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TRIAL CHAMBER I

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge René Blattmann

***SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF THE PROSECUTOR v. THOMAS LUBANGA DYILO***

Public

Decision establishing the principles and procedures to be applied to reparations

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

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Trial Chamber I (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court” or “ICC”), in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, delivers the following Decision establishing the principles and procedures to be applied to reparations.

I. PROCEDURAL BACKGROUND

1. On 14 March 2012, the Chamber issued its Judgment pursuant to Article 74 of the Statute (“Judgment” or “Article 74 Decision”).¹
2. On 14 March 2012, the Chamber issued a Scheduling order establishing the timetable for sentencing and reparations (“Scheduling order”).²
3. On 28 March 2012, the Office of Public Counsel for Victims (“OPCV”) requested leave to make submissions on issues relating to the reparations proceedings (“OPCV’s request”).³
4. Also on 28 March 2012, the Registry filed its First Report to the Trial Chamber on the applications for reparations (“Registry’s first report on applications for reparations”),⁴ and it provided the Chamber with the applications for reparations it had received.⁵ In addition, the Registry reported on the steps it had taken to notify the Judgment, pursuant to Rule 96 of the Rules of Procedure and Evidence (“Rules”),⁶ and it provided two of its mission reports.⁷
5. Finally on the same day, the Women’s Initiatives for Gender Justice (“Women’s Initiatives”), the International Center for Transitional Justice (“ICTJ”), the

¹ Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842.

² Scheduling order concerning timetable for sentencing and reparations, 14 March 2012, ICC-01/04-01/06-2844.

³ Request to appear before the Chamber pursuant to Regulation 81(4)(b) of the Regulations of the Court on issues related to reparations proceedings, 28 March 2012, ICC-01/04-01/06-2848.

⁴ First Report to the Trial Chamber on applications for reparations, 28 March 2012, ICC-01/04-01/06-2847.

⁵ First Transmission to the Trial Chamber of applications for reparations, 28 March 2012, ICC-01/04-01/06-2852 with confidential annexes, *ex parte* only available to the Registry.

⁶ Registry report on the notification of the Judgment, 28 March 2012, ICC-01/04-01/06-2850 with confidential annexes, *ex parte* only available to the Registry.

⁷ Transmission of two Registry mission reports, 28 March 2012, ICC-01/04-01/06-2851 with confidential annexes 1 and 2, *ex parte* only available to the Registry and their public redacted version.

United Nations Children’s Fund (“UNICEF”), the *Fondation Congolaise pour la Promotion des Droits humains et la Paix* (“FOCDP”), the *Coalition pour la CPI/RDC* and *Avocats Sans Frontières* (“ASF”), along with other non-governmental organisations (“NGOs”), namely *Justice-plus*, *Terre des Enfants*, *Centre Pelican – Training for Peace and Justice*/*Journalistes en action pour la Paix*, and *Fédération de Jeunes pour la Paix Mondiale*, requested leave to participate in the reparations proceedings.⁸

6. On 29 March 2012, the Trial Chamber ordered that any submissions in response to the OPCV’s request were to be filed by 16.00 hours on 4 April 2012.⁹
7. On 30 March 2012, the Chamber instructed the parties and participants to file their responses to the requests on behalf of the non-governmental organisations by 16.00 on 16 April 2012.¹⁰
8. On 4 April 2012, the Trust Fund for Victims (“Trust Fund” or “TFV”) sought an extension of time to file its observations on reparations,¹¹ and the defence filed its response to the OPCV’s request.¹²
9. On 5 April 2012, the Chamber issued its Decision on the OPCV’s request,¹³ in relation to which the defence requested leave to appeal on 11 April 2012 (“defence request for leave to appeal”).¹⁴

⁸ Women’s Initiatives for Gender Justice request for leave to participate in reparations proceedings, 28 March 2012 (notified on 29 March 2012), ICC-01/04-01/06-2853; Request for leave to file submission on reparations issues, 28 March 2012 (notified on 29 March 2012), ICC-01/04-01/06-2854; Registry transmission of communications received in the context of reparations proceedings, 29 March 2012 (notified on 30 March 2012), ICC-01/04-01/06-2855 with public annexes 1 and 3 and confidential annex 2.

⁹ E-mail communication from a Legal Officer of the Trial Chamber to the parties and participants on 29 March 2012 at 09.37.

¹⁰ Email communication from a Legal Officer of the Trial Chamber to the parties and participants on 30 March 2012 at 17.37.

¹¹ Request for extension of time to respond to the invitation for observations in the Chamber’s Scheduling order concerning timetable for sentencing and reparations of 14 March 2012, 4 April 2012, ICC-01/04-01/06-2856.

¹² Réponse de la Défense à la « Request to appear before the Chamber pursuant to Regulation 81(4)(b) of the Regulations of the Court on issues related to reparations proceedings », datée du 28 mars 2012, 4 April 2012, ICC-01/04-01/06-2857.

¹³ Decision on the OPCV’s request to participate in the reparations proceedings, 5 April 2012, ICC-01/04-01/06-2858.

¹⁴ Requête de la Défense sollicitant l’autorisation d’interjeter appel de la « Decision on the OPCV’s request to participate in the reparations proceedings » rendue le 5 avril 2012, 11 April 2012, ICC-01/04-01/06-2859.

10. On 12 April 2012, the Chamber instructed the parties and participants to file their responses to the defence request for leave to appeal by 16.00 on 20 April 2012.¹⁵
11. On 13 April 2012, the OPCV filed its response to the defence request for leave to appeal.¹⁶ The Office of the Prosecutor (“prosecution”) filed its response on 16 April 2012.¹⁷
12. On 16 April 2012, the defence filed its submissions in response to the non-governmental organisations’ requests.¹⁸
13. On 18 April 2012, the OPCV,¹⁹ the legal representatives of the V01 group of victims,²⁰ the Registrar,²¹ the defence,²² the prosecution²³ and the V02 group of victims²⁴ submitted their observations on reparations.
14. On 20 April 2012, the Chamber granted leave to Women’s Initiatives, the ICTJ, UNICEF, FOCDP, ASF and certain other NGOs to make representations in the reparations proceedings.²⁵
15. On 25 April 2012, the TFV submitted its observations on reparations.²⁶

¹⁵ E-mail communication from a Legal Officer of the Trial Chamber to the parties and participants on 12 April 2012 at 14.50.

¹⁶ Réponse du Bureau du conseil public pour les victimes à la « Requête de la Défense sollicitant l’autorisation d’interjeter appel de la « Decision on the OPCV’s request to participate in the reparations proceedings » rendue le 5 avril 2012, 13 April 2012, ICC-01/04-01/06-2860.

¹⁷ Prosecution’s Response to the “Requête de la Défense sollicitant l’autorisation d’interjeter appel de la ‘Decision on the OPCV’s request to participate in the reparations proceedings’” (ICC-01/04-01/06-2859), 16 April 2012, ICC-01/04-01/06-2861.

¹⁸ Réponse de la Défense aux demandes de participation à la procédure portant les numéros ICC-01/04-01/06-2853, ICC-01/04-01/06-2854 et ICC-01/04-01/06-2855, 16 April 2012, ICC-01/04-01/06-2862-Conf. A public redacted version was filed the same day: ICC-01/04-01/06-2862-Red.

¹⁹ Observations on issues concerning reparations, 18 April 2012, ICC-01/04-01/06-2863.

²⁰ Observations sur la fixation de la peine et les réparations de la part des victimes a/0001/06, a/0003/06, a/0007/06, a/00049/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0523/08, a/0610/08, a/0611/08, a/0053/09, a/0249/09, a/0292/09, a/0398/09, et a/1622/10, 18 April 2012, ICC-01/04-01/06-2864.

²¹ Registrar’s observations on reparations issues, 18 April 2012, ICC-01/04-01/06-2865.

²² Observations de la Défense sur les principes et la procédure applicables à la réparation, 18 April 2012, ICC-01/04-01/06-2866.

²³ Prosecution’s Submissions on the principles and procedures to be applied in reparations, 18 April 2012, ICC-01/04-01/06-2867.

²⁴ Observations du groupe de victimes VO2 concernant la fixation de la peine et des réparations, 18 April 2012, ICC-01/04-01/06-2869.

²⁵ Decision granting leave to make representations in the reparations proceedings, 20 April 2012, ICC-01/04-01/06-2870.

16. On 3 May 2012, the Chamber rejected the defence request for leave to appeal.²⁷
17. On 10 May 2012, Women's Initiatives, ASF (representing other NGOs), UNICEF and the ICTJ, submitted their observations on reparations.²⁸
18. On 25 May 2012, the defence²⁹ and the legal representatives of the V02 group of victims³⁰ submitted their replies to the submissions of the parties and participants.
19. In addition to the documents set out above, the Chamber had previously received two reports on reparations, which were made publicly available during March 2012. These are the Second Report of the Registry on Reparations³¹ and the TFV's First Report on Reparations,³² which were referred to in the submissions and the Chamber has taken them into consideration.

II. SUBMISSIONS

20. The summary of the submissions set out below is deliberately comprehensive. This is the first reparations decision by a Chamber of this Court, and there were a large number of extensive representations filed in writing. The Chamber considers it necessary to set out the competing points of views before turning to its conclusions. Therefore, the Chamber has reviewed all the submissions by the parties and participants in these proceedings, as well as those from the

²⁶ Observations on Reparations in Response to the Scheduling Order of 14 March 2012, 25 April 2012, ICC-01/04-01/06-2872.

²⁷ Decision on the defence request for leave to appeal, 3 May 2012, ICC-01/04-01/06-2874.

²⁸ Observations of the Women's Initiatives for Gender Justice on Reparations, 10 May 2012, ICC-01/04-01/06-2876; Observations relatives au régime de réparation, 10 May 2012 (notified on 11 May 2012), ICC-01/04-2877; Submission on the principles to be applied, and the procedure to be followed by the Chamber with regard to reparations, 10 May 2012 (notified on 11 May 2012), ICC-01/04-01/06-2878; Submission on reparations issues, 10 May 2012 (notified on 14 May 2012), ICC-01/04-01/06-2879.

²⁹ Réponse de la Défense à l'ensemble des observations déposées par les parties et participants relativement à la procédure et aux principes applicables à la phase de réparation, 25 May 2012, ICC-01/04-01/06-2885.

³⁰ Réplique du groupe de victimes VO2 Aux observations des *amicus curiae*, parties et participants sur la réparation, 25 May 2012, ICC-01/04-01/06-2886.

³¹ Second Report of the Registry on Reparations, 1 September 2011, ICC-01/04-01/06-2806, reclassified as public pursuant to Trial Chamber I's instruction of 19 March 2012.

³² Public Redacted Version of ICC-01/04-01/06-2803-Conf-Exp-Trust Fund for Victims' First Report on Reparations, 23 March 2012, ICC-01/04-01/06-2803-Red.

Registry, the TFV and the non-governmental organisations who have been granted leave to make representations. The Chamber has grouped the submissions by issue.

A. THE PRINCIPLES

1. Introduction

21. The TFV submits that the scope of the principles should not be restricted solely to the manner in which the Court is to conduct the reparations proceedings. Instead, it is argued the principles should “also address underlying philosophical questions related to the right of victims of international crimes to reparations, such as addressing the relationship between reparations and reconciliation”.³³ In addition, the TFV submits that in establishing these principles the Court will be able to address the “dilemma” that has been created by the suggested limitation that exists as regards judicial reparations, the extent of the harm that individuals have suffered and the large number of victims of international crimes.³⁴ The TFV suggests that the Chamber is entitled to apply international law and the standards that have been established in the relevant jurisprudence of the human rights courts,³⁵ particularly the Inter-American Court on Human Rights (“IACtHR”), as well as various texts, such as the 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 Basic Principles”),³⁶ the Paris Principles and Guidelines on Children Associated with Armed Forces and Armed Groups (“Paris Principles”),³⁷ and the Nairobi

³³ ICC-01/04-01/06-2872, para. 7.

³⁴ ICC-01/04-01/06-2872, para. 8.

³⁵ ICC-01/04-01/06-2872, paras 10-11.

³⁶ 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, United Nations General Assembly, Resolution A/RES/60/147, 21 March 2006.

³⁷ Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, UNICEF, February 2007.

Declaration on Women's and Girls' Right to a Remedy and Reparation ("Nairobi Declaration").³⁸

22. The Registry submits that Article 75(1) of the Rome Statute ("Statute") gives the Chamber a broad discretion to establish the principles that are to be applied to reparations for victims, including determining the scope and extent of any damage, loss and injury they experienced.³⁹ The Registry highlights that the French version of Article 75(2) describes the scope of the principles governing reparations as covering "*victimes ou [...] leurs ayants droit*", namely their respective families and successors.⁴⁰ The Registry submits that although Article 75(1) of the Statute does not give victims a right to reparations, the Chamber is entitled to establish this general principle,⁴¹ and the Registry invites the Chamber to take this step.⁴²
23. In this context, it is argued that the Chamber is able to rely on the existing principles and rules of international law, including those relating to the international law of armed conflict, and it is submitted the Court can derive assistance from the national laws of the various legal systems of the world, in accordance with Articles 21(b) and (c) of the Statute.⁴³ The Chamber is invited to investigate whether these principles establish a right on the part of victims to receive reparations, thereby creating a "principle related to reparations" under the Statute.⁴⁴ Notwithstanding the Registry's general submission as to the absence of a general convention that affords victims the right to reparations in international law, it has identified various international and domestic instruments that acknowledge the right of victims to receive reparations, together with an obligation of rectification that is imposed on those who are responsible for causing damage. The Registrar provided two non-exhaustive

³⁸ Nairobi Declaration on Women and Girls' Right to a Remedy and Reparation, adopted at the International Meeting on Women's and Girls' Right to a Remedy and Reparation, held in Nairobi from 19 to 21 March 2007.

³⁹ ICC-01/04-01/06-2865, para. 6.

⁴⁰ ICC-01/04-01/06-2865, para. 6.

⁴¹ ICC-01/04-01/06-2865, para. 6.

⁴² ICC-01/04-01/06-2865, para. 12.

⁴³ ICC-01/04-01/06-2865, paras 7-8.

⁴⁴ ICC-01/04-01/06-2865, para. 8.

lists of relevant international and domestic sources in an annex to its submissions.⁴⁵

24. The prosecution submits that the Chamber should identify, in general terms, the classes of victims who are entitled to compensation, the examples of harm that merit an award, the extent of the influence of the UPC, the amount of any award to be ordered against Mr Lubanga and whether reparations are to be individual or collective in nature.⁴⁶
25. Women's Initiatives observes that the Statute's framework includes provisions requiring it to provide justice that is gender inclusive. It submits that in establishing the principles to be applied to reparations under the Statute, and in any orders or awards, the Court should not prejudice the rights of victims under national and international law, including those that apply to victims of sexual violence.⁴⁷
26. ASF and other NGOs it represents submit that the lack of precedent as regards reparations does not affect the rights of victims that already exist throughout the proceedings.⁴⁸ They argue that the interests of victims in the identification, prosecution and punishment of those responsible for the harm they suffered includes their right to secure the truth and to reparations.⁴⁹ They suggest that the role of the Chamber should be directed, first and foremost, at determining the framework that will ensure the effective implementation of their right to reparations.⁵⁰
27. On the basis of the UN Basic Principles, ICTJ submits that the principles regarding reparations established by the ICC should (a) ensure the recognition of all victims by applying the widest possible approach, (b) facilitate fair and effective access to the Court and the opportunity to apply for reparations from

⁴⁵ ICC-01/04-01/06-2865, paras 13-18 and Annexes 1 and 2.

⁴⁶ ICC-01/04-01/06-2867, para. 3(b).

⁴⁷ ICC-01/04-01/06-2876, para. 8.

⁴⁸ ICC-01/04-01/06-2877, para. 4.

⁴⁹ ICC-01/04-01/06-2877, para. 6.

⁵⁰ ICC-01/04-01/06-2877, para. 7.

the TFV, and (c) support the right of victims to reparations through appropriate mechanisms relating to transitional justice.⁵¹

28. On the basis of the experience of the Congolese military court, ICTJ submits that the importance of recognising the true position of victims is highlighted by their general failure to obtain compensation from the state or the alleged perpetrators as a result of the judgments that are handed down by that court. In these circumstances, it is stressed that the approach of the ICC should be to establish effective and accessible procedures that reflect the true situation of the victims and their lack of access to justice.⁵²

2. Accessibility, Non-discrimination and Consultation with Victims

29. The legal representatives of the V01 group of victims have consulted with twelve of their clients, ten of whom are former child soldiers and two are the parents of former child soldiers.⁵³ The legal representatives suggest that their views and concerns are various and, to an extent, they conflict, and consequently it is argued that victims in this context should not be treated as a single group and instead they should be regarded as individuals. It is indicated that the views that are expressed may be influenced by the composition of the group, which is mostly male.⁵⁴
30. The TFV submits that “[t]he meaningfulness of reparations is as much about the process as it is about the award” and that victims “should be consulted at all stages of the proceedings and have a key role in the determination of the reparations award”.⁵⁵ It is suggested that the principles formulated by the Chamber should reflect this approach.⁵⁶ In addition, the TFV submits that the principles ought to ensure that victims effectively participate in the proceedings, and, for instance, the process needs to be publicised adequately

⁵¹ ICC-01/04-01/06-2879, page 4.

⁵² ICC-01/04-01/06-2879, paras 4 and 5.

⁵³ ICC-01/04-01/06-2864, para. 10.

⁵⁴ ICC-01/04-01/06-2864, paras 12-13.

⁵⁵ ICC-01/04-01/06-2872, para. 24.

⁵⁶ ICC-01/04-01/06-2872, para. 25. See also ICC-01/04-01/06-2803-Red, para. 186.

and the victims provided with appropriate legal assistance and protection.⁵⁷ The TFV suggests it is open to the Chamber to reflect the principle of non-discrimination, including by way of particular measures designed at facilitating access for vulnerable victims with special needs.⁵⁸

31. The TFV recommends that victims are allowed to participate in the design and implementation of any reparations programme, to ensure its effectiveness. It is argued that the Chamber should take the needs and expectations of victims into account, and it should include adequate measures in order to facilitate equal access for the most vulnerable.⁵⁹ In this context, the TFV submits that it is important that victims do not have unrealistic expectations, given the limited resources available for reparations in this case and the general level of poverty in Ituri.⁶⁰ The TFV suggests a community-based debate should occur as to the appropriate reparations to be awarded in each locality.⁶¹ The TFV contends that outreach and communication is essential to ensure that any reparations award “lives up to its fullest *symbolic potential*”.⁶² The TFV suggests that it will be necessary to secure the assistance of counsel representing the victims in order to pursue this suggestion.⁶³
32. The Registry submits that all those affected should be consulted in the design of any award of reparations and that this process should include the individual victims and their local communities.⁶⁴
33. Women’s Initiatives cites the Nairobi Declaration in support of a submission that victims and survivors should be consulted as part of this process, including by participating in the design of the reparations programmes, whether

⁵⁷ ICC-01/04-01/06-2872, para. 26.

⁵⁸ ICC-01/04-01/06-2872, paras 27-29. See also ICC-01/04-01/06-2803-Red, paras 27-36 on gender considerations and paras 55-71 on the representation of the views of victims.

⁵⁹ ICC-01/04-01/06-2872, paras 198-201.

⁶⁰ ICC-01/04-01/06-2872, para. 209.

⁶¹ ICC-01/04-01/06-2872, para. 207.

⁶² ICC-01/04-01/06-2872, para. 213 [emphasis in the original].

⁶³ ICC-01/04-01/06-2872, para. 214.

⁶⁴ ICC-01/04-01/06-2865, para. 21. See also ICC-01/04-01/06-2806, paras 205-207 on the possible role of the Court’s Public Information and Documentation Section.

collective or individual.⁶⁵ Moreover, it encourages the Chamber to consult further with victims and survivors, as well as with experts, in order to ensure that gender-related issues are reflected in the formulation of any awards. It suggests that the experts retained by the Court should have relevant expertise and experience in gender analysis and sexual and gender-based violence.⁶⁶ It submits that this approach would enable the Chamber to reach a more complete understanding of the harm individual victims suffered and its consequences. In particular, this process may reveal the obstacles affecting women and girls who have been the victims of sexual violence; it will assist in formulating an approach to reparations that overcomes these problems; and it will contribute to identifying the priorities of victims and survivors.⁶⁷

34. Women's Initiatives emphasises the importance of including a gender-responsive approach in the process of consulting with victims and survivors, as part of the wider formulation of a reparations programme,⁶⁸ and it stresses that boys and girls and men and women can be affected in widely different ways by the same crime, given the existing gender inequalities in the region and the unequal obstacles faced by women and girls as regards access to justice, information and public life.⁶⁹ It is further suggested that the Chamber ought to reflect the problem of gender discrimination when establishing the principles and procedures for reparations, in order to comply with international human rights standards and the Chamber's obligations under Articles 21(3) and 75(6) of the Statute.⁷⁰

35. UNICEF submits that the interests of the victims ought to be the principal focus for the Court when formulating its approach to reparations, given they were children when the crimes were committed. It is argued that the principle

⁶⁵ ICC-01/04-01/06-2876, para. 24.

⁶⁶ ICC-01/04-01/06-2876, para. 32.

⁶⁷ ICC-01/04-01/06-2876, para. 33.

⁶⁸ ICC-01/04-01/06-2876, para. 8.

⁶⁹ ICC-01/04-01/06-2876, para. 31.

⁷⁰ ICC-01/04-01/06-2876, para. 21.

enshrined in Article 3 of the Convention on the Rights of the Child should guide the Court in this context.⁷¹

36. UNICEF contends that a non-discriminatory approach to reparations ought to be adopted. Moreover, it suggests that whilst the Court should support the position of particular victims, it is critical that individual awards do not have adverse consequences for victims and their communities. **Reparations should not exacerbate potential or existing tensions within communities.**⁷²
37. **UNICEF suggests a community-based approach to reparations, so as to address individual as well as community and collective rights, and it argues that in order to determine the most appropriate form of collective reparations – given the limited available resources – the views of local and international experts should be sought in order to understand the circumstances in different parts of Ituri.**⁷³
38. UNICEF submits that **victims in Ituri who have been marginalised are unlikely to have applied for reparations or to be in a position to do so.** In particular, it is suggested that girls and young women are highly vulnerable in this region, and they are often reluctant to identify themselves as having been associated with an armed force or group or to apply to participate as victims.⁷⁴ Therefore, the Court should reduce the risk that particular victims are singled out and stigmatised.⁷⁵
39. **ICTJ submits that it is critical that all victims are recognised by the Court, and that victims generally should have a fair and effective means of participating in the reparations process. ICTJ underlines the extent of the exclusion of some victims who have been unable to gain access to the Court, and it suggests that the Court should avoid giving preferential treatment to those who** have

⁷¹ ICC-01/04-01/06-2878, paras 2 and 4.

⁷² ICC-01/04-01/06-2878, paras 5-8

⁷³ ICC-01/04-01/06-2878, paras 16-18.

⁷⁴ ICC-01/04-01/06-2878, para. 33.

⁷⁵ ICC-01/04-01/06-2878, para. 36.

participated in the reparations process. Therefore, by reference to Article 3(3) of the Statute, it encourages the Court to consider holding a reparations hearing in Ituri, in order to assist a wider group of victims.⁷⁶

40. ICTJ underlines the need for a comprehensive, evidence-based assessment of the needs of victims, together with an evaluation of the most effective approach to reparations, given the victims' requirements may change over time, particularly bearing in mind the decade that has passed since the relevant conflict in Ituri.⁷⁷

3. Reparations on an individual basis

41. The legal representatives of the V01 group of victims indicate that twelve of the fourteen individuals they represent contend that financial compensation on an individual basis, even if limited, would be appropriate. However, two of their clients disagree with this approach.⁷⁸
42. The legal representatives of the V02 group of victims contend that the ICC's provisions explicitly provide for individual reparations, whereas the power to award collective reparations is only implied.⁷⁹ The legal representatives submit that the principal victims are those children who were conscripted, enlisted and used, and that each child in this category who has been authorised to participate in the proceedings should be awarded individual reparations since they suffered personal harm.⁸⁰ It is argued that with individual reparations, the Chamber should take account of the specific harm suffered (death, physical harm, illness, stigma from sexual violence, *etc.*).⁸¹
43. The OPCV suggests that a combination of individual and collective reparations constitutes the most appropriate response to the challenges presented by the

⁷⁶ ICC-01/04-01/06-2879, paras 10-14

⁷⁷ ICC-01/04-01/06-2879, paras 19 and 20.

⁷⁸ ICC-01/04-01/06-2864, para. 15.

⁷⁹ ICC-01/04-01/06-2869, paras 12-13.

⁸⁰ ICC-01/04-01/06-2869, paras 14-16.

⁸¹ ICC-01/04-01/06-2869, para. 24.

instant case.⁸² Given assets belonging to the convicted person have not been identified and the TFV has limited resources, the Chamber may well be unable to award individual reparations to some or all of the identified victims.⁸³ The OPCV proposes that a deadline is set for any additional individual applications for reparations, in order to avoid delaying the proceedings.⁸⁴ The OPCV recommends that compensation is awarded to former child soldiers and their close family members, who have submitted individual application forms.⁸⁵

44. The TFV argues against a broadly individualistic approach to reparations.⁸⁶ It submits that the source of funding may affect whether there should be an individual or collective award. It suggests that while funding through the TFV may imply a bias towards a collective approach, equally there may be a tendency to grant individual awards if funds are available from the convicted person.⁸⁷ Additionally, the TFV submits that individual awards which are dependent on successful applications to participate may not be the most appropriate approach in the present case, given only a small number of victims are currently participating and they are not necessarily representative of the wider group of victims. It is estimated that thousands of individuals are believed to have been victims in the district of Ituri and it would be a resource-intensive and time-consuming undertaking for the Court to attempt to assess the position of each of them.⁸⁸ The TFV also observes that individual reparations would be incompatible with the “do no/less harm” principle and it would undermine the reconciliation process.⁸⁹ The TFV further submits that in Ituri child recruitment is not always treated as a crime, and therefore former child soldiers may not be perceived as victims.⁹⁰ Moreover, it is suggested there is “community discontent” with the Trial Chamber’s verdict that could lead

⁸² ICC-01/04-01/06-2863, paras 14 and 17.

⁸³ ICC-01/04-01/06-2863, para. 12.

⁸⁴ ICC-01/04-01/06-2863, paras 15-16.

⁸⁵ ICC-01/04-01/06-2863, para. 45.

⁸⁶ ICC-01/04-01/06-2872, paras 151-152.

⁸⁷ ICC-01/04-01/06-2872, paras 17-19.

⁸⁸ ICC-01/04-01/06-2872, paras 104-107.

⁸⁹ ICC-01/04-01/06-2872, paras 136-142. See also ICC-01/04-01/06-2803-Red, paras 153-169.

⁹⁰ ICC-01/04-01/06-2872, para. 145.

former child soldiers and their families to refuse individual awards of reparations due to a fear of reprisals from within their own communities.⁹¹

45. The Registry suggests that it may not be necessary for the Chamber to take a decision, in principle and in advance, as to whether it will order reparations on an individual or collective basis, or both, given it would be appropriate to resolve this issue on a case-by-case basis.⁹²
46. Similarly, the prosecution suggests that the Chamber should award reparations individually and collectively to those who suffered harm within the area controlled by the group led by Mr Lubanga.⁹³ As regards individual reparations, the prosecution highlights the sense of justice that the affected individual may feel if a personal award is granted to him or her.⁹⁴
47. Women's Initiatives suggests there may be utility in combining individual and collective awards of reparations, and it submits it is important to recognise each of the victims who participated in the trial process given the risks they and their families have faced. Nonetheless, it argues that the value of individual reparations is limited, bearing in mind the resources that are required to identify and verify the status of particular victims, which inevitably reduces the impact of any wider reparations programme; the number of victims who are inevitably unidentified; the risk of stigmatisation; and the possibility that communities will be undermined.⁹⁵
48. The NGOs submit that within the context of what occurred in Ituri, individual reparations benefiting particular former child soldiers could be perceived as discriminatory, given part of the population believes these children committed crimes that should not be rewarded by the international community. The NGOs argue that any awards of individual reparations should be accompanied by a

⁹¹ ICC-01/04-01/06-2872, paras 149-150.

⁹² ICC-01/04-01/06-2865, para. 29. See ICC-01/04-01/06-2806, paras 60-73 on the distinction between individual and collective reparations.

⁹³ ICC-01/04-01/06-2867, paras 2(b) and 8.

⁹⁴ ICC-01/04-01/06-2867, para. 9.

⁹⁵ ICC-01/04-01/06-2876, paras 27-30.

strategy that confronts the negative perception of these children and to encourage a more favourable approach to them.⁹⁶ Notwithstanding these broad propositions, the NGOs accept that in some instances individual reparations are appropriate and necessary, for example when victims of sexual violence have been infected with HIV; for those who suffered severe harm; and with victims who will be significantly prejudiced because of their circumstances if they do not receive individual assistance. The NGOs suggest that rehabilitation measures may be the most appropriate course to take in these circumstances.⁹⁷

49. UNICEF submits that in the present proceedings the Court should grant individual and collective reparations. It suggests that individual reparations reflect the harm experienced by particular individuals and they address their personal needs. The opportunity exists to tailor reparations to meet the needs of each group of beneficiaries, and this approach enables the Court to focus on the position of individual victims, which it is suggested is particularly important for child victims.⁹⁸ It is observed that individual reparations can sometimes have the greatest utility for the most marginalised victims.⁹⁹ However, UNICEF argues, that although individual reparations have certain advantages, these are necessarily limited because they are selective and they can lead to the stigmatisation of the recipients and tensions within the relevant communities.¹⁰⁰

50. ICTJ submits that individual reparations may be appropriate for the direct victims of the crimes under consideration, including those victims who have suffered sexual violence and other human rights violations.¹⁰¹ It suggested that in the present case the Chamber should give priority to those who were directly affected by the relevant crimes. However, it is argued that the Court can assist a wider group of victims, including those who have not participated in the

⁹⁶ ICC-01/04-01/06-2877, para. 25.

⁹⁷ ICC-01/04-01/06-2877, para. 27.

⁹⁸ ICC-01/04-01/06-2878, paras 7, 22, 24 and 25.

⁹⁹ ICC-01/04-01/06-2878, para. 32.

¹⁰⁰ ICC-01/04-01/06-2878, para. 28.

¹⁰¹ ICC-01/04-01/06-2879, page 4.

proceedings thus far, by allowing victims to apply to participate at different stages.¹⁰²

4. Collective Reparations

51. The legal representatives of the V01 group of victims submit that the majority of the individuals they represent contend that collective reparations are difficult to apply to former child soldiers because they are not a cohesive group, and they are often in conflict with their own communities (e.g. it is suggested this is the case with the Hema in Ituri). It is argued that although the Hema community suffered as a result of the recruitment of their children, this step was accepted when it occurred and the leaders were supported during the relevant events. Thus, the legal representatives submit that it would be illogical to award reparations for the benefit of the Hema community as a whole, and this would be unfair to other communities.¹⁰³ However, they support collective reparations as a means of reintegrating former child soldiers.¹⁰⁴
52. Although the legal representatives of the V02 group of victims argue in favour of individual reparations, they submit that collective reparations could serve to avoid a negative perception of child soldiers on the part of other members of their communities; they would be open to child soldiers who did not participate in the proceedings; and they may deter child recruitment.¹⁰⁵ The legal representatives suggest that NGOs or other organisations in the field would be able to provide lists of former child soldiers.¹⁰⁶ The legal representatives submit that collective reparations should reflect local and customary cultural practices.¹⁰⁷
53. The OPCV argues there are practical difficulties to consider as regards collective reparations, namely the majority of the victims who will benefit

¹⁰² ICC-01/04-01/06-2879, paras 15-17.

¹⁰³ ICC-01/04-01/06-2864, para. 16.

¹⁰⁴ ICC-01/04-01/06-2864, para. 17.

¹⁰⁵ ICC-01/04-01/06-2869, paras 16, 18-19 and 34(a).

¹⁰⁶ ICC-01/04-01/06-2869, para. 17.

¹⁰⁷ ICC-01/04-01/06-2869, para. 25.

represent only one side of the ethnic conflict (*i.e.* members of the Hema population) and they are likely to be dispersed throughout the Democratic Republic of Congo (“DRC”) and beyond.¹⁰⁸ The OPCV suggests that the Chamber should use its *proprio motu* powers under Article 75(1) of the Statute in order to grant collective reparations because not all the victims have submitted individual applications. Reparations would remain “in respect of victims”, and this approach would potentially extend the scope of Article 75 of the Statute to cover individuals indirectly affected by the crimes and the heirs of victims, as well as members of the families of direct victims, and other individuals or groups who were indirectly harmed.¹⁰⁹

54. The OPCV submits that collective reparations can be given a broad and a narrow interpretation. A narrow approach would include measures that cater for existing groups who are linked by cultural, ethnic, social, cultural or spiritual factors. Applying a broad interpretation, collective reparations would address the position of individual victims who are part of a community or other group, and the awards would complement any individual reparations measures.¹¹⁰ The OPCV suggests that collective reparations should be awarded to those victims who have submitted applications and it contends sufficient individual identification and verification is required.¹¹¹ As regards the narrow interpretation of collective reparations, the OPCV argues that awards would be made to particular communities or groups who have been generally affected by the recruitment of children. Applying this latter approach, it would not be necessary for each and every beneficiary to be identified and the Chamber could make evidential assumptions, as are used nationally in class actions.¹¹²
55. The TFV argues that collective awards may be beneficial as they would operate to “re-establish social solidarity if designed together with victim communities”

¹⁰⁸ ICC-01/04-01/06-2863, para. 13.

¹⁰⁹ ICC-01/04-01/06-2863, para. 18.

¹¹⁰ ICC-01/04-01/06-2863, paras 31-32.

¹¹¹ ICC-01/04-01/06-2863, paras 83-84.

¹¹² ICC-01/04-01/06-2863, paras 96-98.

and they could include measures directed at reconciliation.¹¹³ The TFV supports a “community-based approach to collective reparations”.¹¹⁴ It is observed that **child recruitment harms the child and his or her community**.¹¹⁵ The TFV suggests that in order to rectify collective damage, “experience shows that reparation measures that involve the society as a whole will strengthen the meaningfulness and appropriateness of collective awards”.¹¹⁶ The TFV invites the Court to bear in mind the experience of national reparation programmes that have used a community-based approach,¹¹⁷ and it is suggested that if the TFV’s voluntary contributions are used in this context, this could be more beneficial than a scheme that targets a small, distinct class of victims.¹¹⁸ The TFV contends that collective reparations may be the most effective way of using the limited funds that are likely to be available and they do not require costly and resource-intensive scheme of verification.¹¹⁹ The TFV submits that a community-based approach involves a “wide interpretation” of the term “collective” reparations in Rules 97(1) and 98(3) of the Rules.¹²⁰

56. The TFV submits that this approach should be adopted in order to include vulnerable victims (*inter alia*, former child soldiers, women and girls and their children, victims of gender-based and sexual violence, and those former child soldiers who are illiterate, disabled or who were mutilated).¹²¹
57. The TFV argues that the principles should describe the voluntary nature of participation by victims in the reparations proceedings.¹²² It is suggested that the Court must strive to “do no harm” or to minimise the harm that may inadvertently result from awarding reparations to victims. Any award should

¹¹³ ICC-01/04-01/06-2872, para. 102. See also ICC-01/04-01/06-2803-Red, paras 20-26.

¹¹⁴ ICC-01/04-01/06-2872, para. 103.

¹¹⁵ ICC-01/04-01/06-2872, paras 153-154.

¹¹⁶ ICC-01/04-01/06-2872, para. 155.

¹¹⁷ ICC-01/04-01/06-2872, paras 156-162.

¹¹⁸ ICC-01/04-01/06-2872, paras 163-168.

¹¹⁹ ICC-01/04-01/06-2872, paras 170-171.

¹²⁰ ICC-01/04-01/06-2872, paras 177-178.

¹²¹ ICC-01/04-01/06-2872, para. 103.

¹²² ICC-01/04-01/06-2872, paras 43-44.

be “conflict-sensitive” and it should assist reconciliation and recovery.¹²³ The TFV recommends that explicit language is used in formulating the principles, indicating that reparations should be directed at reconciliation.¹²⁴ Finally, the TFV suggests that reparations should bring about transformation, in the sense that they provide an opportunity to overcome imbedded inequality and exclusion.¹²⁵

58. The prosecution submits that amongst other benefits, collective reparations promote community cohesion and reconciliation, and they target and facilitate the rehabilitation of victims of gender violence. The prosecution also argues that collective awards can use the limited available resources to provide the greatest benefit to groups of victims and they may operate to minimise ethnic conflicts on the basis that they would be accessible to the community concerned as a whole.¹²⁶
59. The defence observes that there are two approaches that need to be distinguished: on the one hand “collective compensation” which is intended to remedy, on a collective basis, the harm that particular individuals suffered, and, on the other hand, the concept of “compensation to a community”, when the community generally is treated as the victim without identifying individual members.¹²⁷ The defence submits that granting collective reparations to the “community” would be contrary to the case law of the Appeals Chamber which has limited the competence of the Trial Chamber to the charges against the accused, as determined by the Pre-Trial Chamber and as set out in the Trial Chamber’s Article 74 Decision. Thus, the defence submits that even if collective reparations are granted, the beneficiaries must be individually identified.¹²⁸ The

¹²³ ICC-01/04-01/06-2872, paras 65-68. See also ICC-01/04-01/06-2803-Red, paras 149-184.

¹²⁴ ICC-01/04-01/06-2872, paras 69-71.

¹²⁵ ICC-01/04-01/06-2872, paras 72-77.

¹²⁶ ICC-01/04-01/06-2867, paras 14-15.

¹²⁷ ICC-01/04-01/06-2866, para. 52.

¹²⁸ ICC-01/04-01/06-2866, paras 53-56.

defence argues that the TFV is in a position to finance projects for victims in Ituri who lack any link to the present case.¹²⁹

60. Women's Initiatives submits that the Court should order collective and individual reparations, although it contends there ought to be an emphasis on collective reparations that allow particular individual factors to be taken into account.¹³⁰ It suggests that collective reparations are appropriate due to the wide nature of the harm that was inflicted in this case, which extended beyond particular individuals,¹³¹ and it is argued that this approach would assist the programmes that address the harm caused by sexual violence.¹³²

61. Women's Initiatives highlights the absence of a definition of collective reparations in international law. It submits that the term "collective reparations" encompasses reparations that are directed at specific groups of people, as well as the wider community. Women's Initiatives refers to the observations of the TFV which distinguishes between collective reparations that are "inherently collective and exclusive", and those that are "community-oriented and not exclusive", and it submits that both approaches would be appropriate in this case, and that certain kinds of harm, particularly those arising from gender-based crimes, require reparations that have an "exclusive" element.¹³³

62. Women's Initiative supports the TFV suggestion that a "community-based approach" could be adopted, although it argues that this should constitute a mechanism for delivering a reparations programme, rather than constituting a means of identifying the individual beneficiaries of the programme. Women's Initiatives underlines the importance of an approach to reparations that seeks to transform communal and gender relations.¹³⁴ It argues that collective

¹²⁹ ICC-01/04-01/06-2866, para. 57.

¹³⁰ ICC-01/04-01/06-2876, para. 10.

¹³¹ ICC-01/04-01/06-2876, para. 14.

¹³² ICC-01/04-01/06-2876, para. 15.

¹³³ ICC-01/04-01/06-2876, paras 11-12.

¹³⁴ ICC-01/04-01/06-2876, para. 13.

reparations can bring about fundamental change by addressing existing gender inequalities within communities through the reparations programme and the support provided to the victims' communities.¹³⁵

63. The NGOs submit that the Statute and the Rules do not define collective reparations, although this possibility is anticipated in Rules 97 and 98 of the Rules.¹³⁶ They argue that the use of common legal representation from the initial stages of the proceedings, along with the use of a collective application form in the *Gbagbo* case, tends to indicate that collective reparations are possible.¹³⁷ The NGOs suggest that collective reparations may be the more appropriate means of addressing the crime of recruiting child soldiers, particularly given they come from the same ethnic group as Mr Lubanga and it is possible they committed crimes against members of other ethnic groups, principally the Lendu.¹³⁸ They contend that collective reparations, which are not exclusive, foster reconciliation and help build trust.¹³⁹ They support the creation of centres that are open to **all members of the affected communities (i.e. cultural centres or a "university for peace")**.¹⁴⁰ Although the NGOs support collective reparations, they submit that individual reparations should also be implemented.¹⁴¹ It is suggested that collective reparations are not directed at an "indivisible group", but instead they can have collective and individual components.¹⁴² They argue that since individuals may request the means of rehabilitation, along with particular forms of reparation, **collective reparations should not necessarily be linked to "collective harm" or to a collective right to reparations**.¹⁴³ The NGOs, by reference to national and international case law, observe that collective reparations can be granted not only in response to a violation of a collective right but also to multiple beneficiaries of individual

¹³⁵ ICC-01/04-01/06-2876, para. 17.

¹³⁶ ICC-01/04-01/06-2877, paras 35-36.

¹³⁷ ICC-01/04-01/06-2877, para. 36.

¹³⁸ ICC-01/04-01/06-2877, para. 37.

¹³⁹ ICC-01/04-01/06-2877, para. 38.

¹⁴⁰ ICC-01/04-01/06-2877, para. 39.

¹⁴¹ ICC-01/04-01/06-2877, para. 40.

¹⁴² ICC-01/04-01/06-2877, para. 41.

¹⁴³ ICC-01/04-01/06-2877, para. 42.

rights.¹⁴⁴ The NGOs also submit that nothing prevents the Court from ordering collective reparations against the convicted person.¹⁴⁵ Moreover, they suggest that reparations should be collective solely as regards their objectives and effects, and the compensation paid by the convicted person could be used for collective reparations in favour of individual members of a group.¹⁴⁶

64. UNICEF submits that collective reparations enable the Court to take account of the damage that has been caused to communities, as well as avoiding the dilemma of granting reparations only to those victims who have been contacted and those who have been able to apply.¹⁴⁷ It submits that in circumstances of widespread or systematic gross human rights violations or international crimes, collective reparations have several advantages and they should form part of the overall reparations ordered in this case.¹⁴⁸ UNICEF notes that collective reparations carry fewer risks for the beneficiaries than individual reparations; they help facilitate the successful reintegration of the victims and local reconciliation; they are appropriate in cultural contexts where understanding an individual's entitlements cannot be separated from those of their families, communities and environment; and they are more likely to alleviate the perception that compensation is being awarded to children who may have participated in crimes.¹⁴⁹

65. ICTJ submits that there is no clear conception of what a "collective" is in the context of reparations, and it is suggested that this ambiguity or uncertainty provides an opportunity for the Court and the TFV to take an innovative approach and to learn from the practice of States.¹⁵⁰ Furthermore, the ICTJ argues that it supports the submissions of the TFV and OPCV to the effect that it is possible to order reparations "in respect of" victims whilst simultaneously

¹⁴⁴ ICC-01/04-01/06-2877, paras 43-46.

¹⁴⁵ ICC-01/04-01/06-2877, para. 47.

¹⁴⁶ ICC-01/04-01/06-2877, para. 48.

¹⁴⁷ ICC-01/04-01/06-2878, para. 7.

¹⁴⁸ ICC-01/04-01/06-2878, para. 34.

¹⁴⁹ ICC-01/04-01/06-2878, para. 35.

¹⁵⁰ ICC-01/04-01/06-2879, para. 50.

benefiting a broader category of victims - for example all the victims of sexual violence.¹⁵¹

66. The ICTJ referred to the *El Alemán* decision from the Bogotá special court, which was created under Law 975 (the Justice and Peace Law) in Colombia. It submitted that there are two aspects of this decision that particularly merit attention. The Colombian court did not grant collective material reparations to the victims of enforced recruitment because it decided that their recruitment into the same paramilitary group did not justify treating them as a 'collective'. The court determined that their individual experiences and the impact on them were not the same. However, it was suggested that the request by the Bogotá special court to the State for reparations and guarantees of non-repetition were intended to benefit the communities from which the victims were recruited. This was described as a request for reparations that was inherently community-based.¹⁵²

67. ICTJ submits that the processes whereby communities become involved in community-based reparations must avoid marginalising entire groups or particular individuals within them.¹⁵³

5. The Beneficiaries of Reparations

68. The legal representatives of the V01 group of victims submit that victims who have participated in the proceedings thus far should have priority over other former child soldiers.¹⁵⁴ They argue that completing an application form is a necessary step and that the Chamber should identify potential beneficiaries, for example via the radio or by contact with the demobilisation centres.¹⁵⁵ Only a few of the victims within this group consider that other victims of the UPC, such as the victims of the crimes committed by child soldiers, should receive

¹⁵¹ ICC-01/04-01/06-2879, para. 58.

¹⁵² ICC-01/04-01/06-2879, paras 30, 36-45.

¹⁵³ ICC-01/04-01/06-2879, para. 47.

¹⁵⁴ ICC-01/04-01/06-2864, para. 24.

¹⁵⁵ ICC-01/04-01/06-2864, para. 25.

reparations given **this will lead to an overall reduction in the available resources.**¹⁵⁶ In addition, the legal representatives contend that although a few of their clients propose that the available resources are simply divided amongst the victims who submitted application forms, the majority suggest that the Chamber is able to determine the categories of victims who should be given priority as regards reparations. The victims identify the following lead categories: girls infected with HIV; individuals currently living in precarious or vulnerable situations; the victims of sexual violence or sexual slavery; those who suffered from physical or psychological trauma; children who were conscripted; and the parents of children who died.¹⁵⁷ Finally, some of the **victims suggest that victims who have already benefited from other public or NGO programmes should not receive reparations from the ICC.**

69. The legal representatives of the V02 group of victims submit that individual reparations should be paid to children who were recruited by the UPC and who participated in the proceedings, as well as "*leurs ayant droit*", pursuant to Article 75 of the Statute.¹⁵⁸ They suggest that the villages, schools and other establishments from where children were recruited should be able to apply for reparations,¹⁵⁹ along with the children's parents and the communities that were affected.¹⁶⁰
70. The OPCV submits that direct and indirect victims are entitled to receive reparations, including immediate and more distant family members.¹⁶¹
71. The TFV argues that awards can include the victims of the crimes of which the convicted person has been found guilty, regardless of whether they filed an application or participated in the proceedings.¹⁶² The TFV submits that the principles established by the Chamber should address "the question of equal,

¹⁵⁶ ICC-01/04-01/06-2864, para. 26.

¹⁵⁷ ICC-01/04-01/06-2864, paras 28-29.

¹⁵⁸ ICC-01/04-01/06-2869, para. 22.

¹⁵⁹ ICC-01/04-01/06-2869, para. 31.

¹⁶⁰ ICC-01/04-01/06-2869, para. 34.

¹⁶¹ ICC-01/04-01/06-2863, paras 33-35.

¹⁶² ICC-01/04-01/06-2872, para. 22. See also, ICC-01/04-01/06-2803-Red, paras 37-45 and 369-389.

effective and safe access of victims to reparations”, and in particular access by the most vulnerable victims who may find it difficult to apply.¹⁶³

72. The TFV highlights that pursuant to Regulation 46 of the Regulations of the Trust Fund for Victims (“Regulations of the TFV”), awards may only benefit victims as defined in Rule 85 of the Rules. It is suggested that the charges on which the accused was convicted defined the scope of any reparations order. The TFV further observes that an expert could assist in order to establish whether particular children suffered trauma or other emotional harm.¹⁶⁴ It is contended that the Court should state in the principles that are to be applied that indirect victims, including the families of child soldiers and those individuals who suffered harm trying to protect them, are eligible for reparations.¹⁶⁵
73. In addition, the TFV argues that any benefits received by victims in national or international procedures should be taken into account, and it should be clear to the communities in which the victims live that the reparations process is fair and equitable.¹⁶⁶
74. The TFV suggests that although it can be asked, pursuant to Rules 60 and 61 of the Regulations of the TFV, to identify victims as an alternative to an application-based process,¹⁶⁷ this would be a very resource-intensive procedure which may not be proportional or assist in securing an appropriate outcome.¹⁶⁸ The TFV recognises that a series of problems may arise when identifying individual victims (*e.g.* the reliability of demobilisation data and the definition of a “child soldier” in DRC legislation, which may differ from that established in the Statute).¹⁶⁹ The TFV suggests that the current location of former child soldiers may not necessarily reflect where they were recruited because they

¹⁶³ ICC-01/04-01/06-2872, para. 23. See also ICC-01/04-01/06-2803-Red, para. 62.

¹⁶⁴ ICC-01/04-01/06-2872, paras 45-47.

¹⁶⁵ ICC-01/04-01/06-2872, paras 48-49.

¹⁶⁶ ICC-01/04-01/06-2872, paras 53-54.

¹⁶⁷ ICC-01/04-01/06-2872, para. 108. See also ICC-01/04-01/06-2803-Red, paras 264-265.

¹⁶⁸ ICC-01/04-01/06-2872, paras 108-110. See also ICC-01/04-01/06-2803-Red, paras 264-272.

¹⁶⁹ ICC-01/04-01/06-2872, paras 111-127.

frequently moved if they were rejected by their families and communities, and as a consequence of other problems linked to their recruitment.¹⁷⁰

75. The Registry submits that pursuant to Article 75(6) of the Statute, the rights of victims under national law – in this instance the laws of the DRC – should not be prejudiced by an order of the Court granting or refusing reparations. Similarly, any national award of reparations should not affect a victim’s right to reparations in international proceedings.¹⁷¹ In an earlier report, the Registry referred to the possibility of “prioritizing” resources in favour of certain forms of reparations or groups of beneficiaries, according to the vulnerability of, or the needs or the harm suffered by, the victims, and in order to make the best use of the limited available resources.¹⁷²

76. The prosecution submits that a criminal trial and any subsequent reparations proceedings are separate processes, and as a result the restricted charges brought against the accused should not be viewed as limiting an entitlement to reparations. The prosecution argues that all the victims of the attacks by the UPC, including members of the Lendu communities who were targeted, are eligible to apply as victims in the reparations phase of this case if they demonstrate that they suffered harm as a result of “the activities of the UPC”.¹⁷³

The prosecution suggests that the Chamber is able to appoint one or more experts who could identify potential victims and any funds that are available to compensate them, in consultation with the TFV and other individuals or bodies who are willing to contribute.¹⁷⁴ The prosecution submits that the beneficiaries of reparations should include the children who were unlawfully recruited by Mr Lubanga’s militia or used to participate actively in hostilities, as well as their immediate families. It is contended, however, that there is a wider class of victims, in the sense that reparations should provide restorative justice to the

¹⁷⁰ ICC-01/04-01/06-2872, paras 128-132.

¹⁷¹ ICC-01/04-01/06-2865, paras 9-11.

¹⁷² ICC-01/04-01/06-2806, paras 25-47.

¹⁷³ ICC-01/04-01/06-2867, para. 2(a).

¹⁷⁴ ICC-01/04-01/06-2867, para. 2(e).

communities that were affected.¹⁷⁵ The prosecution submits that Mr Lubanga is only liable to compensate the victims of the crimes of which he was convicted,¹⁷⁶ and that reparations for the broader group of victims should be paid from funds obtained through fines and forfeiture, or otherwise collected by the TFV.¹⁷⁷ The prosecution therefore argues that the following individuals are eligible for reparations: a) former child soldiers and their parents and guardians, and anyone who suffered harm attempting to prevent their abduction; b) the victims of sexual violence that was linked to their conscription and enlistment; and c) the members of any ethnic group who suffered at the hands of the UPC, regardless of whether the harm was inflicted during the period covered by the charges.¹⁷⁸

77. The defence submits that the concept of a “victim” under Rule 85 of the Rules should apply to any individual who benefits from reparations, and that in order to receive an award, it is necessary to submit an application form pursuant to Rule 94 of the Rules and Regulation 88 of the Regulations of the Court (“Regulations”). It is argued that the victim must have suffered personal harm, whether direct or indirect, that is linked to the charges against the accused.¹⁷⁹ The defence further submits that direct victims are those children recruited by the FPLC between September 2002 and 13 August 2003 who were under the age of 15 at the time. Indirect victims are those individuals who suffered harm as a result of what occurred to their relatives who are direct victims (*e.g.* the parents of child soldiers), or those who suffered harm while attempting to prevent a child’s recruitment.¹⁸⁰ The defence also contends that a victim who has already received compensation should not receive a further award, or “double reparations”. The defence refers in this context to the projects already run by

¹⁷⁵ ICC-01/04-01/06-2867, paras 4-6.

¹⁷⁶ ICC-01/04-01/06-2867, paras 16-18.

¹⁷⁷ ICC-01/04-01/06-2867, para. 19.

¹⁷⁸ ICC-01/04-01/06-2867, para. 20.

¹⁷⁹ ICC-01/04-01/06-2866, paras 3-7.

¹⁸⁰ ICC-01/04-01/06-2866, paras 37-38.

the TFV, as well as other projects set up by NGOs that target former child soldiers in Ituri.¹⁸¹

78. Women's Initiatives underlines the importance of designing a reparations scheme that is not limited to those individuals whose applications to participate as victims and for reparations have been accepted. It is suggested the scheme must have the potential of reaching unidentified victims, and in particular women and girls. In addition, it argues that during the reparations phase of the proceedings, the Court will be able to identify other victims, paying particular attention to any circumstances that may prevent victims or survivors from applying, and the Court is urged to use strategies that will ensure equal access to the proceedings.¹⁸²

79. The NGOs submit that the right to receive reparations should not be limited to those individuals who submitted an application form and were granted participation status, since this would infringe the suggested principle that the right to reparations belongs to all those who are the victims of the crime and not only those who have been granted permission to participate. It is emphasised that there is a distinction between the trial that led to the Article 74 Decision and the hearing on sentence and reparations.¹⁸³ The NGOs submit that the Court should consider all the victims of these crimes and not just those who submitted application forms.¹⁸⁴

80. The NGOs suggest that the limited number of applications for reparations the Court has received does not reflect a lack of interest by victims in participating in the proceedings or in receiving reparations. Instead, it is said that the low number is explained by the difficulties involved in informing the victims about the relevant procedures, coupled with the wide area over which the conflict

¹⁸¹ ICC-01/04-01/06-2866, paras 68-73.

¹⁸² ICC-01/04-01/06-2876, paras 20, 22-23.

¹⁸³ ICC-01/04-01/06-2877, paras 8-9.

¹⁸⁴ ICC-01/04-01/06-2877, para. 10.

occurred. Moreover, they suggest that the situation will be improved once clear principles in relation to reparations have been established.¹⁸⁵

81. The NGOs submit that tensions may arise if former child soldiers are the only beneficiaries of an award of reparations, given they perpetrated crimes against their own communities, as well as against members of other communities. By reference to the Paris Principles and the Truth and Reconciliation Commission for Sierra Leone, the NGOs submit that reparations should not aggravate existing disparities between victims or stigmatise victims, and instead the Court should consider targeting “all children together”.¹⁸⁶

82. The NGOs contend that Article 75(1) of the Statute allows the Chamber to apply reparations beyond the circle of those individuals authorised to participate in the proceedings.¹⁸⁷ This provision, read along with Regulation 60 of the Regulations of the TFV and Rule 98 of the Rules, means that individuals can be considered who have not submitted individual applications for reparations in accordance with Rule 94 of the Rules.¹⁸⁸

83. Similarly UNICEF submits that, given the events occurred in Ituri and applying the Paris Principles, it would be appropriate for the Court to award reparations beyond the group that participated at trial. Moreover, it argues that if the Court approaches reparations on the basis of “the best interests of the child” and the principle of non-discrimination, along with particular identified international norms and guidelines, the Statute, the Rules and the Court’s own decisions, it will be able to apply reparations on the basis of a broad understanding of entitlement.¹⁸⁹ UNICEF submits that children from every community were the victims of recruitment, given armed groups used them, and that as a result if

¹⁸⁵ ICC-01/04-01/06-2877, paras 11-12.

¹⁸⁶ ICC-01/04-01/06-2877, paras 13-15.

¹⁸⁷ ICC-01/04-01/06-2877, paras 16-17.

¹⁸⁸ ICC-01/04-01/06-2877, para. 18.

¹⁸⁹ ICC-01/04-01/06-2878, paras 9-11.

compensation is directed only at victims drawn from one particular group, this may fuel ethnic tension in Ituri.¹⁹⁰

84. ICTJ observes that an important consideration before distributing individual (or even community) reparations is that the Court has ensured that any potential recipients have been satisfactorily identified, along with the nature of reparations they should receive.¹⁹¹ It submits that it will be appropriate for the Court (or the TFV) to maintain an 'open' list of applicants, in order to be able to conduct periodic registrations, and it should retain the flexibility of being able to adjust awards for reparations on the basis of a proper assessment according to need.¹⁹² Furthermore, ICTJ refers to the assessments it conducted in Ituri that demonstrate a level of frustration among the Lendu community because Mr Lubanga was not charged with what some members of the population perceive as the "real" crimes committed by the UPC (murder, rape, torture, looting and destruction of property). These assessments show the need for a community-based approach to establishing the truth, and otherwise reparations to former child soldiers may "seem like a reward for impunity (and) is likely to create resentment on the part of other victims".¹⁹³ ICTJ also suggests that a reparations order that is perceived as focusing exclusively on Hema victims, which represent the bulk of the direct victims of the crimes in this case, may reinforce a sense of frustration and scepticism. Instead, it is argued that reparations orders that publicly and clearly acknowledge the suffering of all victims in Ituri will provide a powerful tool for reconciliation.¹⁹⁴

6. The Harm Suffered

85. The OPCV refers to Principle 8 of the UN Basic Principles and the case law of the IACtHR, which provide a broad definition of harm.¹⁹⁵ The OPCV submits

¹⁹⁰ ICC-01/04-01/06-2878, para. 36 (c).

¹⁹¹ ICC-01/04-01/06-2879, para. 21.

¹⁹² ICC-01/04-01/06-2879, para. 29.

¹⁹³ ICC-01/04-01/06-2879, paras 23-25.

¹⁹⁴ ICC-01/04-01/06-2879, para. 67.

¹⁹⁵ ICC-01/04-01/06-2863, paras 33-34.

that the direct victims in this case may have suffered physical injury and psychological harm from the training, their enforced recruitment and participation in the hostilities, and the sexual violence some of them experienced, as well as the harm caused by the interference with their studies.¹⁹⁶ The OPCV emphasises that indirect victims may have been psychologically harmed as a result of the enforced recruitment of their relatives, particularly given the uncertainties surrounding their situation and the risk that they may have been killed.¹⁹⁷

86. The OPCV suggests that individual compensation for former child soldiers ought to be based on the concept of the “project of life” developed by the IACtHR. This concept addresses the damage to the victims’ future, taking into account their circumstances, potential, ambitions and goals, and their overall anticipated “life plan”. The OPCV submits that the IACtHR has determined that the “life plan” under consideration must be “reasonable and attainable in practice”. The OPCV also refers to the European Court of Human Rights (“ECtHR”), which has developed case law based on the concept of a “loss of opportunity”.¹⁹⁸
87. The OPCV highlights that the IACtHR and the ECtHR have awarded reparations for “non-material damages”, including “all elements of physical, mental and emotional suffering”.¹⁹⁹ The OPCV submits, by reference to the case law of those courts, that victims’ families are entitled to compensation for non-material damage, either as the successors of victims who have died or as victims in their own right.²⁰⁰
88. The Registry argues that with reparations ordered by the Court, the harm should have been “as a result” of a crime for which Mr Lubanga is responsible.

¹⁹⁶ ICC-01/04-01/06-2863, para. 36.

¹⁹⁷ ICC-01/04-01/06-2863, para. 37.

¹⁹⁸ ICC-01/04-01/06-2863, paras 47-60.

¹⁹⁹ ICC-01/04-01/06-2863, paras 62-71.

²⁰⁰ ICC-01/04-01/06-2863, paras 72-76. See also paras 77-82 in which the OPCV refers to other international jurisdictions.

However, it is advanced that when the TFV offers support to victims, this could include “victims of the situation more generally”.²⁰¹ The Registry identifies the following examples of harm resulting from the recruitment of children: a) physical and psychological harm;²⁰² b) loss of opportunity;²⁰³ and c) communal or collective harm.²⁰⁴

89. The prosecution submits that the harm experienced by victims includes physical, psychological, economic and emotional damage. The Chamber is invited to consider the damaging consequences of the events underlying the charges that extend beyond military service, such as the impact on education, family life and other opportunities. It is highlighted that female recruits were subjected to sexual violence and in consequence they have been ostracised within their communities.²⁰⁵
90. The defence submits that the harm must have been inflicted on an individual or a clearly identified legal entity, and in either case they must be directly linked to the crimes of which Mr Lubanga was convicted.²⁰⁶ Moreover, the defence argues that the harm must be: a) personal; b) real, current and certain; and c) not the subject of a previous reparations award.²⁰⁷ As regards the suggested requirement of “personal” harm, the defence submits that only a victim who has suffered harm is entitled to reparations, because he or she was recruited or has a family relationship with a direct victim.²⁰⁸ In relation to the “real, current and certain” requirement, the defence suggests that the harm must exist when the reparations are requested. It is argued that reparations for future harm can be claimed if the latter is certain and it is a direct result of the crime in question.

²⁰¹ ICC-01/04-01/06-2806, para. 16.

²⁰² ICC-01/04-01/06-2806, para. 20.

²⁰³ ICC-01/04-01/06-2806, paras 21-22.

²⁰⁴ ICC-01/04-01/06-2806, paras 23-24.

²⁰⁵ ICC-01/04-01/06-2867, para. 23.

²⁰⁶ ICC-01/04-01/06-2866, para. 58.

²⁰⁷ ICC-01/04-01/06-2866, para. 60.

²⁰⁸ ICC-01/04-01/06-2866, paras 61-63.

The defence submits that these requirements equally apply when the harm alleged relates to a “loss of opportunity”.²⁰⁹

91. When considering this latter suggested “loss of opportunity”, the defence suggests that the “opportunity” must have been in existence prior to the crime and it should not be uncertain. It is contended that when it is alleged that there has been a loss of schooling or the opportunity to practice a chosen profession, this should be evaluated in light of the circumstances in the DRC at the time of the charges, given the disruption caused by a civil war that cannot be attributed to Mr Lubanga.²¹⁰

92. Women’s Initiatives submits that every aspect of the harm suffered as a result of the crimes for which Mr Lubanga has been convicted should be included in the reparations order. This includes the harm arising from abduction and forced conscription; compulsory participation in combat; rape and other forms of sexual violence; sexual slavery; the rejection of children by their families and communities; the loss of family life, childhood, education and other opportunities; unwanted pregnancies and infection with sexually transmitted diseases; and post-traumatic stress disorder.²¹¹ It suggests that reparations should reflect a broad rather than a narrow assessment of the harm resulting from these crimes,²¹² and it highlights the evidence of rape and other forms of sexual violence that it suggests featured in the trial.²¹³

93. Women’s Initiatives underlines the absence of an authoritative definition of the concept of harm in the Statute’s framework. The Court’s jurisprudence has only addressed this issue on a limited basis, focussing mainly on the procedures for participation by victims during the pre-trial and trial stages, and the criteria varies between the various stages of the proceedings. Women’s Initiatives submits that the Chamber should focus on the concept of ‘harm’ for the

²⁰⁹ ICC-01/04-01/06-2866, paras 64-67.

²¹⁰ ICC-01/04-01/06-2866, paras 65-67.

²¹¹ ICC-01/04-01/06-2876, para. 36.

²¹² ICC-01/04-01/06-2876, para. 37.

²¹³ ICC-01/04-01/06-2876, para. 38.

purposes of the reparations phase, taking into account the provisions of Article 21(3), and Article 75(6) of the Statute. Finally, the Women's Initiatives emphasises that any interpretation of harm that unnecessarily restricts the number or the categories of victims who are eligible to participate in the Court's reparations scheme would undermine the purpose of the relevant statutory provisions, and it is argued that the Chamber should apply a broad approach in order to ensure that reparations are widely available and effective.²¹⁴

94. The NGOs submit that the Chamber, in assessing the harm suffered, should focus on the current needs of the victims.²¹⁵

95. The NGOs contend that Article 75(2) and other linked provisions of the Statute's framework tend to emphasise the financial dimension of reparations, in the context of evaluating the harm suffered by particular victims. However, they submit that this does not require the Court to approach this issue on an individual basis, particularly bearing in mind the breadth and gravity of the crimes within the jurisdiction of the ICC. They argue that the harm suffered by individual victims should be viewed in the context of the consequences that these crimes have had on the wider population, in order to ensure that reparations have the widest possible effect.²¹⁶

7. The Standard and Burden of Proof

96. The legal representatives of the V01 group of victims submit that there needs to be an efficient determination of the harm suffered, and the procedures should be tailored to reflect the number of victims, as well as being proportionate to the available funds. They argue that the harm suffered by each individual ought to be determined precisely, as in civil proceedings, although it is

²¹⁴ ICC-01/04-01/06-2876, paras 39-43.

²¹⁵ ICC-01/04-01/06-2877, para. 19.

²¹⁶ ICC-01/04-01/06-2877, paras 23-24.

conceded that compensation could be addressed by way of broadly similar lump-sum payments.²¹⁷

97. The OPCV submits that the standard and burden of proof should be applied flexibly, and it is suggested that in the context of reparations the Court is able to rely on presumptions and circumstantial evidence. It is argued that a *prima facie* standard of proof is appropriate for the purpose of awarding individual reparations, given the present availability of relevant evidence, the victims' inability to obtain additional supporting materials and the factual findings of the Chamber in the Article 74 Decision.²¹⁸
98. As regards collective reparations, the OPCV suggests that "relaxed standards of proof" should be applied, and it proposes formulations such as a "plausible case", "a predominantly probable claim" and a "credibly demonstrated claim". The OPCV also refers to the case law of the IACtHR, and the experience of the various commissions that have encouraged individuals to give truthful accounts. It is suggested these bodies have relied on circumstantial evidence, presumptions and inferences.²¹⁹ The OPCV also submits that in mass-claim cases, particularly in the United States, the doctrine of "*Cy Pres*" assists when it is anticipated that collective awards or fixed lump sums will be paid to a large number of victims and when an assessment of individual harm is immaterial. The OPCV argues that where the "*per capita* expenditure on each beneficiary is marginal", a more relaxed standard should be applied.²²⁰
99. The TFV suggests that given the reparations proceedings differ fundamentally from the trial, a lower evidential standard than "beyond reasonable doubt" can be applied. The TFV observes that victims will often lack the means to establish

²¹⁷ ICC-01/04-01/06-2864, para. 27.

²¹⁸ ICC-01/04-01/06-2863, paras 38-39.

²¹⁹ ICC-01/04-01/06-2863, paras 40-42.

²²⁰ ICC-01/04-01/06-2863, paras 43-44.

the harm they suffered and as a result the Chamber should act on presumptions or circumstantial evidence.²²¹

100. The prosecution submits that if a high standard of proof is applied, it would exclude most, if not all, of the victims from the reparations process and thereby undermine Article 75 of the Statute. It is suggested that applications by victims should be granted if they are established on a balance of probabilities, although it will be sufficient if the supporting documentation crosses the *prima facie* threshold. The prosecution supports a “presumption of harm standard” and it contends that the interests of victims who have died can be represented by others.²²²

101. The defence submits that the victims who wish to receive reparations should provide evidence of the harm they have suffered, along with a link to the crimes established in the Article 74 Decision. The defence suggests the Chamber should apply a “balance of probabilities”, as opposed to a “*prima facie*”, standard of proof. The defence highlights that the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) requires proof on a balance of probabilities.²²³ On the basis that Article 67 of the Statute and Rules 63 *et seq* of the Rules apply to all stages of the proceedings, it is submitted that the defence should be permitted to cross-examine any witnesses who are called, present evidence and challenge the credibility of the evidence relied on in support of the applications for reparations.²²⁴

102. Women’s Initiatives invites the Chamber to establish a broad definition of the concept of harm in the context of establishing the principles that are to be applied to reparations under Article 75(1) of the Statute. It is argued that the Chamber will need to address (i) the types of harm which are to be recognised; and (ii) the relationship between the crimes committed by Mr Lubanga and the

²²¹ ICC-01/04-01/06-2872, paras 50-52. See also ICC-01/04-01/06-2803-Red, paras 46-51.

²²² ICC-01/04-01/06-2867, para. 24.

²²³ ICC-01/04-01/06-2866, paras 39-45.

²²⁴ ICC-01/04-01/06-2866, paras 75-78.

harm suffered. Furthermore, it is contended when establishing the standard of proof to be applied in this context, the Chamber should take into account the difficulties in obtaining documentary and other evidence.²²⁵

8. The different means of implementing reparations

103. The majority of the victims of the V01 group seek measures that would enable them to pursue some form of economic activity, including training for work and to help them set up their own businesses. Similarly, they suggest the Court or the TFV should organise facilities that provide medical and psychological treatment.²²⁶ They argue that collective reparations would benefit former child soldiers, who should be reintegrated into society. Some of the victims advocate awareness campaigns within their communities in order to address their low reputation and to encourage support for the victims of child recruitment. They propose a public memorial to recognise children who perished in combat and to denounce the horror of child recruitment. Finally, some victims suggest that a “war victim” certificate would have utility.²²⁷
104. The OPCV suggests that if former child soldiers had their “life plan” seriously disrupted, reparations should include, *inter alia*, “reintegration into society, physical and mental care, and provision of some form of education or vocational training and sustainable work opportunities”. Reparations should facilitate the child’s access to education, a livelihood, “life skills” and a meaningful role in society.²²⁸ The OPCV contends that monetary reparations are inappropriate, and that education, health services, micro-enterprise loans and training are preferable.²²⁹
105. The OPCV submits that rehabilitation provides an appropriate approach for collective reparations, which will assist former child soldiers and their relatives

²²⁵ ICC-01/04-01/06-2876, para. 46.

²²⁶ ICC-01/04-01/06-2864, paras 20-22.

²²⁷ ICC-01/04-01/06-2864, paras 17-19 and 23.

²²⁸ ICC-01/04-01/06-2863, paras 56-59.

²²⁹ ICC-01/04-01/06-2863, para. 61.

to address the physical and mental harm they suffered. The OPCV suggests that former child soldiers and their relatives should also receive reparations in the form of assistance from social services, education and other learning opportunities, and it is highlighted that these facilities could be organised by the TFV, given their experience in this area.²³⁰

106. The OPCV observes that if applied on a narrow basis, collective reparations in the form of the establishment of “social, infrastructural and education facilities for the community” could be implemented, by way of development programs, education and medical services. The OPCV suggests that it is crucial that the Chamber considers the options for making effective use of the TFV in order to ensure the successful implementation of these programmes. It is argued that the co-operation of the Congolese authorities and other governments is essential in this context. The OPCV submits that the implementation of these programmes will require an assessment of the local communities to which the victims belong.²³¹

107. The OPCV refers to the measures of satisfaction in Principle 22 of the UN Basic Principles, along with the IACtHR case law, which are symbolic in nature and do not require significant financial resources.²³² These include public apologies or an admission of responsibility, commemoration events and tributes, the incorporation of an accurate account of the violations in training and educational materials, and providing a guarantee that the behaviour will not be repeated.²³³ The OPCV suggests that the Chamber could order the convicted person to make a public apology, including an acknowledgment of the material facts and an acceptance of responsibility.²³⁴

108. The TFV argues that in addition to monetary awards, the principles should provide for symbolic reparations that have substance and assist victims within

²³⁰ ICC-01/04-01/06-2863, paras 85-95.

²³¹ ICC-01/04-01/06-2863, paras 97-107.

²³² ICC-01/04-01/06-2863, paras 108-110.

²³³ ICC-01/04-01/06-2863, paras 111-121.

²³⁴ ICC-01/04-01/06-2863, para. 128.

their communities.²³⁵ In a previous report, the TFV analysed the different forms of reparations and their utility in the present case, and it suggested that: a) restitution does not appear to be applicable in the present case;²³⁶ b) compensation has the capacity to be problematic and should be carefully investigated;²³⁷ c) rehabilitation could be assisted by the experience of the TFV;²³⁸ and d) non-monetary reparations could be adapted to the ICC context.²³⁹

109. The Registry proposes a programme of “moral reparations” that will not require significant financial expenditure, such as an apology by Mr Lubanga and it suggests the Article 74 Decision constitutes a form of reparation.²⁴⁰ The Registry also identifies examples of redress that have significant financial implications, such as: a) monetary compensation, which it suggests may not always be appropriate, particularly when addressing the harm suffered by child soldiers;²⁴¹ b) rehabilitation for former child soldiers and the communities that were affected;²⁴² c) scholarships for education and vocational training;²⁴³ d) resettlement programmes designed to reunite families (including by way of tracing lost relatives);²⁴⁴ e) support for civic education;²⁴⁵ f) memorials, commemorations and other forms of public recognition;²⁴⁶ and g) reparations for “institutional victims” such as schools.²⁴⁷

110. The prosecution submits that reparations should not be limited to financial awards, and it suggests that “satisfaction” can be provided in other ways such as a verification of the facts and a full public disclosure of the truth; the search for individuals who disappeared and information on the identities of those who

²³⁵ ICC-01/04-01/06-2872, paras 55-57.

²³⁶ ICC-01/04-01/06-2803-Red, para. 303.

²³⁷ ICC-01/04-01/06-2803-Red, paras 304-314.

²³⁸ ICC-01/04-01/06-2803-Red, paras 315-326.

²³⁹ ICC-01/04-01/06-2872, para. 58; ICC-01/04-01/06-2803-Red, paras 327-343.

²⁴⁰ ICC-01/04-01/06-2806, paras 76-81.

²⁴¹ ICC-01/04-01/06-2806, paras 82-87.

²⁴² ICC-01/04-01/06-2806, paras 88-97.

²⁴³ ICC-01/04-01/06-2806, paras 98-105.

²⁴⁴ ICC-01/04-01/06-2806, paras 106-109.

²⁴⁵ ICC-01/04-01/06-2806, paras 110-114.

²⁴⁶ ICC-01/04-01/06-2806, paras 115-117.

²⁴⁷ ICC-01/04-01/06-2806, paras 118-119.

were abducted; an official declaration or a judicial decision in this context; a public apology; and public commemorations and tributes to victims.²⁴⁸ The prosecution also argues that the Article 74 Decision already represents a form of redress. Finally, the prosecution suggests that the Chamber could order or request Mr Lubanga to make a public or private apology to the victims.²⁴⁹

111. Women's Initiatives observes that collective reparations could include, *inter alia*, rehabilitation programmes that provide medical and other forms of personal support to victims and the survivors of gender-based crimes; medical centres with expertise in addressing childhood trauma and working with child soldiers; support for rape crisis and health centres that provide medical and other forms of support for women recovering from sexual violence, including sexual and reproductive health services and treatment for sexually transmitted diseases such as HIV; rehabilitation and demobilisation programmes for former child soldiers; education programmes for women to help them live without violence; and programmes directed at encouraging male community leaders to support these initiatives.²⁵⁰

112. The NGOs submit that although individual financial awards would improve the position of particular victims, whether awarded on an individual or a collective basis, without other measures their impact is likely to be short lived.²⁵¹ They submit that individual recipients will be at risk either of pressure to share the compensation they receive with their families and communities or theft.²⁵²

113. The NGOs argue that rehabilitation measures should be ordered, on the basis of identified requirements, if they are appropriate and proportionate to the gravity and extent of the violations. The NGOs note that the rehabilitation measures could include medical and psychological care, legal and social

²⁴⁸ ICC-01/04-01/06-2867, para. 12.

²⁴⁹ ICC-01/04-01/06-2867, para. 13.

²⁵⁰ ICC-01/04-01/06-2876, para. 25.

²⁵¹ ICC-01/04-01/06-2877, para. 24.

²⁵² ICC-01/04-01/06-2877, para. 26.

services and other forms of rehabilitation in order “to restore the dignity and reputation of the victims”.²⁵³ The NGO’s suggest that compensation could pay for medical treatment or other rehabilitation measures.²⁵⁴

114. The NGOs submit that rehabilitation should address the difficulties faced in Ituri, which include the shortcomings within the demobilisation, disarmament and reintegration programmes; the difficulties in identifying former child soldiers in Ituri; the inadequate education programmes; the shortage of facilities for child victims; the lack of awareness within the population as regards child soldiers; and the low level of cooperation between those responsible for victims.²⁵⁵ They suggest that rehabilitation measures should: a) raise levels of awareness within the community; b) address the behavioural problems of former child soldiers; c) develop cultural and sporting activities; d) provide appropriate education for former child soldiers; and e) assist the latter’s social and economic reintegration.²⁵⁶

115. The NGOs stress the importance of symbolic reparations and their use in the Inter-American system of human rights and by the ECCC.²⁵⁷ They suggest reparations of this kind would allow the ICC to provide redress for victims, notwithstanding the Court’s limited funds.²⁵⁸ The NGOs particularly advocate the creation of a memorial for child soldiers killed in the war.²⁵⁹

116. UNICEF highlights the reference in this provision to restitution, compensation and rehabilitation as examples of reparations. UNICEF submits that the Court should consider ordering measures that are aimed at preventing crimes and violations of this kind in the future.²⁶⁰ Therefore, it is suggested that the Chamber’s decision should address the underlying causes of the present

²⁵³ ICC-01/04-01/06-2877, para. 31.

²⁵⁴ ICC-01/04-01/06-2877, paras 31-32.

²⁵⁵ ICC-01/04-01/06-2877, para. 33.

²⁵⁶ ICC-01/04-01/06-2877, para. 34.

²⁵⁷ ICC-01/04-01/06-2877, paras 49-50.

²⁵⁸ ICC-01/04-01/06-2877, para. 52.

²⁵⁹ ICC-01/04-01/06-2877, para. 53.

²⁶⁰ ICC-01/04-01/06-2878, para. 38.

offences. It is argued that it is open to the Court to support particular current initiatives directed at the practice of recruiting and using children in the armed forces, along with other violations of the rights of children.²⁶¹

117. UNICEF submits that restitution for victims who suffered as children should be similar to the awards directed at other groups of victims, although there ought to be a focus on lost opportunities such as their formal education. It is contended that compensation usually involves a monetary award, although it is argued that the experience of UNICEF and other child protection agencies is that the distribution of cash as a part of a reintegration programme can be ineffective. It is submitted that an assessment of adequate compensation should involve consideration of the long-term consequences of the violations. UNICEF contends that rehabilitation measures that equally benefit victims and their communities have the greatest utility. It advocates partnerships with national and local authorities, with particular concentration on schools since they provide a safe environment for study and they assist with the reintegration of victims.²⁶²

118. UNICEF submits that culturally-sensitive symbolic reparations have an important place in the overall scheme, and they can take different guises. It is suggested that symbolic reparations should be devised on the basis of a process of consultation that includes victims and their communities.²⁶³

119. ICTJ suggests a possible combination of measures, including individual compensation to victims; the rehabilitation of individual victims, including medical and psychological care; access to training or financial assistance to continue education that was interrupted by the crime; and other measures of satisfaction directed at individual child soldier victims.²⁶⁴

²⁶¹ ICC-01/04-01/06-2878, paras 19-20.

²⁶² ICC-01/04-01/06-2878, paras 39-41.

²⁶³ ICC-01/04-01/06-2878, para. 42.

²⁶⁴ ICC-01/04-01/06-2879, para. 17.

9. Proportionate and Appropriate Reparations

120. The OPCV submits that reparations ought to be adequate, effective, prompt and proportionate to the gravity of the harm inflicted, and it refers to international instruments and the jurisprudence in which these principles have been examined.²⁶⁵
121. The TFV invites the Chamber to investigate whether the cost of determining an award of reparations is in proportion to the award itself. Moreover, it suggests that in order to achieve fairness, the Court should take into account the overall context, including the extent of the available resources and the need not to discriminate. The TFV argues that a costly procedure will be unjustified if the available funds are limited. It is contended that the overall objective should be to provide fair and adequate reparations,²⁶⁶ which are sustainable and appropriately defined.²⁶⁷ The TFV urges the Chamber to address the security challenges that may arise when implementing a reparations order.²⁶⁸
122. The NGOs submit that reparations should be in the most convenient form achievable; they ought to be adaptable and reflect the nature of the violations that were perpetrated; and they must be effective in addressing the harm suffered by the victims and the wider community. They suggest that collective reparations are to be preferred over individual reparations.²⁶⁹ The NGOs submit that in the present case reparations are unlikely to rectify all the consequences of Mr Lubanga's crimes and as a result the Court should particularly promote social reconciliation and a collective approach.²⁷⁰

²⁶⁵ ICC-01/04-01/06-2863, paras 19-30.

²⁶⁶ ICC-01/04-01/06-2872, paras 78-84.

²⁶⁷ ICC-01/04-01/06-2872, paras 59-61.

²⁶⁸ ICC-01/04-01/06-2872, paras 62-63.

²⁶⁹ ICC-01/04-01/06-2877, para. 21.

²⁷⁰ ICC-01/04-01/06-2877, para. 22.

10. The Rights of the Defence

123. The TFV submits that although Mr Lubanga's rights must be guaranteed, the Chamber should predominantly focus on the victims during the reparations proceedings.²⁷¹
124. The defence contends that participation by victims should not undermine the fairness of the proceedings, regardless of the stage of their involvement. It is suggested that the alleged personal harm they suffered as a result of the crimes for which Mr Lubanga has responsibility may constitute fresh allegations which he has the right to meet, pursuant to Article 67 of the Statute.²⁷² The defence submits that it has the right to investigate the allegations set out in the applications for reparations and it should be permitted to introduce evidence and advance submissions in this regard.²⁷³ The defence reminds the Chamber that it withdrew the opportunity for certain victims and prosecution witnesses to participate in the proceedings.²⁷⁴ The defence notes that the substantial redactions that were made to the applications for reparations had the effect of concealing the identity of the great majority of the victims and the individuals acting on their behalf, thereby making it impossible for the defence to mount any effective challenge.²⁷⁵ On the basis of the jurisprudence of the Chamber and the ECCC, the defence submits that the anonymity of the victims and the redactions applied to the facts set out in their applications render the proceedings manifestly unfair.²⁷⁶ It is submitted that it is essential that certain evidence is disclosed to the defence, including information on the civil status of the applicants; material relating to the alleged crimes; and the identity of the individuals acting on behalf of the victims or assisting them, along with the identities of the intermediaries. The defence also requests disclosure of the applications to participate, the documents annexed and the supplementary

²⁷¹ ICC-01/04-01/06-2872, para. 21.

²⁷² ICC-01/04-01/06-2866, paras 8-9.

²⁷³ ICC-01/04-01/06-2866, paras 10-11.

²⁷⁴ ICC-01/04-01/06-2866, para. 12.

²⁷⁵ ICC-01/04-01/06-2866, paras 13-14.

²⁷⁶ ICC-01/04-01/06-2866, paras 15-17.

declarations.²⁷⁷ Addressing the suggested insecurity of the victims, the defence argues that it has respected their confidentiality throughout the trial process.²⁷⁸

11. Reparations Orders Against the Convicted Person

125. The legal representatives of the V01 group of victims suggest that reparations are the responsibility of the individual who was convicted, a responsibility that is unaffected by his indigence. It is argued that an order for reparations against Mr Lubanga will have a potentially beneficial psychological impact and it would mark the harm that he caused. Moreover, Mr Lubanga may acquire assets, either during the course of his term of imprisonment or after its completion, which could be used for reparations.²⁷⁹ It is submitted, therefore, that the Chamber has the power to order that any property and assets that Mr Lubanga receives at a later date can be the subject of a reparations order. The legal representatives additionally argue that State Parties are in a position to execute any reparation order, pursuant to Article 109 of the Statute and Rule 217 of the Rules.²⁸⁰
126. The legal representatives of the V02 group of victims submit that the accused's indigence seemingly renders a personal order against him impossible, but they suggest that reparations on this basis could be ordered if they are executed by the TFV and mechanisms are put in place to recover any funds that he later acquires.²⁸¹
127. The OPCV submits that if assets belonging to Mr Lubanga are identified in the future, they should be used to meet the Court's reparations order.²⁸²
128. The TFV submits that a reparations order is founded on a finding of individual criminal responsibility, and consequently the convicted person is the individual

²⁷⁷ ICC-01/04-01/06-2866, paras 18-34.

²⁷⁸ ICC-01/04-01/06-2866, paras 35-36.

²⁷⁹ ICC-01/04-01/06-2864, paras 33-35.

²⁸⁰ ICC-01/04-01/06-2864, paras 37-38.

²⁸¹ ICC-01/04-01/06-2869, para. 39.

²⁸² ICC-01/04-01/06-2863, para. 127.

who is principally responsible for paying the award.²⁸³ The TFV suggests that the Chamber may wish to consider the options available to address Mr Lubanga's financial liability for reparations and to obtain additional information about his financial background, including from the DRC.²⁸⁴ The TFV argues that the Chamber could impose a fine on Mr Lubanga or investigate the possibility of forfeiting any proceeds relating to the crime.²⁸⁵

129. The TFV submits that the financial contribution of Mr Lubanga to the reparations award could have a potential symbolic value along with other beneficial effects.²⁸⁶

130. The Registry maintains that Mr Lubanga will only be able to meet an order for reparations that is not financially significant.²⁸⁷

131. The prosecution submits that the Chamber is in a position to order Mr Lubanga personally to compensate the victims of the crimes for which he was convicted.²⁸⁸ However, the prosecution suggests that given he has limited resources and is unable to pay compensation for all the harm that was inflicted, it would be "unnecessarily frustrating to raise victims' expectations".²⁸⁹ However, the prosecution submits that there is no bar against making a reparations order against an indigent individual who has been convicted, and it is suggested that Mr Lubanga's financial affairs should be kept under review and the ICC or the national courts would be in a position to enforce at a later stage any provisional orders made by the Chamber.²⁹⁰

132. The prosecution suggests that the Chamber could order Mr Lubanga to pay a "symbolic nominal sum" to each identified victim, but only if the benefits of this step outweigh any potential offence caused to the recipients by seemingly

²⁸³ ICC-01/04-01/06-2872, para. 14.

²⁸⁴ ICC-01/04-01/06-2872, para. 239.

²⁸⁵ ICC-01/04-01/06-2872, para. 240. See also ICC-01/04-01/06-2803-Red, paras 112-115.

²⁸⁶ ICC-01/04-01/06-2872, para. 241.

²⁸⁷ ICC-01/04-01/06-2865, para. 27.

²⁸⁸ ICC-01/04-01/06-2867, para. 2(d).

²⁸⁹ ICC-01/04-01/06-2867, para. 10.

²⁹⁰ ICC-01/04-01/06-2867, paras 27-28.

minimising their suffering.²⁹¹ The prosecution also submits that the Court could order non-monetary reparations against Mr Lubanga, such as making a public acknowledgment of his wrongdoing or offering his apologies to the individuals who were affected.²⁹² The prosecution further contends that if, in due course, funds come into the possession of Mr Lubanga, they should be seized in order to satisfy any outstanding reparations orders.²⁹³

133. The prosecution submits that monies obtained by way of a fine or forfeiture may be used for reparations and they could be applied to a broad group of victims, given a fine is meant to be punitive and forfeiture is designed to deprive the wrongdoer of the proceeds of the crime.²⁹⁴

134. Women's Initiatives submits that symbolic reparations would be an appropriate step if ordered against the convicted person. Furthermore, it argues that while Mr Lubanga has been assessed as indigent for the purposes of legal aid, any of his assets should be considered by the Court in determining whether he is able to contribute to reparations. It suggests that the views of the victims and the survivors, together with their communities, should be sought to ensure that any symbolic measures provide an adequate form of redress.²⁹⁵

135. ICTJ submits that ordering the convicted person to pay compensation, regardless of his purported indigence, has important symbolic value. Furthermore, it argues that in Congolese judicial practice it is common for the victim to request a symbolic payment of one Congolese franc when a perpetrator is indigent, and an order of this kind by the Court may be effective in the communities in Ituri.²⁹⁶

²⁹¹ ICC-01/04-01/06-2867, paras 11 and 30.

²⁹² ICC-01/04-01/06-2867, para. 26.

²⁹³ ICC-01/04-01/06-2867, para. 29.

²⁹⁴ ICC-01/04-01/06-2867, para. 19.

²⁹⁵ ICC-01/04-01/06-2876, paras 54-56.

²⁹⁶ ICC-01/04-01/06-2879, para. 63.

136. ICTJ submits that the Court can facilitate an apology by the convicted person but it should not order him to take this step.²⁹⁷

12. Reparations “through the Trust Fund for Victims”

137. The legal representatives of the V01 group of victims suggest that reparations ordered against Mr Lubanga could be “advanced” by the TFV or another organisation until other funds become available. They submit that it would be potentially misleading and contrary to the principle of legal certainty to make the convicted person’s contribution depend on assets accrued in the future, secured by a procedure initiated by the TFV. Instead, it is suggested that any funds belonging to the convicted person that become available in the future could be deposited with the TFV, which would be able to take appropriate action if it is ordered that reparations are to be made “through the Trust Fund”. The legal representatives contend that the Chamber could divide responsibility for paying reparations between the convicted person and the TFV.²⁹⁸ The legal representatives observe that by September 2011 the TFV had received at least a million euros by way of voluntary contributions for the two cases arising out of the situation in the DRC that could be used for reparations in the present case “through the Trust Fund”.²⁹⁹
138. The legal representatives of the V02 group of victims recommend that reparations are ordered through the TFV, given the convicted person is indigent. The legal representatives suggest that the defence is not entitled to make submissions on the payment of reparations through the TFV.³⁰⁰
139. The OPCV submits that if, pursuant to Rule 98(2) of the Rules, at the time of making the reparations order it is impossible or impracticable to make individual awards directly to each victim, the TFV should use funds from its general resources to effect expeditious compensation. The OPCV suggests that

²⁹⁷ ICC-01/04-01/06-2879, paras 68-69.

²⁹⁸ ICC-01/04-01/06-2864, paras 36-44.

²⁹⁹ ICC-01/04-01/06-2864, para. 45.

³⁰⁰ ICC-01/04-01/06-2869, paras 40-42.

given assets belonging to Thomas Lubanga have not been identified, the Chamber should consider making awards through the TFV, as well as urging the State Parties, pursuant to Article 93(1)(k) of the Statute, to assist the Court by identifying, tracing, freezing and seizing resources for forfeiture.³⁰¹

140. The Registry submits that “when making a reparations order ‘through’ the Trust Fund the Court is making an order ‘by means of’ the Fund” meaning the Trust Fund must “ensure that there are sufficient funds to *comply* with any reparation order that the Court may make under article 75 of the Statute”.³⁰² The Registry suggests that when the accused has no available assets, the Court “may order that the award be made through the Trust Fund”.³⁰³

141. The TFV submits that pursuant to Regulation 56 of the Regulations of the TFV, the TFV “may contribute to complementing the funding of a reparations award, within the limitations of its available resources and without prejudice to its assistance mandate”, particularly if the award is of a collective nature or is made to an organisation.³⁰⁴ However, the TFV observes that this does not “replace” the convicted person as the individual against whom a reparations order should be made.³⁰⁵

142. The TFV submits that a decision by the Board of Directors of the TFV on complementing a Court award for reparations “should result from a consultative process with the Court and will depend on prior decisions taken by the Chamber”.³⁰⁶ The TFV suggests that its “other resources” should be primarily directed at collective awards or to particular organisations.³⁰⁷

³⁰¹ ICC-01/04-01/06-2863, paras 122-126.

³⁰² ICC-01/04-01/06-2806, paras 125-126.

³⁰³ ICC-01/04-01/06-2806, para. 128. See also paras 131 *et seq.* of the same report in which the Registry refers to the various provisions that in its view support this view.

³⁰⁴ ICC-01/04-01/06-2872, para. 16. See also ICC-01/04-01/06-2803-Red, paras 116-148.

³⁰⁵ ICC-01/04-01/06-2872, para. 16.

³⁰⁶ ICC-01/04-01/06-2872, para. 245.

³⁰⁷ ICC-01/04-01/06-2872, para. 244.

143. The Registry has reiterated that financially significant measures, if any, should only be ordered through the TFV, given the convicted person is indigent.³⁰⁸
144. The prosecution suggests that the Chamber can request the TFV to provide reparations on a collective basis.³⁰⁹ The prosecution submits that the proceeds of any forfeiture order and fine can be collected and managed by the TFV, and that reparations could also be paid through the TFV's "other resources". The prosecution argues that the Chamber is entitled to "request" – but not to "order" – the TFV to use its "other resources".³¹⁰ In this context, the prosecution notes that Regulation 56 of the Regulations of the TFV provides that the TFV is able to complement the resources collected through awards for reparations with the "other resources of the Trust Fund".³¹¹
145. The Women's Initiatives submits that the TFV is the appropriate body to implement a reparations order, as provided in Article 75(2) of the Statute, and Rule 98(3) of the Rules. As a body independent of the Court with specific expertise in reparations, it has the necessary experience and standing to fulfil this task by implementing its general assistance mandate with a specific focus on gender-based crimes in the DRC, Uganda and the Central African Republic.³¹²
146. ICTJ argues that a collective and community reparations award that is not funded by the convicted person will be made through the TFV. It suggests that given the TFV's experience in providing assistance to victims *during* the trial and its overall role under the Statute, it is in the best position to confer legitimacy to symbolic measures and to navigate the often difficult and

³⁰⁸ ICC-01/04-01/06-2865, para. 27.

³⁰⁹ ICC-01/04-01/06-2867, para. 14.

³¹⁰ ICC-01/04-01/06-2867, paras 31-32.

³¹¹ ICC-01/04-01/06-2867, para. 33.

³¹² ICC-01/04-01/06-2876, paras 57-60.

sensitive process of consulting and persuading communities in divided societies to agree on collective reparations.³¹³

13. Other Sources of Finance

147. The TFV observes that it would be able to **start fundraising** “once the Chamber has decided on the parameters of a reparations award” and it has approved the method of implementation.³¹⁴ The TFV also submits that the Assembly of State Parties will be in a position to contribute voluntarily to an award.³¹⁵

148. Regardless of the viability of these other financing options, the TFV notes “the financial complement to be decided by the Trust Fund’s Board of Directors in accordance with Regulation 56 is most likely to constitute the “starting capital” of a reparations award in the present case”.³¹⁶

149. The Registry submits that in a “worst case scenario” when funds are not available from the convicted person or the TFV, the latter is in a position to raise money by way of voluntary contributions.³¹⁷ The Registry anticipates that the Chamber could “play a role in notifying reparations proceedings to States under Rule 96(1) and inviting them to contribute to reparations through their voluntary contributions” and it would be open to the Court to invite the Assembly of State Parties to participate.³¹⁸

14. The role of the States

150. The TFV submits that the principles established by the Chamber should operate to remind States of their duty under Articles 75(5) and 109 of the Statute to cooperate as regards reparations. It suggests that the principles will highlight, first, the obligation of States not to hinder the enforcement of reparations orders and the implementation of any awards, and, second, the opportunity for the

³¹³ ICC-01/04-01/06-2879, para. 70.

³¹⁴ ICC-01/04-01/06-2872, para. 247.

³¹⁵ ICC-01/04-01/06-2872, para. 249. See also ICC-01/04-01/06-2803-Red, paras 116-148.

³¹⁶ ICC-01/04-01/06-2872, para. 253.

³¹⁷ ICC-01/04-01/06-2806, paras 144-145.

³¹⁸ ICC-01/04-01/06-2806, paras 146-147.

Court to request assistance in relation to “the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture” pursuant to Articles 75(4) and 93(1)(k) of the Statute.³¹⁹ The TFV argues that the principles can address some of the wider dimensions of reparations, particularly by way of strengthening national schemes.³²⁰

B. THE REPARATIONS PROCEDURE

1. The role of the Judiciary

151. The OPCV contends that the Chamber which convicted the accused should determine reparations, since they are an integral part of the overall proceedings. Furthermore, the evidence introduced during the trial and the factual findings of the Chamber are potentially relevant when determining this issue.³²¹

152. The prosecution suggests the Chamber should establish the general approach to be taken to reparations prior to delegating the task of implementation to an expert appointed in accordance with Rule 97 of the Rules.³²²

153. The defence observes that pursuant to Article 74(1) of the Statute, all three judges of the Trial Chamber must be present at each stage of the trial.³²³

2. The *proprio motu* powers of the Trial Chamber

154. Although the Chamber may, in exceptional circumstances, act *proprio motu* under Article 75(1) of the Statute, the defence argues that since the Chamber has received 85 applications for reparations it would be inappropriate to take this step at this stage. Additionally, it is suggested this procedure should not be

³¹⁹ ICC-01/04-01/06-2872, paras 85-87.

³²⁰ ICC-01/04-01/06-2872, paras 88-92.

³²¹ ICC-01/04-01/06-2863, paras 129-130.

³²² ICC-01/04-01/06-2867, para. 1.

³²³ ICC-01/04-01/06-2866, para. 47.

extended to crimes that were not included in the charges or to victims who have not applied for reparations.³²⁴

3. Experts appointed pursuant to Rule 97 of the Rules

155. The legal representatives of the V01 group of victims submit that the Registry could be asked to report to the Chamber on its assessment of the harm the victims suffered, assisted by one or more experts assigned by the Chamber. It is argued that the task of examining this report could be delegated to a single judge from the Chamber, who would be assisted by submissions from the parties and participants.³²⁵ It would be open to the TFV to report on the financial implications of an award of reparations.³²⁶
156. The legal representatives of the V02 group of victims submit that in order to assess the harm experienced by the victims, the Chamber should rely on their application forms and on the reports prepared by the experts appointed by the Chamber. The factors to be considered include the costs of local or professional care; the needs of the victims; their level of education and professional capacities; their ages and the time that they spent with the UPC; their psychological development following recruitment; and any special considerations that apply to victims of sexual violence, as well as the impact of local customs.³²⁷ It is suggested that the experts would be well placed to report on the utility of collective reparations.³²⁸ Additionally, the legal representatives suggest that the Chamber could appoint psychological experts. Finally, they submit that for the purposes of assessing individual reparations the legal representatives should be permitted to propose experts, whereas local NGOs would be in a position to recommend experts in order to address collective reparations.³²⁹

³²⁴ ICC-01/04-01/06-2866, paras 48-50.

³²⁵ ICC-01/04-01/06-2864, paras 46-49.

³²⁶ ICC-01/04-01/06-2864, para. 49.

³²⁷ ICC-01/04-01/06-2869, paras 27 and 37.

³²⁸ ICC-01/04-01/06-2869, para. 36.

³²⁹ ICC-01/04-01/06-2869, paras 43-44.

157. The OPCV suggests that for the purpose of evaluating the harm suffered by former child soldiers, the Chamber should consider appointing an expert to report on how the recruitment of children under the age of 15 may have affected their development and ability to learn, their progress in life, social reintegration, intellectual capacity and concentration, education and professional performance, emotions and general behaviour, and moral development.³³⁰
158. As part of the implementation plan, the TFV indicates that it could undertake the assessment of harm during a consultation process that includes the victims and the communities that were affected.³³¹ The TFV also proposes that a team of interdisciplinary experts assesses the harm suffered by the victims and their communities, with the support of the Registry, the OPCV and any relevant local individuals and organisations.³³² The TFV indicates that it has previously used this approach in projects it has undertaken pursuant to its assistance mandate.³³³
159. As regards the use of experts by way of written submissions and any hearing pursuant to Rule 97 of the Rules, the TFV recommends that they could address various issues (including those relating to reconciliation, a gender-sensitive approach to reparations and their administration, and the current situation in Ituri). The TFV suggests that the Chamber could also receive information from the Registry's Victims and Witnesses Unit, Victims Participation and Reparations Section and Field Operations and Security.³³⁴

³³⁰ ICC-01/04-01/06-2863, para. 142.

³³¹ ICC-01/04-01/06-2872, para. 202.

³³² ICC-01/04-01/06-2872, para. 204.

³³³ ICC-01/04-01/06-2872, para. 206.

³³⁴ ICC-01/04-01/06-2872, para. 257.

160. The TFV also submits that the Trust Fund's Board of Directors is able to consult with experts or expert organisations, although the information provided would be different in nature to that from a court-appointed expert.³³⁵
161. The TFV proposes the use of experts during the following stages of the proceedings if a community-based approach to collective reparations is adopted by the Chamber, in order to: a) assist in establishing the general context (*e.g.* the situation in Ituri and the circumstances of the conflict) at hearings pursuant to Rule 97 of the Rules; b) identify the relevant victims and localities; c) assess the harm suffered by the victims and their communities; d) assess the viability and adequacy of the proposals for reparations at any hearing pursuant to Rule 97 of the Rules; and e) advise at the implementation stage.³³⁶
162. The Registry recommends that a "scoping assessment of potentially eligible beneficiaries and an impact assessment on different forms of reparations and methods of prioritisation be carried out prior to a reparations award being made". The Registry submits that this process could be undertaken by experts pursuant to Rule 97(2) of the Rules in order to assist the Court in identifying a solution that is recognised as having utility by the victims and their communities. The Registry suggests that this assessment should be carried out promptly,³³⁷ and it recommends that the experts evaluate the broad consequences of the Chamber's decision on reparations within the DRC.³³⁸ The Registry suggests it is in a position to assist the Chamber in identifying appropriate experts pursuant to Rule 97 of the Rules. It urges the Chamber to appoint a "team of experts" – individuals who represent a range of disciplines, drawn from the DRC and the international community. Expert assistance could also be sought for the design of the reparations programme, particularly by

³³⁵ ICC-01/04-01/06-2872, para. 260.

³³⁶ ICC-01/04-01/06-2872, para. 262.

³³⁷ ICC-01/04-01/06-2865, paras 20 and 22.

³³⁸ ICC-01/04-01/06-2865, para. 24.

way of explaining the local context, along with the needs of child protection and gender-based violence.³³⁹

163. The prosecution submits that it would be open to the Chamber to leave the assessment of harm to the TFV or, as it submits is preferable, to court-appointed experts.³⁴⁰ As a consequence, the prosecution suggests that the experts would be best placed to identify the relevant issues by way of oral submissions.³⁴¹ In any event, the prosecution suggests that one or more experts are appointed to: a) identify the individuals who suffered harm and who are entitled to reparations; b) determine which communities were affected and to investigate which form of reparations would have greatest utility; c) identify any available funds; d) prepare and implement a reparations plan;³⁴² and e) propose appropriate criteria for determining the reparations awards.³⁴³

164. The defence submits that experts should address the harm that it is suggested was experienced by the victims, including by way of physical examinations. The defence argues that it has the right to question the witnesses called in this context, pursuant to, *inter alia*, Rule 63 and Rule 140 of the Rules and Regulation 44 of the Regulations (see also Article 67 of the Statute and Rule 97(3) of the Rules).³⁴⁴

165. Women's Initiatives notes that the Statute and the Regulations of the TFV provide for the appointment of experts in two distinct but complementary circumstances. Under Rule 97 of the Rules experts can be appointed by the Chamber to assist in the reparations proceedings, whilst Regulation 70 of the Regulations of the TFV enables the appointment of an expert panel to assist the TFV consult with the victims and survivors, assess any harm and its causes,

³³⁹ ICC-01/04-01/06-2865, para. 28.

³⁴⁰ ICC-01/04-01/06-2867, paras 21-22.

³⁴¹ ICC-01/04-01/06-2867, para. 3(a).

³⁴² ICC-01/04-01/06-2867, para. 3(c).

³⁴³ ICC-01/04-01/06-2867, para. 25.

³⁴⁴ ICC-01/04-01/06-2866, paras 79-81.

design the awards, and implement the reparations orders in the present case.³⁴⁵ It further submits that the experts should be independent. The mandate or terms of reference of the expert or team of experts that are determined by the Chamber should require expertise in: i) gender-based violence and working with children who are victims or survivors, and other vulnerable groups; ii) reparations for victims or survivors of gender-based crimes and girl soldiers; and iii) the impact of sexual violence on boy soldiers.³⁴⁶

166. Women's Initiatives also submits that an expert or team of experts would be able to assist the Chamber by determining the criteria to be applied to the awards. If an application procedure is adopted, the experts are well placed to propose criteria on the basis of the number and categories of claimants, together with the availability of funds.³⁴⁷

4. The role of the Participants in the Reparations Proceedings

167. The legal representatives of the V01 group of victims submit that once the Chamber has assessed the harm suffered and identified the means to implement the reparations and their associated costs, the defence and the prosecution should not be involved in the implementation of any programme. However, it is suggested it would be appropriate for the legal representatives of victims to assist the TFV in this process and they should be allowed to represent their clients.³⁴⁸

168. The legal representatives of the V02 group of victims argue that the defence should not advance submissions on reparations that are to be made through the TFV.³⁴⁹

³⁴⁵ ICC-01/04-01/06-2876, para. 48.

³⁴⁶ ICC-01/04-01/06-2876, para. 49.

³⁴⁷ ICC-01/04-01/06-2876, para. 50.

³⁴⁸ ICC-01/04-01/06-2864, para. 50.

³⁴⁹ ICC-01/04-01/06-2869, para. 42.

169. The defence submits that the applicable law (namely, Rules 95 and 97 of the Rules and Articles 75(3) and 82(4) of the Statute) does not provide for participation by the prosecution at this particular stage of the proceedings.³⁵⁰

5. The implementation of the Reparations Orders

170. The OPCV contends that the progress of the reparations proceedings should not be suspended or delayed by the Chamber pending any appeal against the Article 74 Decision. The OPCV observes that it is the Appeals Chamber alone which has the power to suspend any reparations order by the Trial Chamber in the event of an appeal against the order, and then only following an application.³⁵¹

171. The TFV reminds the Chamber that it is entitled to invite the TFV to prepare a draft reparations implementation plan, and it highlights the procedures that it suggests should be followed.³⁵² The TFV indicates that it is well placed to develop an implementation plan for this case.³⁵³ The TFV recommends that this should focus on five distinct elements: a) psychological and social support; b) broad participation in decision making; c) sensitivity to cultural diversity; d) gender equality; and e) the importance of the symbolic nature of reparations.³⁵⁴ The TFV observes that the support of the Registry and the OPCV will be particularly necessary.³⁵⁵

172. The TFV suggests that if an appeal is lodged against the Article 74 Decision, the implementation of any reparations order should be suspended until the appeal is resolved.³⁵⁶

173. The TFV proposes five distinct stages in the implementation of the reparations plan. First, the Registry and any experts who are appointed identify the

³⁵⁰ ICC-01/04-01/06-2866, paras 82-83.

³⁵¹ ICC-01/04-01/06-2863, paras 131-135.

³⁵² ICC-01/04-01/06-2872, paras 181-183.

³⁵³ ICC-01/04-01/06-2872, para. 184.

³⁵⁴ ICC-01/04-01/06-2872, para. 186.

³⁵⁵ ICC-01/04-01/06-2872, para. 187.

³⁵⁶ ICC-01/04-01/06-2803-Red, paras 403-410.

localities that are linked to the reparations process (*i.e.* the places mentioned in the Article 74 Decision as affected by the crimes established in this case).³⁵⁷ The TFV observes that it is open to the Chamber to focus solely on the 18 distinct localities identified in the Article 74 Decision. It recommends, however, that the Chamber issues criteria in order to identify any other relevant localities.³⁵⁸ Second, the TFV initiates a consultation process with the victims and their communities.³⁵⁹ Third, the experts assess the extent of the harm inflicted.³⁶⁰ Fourth, the communities in each locality are provided with information about the principles and procedure that are to be applied to reparations.³⁶¹ Finally, the TFV recommends compiling the proposals for collective reparations that have been developed in each locality.³⁶² The TFV observes that the Chamber is entitled to establish guidelines as to the threshold for qualifying for reparations and to indicate whether participation in collective reparations may affect a victim's entitlement to individual reparations.³⁶³

174. The TFV observes that there are several "operational issues" that should be taken into consideration by the Chamber, such as the limited funding for the ICC Bunia Field Office. The TFV invites the Chamber to instruct the Registrar to ensure that adequate support is provided to the TFV to enable it to fulfil its obligations, as established by the Chamber.³⁶⁴ The TFV also requests the Chamber to "instruct the Registrar to provide the necessary support for ensuring that the proper legal frameworks are in place with the DRC for assessing information from the disarmament, demobilisation and reintegration ("DDR") database, for interacting with sector ministers, and for providing the

³⁵⁷ ICC-01/04-01/06-2872, para. 190.

³⁵⁸ ICC-01/04-01/06-2872, paras 192-194.

³⁵⁹ ICC-01/04-01/06-2872, paras 198-201.

³⁶⁰ ICC-01/04-01/06-2872, paras 202-206.

³⁶¹ ICC-01/04-01/06-2872, paras 207-214.

³⁶² ICC-01/04-01/06-2872, paras 215-217.

³⁶³ ICC-01/04-01/06-2872, paras 218-219.

³⁶⁴ ICC-01/04-01/06-2872, paras 220-223.

necessary protection of the implementing partners who will deliver the reparations programmes on behalf of the TFV and the Court".³⁶⁵

175. Finally, the TFV encourages the Chamber to conduct a hearing *in situ* if this step is practical and achievable.³⁶⁶

III. THE DETERMINATION OF THE CHAMBER

A. INTRODUCTORY REMARKS

176. Pursuant to Article 75(1) of the Statute, "[t]he Court shall establish principles relating to reparation to, or in respect of, victims, including restitution, compensation and rehabilitation".

177. The Statute and the Rules introduce a system of reparations that reflects a growing recognition in international criminal law that there is a need to go beyond the notion of punitive justice, towards a solution which is more inclusive, encourages participation and recognises the need to provide effective remedies for victims.³⁶⁷

178. The Chamber agrees with the observation of Pre-Trial Chamber I when it stated:

The reparation scheme provided for in the Statute is not only one of the Statute's unique features. It is also a key feature. In the Chamber's opinion, the success of the Court is, to some extent, linked to the success of its reparation system. [footnotes omitted]³⁶⁸

179. Reparations fulfil two main purposes that are enshrined in the Statute: they oblige those responsible for serious crimes to repair the harm they caused to the

³⁶⁵ ICC-01/04-01/06-2872, para. 229.

³⁶⁶ ICC-01/04-01/06-2872, para. 231.

³⁶⁷ UN Basic Principles. See also: The rule of law and transitional justice in conflict and post-conflict societies, Report of the United Nations Secretary-General S/2004/616, 23 August 2004; Updated Set of principles for the protection and promotion of human rights through action to combat impunity, Report of the independent expert Diane Orentlicher, E/CN.4/2005/102/Add.1, 8 February 2005.

³⁶⁸ Corrigendum of Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58, 10 February 2006, ICC-01/04-01/06-1-US-Exp-Corr, para. 150.

victims and they enable the Chamber to ensure that offenders account for their acts.³⁶⁹ Furthermore, reparations can be directed at particular individuals, as well as contributing more broadly to the communities that were affected. Reparations in the present case must – to the extent achievable – relieve the suffering caused by these offences; afford justice to the victims by alleviating the consequences of the wrongful acts; deter future violations; and contribute to the effective reintegration of former child soldiers. Reparations can assist in promoting reconciliation between the convicted person, the victims of the crimes and the affected communities (without making Mr Lubanga’s participation in this process mandatory).

180. In the Chamber’s view, reparations, as provided in the Statute and Rules, are to be applied in a broad and flexible manner, allowing the Chamber to approve the widest possible remedies for the violations of the rights of the victims and the means of implementation.³⁷⁰ The Court should have a real measure of flexibility in addressing the consequences of the crimes that Mr Lubanga committed in this case (*i.e.* enlisting and conscripting children under the age of 15 and using them to participate actively in the hostilities).

181. Although in this decision the Trial Chamber has established certain principles relating to reparations and the approach to be taken to their implementation, these are limited to the circumstances of the present case. This decision is not intended to affect the rights of victims to reparations in other cases, whether before the ICC or national, regional or other international bodies.

³⁶⁹ Eva Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations* (2010), page 43; See also: Gilbert Bitti and Gabriela Gonzales Rivas, *The Reparations Provisions for Victims Under the Rome Statute of the International Criminal Court in Redressing Injustices Through Mass Claims Processes: Innovative Responses to Unique Challenges* (2006), pages 300-301.

³⁷⁰ Peter Lewis and Håkan Friman, *Reparations to Victims*, in Lee, R. (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2000), page 483.

B. PRINCIPLES ON REPARATIONS

1. Applicable Law

182. In accordance with Article 21(1)(a) of the Statute, when deciding on reparations the Court shall apply the Statute, the Elements of Crimes and the Rules. The Court will also consider the Regulations of the Court, the Regulations of the Registry and the Regulations of the TFV.³⁷¹
183. Pursuant to Article 21(1)(b) and (c) of the Statute, the Court will consider, where appropriate, the applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict, and the general principles of law derived by the Court from national laws of legal systems of the world.
184. In accordance with Article 21(3) of the Statute, the implementation of reparations “must be consistent with internationally recognized human rights and be without any adverse distinction founded on grounds such as gender [...] age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status”.
185. The Chamber accepts that the right to reparations is a well-established and basic human right, that is enshrined in universal and regional human rights treaties,³⁷² and in other international instruments, including the UN Basic

³⁷¹ Rule 86 of the Rules provides that “A Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with article 68, in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence”. See also Article 68, paras 1 and 2 and Rules 16-17, 70-72, 88, paras 1 and 5 of the Rules. Pursuant to Article 541(b) of the Statute, the Prosecutor is under the obligation to “[t]ake appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court [...] and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children”. The Rome Statute also underscores the need for specific expertise and training on gender-based violence, including in the appointment of experts. See Articles 36 (8)(b), 42(9), and 43(6) of the Statute and Rule 17(2)(a)(iv) of the Rules.

³⁷² See Article 8 of the Universal Declaration of Human Rights which contains provisions relating to the right of every individual to an “effective remedy” for acts violating fundamental rights; Article 9(5) of the International Covenant on Civil and Political Rights which refers to an “enforceable right to compensation”; Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination which provides for a right to “seek [...] just and adequate reparations or satisfaction for any damages suffered[. . .]”; Article 14(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which provides for “an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible”; Article 21(2) of the African Charter on Human and Peoples’ Rights which refers to a right to recovery

Principles; the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power;³⁷³ the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime;³⁷⁴ the Nairobi Declaration; the Cape Town Principles and Best Practices on the Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa;³⁷⁵ and the Paris Principles. These international instruments, as well as certain significant human rights reports,³⁷⁶ have provided guidance to the Chamber in establishing the present principles.

186. In addition to the instruments rehearsed above, given the substantial contribution by regional human rights bodies in furthering the right of individuals to an effective remedy and to reparations,³⁷⁷ the Chamber has taken into account the jurisprudence of the regional human rights courts and the national and international mechanisms and practices that have been developed in this field.

2. Dignity, non-discrimination and non-stigmatisation

187. All victims are to be treated fairly and equally as regards reparations, irrespective of whether they participated in the trial proceedings. Notwithstanding the submissions of the defence and the legal representatives

of property and adequate compensation, and Article 63(1) of the American Convention on Human Rights which calls for the situation giving rise to the breach of a right or freedom “be remedied” and that “fair compensation be paid to the injured party”.

³⁷³ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, United Nations General Assembly, Resolution A/RES/40/34, 29 November 1985.

³⁷⁴ Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, United Nations Economic and Social Council, Resolution 2005/20, 22 July 2005.

³⁷⁵ Cape Town Principles and Best Practices, Adopted at the Symposium on the Prevention of Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa, Cape Town, UNICEF, 27-30 April 1997.

³⁷⁶ Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report submitted by Mr Theo van Boven, Special Rapporteur to United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1993/8, 22 July 1993; The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report of the Special Rapporteur Mr M. Cherif Bassiouni to the Commission on Human Rights, E/CN.4/2000/62, 18 January 2000; The rule of law and transitional justice in conflict and post-conflict societies, Report of the United Nations Secretary-General S/2004/616, 23 August 2004; The rule of law and transitional justice in conflict and post-conflict societies, Report of the UN Secretary General, S/2011/634, 12 October 2011.

³⁷⁷ While human rights courts such as the IACtHR and the ECtHR have the power to order reparations against States rather than individuals, general concepts relating to reparations which have been established through the jurisprudence of these courts can provide useful guidance to the ICC.

of victims, it would be inappropriate to limit reparations to the relatively small group of victims that participated in the trial and those who applied for reparations.

188. The victims of the present crimes, as defined in Rule 85 of the Rules, are to enjoy equal access to any information relating to their right to reparations and to assistance from the Court, as part of their entitlement to fair and equal treatment throughout the proceedings.³⁷⁸
189. In all matters relating to reparations, the Court shall take into account the needs of all the victims, and particularly children, the elderly, those with disabilities and the victims of sexual or gender violence, pursuant to Article 68 of the Statute and Rule 86 of the Rules.
190. When deciding on reparations, the Court shall treat the victims with humanity and it shall respect their dignity and human rights, and it will implement appropriate measures to ensure their safety,³⁷⁹ physical and psychological well being and privacy, pursuant to Rules 87 and 88 of the Rules.
191. Under Article 21(3) of the Statute, reparations shall be granted to victims without adverse distinction on the grounds of gender, age, race, colour, language, religion or belief, political or other opinion, sexual orientation, national, ethnic or social origin, wealth, birth or other status.³⁸⁰
192. Reparations need to address any underlying injustices and in their implementation the Court should avoid replicating discriminatory practices or structures that predated the commission of the crimes.³⁸¹ Equally, the Court

³⁷⁸ UN Basic Principles, principles 11, 12 and 24.

³⁷⁹ UN Basic Principles, principle 10.

³⁸⁰ UN Basic Principles, principle 25.

³⁸¹ Nairobi Declaration, para. 3.

should avoid further stigmatisation of the victims and discrimination by their families and communities.³⁸²

193. Reparations should secure, whenever possible, **reconciliation** between the convicted person, the victims of the crimes and the affected communities.³⁸³

3. Beneficiaries of reparations

194. Pursuant to Rule 85 of the Rules, reparations may be granted to direct and indirect victims, including the family members of direct victims (see below); anyone who attempted to prevent the commission of one or more of the crimes under consideration; and those who **suffered personal harm as a result of these offences, regardless of whether they participated in the trial proceedings.**³⁸⁴

195. In order to determine whether a suggested “indirect victim” is to be included in the reparations scheme, the Court should determine whether there was a **close personal relationship between the indirect and direct victim, for instance as exists between a child soldier and his or her parents.**³⁸⁵ It is to be recognised that the concept of “family” may have many cultural variations, and the Court ought to have regard to the applicable social and familial structures. In this context, the Court should take into account the widely accepted presumption that an individual is succeeded by his/her spouse and children.³⁸⁶

³⁸² Paris Principles, particularly principle 3.3, emphasise that measures in favour of former child soldiers should not “stigmatise or make any negative distinction between children who have been recruited or used and those who have not [. . .]. It is also detrimental to all conflict-affected children if other vulnerable children who have not been associated with armed forces or armed groups are placed at a disadvantage vis-à-vis those who have been so associated.”

³⁸³ The limited scope of the charges brought by the prosecution against Mr Lubanga limited the categories of victims who have participated in this case. They come largely from the same ethnic group and they do not necessarily represent all those who suffered from crimes committed during the relevant conflict in Ituri. This situation could give rise to a risk of resentment on the part of other victims and the re-stigmatisation of former child soldiers within their communities.

³⁸⁴ Decision on victims’ participation, 18 January 2008, ICC-01/04-01/06-1119; Judgment on the Appeal 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; Redacted Version of “Decision on ‘indirect victims’”, 8 April 2009, ICC-01/04-01/06-1813.

³⁸⁵ ICC-01/04-01/06-1432, para. 32.

³⁸⁶ See, IACtHR, *Case of Aloeboetoe et al. v Suriname, Reparations and Costs*, Judgment of 10 September 1993, para. 62; IACtHR, *Case of Velásquez Rodríguez v Honduras, Reparations and costs*, Judgment of 21 July 1989, para 13.

196. Indirect victims may also include individuals who suffered harm when helping or intervening on behalf of direct victims.³⁸⁷
197. Reparations can be granted to legal entities, pursuant to Rule 85(b) of the Rules. These may include, *inter alia*, non-governmental, charitable and non-profit organisations, statutory bodies including government departments, public schools, hospitals, private educational institutes (primary and secondary schools or training colleges), companies, telecommunication firms, institutions that benefit members of the community (such as cooperative and building societies, or bodies that deal with micro finance), and other partnerships.³⁸⁸
198. In the reparations proceedings, victims may use official or unofficial identification documents, or any other means of demonstrating their identities that are recognised by the Chamber.³⁸⁹ In the absence of acceptable documentation, the Court may accept a statement signed by two credible witnesses establishing the identity of the applicant and describing the relationship between the victim and any individual acting on his or her behalf.³⁹⁰
199. When the applicant is an organisation or institution, the Chamber will recognise any credible document that constituted the body in order to establish its identity.³⁹¹
200. The Chamber recognises that priority may need to be given to certain victims who are in a particularly vulnerable situation or who require urgent assistance. These may include, *inter alia*, the victims of sexual or gender-based violence, individuals who require immediate medical care (especially when plastic surgery or treatment for HIV is necessary), as well as severely traumatized

³⁸⁷ ICC-01/04-01/06-1813, para. 51. See also UN Basic Principles, principle 8.

³⁸⁸ Standard Application Form for Organisations, Part A. Standard Application Forms are available at: <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Forms.htm>; See also: Eva Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations* (2010), pages 96-98.

³⁸⁹ ICC-01/04-01/06-1119, paras 87-88.

³⁹⁰ ICC-01/04-01/06-1119, para. 88.

³⁹¹ ICC-01/04-01/06-1119, para. 89.

children, for instance following the loss of family members. The Court may adopt, therefore, measures that constitute affirmative action in order to guarantee equal, effective and safe access to reparations for particularly vulnerable victims.³⁹²

201. Pursuant to Article 75(6) of the Statute, a decision of the Court on reparations should not operate to prejudice the rights of victims under national and international law. Equally, decisions by other bodies, whether national or international, do not affect the rights of victims to receive reparations pursuant to Article 75 of the Statute. However, notwithstanding those general propositions, the Court is able to take into account any awards or benefits received by victims from other bodies in order to guarantee that reparations are not applied unfairly or in discriminatory manner.

4. Accessibility and consultation with victims

202. A gender-inclusive approach should guide the design of the principles and procedures to be applied to reparations, ensuring that they are accessible to all victims in their implementation. Accordingly, gender parity in all aspects of reparations is an important goal of the Court.³⁹³

203. The victims of the crimes, together with their families and communities should be able to participate throughout the reparations process and they should receive adequate support in order to make their participation substantive and effective.

³⁹² See Convention on the Elimination of All Discrimination against Women (1979), article 4 and Nairobi Declaration, para. 7.

³⁹³ See Nairobi Declaration, principle 2; Beijing Declaration and Platform for Action (“Beijing Declaration”), adopted at the Fourth World Conference on Women, Beijing, 4-15 September 1995, para. 141. See also: The rule of law and transitional justice in conflict and post-conflict societies, Report of the United Nations Secretary-General S/2004/616, 23 August 2004, para. 64 (g).

204. Reparations are entirely voluntary and the informed consent of the recipient is necessary prior to any award of reparations, including participation in any reparations programme.³⁹⁴
205. Outreach activities, which include, firstly, gender- and ethnic-inclusive programmes and, secondly, communication between the Court and the affected individuals and their communities are essential to ensure that reparations have broad and real significance.³⁹⁵
206. The Court should consult with victims on issues relating, *inter alia*, to the identity of the beneficiaries, their priorities and the obstacles they have encountered in their attempts to secure reparations.

5. Victims of sexual violence

207. The Court should formulate and implement reparations awards that are appropriate for the victims of sexual and gender-based violence. The Court must reflect the fact that the consequences of these crimes are complicated and they operate on a number of levels; their impact can extend over a long period of time; they affect women and girls,³⁹⁶ men and boys, together with their families and communities; and they require a specialist, integrated and multidisciplinary approach.
208. The Court shall implement gender-sensitive measures to meet the obstacles faced by women and girls when seeking to access justice in this context, and accordingly it is necessary that the Court takes steps to ensure they are able to participate, in a full sense, in the reparations programmes.

³⁹⁴ Paris Principles, principle 3.8.

³⁹⁵ Report of the Bureau on the impact of the Rome Statute system on victims and affected communities, Assembly of States Parties, Resolution ICC-ASP/9/25, 22 November 2010, paras 26-32.

³⁹⁶ Beijing Declaration, para. 135; See also Further actions and initiatives to implement the Beijing Declaration and Platform for Action, UN General Assembly Resolution A/RES/S-23/3, 16 November 2000, para. 15.

209. Therefore, the approach taken by the Court should enable women and girls in the affected communities to participate in a significant and equal way in the design and implementation of any reparations orders.³⁹⁷

6. Child victims

210. Pursuant to Article 68(1) of the Statute, one of the relevant factors – which is of high importance in the present case – is the age of the victims. Pursuant to Rule 86 of the Rules, the Court shall take account of the age-related harm experienced by, along with the needs of, the victims of the present crimes. Furthermore, any differential impact of these crimes on boys and girls is to be taken into account.³⁹⁸

211. In reparations decisions concerning children, the Court should be guided, *inter alia*, by the Convention on the Rights of the Child and the fundamental principle of the “best interests of the child” that is enshrined therein.³⁹⁹ Further, the decisions in this context should reflect a gender-inclusive perspective.

212. The Chamber notes that the Convention on the Rights of the Child encourages States Parties to the Convention to:

[...] take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.⁴⁰⁰

213. Reparations proceedings, and reparations orders and programmes in favour of child soldiers, should guarantee the development of the victims’ personalities, talents and abilities to the fullest possible extent and, more broadly, they should ensure the development of respect for human rights and fundamental freedoms. For each child, the measures should aim at developing respect for

³⁹⁷ Nairobi Declaration, principle 1-D. See also The rule of law and transitional justice in conflict and post-conflict societies, Report of the UN Secretary General, S/2011/634, 12 October 2011, para. 42.

³⁹⁸ Paris Principles, principle 4.0.

³⁹⁹ Convention on the Rights of the Child, adopted by UN General Assembly Resolution 22/25 of 20 November 1989, article 3. See also Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime.

⁴⁰⁰ Convention on the Rights of the Child, article 39.

their parents, cultural identity and language. Former child soldiers should be helped to live responsibly in a free society, recognising the need for a spirit of understanding, peace and tolerance, showing respect for equality between the sexes and valuing friendship between all peoples and groups.⁴⁰¹

214. The Court shall provide information to child victims, their parents, guardians and legal representatives about the procedures and programmes that are to be applied to reparations, in a form that is comprehensible for the victims and those acting on their behalf.

215. The views of the child victims are to be considered when decisions are made about individual or collective reparations that concern them, bearing in mind their circumstances, age and level of maturity.⁴⁰²

216. In this context, the Court shall reflect the importance of rehabilitating former child soldiers and reintegrating them into society in order to end the successive cycles of violence that have formed an important part of past conflicts.⁴⁰³ These measures must be approached on a gender-inclusive basis.

7. Scope of reparations

217. There is a growing recognition in international human rights law that victims and groups of victims may apply for and receive reparations.⁴⁰⁴ Pursuant to 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”. In consequence, and in accordance with Article 21(3) of the Statute and Rule 85 of

⁴⁰¹ Paris Principles, principles 7.46 - 7.49.

⁴⁰² Convention on the Rights of the Child, articles 12 and 29; Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, para. 8(d).

⁴⁰³ Paris Principles, principle 7.0.

⁴⁰⁴ UN Basic Principles, principles 8 and 13. In addition, the European Convention of Human Rights recognizes that “groups of individuals” can claim violations to their rights pursuant to the Convention (see articles 25(1) and 50). Similarly, under the American Convention of Human Rights any person or group of persons, or any non-governmental entity legally recognized in one or more member states of the Organization may lodge a petition with the Commission for violations to the rights enshrined in that Convention (see articles 44 and 63).

the Rules,⁴⁰⁵ reparations may be awarded to: a) individual victims; or b) groups of victims, if in either case they suffered personal harm.

218. The Court shall ensure that reparations are awarded on non-discriminatory and gender-inclusive basis.
219. Given the uncertainty as to the number of victims of the crimes in this case – save that a considerable number of people were affected – 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. Individual and collective reparations are not mutually exclusive, and they may be awarded concurrently.⁴⁰⁶ Furthermore, individual reparations should be awarded in a way that avoids creating tensions and divisions within the relevant communities.
221. When collective reparations are awarded, these should address the harm the victims suffered on an individual and collective basis. The Court should consider providing medical services (including psychiatric and psychological care) along with assistance as regards general rehabilitation, housing, education and training.

8. Modalities of reparations

222. Although Article 75 of the Statute lists restitution, compensation and rehabilitation as forms of reparations, this list is not exclusive. Other types of reparations, for instance those with a **symbolic, preventative or transformative value, may also be appropriate**. As set out above, a gender-sensitive approach

⁴⁰⁵ Appeals Chamber Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, para. 36.

⁴⁰⁶ See IACtHR, *Case of the Moiwana Community v Suriname*, Preliminary objections, merits, reparations and costs, Judgment of 15 June 2005, paras 194 and 201.

should be applied when determining the manner in which reparations are to be applied.

a. Restitution

223. Restitution should, as far as possible, restore the victim to his or her circumstances before the crime was committed,⁴⁰⁷ but this will often be unachievable for victims of the crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in the hostilities.

224. Restitution is directed at the restoration of an individual's life, including a return to his or her family, home and previous employment; providing continuing education; and returning lost or stolen property.⁴⁰⁸

225. Restitution may be apposite for legal bodies such as schools or other institutions.

b. Compensation

226. Compensation should be considered when i) the economic harm is sufficiently quantifiable; ii) an award of this kind would be appropriate and proportionate (bearing in mind the gravity of the crime and the circumstances of the case); and iii) the available funds mean this result is feasible.⁴⁰⁹

227. Compensation is to be approached on a gender-inclusive basis and awards should avoid reinforcing previous structural inequalities and perpetuating prior discriminatory practices.

⁴⁰⁷ The Chamber notes that in the context of State responsibility, the IACtHR established that “the concept of “integral reparation” (*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. However, bearing in mind the context of structural discrimination in which the facts of this case occurred, which was acknowledged by the State [...] reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification. In this regard, re-establishment of the same structural context of violence and discrimination is not acceptable”. *Case of Gonzalez et al v. Mexico* (Cotton Field Case), Preliminary Objection, Merits, Reparations, and Costs, Judgment of 16 November 2009, para. 450.

⁴⁰⁸ UN Basic Principles, principle 19; Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, para. 37.

⁴⁰⁹ UN Basic Principles, principle 20.

228. The concept of “harm”, while not defined in the Statute or the Rules, denotes “hurt, injury and damage”.⁴¹⁰ The harm does not necessarily need to have been direct, but it must have been personal to the victim.⁴¹¹

229. Consistent with internationally recognised human rights law, compensation requires a broad application, to encompass all forms of damage, loss and injury, including material, physical and psychological harm.⁴¹²

230. Although some forms of damage are essentially unquantifiable in financial terms, compensation is a form of economic relief that is aimed at addressing, in a proportionate and appropriate manner, the harm that has been inflicted.⁴¹³

Examples include:

- a. Physical harm, including causing an individual to lose the capacity to bear children;⁴¹⁴
- b. Moral and non-material damage resulting in physical, mental and emotional suffering.⁴¹⁵
- c. Material damage, including lost earnings and the opportunity to work; loss of, or damage to, property; unpaid wages or salaries;

⁴¹⁰ ICC-01/04-01/06-1432, para. 31.

⁴¹¹ ICC-01/04-01/06-1432, para. 32.

⁴¹² UN Basic Principles, principle 8; see also ECCC, Internal Rules (Rev. 5), as revised on 9 February 2010, rule 23bis(1)(b); IACtHR, *Case of the “Las Dos Erres” Massacre v. Guatemala, Preliminary Objection, Merits, Reparations, and Costs*, Judgment of 24 November 2009, para. 226, where the IACtHR noted: “[I]t is evident that the victims of prolonged impunity suffer different infringements in their search for justice, not only materially, but also other suffering and damages of a psychological and physical nature and in their life projects, as well as other potential alterations of their social relations and to the dynamics of their families and communities.”

⁴¹³ UN Basic Principles, principle 20; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, principle 1.

⁴¹⁴ IACtHR, *Case of Velásquez Rodríguez v Honduras, Merits*, Judgment of 29 July 1988, paras 156, 175, 187; ECtHR, *X and Y v Netherlands*, App No 8978/80, Judgment of 26 March 1985, para. 22. See also Standard Application Form for Individuals, Parts C and E.

⁴¹⁵ See for example the jurisprudence of the IACtHR (e.g. *Case of Garrido and Baigorria v Argentina, Reparations and costs*, Judgment of 27 August 1998, para. 49 and *Case of the Plan de Sánchez Massacre v Guatemala, Reparations and costs*, Judgment of 19 November 2004, paras 80-89 and 117; *Case of the “Juvenile Reeducation Institute” v Paraguay, Preliminary Objections, Merits, Reparations and Costs*, Judgment of 2 September 2004, para. 295) and the ECtHR (e.g. *Selmouni v France*, App No 25803/94, Judgment of 28 July 1999, paras 92, 98 and 105; *Aksoy v Turkey*, App No 21987/93, Judgment of 18 December 1996, para. 113.); Decision on the Applications for Participation in the Proceedings of Applicants a/0327/07 to a/0337/07 and a/0001/08, 2 April 2008, ICC-01/04-01/07-357, page 11; Fourth Decision on Victims’ Participation, 12 December 2008, ICC-01/05-01/08-320, paras 51 and 70-73.

other forms of interference with an individual's ability to work; and the loss of savings.⁴¹⁶

- d. Lost opportunities, including those relating to employment, education and social benefits; loss of status; and interference with an individual's legal rights⁴¹⁷ (although the Court must ensure it does not perpetuate traditional or existing discriminatory practices, for instance on the basis of gender, in attempting to address these issues).⁴¹⁸
- e. Costs of legal or other relevant experts, medical services, psychological and social assistance, including, where relevant, help for boys and girls with HIV and Aids.⁴¹⁹

231. The measures put in place for awarding compensation should take into account the gender and age-specific impact that the crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in the hostilities can have on direct victims, their families and communities. The Court should assess whether it is appropriate to provide compensation for any of the detrimental consequences of child recruitment for the individuals directly affected, along with their families and communities.⁴²⁰

⁴¹⁶ See for example the jurisprudence of the IACtHR (*Case of El Amparo v Venezuela, Reparations and Costs*, Judgment of 14 September 1996, paras 28-30) and the ECtHR (*Ayder and Others v. Turkey, Merits*, App No 23656/94, Judgment of 8 January 2004, paras 141-152).

⁴¹⁷ See for example the jurisprudence of the ECtHR (*Campbell and Cosans v United Kingdom, Just Satisfaction*, App No 7511/76; 7743/76, Judgment of, 23 March 1983, para. 26; *TP and KM v United Kingdom*, App No 28945/95, Judgment of 10 May 2001, para. 115; *Thlimmenos v Greece*, App No 34369/97, Judgment of 6 April 2000, para. 70).

⁴¹⁸ The Chamber notes that the concept of "damage to a life plan", adopted in the context of State responsibility at the IACtHR, which may be relevant to reparations at the ICC. IACtHR, *Case of Loayza Tamayo v Peru, Reparations and costs*, Judgment of 27 November 1998, paras 147-148; *Case of Cantoral Benavides v Peru, Reparations and Costs*, Judgment of 3 December 2001, para. 80.

⁴¹⁹ See for example the jurisprudence of the IACtHR (*Case of Loayza Tamayo v Peru, Reparations and Costs*, Judgment of 27 November 1998, para. 129(d); *Case of Barrios Altos v Peru, Reparations and Costs*, Judgment of 30 November 2001, para. 42).

⁴²⁰ Paris Principles, principles 3.3 and 7.3. See also Pablo De Grieff and Marieke Wierda, *The Trust Fund for Victims of the ICC: Between Possibilities and Constraints*, in Bossuyt, M. and others (ed.), *Out of the Ashes. Reparations for Victims of Gross and Systematic Human Rights Violations* (2006), page 239. The authors suggest that the Court should reserve its power to order compensation payments to individuals for cases in which the accused has assets that have been seized for this purpose, when there is a demonstrable link between

c. Rehabilitation

232. The right of victims to rehabilitation is to be implemented by the Court on the basis of the principles relating to non-discrimination,⁴²¹ and this shall include a gender-inclusive approach that encompasses males and females of all ages.
233. Rehabilitation shall include the provision of medical services and healthcare (particularly in order to treat HIV and Aids);⁴²² psychological, psychiatric and social assistance to support those suffering from grief and trauma; and any relevant legal and social services.⁴²³
234. Rehabilitation of the victims of child recruitment should include measures that are directed at facilitating their reintegration into society, taking into account the differences in the impact of these crimes on girls and boys. These steps should include the provision of education and vocational training, along with sustainable work opportunities that promote a meaningful role in society.⁴²⁴
235. The rehabilitation measures ought to include the means of addressing the shame that child victims may feel, and they should be directed at avoiding further victimisation of the boys and girls who suffered harm as a consequence of their recruitment.
236. The steps taken to rehabilitate and reintegrate former child soldiers may also include their local communities, to the extent that the reparations programmes are implemented where their communities are located.⁴²⁵ Programmes that have transformative objectives, however limited, can help prevent future

the accused and the particular victim or group of victims, and when the case concerns a limited and definable group of victims.

⁴²¹ UN Basic Principles, principle 25.

⁴²² *Case of the Mapiripán Massacre v Colombia, Merits, Reparations and Costs*, Judgment of 15 September 2005, para. 312; *Case of the Rochela Massacre v Colombia, Merits, Reparations and Costs*, Judgment of 11 May 2007, para. 302; *Case of the Plan de Sánchez Massacre v Guatemala, Reparations and Costs*, Judgment of 19 November 2004, para. 110.

⁴²³ UN Basic Principles, principle 21.

⁴²⁴ Paris Principles, principles 7.77 – 7.84.

⁴²⁵ Convention on the Rights of the Child, article 39. See also the jurisprudence of the IACtHR which has awarded rehabilitation as part of broader measures of reparations, such as in the *Case of Barrios Altos v Peru, Reparations and Costs*, Judgment of 30 November 2001, para. 42.

victimisation, and symbolic reparations, such as commemorations and tributes, may also contribute to the process of rehabilitation.

d. Other Modalities of Reparations

237. The conviction and the sentence of the Court are examples of reparations, given they are likely to have significance for the victims, their families and communities.⁴²⁶
238. The wide publication of the Article 74 Decision may also serve to raise awareness about the conscription and enlistment of children under the age of 15 and their use to participate actively in the hostilities,⁴²⁷ and this step may help deter crimes of this kind.
239. The Court, through the present trial and in accordance with its broad competence and jurisdiction, assisted by the State Parties and the international community pursuant to Part 9 of the Statute on “International cooperation and judicial assistance”,⁴²⁸ is entitled to institute other forms of reparation, such as establishing or assisting campaigns that are designed to improve the position of victims; by issuing certificates that acknowledge the harm particular individuals experienced; setting up outreach and promotional programmes that inform victims as to the outcome of the trial; and educational campaigns that aim at reducing the stigmatisation and marginalisation of the victims of the present crimes. These steps can contribute to society’s awareness of the crimes committed by Mr Lubanga and the need to foster improved attitudes towards

⁴²⁶ IACtHR, *Case of Velásquez Rodríguez v Honduras, Reparations and Costs*, Judgment of 21 July 1989, para. 36; *Case of Tibi v Ecuador, Preliminary Objections, Merits, Reparations and Costs*, Judgment of 7 September 2004, para. 243; *Case of the Plan de Sánchez Massacre v Guatemala, Reparations and Costs*, Judgment of 19 November 2004, para. 81; *Case of Juan Humberto Sánchez v Honduras, Preliminary Objections, Merits, Reparations and Costs*, Judgment of 7 June 2003, para. 172.

⁴²⁷ Public education initiatives have been ordered in numerous reparation judgments of the IACtHR. See for example *Case of Radilla-Pacheco v. Mexico, Preliminary Objections, Merits, Reparations, and Costs*, Judgment of 23 November 2009, paras 345-347.

⁴²⁸ See Articles 86 *et seq.* of the Statute.

events of this kind, and ensure that children play an active role within their communities.⁴²⁹

240. Reparations may include measures to address the shame felt by some former child soldiers, and to prevent any future victimisation, particularly when they endured sexual violence, torture and inhumane and degrading treatment following their recruitment. As canvassed above, the Court's reparations strategy should, in part, be directed at preventing future conflicts and raising awareness that the effective reintegration of the children requires eradicating the victimisation, discrimination and stigmatisation of young people in these circumstances.
241. Mr Lubanga is able to contribute to this process by way of a voluntary apology to individual victims or to groups of victims, on a public or confidential basis.

9. Proportional and adequate reparations

242. Victims should receive appropriate, adequate and prompt reparations.⁴³⁰
243. The reparations should, in all circumstances, be awarded on a non-discriminatory basis, and they need to be formulated and applied in a gender-inclusive manner. The awards ought to be proportionate to the harm, injury, loss and damage as established by the Court. The measures will depend on the particular context of this case and circumstances of the victims, and they should accord with the overarching objectives of reparations, as set out in this decision.
244. Reparations should aim at reconciling the victims of the present crimes with their families and all the communities affected by the charges.⁴³¹

⁴²⁹ Report of the Bureau on the impact of the Rome Statute system on victims and affected communities, Assembly of States Parties, para. 53: "As to reparations, due to the massive nature of the crimes, and with the Court being the court of last resort with a policy of prosecuting only those most responsible, the States (both situation countries and other States) also have a fundamental role to play within the Rome Statute system from the point of view of complementarity. In establishing national reparation systems, General Assembly resolution 60/147 of 16 December 2005 (Basic Principles and Guidelines on the Right to a Remedy) could serve as a reference. With this in mind, States should not wait until the end of a judicial cycle for the victims to be compensated but could, for example, already prioritize within existing or future development projects for victims of crimes falling under the Rome Statute".

⁴³⁰ UN Basic Principles, principle 15.

245. Whenever possible, reparations should reflect local cultural and customary practices unless these are discriminatory, exclusive or deny victims equal access to their rights.

246. Reparations need to support programmes that are self-sustaining, in order to enable victims, their families and communities to benefit from these measures over an extended period of time. If pensions or other forms of economic benefits are to be paid, these should be allocated, if possible, by periodic instalments rather than by way of a lump payment.⁴³²

10. Causation

247. The “damage, loss and injury,” which form the basis of a reparations claim, must have resulted from the crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in the hostilities.

248. It is to be observed in this general context that neither the Statute nor the Rules define the precise requirements of the causal link between the crime and the relevant harm for the purposes of reparations. Moreover, there is no settled view in international law on the approach to be taken to causation.⁴³³

249. Reparations should not be limited to “direct” harm or the “immediate effects” of the crimes of enlisting and conscripting children under the age of 15 and

⁴³¹ In cases of sexual violence, reconciliation with the perpetrator may be an inappropriate measure as data shows that many survivors of sexual violence do not want a direct apology from the perpetrator or any contact with him or her. See Sara Sharratt, *Gender, Shame and Sexual Violence, The Voices of Witnesses and Court Members at War Crimes Tribunals* (2011), pages 11-18.

⁴³² Paris Principles, principle 7.35 states: Direct cash benefits to released or returning children are not an appropriate form of assistance, as experience has repeatedly demonstrated.

⁴³³ See Veijo Heiskanen and others, *Reparations to Victims Before the International Criminal Court: Lessons from International Mass Claims Processes*, *Criminal Law Forum* (2006), page 325. For example, the United Nations Compensation Commission has generated extensive jurisprudence on causation but has not established a uniform standard. See also Eva Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations* (2010), pages 143-145; and Andrea Gattini, *The UN Compensation Commission – Old Rules, New Procedures on War Reparations*, in *European Journal of International Law* 13 (2002), page 161. For example, the ECtHR has adopted a standard of a “clear causal connection” between the violation and the losses claimed when applied to pecuniary or material losses. On the other hand, the ECtHR and the IACtHR have presumed the existence of non-pecuniary harm, or moral damage, once it has been established that that a person is a victim of a grave violation of human rights.

using them to participate actively in the hostilities,⁴³⁴ but instead the Court should apply the standard of “proximate cause”.

250. In reaching this conclusion as to the relevant standard of causation to be applied to reparations, and particularly to the extent that they are ordered against the convicted person, the Chamber needs to reflect the divergent interests and rights of the victims and the convicted person.⁴³⁵ Balancing those competing factors, at a minimum the Court must be satisfied that there exists a “but/for” relationship between the crime and the harm and, moreover, the crimes for which Mr Lubanga was convicted were the “proximate cause” of the harm for which reparations are sought.

11. Standard and burden of proof

251. At trial, the prosecution must establish the relevant facts to the criminal standard, namely beyond a reasonable doubt. Given the fundamentally different nature of these reparations proceedings, a less exacting standard should apply.⁴³⁶

252. Several factors are of significance in determining the appropriate standard of proof at this stage, including the difficulty victims may face in obtaining evidence in support of their claim due to the destruction or unavailability of evidence.⁴³⁷ This particular problem has been recognised by a number of

⁴³⁴ The Chamber notes the standards applied by mass claims bodies and regional human rights courts. IACtHR only requires that the State make reparations for the “immediate effects of such unlawful acts”. See *Aloeboetoe et al. v Suriname, Reparations and Costs*, Judgment of 10 September 1993, para. 49. The United Nations Compensation Commission limited liability of perpetrators for claims arising out of Iraq’s invasion and occupation in Kuwait to “direct losses” only. See War Crimes Research Office – International Criminal Court Legal Analysis and Education Project, “The Case-Based Reparations Scheme at the International Criminal Court” (2010), page 38.

⁴³⁵ See Rule 97(3) and Eva Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations* (2010), page 95.

⁴³⁶ This is consistent with the history of debate among the drafters of the Statute, who contemplated various possible standards of proof, but agreed that the standard must be one that is lower than that which is required for a conviction. See Peter Lewis and Håkan Friman, *Reparations to Victims*, in Lee, R. (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2000), page 483.

⁴³⁷ Marc Henzelin and others, *Reparations to Victims Before the International Criminal Court: Lessons from International Mass Claims Processes*, *Criminal Law Forum* (2006), page 326; see also Heike Niebergall, *Overcoming Evidentiary Weaknesses in Reparation Claims Programmes*, in *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making* (2009),

sources,⁴³⁸ including Rule 94(1) of the Rules, which provides that victims' requests for reparations shall contain, to the extent possible, any relevant supporting documentation, including names and addresses of witnesses.

253. Given the Article 74 stage of the trial has concluded, the standard of "a balance of probabilities" is sufficient and proportionate to establish the facts that are relevant to an order for reparations when it is directed against the convicted person.⁴³⁹

254. When reparations are awarded from the resources of the Trust Fund for Victims or from any other source, a wholly flexible approach to determining factual matters is appropriate, taking into account the extensive and systematic nature of the crimes and the number of victims involved.

12. Rights of the defence

255. Nothing in these principles will prejudice or be inconsistent with the rights of the convicted person to a fair and impartial trial.

pages 145, 149-150; see also War Crimes Research Office – International Criminal Court Legal Analysis and Education Project, *The Case-Based Reparations Scheme at the International Criminal Court* (2010), page 26.

⁴³⁸ See for example Heike Niebergall, *Overcoming Evidentiary Weaknesses in Reparation Claims Programmes, in Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making* (2009), pages. 156-158; also van Jacomijn Haersolte-van Hof, *Innovations to Speed Mass Claims: New Standards of Proof, in Redressing Injustices through Mass Claims Processes: Innovative Responses to Unique Challenges* (2006), pages 14-22.

⁴³⁹ The term "balance of probabilities" is also described as a "preponderance of proof" or "balance of probability". Black's Law Dictionary defines it as: "the greater the weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other". Black's Law Dictionary, Eighth Edition, Garner (ed.), 2004, page 1220. It is important to note that during the Preparatory Commission some delegations suggested that the evidence standard should be based on a "balance of probabilities", as opposed to the "beyond reasonable doubt" standard applied in criminal proceedings. Many reparations programmes dealing with mass claims have also adopted flexible evidential standards based on a "plausibility test" in order to accommodate the situation of the victims, who usually have difficulties in providing the documentation that is required. See Peter Lewis and Håkan Friman, *Reparations to Victims*, in Lee, R. (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2000), page 486.

13. States and Other Stakeholders

256. State Parties have the obligation under Parts 9 and 10 of the Statute,⁴⁴⁰ of cooperating fully in the enforcement of orders, decisions and judgments of the Court, and they are enjoined not to prevent the enforcement of reparations orders or the implementation of awards.
257. Pursuant to Articles 25(4) and 75(6) of the Statute, reparations under the Statute do not interfere with the responsibility of States to award reparations to victims under other treaties or national law.

14. Publicity of these Principles

258. In accordance with Rule 96 of the Rules, entitled "Publication of reparation proceedings", the Registrar is responsible for taking all the necessary measures in this context, including outreach activities with the national authorities, local communities and the affected populations, in order to publicise these principles and any reparation proceedings before the Court.
259. Reparations proceedings shall be transparent and measures should be adopted to ensure that all victims within the jurisdiction of the Court have detailed and timely notice of these proceedings and access to any awards.

C. OTHER SUBSTANTIVE AND PROCEDURAL ISSUES

1. Chamber for the purposes of reparations

260. Reparations proceedings are an integral part of the overall trial process. Article 75 of the Statute provides that the Court may order reparations, although it does not specify the body that is to monitor and supervise this part of the proceedings. Pursuant to Article 64(2) and (3)(a) of the Statute, the Chamber is of the view that these tasks fall within the responsibilities and functions of the Judiciary.

⁴⁴⁰ Part 9 of the Statute deals with "International cooperation and judicial assistance" while Part 10 refers to "Enforcement".

261. The Chamber considers that it is unnecessary for the present judges of Trial Chamber I to remain seized throughout the reparations proceedings. Therefore, reparations in this case will be dealt with principally by the TFV, monitored and overseen by a differently composed Chamber.

262. During the implementation process, as indicated below, the Chamber will be in a position to resolve any contested issues arising out of the work and the decisions of the TFV.

2. Experts pursuant to Rule 97 of the Rules

263. The Chamber strongly recommends that a multidisciplinary team of experts is retained to provide assistance to the Court in the following areas: a) an assessment of the harm suffered by the victims in this case; b) the effect that the crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities had on their families and communities; c) identifying the most appropriate form of reparations in this case, in close consultation with the victims and their communities; d) establishing those individuals, bodies, groups or communities who should be awarded reparations; and d) accessing funds for these purposes. The team of experts needs to be in a position to assist the Court in the preparation and implementation of a reparations plan.

264. The Chamber therefore endorses the Registry's proposal that there should be a team of experts, rather than a sole expert. The team ought to include representatives from the DRC, international representatives⁴⁴¹ and specialists in child and gender issues. The Chamber accepts the TFV's suggestion that there should be a preliminary consultative phase involving the victims and the affected communities, to be carried out by the team of experts, with the support

⁴⁴¹ ICC-01/04-01/06-2865, para. 28.

of the Registry, the OPCV and any local partners.⁴⁴² This work must be undertaken with the cooperation and assistance of any relevant ICC officials.

265. The Chamber, in discharging its powers under Rule 97(2) of the Rules, delegates to the TFV the task of selecting and appointing appropriate multidisciplinary experts, and the TFV is to oversee their work. Experts in the fields of child soldiers, violence against girls and boys and gender issues should be amongst those appointed by the TFV.

266. The Chamber is of the view that the TFV is well placed to determine the appropriate forms of reparations and to implement them. It is able to collect any relevant information from the victims, and the Chamber notes the TFV is already conducting extensive activity in the DRC for the benefit of victims in the context of the general situation of which this case is a part.⁴⁴³

3. Participants in the reparations proceedings

267. As already indicated, the reparations phase is an integral part of the trial proceedings, but unlike the Article 74 or the sentencing stages when the principal focus is on the defence and the prosecution, the Court is mainly concerned at this juncture with the victims, even though the prosecution and the defence are also parties to the reparations proceedings.

268. The Registry shall decide, in accordance with its powers under Article 43(1) of the Statute, the most appropriate manner in which the current victims participating in the proceedings, along with the broader group of victims who may ultimately benefit from a reparations plan, are to be represented in order to express their views and concerns.

⁴⁴² ICC-01/04-01/06-2872, para. 204.

⁴⁴³ Trust Fund for Victims, Reviewing Rehabilitation Assistance and Preparing for Delivering Reparations, Programme Progress Report, Summer 2011, pages 9-11; Recognizing Victims & Building Capacity in Transitional Societies, Programme Progress Report, Spring 2010, page 15. These reports are available at: <http://www.trustfundforvictims.org>.

4. Reparations orders against the convicted person or “through the Trust Fund for Victims”

269. The convicted person has been declared indigent and no assets or property have been identified that can be used for the purposes of reparations. The Chamber is, therefore, of the view that Mr Lubanga is only able to contribute to non-monetary reparations. Any participation on his part in symbolic reparations, such as a public or private apology to the victims, is only appropriate with his agreement. Accordingly, these measures will not form part of any Court order.

270. As regards the concept of “reparations through the Trust Fund”, and applying the Vienna Convention on the Law of Treaties, the Chamber gives the word “through” its ordinary meaning, namely “by means of”.⁴⁴⁴ Thus, when Article 75(2) of the Statute provides that an award for reparations may be made “through” the Trust Fund, the Court is able to draw on the logistical and financial resources of the Trust Fund in implementing the award.

271. Moreover, the Chamber is of the view that when the convicted person has no assets, if a reparations award is made “through” the Trust Fund, the award is not limited to the funds and assets seized and deposited with the Trust Fund, but the award can, at least potentially, be supported by the Trust Fund’s own resources. This interpretation is consistent with Rule 98(5) of the Rules and Regulation 56 of the Regulations of the TFV. Rule 98(5) of the Rules provides that the Trust Fund may use “other resources” for the benefit of victims. Regulation 56 of the Regulations of the TFV imposes an obligation on the TFV’s Board of Directors to complement the resources collected from a convicted person with “the other resources of the Trust Fund”, providing the Board of Directors make all reasonable efforts to manage the Fund taking into consideration the need to provide adequate resources to complement payments for awards under Rule 98(3) and (4) of the Rules. In the Chamber’s view, the

⁴⁴⁴ Oxford English Dictionary.

wording of Regulation 56 of the Regulations of the TFV suggests that the “need to provide adequate resources” includes the need to fund reparation awards. In circumstances when the Court orders reparations against an indigent convicted person, the Court may draw upon “other resources” that the TFV has made reasonable efforts to set aside.⁴⁴⁵

272. Furthermore, this interpretation is consistent with Pre-Trial Chamber I’s decision permitting the Trust Fund to engage in activities outside the context of Court-ordered reparations, pursuant to Regulation 50 of the Regulations of the TFV, noting that “[...] the responsibility of the Trust Fund is first and foremost to ensure that sufficient funds are available in the eventuality of a Court reparation order pursuant to Article 75 of the Statute”.⁴⁴⁶

273. The Chamber considers that pursuant to Regulation 56 of the Regulations of the TFV, the TFV shall complement the funding of a reparations award, albeit within the limitations of its available resources and without prejudice to its assistance mandate.⁴⁴⁷

274. As noted above, the TFV has indicated that reparations to be funded by the TFV with its own resources will tend to be collective in nature or they will be made to an organisation pursuant to Regulation 56 of the Regulations of the TFV. The Chamber endorses this suggestion of the TFV that a community-based approach, using the TFV’s voluntary contributions, would be more beneficial and have greater utility than individual awards, given the limited funds available and the fact that this approach does not require costly and resource-intensive verification procedures.⁴⁴⁸

275. The Chamber furthermore acknowledges the importance of the ongoing child soldier rehabilitation projects, sustained by the TFV, which provide support to

⁴⁴⁵ See also the French version of Regulation 56: “Le Conseil de direction détermine s’il faut compléter le produit de l’exécution des ordonnances de réparation par d’«autres ressources du Fonds» et en informe la Cour”.

⁴⁴⁶ Decision on the Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund, 11 April 2008, ICC-01/04-492, page 7.

⁴⁴⁷ ICC-01/04-01/06-2872, para. 16.

⁴⁴⁸ ICC-01/04-01/06-2872, paras 16, 153-180 and 244.

former child soldiers in improving their economic position through access to village savings and loans schemes.⁴⁴⁹ Furthermore, partnerships between the TFV and various organisations within the DRC have established a local system of “mutual solidarity”, which is another form of community savings plan.⁴⁵⁰ These initiatives, in the Chamber’s view, deserve the support of the ICC, the States Parties and any other interested actors.

5. Other financing methods

276. Pursuant to Article 93(1)(k) of the Statute, States Parties to the Statute should provide assistance to the Court in “the identification, tracing and freezing or seizure of proceeds, property, assets and instrumentalities of crimes for the purpose of eventual forfeiture”.

277. The identification and freezing of any assets of the convicted person are a fundamental element in securing effective reparations, and pursuant to Article 93(1)(k) of the Statute, State Parties should provide the Court with timely and effective assistance at the earliest possible stage of the proceedings.⁴⁵¹

278. In order for the reparations award to have effect, the ICC requires the cooperation of States Parties and non-states parties,⁴⁵² as well as the close cooperation with the DRC local government.

279. On 8 June 2010, during its 9th plenary meeting, the Review Conference adopted a resolution that:

Calls upon States Parties, international organizations, individuals, corporations and other entities to contribute to the Trust Fund for Victims to ensure that timely and adequate assistance and reparations can be provided to victims in accordance with the Rome Statute, and expresses its gratitude to those that have done so.⁴⁵³

⁴⁴⁹ ICC-01/04-01/06-2803-Red, para. 313.

⁴⁵⁰ ICC-01/04-01/06-2803-Red, para. 314.

⁴⁵¹ Assembly of State Parties, Reparations, Resolution ICC-ASP/10/Res.3, 20 December 2011.

⁴⁵² Articles 75(5) and 87(5)(a) of the Statute.

⁴⁵³ Assembly of State Parties, Impact of the Rome Statute system on victims and affected communities, Resolution RC/Res.2, 8 June 2010, para. 7.

280. The Chamber recommends that the Registry and the TFV establish standard operating procedures, confidentiality protocols and financial reporting obligations that are to be applied by the international, national, and local organisations with which they may collaborate.

6. Implementation of the reparations plan and role of the Judiciary

281. The Chamber endorses the five-step implementation plan suggested by the TFV, which is to be executed in conjunction with the Registry, the OPCV and the experts.

282. First, the TFV, the Registry, the OPCV and the experts, should establish which localities ought to be involved in the reparations process in the present case (focusing particularly on the places referred to in the Judgment and especially where the crimes committed).⁴⁵⁴ Although the Chamber referred in the Article 74 Decision to several particular localities, the reparations programme is not limited to those that were mentioned. Second, there should be a process of consultation in the localities that are identified.⁴⁵⁵ Third, an assessment of harm should be carried out during this consultation phase by the team of experts.⁴⁵⁶ Fourth, public debates should be held in each locality in order to explain the reparations principles and procedures, and to address the victims' expectations.⁴⁵⁷ The final step is the collection of proposals for collective reparations that are to be developed in each locality, which are then to be presented to the Chamber for its approval.⁴⁵⁸

283. The Chamber agrees that the assessment of harm is to be carried out by the TFV during a consultative phase in different localities.⁴⁵⁹ Moreover, the Chamber is satisfied that, in the circumstances of this case, the identification of the victims

⁴⁵⁴ ICC-01/04-01/06-2872, paras 181-197.

⁴⁵⁵ ICC-01/04-01/06-2872, paras 198-201.

⁴⁵⁶ ICC-01/04-01/06-2872, paras 202-206.

⁴⁵⁷ ICC-01/04-01/06-2872, paras 207-214.

⁴⁵⁸ ICC-01/04-01/06-2872, paras 215-217.

⁴⁵⁹ ICC-01/04-01/06-2872, para. 202.

and beneficiaries (Regulations 60 to 65 of the Regulations of the TFV) should be carried out by the TFV.

284. In light of the above, the Chamber considers that the individual application forms for reparations received thus far by the Registry should be transmitted to the TFV. If the TFV considers it appropriate, victims who have applied for reparations could be included in any reparations programme that is to be implemented by the TFV.

285. As noted above, the TFV proposes that a team of interdisciplinary experts assesses the harm suffered by the victims in different localities, with the support of the Registry, the OPCV and local partners.⁴⁶⁰ The TFV indicates that it has already used this approach in its projects under its assistance mandate.⁴⁶¹

286. In order for the Judiciary to exercise its monitoring and oversight functions, the newly constituted Chamber should be updated on this five-step implementation plan on a regular basis. In accordance with Article 64(2) and (3)(a) of the Statute, the Chamber may be seized of any contested issues arising out of the work and the decisions of the TFV.

287. The Chamber will not otherwise issue, in this case, any order or instruction to the TFV on the implementation of reparations that are to be made through the TFV and funded by any voluntary contributions (as governed by Regulations 47 and 48 of the Regulations of the TFV and the decisions of its Board of Directors pursuant to Regulation 50 of the Regulations of the TFV).

288. There are very limited financial resources available in this case and it should be ensured that these are applied to the greatest extent possible to the benefit of the victims and any other beneficiaries. The Chamber considers that coordination and cooperation between the Registry, the OPCV and the TFV in

⁴⁶⁰ ICC-01/04-01/06-2872, para. 204.

⁴⁶¹ ICC-01/04-01/06-2872, para. 206.

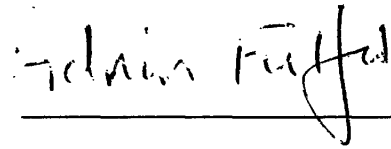
establishing the reparations that are to be applied and implementing the plan are essential.

IV. CONCLUSIONS

289. The Chamber accordingly:

- a. Issues the above principles on reparations pursuant to Article 75(1) of the Statute;
- b. Decides not to examine the individual application forms for reparations and instructs the Registry to transmit to the TFV all the individual application forms received thus far;
- c. Remains seized of the reparations proceedings, in order to exercise any necessary monitoring and oversight functions in accordance with Article 64(2) and (3)(a) of the Statute (including considering the proposals for collective reparations that are to be developed in each locality, which are to be presented to the Chamber for its approval); and
- d. Otherwise declines to issue specific orders to the TFV on the implementation of reparations that are to be funded using voluntary contributions.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 7 August 2012

At The Hague, The Netherlands