December 2008, para. 82.

<sup>14</sup> *Luluyev et. al v. Russia*, Applicant No. 69480/01, Eur. Ct. H.R., (Reparations and Costs), 9 November 2006.

<sup>15</sup> *Taniş et. al. v. Turkey*, Applicant No. 65899/01, Eur. Ct. H.R., (Reparations and Costs), 2 August 2005.

<sup>16</sup> *Luluyev et. al v. Russia*, Applicant No. 69480/01, Eur. Ct. H.R., (Reparations and Costs), 9 November 2006, para. 112.

<sup>17</sup> *Luluyev et. al v. Russia*, Applicant No. 69480/01, Eur. Ct. H.R., (Reparations and Costs), 9 November 2006, para. 112.

<sup>18</sup> *Taniş et. al. v. Turkey*, Applicant No. 65899/01, Eur. Ct. H.R. (Reparations and Costs), 2 August 2005, paras. 220-221.

<sup>19</sup> *Taniş et. al. v. Turkey*, Applicant No. 65899/01, Eur. Ct. H.R. (Reparations and Costs), 2 August 2005, paras. 220-221.

<sup>20</sup> *Timurtas v. Turkey*, Applicant No. 23531/94, Eur. Ct. H.R. (Reparations and Costs), 13 June 2000.

Court as having been exacerbated by the conduct of the authorities.<sup>21</sup> The investigation lacked promptitude and efficiency, and certain members of the security forces also displayed a callous disregard for the applicant's concerns.<sup>22</sup>

Similarly, in *Varnava et. al. v. Turkey*,<sup>23</sup> the Court noted that the disappearances had taken place in the context of military operations, which resulted in considerable loss of life, large-scale arrests and detentions and enforced separations of families. The relatives of the missing men had suffered the agony of not knowing whether their family member had been killed in the conflict or had been taken into detention and, due to the continuing division of Cyprus, had been faced with very serious obstacles in their search for information. The Court referred to previous cases involving similar circumstances in holding that the "silence of the authorities of the respondent State in face of the real concerns of the relatives could only be categorized as inhuman treatment."<sup>24</sup> The Court relied on this finding without examining each particular familial tie of the applicants to the disappeared.<sup>25</sup>

The case law indicates that the Court is increasingly concerned with the actions of the family member applicant and the role played by the State after requests for information have been made when making determinations on victim status in Article 3 cases. This is a welcome development, requiring the Court to undertake a deeper analysis after looking at the proximity of the family tie and the particular circumstances of the relationship. This approach acknowledges the complexities of family bonds and the importance of victim acknowledgement and corresponds with standards of victim recognition by other international judicial institutions.

#### **b. VICTIM RECOGNITION IN INTERNATIONAL LAW**

An approach that recognizes victims based on (1) the involvement of the family member in the attempts to obtain information about the disappeared person and (2) the way in which the authorities responded to those enquiries, is in line with the standards for victim recognition applied by other international judicial institutions, which in the past few years have cast a broader net for victim recognition. The following section sets out the applicable standards in relation to victim recognition (i) for the purpose of reparations at the Inter-American Court of Human Rights (IACtHR) and (ii) for the purposes of recognition as a civil party participating in a proceedings at the Extraordinary Chambers in the Courts of Cambodia (ECCC) and recognition as a victim participating in the proceedings at the International Criminal Court (ICC).

The IACtHR has had to deal with a number of important cases concerning missing family members (enforced disappearances) as well as the failure on the part of the State to provide information to family members about missing relatives. Importantly, jurisprudence from the IACtHR recognizes family members of missing persons as victims when they have shown serious concern after the disappearance and when they are treated inhumanely by the State in their search for information about their missing family member. As a regional human rights court dealing with State responsibility, its jurisprudence is particularly informative for this Court.

Unlike the IACtHR, the ECCC is an *ad hoc* internationalized criminal court and the ICC is a permanent international criminal court. While dealing with individual criminal liability rather than State responsibility, these courts have had to grapple with the issue of the recognition of family members of direct victim as victims in relation to serious underlying violations of human rights by States and armed groups. Jurisprudence from these courts sheds light on some of the most recent developments concerning victim acknowledgement and recognition by judicial institutions.

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<sup>21</sup> *Timurtas v. Turkey*, Applicant No. 23531/94, Eur. Ct. H.R. (Reparations and Costs), 13 June 2000, para. 96.

<sup>22</sup> *Timurtas v. Turkey*, Applicant No. 23531/94, Eur. Ct. H.R. (Reparations and Costs), 13 June 2000, para. 97.

<sup>23</sup> *Varnava et. al. v. Turkey*, Applications Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Eur. Ct. H.R., Judgment, 18 September 2009.

<sup>24</sup> *Varnava et. al. v. Turkey*, Applications Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Eur. Ct. H.R., 18 September 2009, para. 201.

<sup>25</sup> *Varnava et. al. v. Turkey*, Applications Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Eur. Ct. H.R., 18 September 2009, paras. 201-2.

## *The Inter-America Court of Human Rights*

Like the European Court of Human Rights, the IACtHR looks at a variety of criteria when assessing the victim status of applicants. Crucially, the IACtHR has also emphasized the importance of family members in attempts to obtain information about the fate of a lost relative when determining victim status. In *Garrido and Baigorria v. Argentina*, for example, siblings of the two missing men made applications to the Court for compensation for moral damages. They offered no proof of an affective relationship such that the disappearance of their brother would have caused them grievous suffering. No evidence was presented that demonstrated frequent family visits prior to the disappearance, or that they took much interest in the lives that their brothers had led up to that point. However, because the siblings of the missing men were found to have shown serious concern after the disappearances, the Court consequently awarded compensation for moral damages to each of the applicants.<sup>26</sup>

In addition, the IACtHR has adopted a broad interpretation of victim recognition regarding family members of missing persons for the purposes of reparations on account of a teleological interpretation of the American Convention on Human Rights. Moreover, it has held that family member victims are entitled to reparations for their own harms suffered and not just the harms suffered by their disappeared relative.

Before the 2009 reform of the Court's Rules of Procedure, Article 2(15) of the American Convention stated that "the expression 'next of kin' refers to the immediate family, namely, direct ascendants, descendants, siblings, spouses or permanent companions, or those determined by the Court."<sup>27</sup> However, in 2009, the reference to next of kin was removed. This marked a broadening of the definition to reflect the interpretation in the jurisprudence up until that point. It formally allows extended relatives who can otherwise show that they have sought information about their loved one from the authorities and suffered harm as a result of the violation as well as children who may not have been recognized, for a variety of reasons, by their parents to be recognized as a victim in the case.<sup>28</sup>

In addition to a widening of the familial relationship for the purposes of victim recognition, the IACtHR held in *Blake v. Guatemala* that State authorities violated Article 5 of the American Convention, addressing the right to humane treatment,<sup>29</sup> as the enforced disappearance caused the parents and brothers of the missing person suffering, intense anguish, and frustration in the face of the authorities' failure to investigate and their cover up of what had occurred.<sup>30</sup> The IACtHR determined that these relatives constituted the injured party within the meaning of Article 63(1) of the American Convention<sup>31</sup> and held that they are entitled to reparations in their own right.<sup>32</sup>

## *International Criminal Institutions*

Similar to the IACtHR, the ICC and ECCC have also adopted a broad approach towards victim recognition, which is in line with current victimological studies stressing the importance of victim acknowledgment by authorities.<sup>33</sup> At the ICC, the Appeals Chamber held, in the case of *Prosecutor v.*

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<sup>26</sup> *Garrido and Baigorria v. Argentina*, Inter-Am. Ct. H.R., Judgment (Reparations and Costs), 27 August 1998, para. 64.

<sup>27</sup> Amaya Ubada de Torres, *Determination of Victims*, in: Laurence L. Burgorgue-Larsen, Amaya A. Ubada De Torres, Rosalind R. Greenstein, *The Inter-American Court of Human Rights: Case Law and Commentary*, 2011, p. 114.

<sup>28</sup> Amaya Ubada de Torres, *Determination of Victims*, in: Laurence L. Burgorgue-Larsen, Amaya A. Ubada De Torres, Rosalind R. Greenstein, *The Inter-American Court of Human Rights: Case Law and Commentary*, 2011, pp. 113-4.

<sup>29</sup> Art. 5(1). "Every person has the right to have his physical, mental, and moral integrity respected." Art. 5(2). "No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."

<sup>30</sup> *Blake v. Guatemala*, Inter-Am. C.H.R. Judgment (Merits) 24 January 1998, para. 97.

<sup>31</sup> Art 63(1); "If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

<sup>32</sup> *Blake v. Guatemala*, Inter-Am. Ct. H.R., Judgment (Merits), 24 January 1998, para. 38.

<sup>33</sup> See, for example, United Nations Office for Drug Control and Crime Prevention: Center for International Crime Prevention, Handbook on Justice for Victims: On the Use and Application of on the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power [1999] at 9; see also Shapland, J., Willmore, J. and Duff, P., Victims in the Criminal Justice System, Gower (1985).

*Lubanga*,<sup>34</sup> that “[h]arm suffered by one victim as a result of the commission of a crime within the jurisdiction of the Court can give rise to harm suffered by other victims” so long as an individual suffers harm personally.<sup>35</sup> As a result, the status of victim has been granted to close family members of a direct victim, including parents, an aunt, cousin and nephew, on the basis that they had suffered personal harm as a result of crimes within the jurisdiction of the Court committed against a direct victim.<sup>36</sup> While this court has not specifically set out that efforts to find out information about missing relatives is a criteria for the purpose of assessment of victim recognition, such information is often included in the victim applications. This information is not only important for purposes of reparation but it often highlights the bond between the family member victim and family member applicant.

Similarly, the ECCC Appeals Chamber in the case of *Prosecutor v. Kaing Guek Eav alias Duch* (Case 001)<sup>37</sup> interpreted the term “indirect victims of international crimes” broadly, emphasizing, in particular, the psychological suffering of family members of direct victims of international crimes. According to the Appeals Chamber, such psychological injury results from uncertainty and fear about the direct victim’s fate, knowledge of their suffering, or the loss of the sense of safety and moral integrity.<sup>38</sup> The Appeals Chamber held that psychological and physical injury may be suffered by the vulnerable, such as infants, children, elderly and sick, whose caregivers were taken away from them.<sup>39</sup> It further found that material injury may have been inflicted upon those for whom the direct victim was providing at the time of the victimization, or would have, in all probability, provided for in the future, as, for instance, in the relationship between parents and children.<sup>40</sup> Material injury, it found, may be caused by, or be a material consequence of, damage to the patrimony of the family.<sup>41</sup>

Likewise, the ECCC Pre-Trial Chamber in the case of *Prosecutor v. Ieng Sary, Ieng Thirith, Nuon Chea and Khieu Samphan* (Case 002) adopted a broad view with respect to admitting family members of direct victims as civil party participants in the proceedings.<sup>42</sup> Taking into account the nature of the mass crimes within the jurisdiction of the ECCC, and the Khmer family tradition,<sup>43</sup> the Pre-Trial Chamber determined that there is a presumption of psychological harm for the members of the direct family of the immediate victim. The category ‘direct family’ encompasses parents, children, spouses and siblings of the direct victim. The presumption of psychological harm is considered (i) when the immediate victim is deceased or has disappeared as a direct consequence of the facts under investigation, or (ii) when the immediate victim has been forcibly moved and separated from the direct family as a direct consequence of facts under investigation and such separation results in suffering for the direct family members that meet the personal psychological harm threshold. The Pre-Trial Chamber furthermore noted that a case-by-case assessment should be made for extended family members, which comprises: grandparents, aunts, uncles, nieces, nephews, cousins, in-laws and other

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<sup>34</sup> *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06-1432, Int. Cr. Ct., ‘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, para. 32.

<sup>35</sup> *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06-1432, Int. Cr. Ct., ‘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, para. 32.

<sup>36</sup> *Situation in the Democratic Republic of Congo*, No. ICC-01/04-545, Int. Cr. Ct., ‘Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of Congo by Applicants a/0189/06 to a/0198/06, a/0200/06 to a/0202/06, a/0204/06 to a/0208/06, a/0210/06, a/0213/06, a/0215/06, to a/0218/06, a/0219/06, a/0332/07, a/0334/07, a/0337/07, a/0001/08, a/0030/08, a/0031/08’, 4 November 2008, para. 46.

<sup>37</sup> *Prosecutor v. Kaing Guek Eav alias ‘Duch’*, Case No. 001/18-07-2007, ECCC, Judgment, 26 July 2010, para. 643.

<sup>38</sup> *Prosecutor v. Kaing Guek Eav alias ‘Duch’*, Case No. 001/18-07-2007, ECCC, Appeal Judgment, 3 February 2012, para. 417.

<sup>39</sup> *Prosecutor v. Kaing Guek Eav alias ‘Duch’*, Case No. 001/18-07-2007, ECCC, Appeal Judgment, 3 February 2012, para. 417.

<sup>40</sup> *Prosecutor v. Kaing Guek Eav alias ‘Duch’*, Case No. 001/18-07-2007, ECCC, Appeal Judgment, 3 February 2012, para. 417.

<sup>41</sup> *Prosecutor v. Kaing Guek Eav alias ‘Duch’*, Case No. 001/18-07-2007, ECCC, Appeal Judgment, 3 February 2012, paras. 416-7.

<sup>42</sup> *Prosecutor v. Ieng, Sary, Ieng Thirith, Nuon, Chea Khieu, Samphan*, Case No. 002/19-09-2007, ECCC, ‘Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications’, 24 June 2011, para. 42.

<sup>43</sup> *Prosecutor v. Meas Muth, Sou Met*, Case No. 003/07-09-2009, ECCC, ‘Order on the Reconsideration of the Admissibility of the Civil Party Application of Robert Hamill’, 24 February 2012, para. 22.

indirect kin.<sup>44</sup> The Supreme Court Chamber held in this respect that the criterion of special bonds of affection or dependence connecting the applicant with the direct victim captures the essence of interpersonal relations, the destruction of which is conducive to an injury on the part of indirect victims, and concluded that this criterion applies to all persons who claim to be indirect victims, whether family or not.<sup>45</sup> In line with this reasoning, it is logical that in cases where the family member applicant is extended family, the court would undertake a case-by-case assessment and consider involvement of that family member in the attempts to obtain information about the fate of the lost relative as evidence of special bonds of affection.

As a result of the above-mentioned jurisprudence, both the ICC and ECCC have acknowledged that a broader set of familial relationships can trigger victim recognition, but they also emphasize the importance of carrying out a case-by-case assessment on types of harm suffered by family members, and in particular by extended family members. While the assessments in these cases relate to harm suffered as a result of substantive violations of the courts' governing documents, the need for wide assessment of harm suffered as a result of a procedural violation (as is the case in the current case by the Court) is equally applicable. A wider assessment is preferred to a strict test of family ties because such an assessment reflects the complexities of family relationships and harms suffered by family member victims.

### III. SATISFACTION AS REPARATION: ARTICLE 41

The second issue addressed in this submission concerns satisfaction as a form of reparation. This Court has generally interpreted Article 41 narrowly, as providing mainly for monetary reparations. Only in "extremely rare cases" has it issued non-monetary reparations, aimed at ending or remedying a violation.<sup>46</sup> The following sections analyze this important case law of the Court as well as other international legal standards on reparations which support the position that Article 41 may be interpreted to include non-monetary reparations, and particularly satisfaction and guarantees of non-repetition. It is submitted that, in line with international developments, the Court may wish to treat the present case as an 'extremely rare case' in order to fully remedy the acknowledged harm suffered by the victims.

#### a. SATISFACTION AND THE EUROPEAN COURT OF HUMAN RIGHTS

Article 41 of the ECHR provides that "if the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."<sup>47</sup> The textual interpretation of 'just satisfaction' appears unclear looking at the wording of the Convention. However, Article 5(5) provides that victims of a violation of Article 5 "shall have an enforceable right to compensation."<sup>48</sup> The difference in wording between Article 5 and Article 41 implies that 'just satisfaction' constitutes more extensive remedies than compensation alone.<sup>49</sup>

With regard to the intention of the drafters on this matter, there is limited guidance as Article 50 (now Article 41) was drafted with the expectation that the majority of cases before the Court would be inter-state in nature.<sup>50</sup> To be sure, the move within international human rights towards a victim-

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<sup>44</sup> *Prosecutor v. Ieng, Sary, Ieng Thirith, Nuon, Chea Khieu, Samphan*, Case No. 002/19-09-2007, ECCC, 'Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications', 24 June 2011, paras. 41-54.

<sup>45</sup> *Prosecutor v. Kaing Guek Eav alias 'Duch'*, Case No. 001/18-07-2007, ECCC, Appeal Judgment, 3 February 2012, para. 447.

<sup>46</sup> President of the European Court of Human Rights, *Practice Direction Just Satisfaction Claims*, 28 March, 2007, para. 23.

<sup>47</sup> Article 41. Convention for the Protection of Human Rights and Fundamental Freedoms (1950) as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13.

<sup>48</sup> Article 5. Convention for the Protection of Human Rights and Fundamental Freedoms (1950) as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13.

<sup>49</sup> Mera Martinot, Martina Siegfried, Jacco Snoeijer, *The Competence of the European Court of Human Rights to Order Restitutio in Integrum and Specific Orders as Remedial Measures in the Case 46221/99*, 2000, p. 16.

<sup>50</sup> Mera Martinot, Martina Siegfried, Jacco Snoeijer, *The Competence of the European Court of Human Rights to Order Restitutio in Integrum and Specific Orders as Remedial Measures in the Case 46221/99*, 2000, p. 17.

oriented justice system was not anticipated when the Convention was drafted. However, as stressed in *Tyrer v. The United Kingdom*, the Convention is a living instrument, which must be interpreted in the light of present-day conditions.<sup>51</sup>

If this is true, the current approach to reparation for violations of human rights requires full and effective remedy for harms suffered. However, this has not always been the case at the Court. In the past, the Court held that its judgment was declaratory in nature and that it “leaves to the State the choice of the means to be utilized in its domestic legal system for performance of its obligation under Article 53” (now Art. 46).<sup>52</sup> That obligation involves ending the breach and making reparations.<sup>53</sup> Nevertheless, as mentioned above, this Court has, on occasion, adopted a more holistic approach towards reparations in a handful of exceptional cases. In other words, the Court has previously taken steps towards a broader interpretation of Article 41.

For instance, in *Papamichalopoulos and Others v. Greece*, the Court found that although States are in principle free to choose how to comply with Art. 53 (now Art. 46), if the nature of the breach allows for *restitutio in integrum*, the State has to do so, but if this is not allowed by national law, the Court can afford just satisfaction.<sup>54</sup> Consequently, the Court held that the land at issue had to be returned by the respondent State to the applicants within six months.<sup>55</sup> Similarly, in *Assanidze v. Georgia*, the Court ordered the release of the applicant who was unlawfully detained, reasoning that “the violation found in the instant case does not leave any real choice as to the measures required to remedy it.”<sup>56</sup> In *Broniowski v. Poland*, the Court held that in light of the systematic situation that led to the violation “the respondent State must, through appropriate legal measures and administrative practices, secure the implementation of the property right.”<sup>57</sup>

The remedies provided for in these cases, as well as others, exceed mere restitution. They are forms of satisfaction aimed at ending a continuing violation. Moreover, in the latter case, the Court ordered a remedy that not only addresses the applicants but all those in a similar situation, which helps guarantee non-repetition of the violation. These cases show that this Court has recognized the importance of satisfaction, within Article 41, as a means through which to provide full and effective remedies to the victims as well as to address guarantees of non-repetition. Such decisions are in line with international developments on reparations.

## **b. INTERNATIONAL STANDARDS REGARDING REPARATIONS**

Within international law, the practice of awarding reparations to individuals continues to evolve.<sup>58</sup> However, key developments are noticeable and can inform the interpretation of reparations in this case. Importantly, just satisfaction is generally associated with multiple forms of redress, both monetary and non-monetary in nature.

### ***United Nations Guidelines***

The 2006 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* (UN Principles) provide that victims of gross violations of international human rights law and serious violations of international humanitarian law “should [...] be provided with full and effective reparation, [...], which include the following forms: restitution,

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<sup>51</sup> *Tyrer v. The United Kingdom*, Application No. 5856/72, Eur. Ct. H.R., Judgment, 25 April 1978, para. 31.

<sup>52</sup> *Marckx v. Belgium*, Application No. 6833/74, Eur. Ct. H.R., Judgment, 13 June 1979, para. 58.

<sup>53</sup> *Papamichalopoulos and others v. Greece*, Application No. 14556/89, Eur. Ct. H.R., Judgment, 31 October 1995, para. 34.

<sup>54</sup> *Papamichalopoulos and others v. Greece*, Application No. 14556/89, Eur. Ct. H.R., Judgment, 31 October 1995, para. 34.

<sup>55</sup> *Papamichalopoulos and others v. Greece*, Application No. 14556/89, Eur. Ct. H.R., Judgment, 31 October 1995, finding 2; reaffirmed in *Brumărescu v. Romania*, Application No. 28342/95, Eur. Ct. H.R., Judgment (Just Satisfaction), 23 January 2001, para. 22.

<sup>56</sup> *Assanidze v. Georgia*, Application No. 71503/01, Eur. Ct. H.R., Judgment, 8 April 2004, paras. 202-3.

<sup>57</sup> *Broniowski v. Poland*, Application No. 31443/96, Eur. Ct. H.R., Judgment, 22 June 2004, paras. 193-4.

<sup>58</sup> Theo van Boven, *Victim's Right to a Remedy and Reparation: The New United Nations Principles and Guidelines*, in: Carla Ferstman, Mariana Goetz, Alan Stephens, eds., *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, 2009, p. 21.

compensation, rehabilitation, satisfaction and guarantees of non-repetition.”<sup>59</sup> The UN Principles provide that individual circumstances, as well as the circumstances of the case, should be taken into account when assessing what type of reparations would be the most appropriate.<sup>60</sup>

The UN Principles provide that satisfaction should include, where applicable (a) cessation of continuing violations; (b) verification of the facts and full public disclosure of the truth; (c) search for the whereabouts of the disappeared, and assistance in the recovery, identification and reburial of bodies; (d) an official declaration of judicial decision restoring the dignity, reputation and rights of the victims; (e) public apology, including acknowledgement of facts and acceptance of responsibility; (f) judicial and administrative sanctions against those responsible; (g) commemorations and tributes to the victims; (h) inclusion of an accurate account in training and educational material.<sup>61</sup>

Guarantees of non-repetition should include, where applicable, (a) ensuring effective civilian control of military and security forces; (b) ensuring international standards of due process, fairness and impartiality; (c) strengthening the independence of the judiciary; (d) protecting persons in the legal profession and human rights defenders; (e) providing human rights and international humanitarian law education and training; (f) promoting the observance of codes of conduct and ethical norms; (g) promoting mechanisms for preventing and monitoring social conflicts and their resolution.<sup>62</sup>

Although non-binding, the UN Principles were adopted by consensus by the General Assembly and reflect commonly accepted norms. They provide clear guidance for States (as well as international and regional institutions) and have become of practical importance, as demonstrated by the jurisprudence of the IACtHR and ICC, discussed below.

### ***Inter-American Court of Human Rights***

It is widely noted that the IACtHR has taken a broader approach to reparations than this Court. The process of awarding reparations for victims holds a prominent place in the jurisprudence of the IACtHR,<sup>63</sup> the basis for which can be found in Article 63(1) of the American Convention.<sup>64</sup> This article provides that the IACtHR “shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.”<sup>65</sup> However, the Court has not limited itself in only providing for compensation or restitution. In *Blake v. Guatemala*, the IACtHR held that ‘reparations’ is a generic term that covers various forms of redress; including *restitutio in integrum*, compensation, satisfaction, and guarantees of non-repetition.<sup>66</sup>

As a result, the nature of reparations varies depending on the nature of the violation. Monetary compensation is often granted in combination with other forms of reparation. With respect to cases relating to disappearances or deaths caused by government officials, reparations often take the form of satisfaction. In *el Amparo v. Venezuela*, 14 fishermen had been killed by police and military officials. Next to awarding monetary compensation to the victims and their relatives, the IACtHR ordered

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<sup>59</sup> 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*, U.N. Doc. A/RES/60/147, 21 March 2006, para. 18.

<sup>60</sup> 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*, U.N. Doc. A/RES/60/147, 21 March 2006, para. 18.

<sup>61</sup> 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*, U.N. Doc. A/RES/60/147, 21 March 2006, para. 22.

<sup>62</sup> 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*, U.N. Doc. A/RES/60/147, 21 March 2006, para. 23.

<sup>63</sup> Theo van Boven, *Reparations: A Requirement of Justice*, in: *Memoria Del Seminario: El Sistema Interamericano de Protección de los Derechos Humanos en el Umbral del Siglo*, 1999, p. 664.

<sup>64</sup> Art 63(1); “If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.”

<sup>65</sup> Article 63. American Convention on Human Rights (1969).

<sup>66</sup> *Blake v. Guatemala*, Inter-Am. Ct. H.R., (Reparations), 22 January 1999, para. 31.

Venezuela to continue investigations into the circumstances of the case, and to punish those responsible.<sup>67</sup> In *Caballero-Delgado and Santana v. Colombia*, a case relating to the disappearance of two individuals by army officials and civilians collaborating with them, the IACtHR issued monetary reparation, and ordered Colombia to continue its efforts to locate and identify the remains of victims and deliver them to their next of kin.<sup>68</sup> Similarly, in “*Las Dos Erres*” *Massacre v. Guatemala*, which relates to the massacre of the village Dos Erres by government officials in 1982, the Court found *inter alia* a violation of the right to humane treatment (Art. 5) of 153 next-of-kin of the deceased of the massacre. Although the massacre itself occurred four-and-a-half years before Guatemala had accepted the jurisdiction of the IACtHR, the IACtHR ordered Guatemala to investigate “the facts that originated that violations declared in this judgment,”<sup>69</sup> instigate disciplinary, administrative or criminal actions against the State authorities responsible, proceed with the exhumation, identification, and delivery of the mortal remains of the victims, as well as publish an official declaration, and create a monument. Moreover, guarantees of non-repetition were ordered, with the IACtHR requiring Guatemala to adopt the necessary measures to amend its domestic legislation, and implement training courses on human rights.<sup>70</sup>

In a like manner, under Article 41 of the ECHR, the Court may adopt measures to prevent similar conduct in the future and to fully address the harm suffered by the victims, such as those ordered by the IACtHR, particularly related to the nature and severity of the underlying human rights violations and when the violation is a continuing violation.

### ***Reparations in International Criminal Law***

Like the IACtHR, the ICC and the ECCC both have a mandate which allows for the awarding of reparations. At the ICC, both individual and collective awards are permitted.<sup>71</sup> The reparations are to be paid either by the convicted accused or the Trust Fund for Victims. At the ECCC, the Internal Rules makes provision for moral and collective awards to be borne by the convicted accused.<sup>72</sup>

Though a reparations judgment has not yet been handed down by the ICC, in the decision establishing the principles and procedures to be applied to reparations in the *Lubanga* case, the Trial Chamber emphasized the need to provide effective remedies for victims.<sup>73</sup> It held that different modalities of reparations, such as restitution, compensation, rehabilitation, or reparations with a symbolic, preventative or transformative aim, might be appropriate.<sup>74</sup> In addition to outlining the meaning of restitution, compensation and rehabilitation, the Court established other possible modalities of reparations (such as educational campaigns) that aim to contribute to a society’s awareness of the crimes committed.<sup>75</sup>

In its only ruling on reparations to date, the ECCC “recognized the suffering of the victims as well as their right to obtain effective forms of reparation under internationally established standards.”<sup>76</sup> Though the ECCC was limited in what reparations it could award due to the nature of its Internal Rules and the indigence of the convicted accused, the Appeals Chamber did attempt to award more than the absolute minimum — which is the judgment itself as the reparation. Instead, in addition to the judgment itself, it ordered the compilation and wide distribution of all statements of apology and

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<sup>67</sup> *el Amparo v. Venezuela*, Inter-Am. Ct. H.R., Judgment (Reparations and Costs), 14 September 1996, para. 61.

<sup>68</sup> *Caballero-Delgado and Santana v. Colombia*, Inter-Am. Ct. H.R., Judgment (Reparations and Costs), 29 January 1997, para. 4.

<sup>69</sup> “*Las Dos Erres*” *Massacre v. Guatemala*, Inter-Am. Ct. H.R., Judgment (Preliminary Objection, Merits, Reparations, and Costs), 24 November 2009, finding 8.

<sup>70</sup> “*Las Dos Erres*” *Massacre v. Guatemala*, Inter-Am. Ct. H.R., Judgment (Preliminary Objection, Merits, Reparations, and Costs), 24 November 2009.

<sup>71</sup> Article 75. Rome Statute (1998).

<sup>72</sup> Internal Rules Extraordinary Chambers in the Courts of Cambodia, 3 August 2011, Rule 23.

<sup>73</sup> *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06-1432, Int. Cr. Ct., ‘Decision Establishing the Principles and Procedures to be applied to Reparations’, 7 August 2012, para. 177.

<sup>74</sup> *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06-1432, Int. Cr. Ct., ‘Decision Establishing the Principles and Procedures to be applied to Reparations’, 7 August 2012, para. 222.

<sup>75</sup> *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06-1432, Int. Cr. Ct., ‘Decision Establishing the Principles and Procedures to be applied to Reparations’, 7 August 2012, paras. 237-41.

<sup>76</sup> *Prosecutor v. Kaing Guek Eav alias ‘Duch’*, Case No. 001/18-07-2007, ECCC, Appeal Judgment, 3 February 2012, para. 717.

acknowledgements of responsibility made by the convicted accused during the course of the trial. The court's outreach programs, in connection with civil society organizations, would be responsible for the distribution. It further declared that all admitted civil parties suffered harm as direct consequence of the crimes perpetrated.<sup>77</sup>

The needs of victims have become of greater importance in the international legal arena since the drafting of the ECHR. The Court is already moving away from a strictly monetary interpretation of satisfaction, and has ordered different types of reparations, such as *restitutio in integrum*, and guarantees of non-repetition. However, this Court has done so only on occasion. This limited approach towards reparation for harms suffered as a result of serious human rights violations falls short of international practice, which has seen a rise in the awards of non-monetary reparations, particularly at its sister institution, the IACtHR.

Non-monetary reparations, such as what different forms of satisfaction can offer, provide creative solutions to cases involving serious violations of human rights, particularly those involving ongoing violations. They might include the continuation of the efforts to locate and identify the remains of the victims and deliver them to the immediate next of kin, if they so desire. Essential non-monetary tools in affording just satisfaction to the injured party can also include verification of facts, searching for the whereabouts of the disappeared or the bodies of the killed, adequate and unrestricted exhumations and autopsies, access to investigation files, a public apology, or other reparations with a symbolic, preventative or transformative aim or the guarantee of non-repetition. Developing a reparations scheme that includes effective remedies and corresponds with international practice on reparations interprets just satisfaction in Article 41 in a manner that aligns to present-day perspectives on victimhood and reparations and furthers the Court's aim to administer justice.

#### IV. CONCLUSION

In accordance with Rule 44 of the Rules of the Court, this third party submission has touched upon two specific points arising before the Grand Chamber in the case of *Janowiec and Others v. Russia*. With regard to the issue of victim recognition, it is submitted that this Court's case law as well as developments in international law, as it relates to the recognition of victims of serious violations of human rights and war crimes, indicates that an increasing emphasis is placed on the actions of the family member applicant and the role played by the State after requests for information have been made. This emphasis is especially important for extended family members and immediate family members who may not have had the opportunity to establish close personal bonds with the family member victim but for whom the impact of the crime and the harm suffered has, nevertheless, been severe. Indeed, this approach better reflects the complexities of family bonds and the importance of victim acknowledgement.

The second issue discussed concerns the issue of satisfaction as reparation. Despite finding violations, the Court at first instance declined to award reparations beyond holding that the decision alone constituted sufficient just satisfaction.<sup>78</sup> It is submitted that a broader interpretation of Article 41, which would allow for non-monetary reparations in the present case, is in line with past Court practice as well as international developments. In particular, an award calling for the continuation of efforts to locate and identify the remains of the victims and deliver them to the next of kin, if they so desire, is of paramount importance.

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<sup>77</sup> *Prosecutor v. Kaing Guek Eav alias 'Duch'*, Case No. 001/18-07-2007, ECCC, Appeal Judgment, 3 February 2012, paras. 666-716; *Prosecutor v. Kaing Guek Eav alias 'Duch'*, Case No. 001/18-07-2007, ECCC, Judgment, 26 July 2010, paras. 667-675.

<sup>78</sup> *Janowiec and Others v. Russia*, Application Nos. 55508/07, 29520/09, Eur. Ct. H.R., Judgment, 16 April 2012, para. 173.