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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 PROSECUTOR v. THOMAS LUBANGA DYILO**

**Public Redacted Version of ICC-01/04-01/06-2803-Conf-Exp–Trust Fund for
Victims’ First Report on Reparations**

Source: The Trust Fund for Victims

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

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**Victims Participation and Reparations
Section**

Ms. Fiona McKay

Trust Fund for Victims

Mr. Pieter de Baan, Executive Director,
Secretariat

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The Board of Directors of the Trust Fund for Victims of the International Criminal Court

NOTING the written instruction addressed by the Chamber to the Registry and to the Secretariat of the Trust Fund for Victims (the “Trust Fund Secretariat”) by e-mail of 16 March 2011, requesting the a consolidated and updated joint filing on reparations from the Trust Fund for Victims (the “Trust Fund”) and the Registry;

NOTING Articles 75 and 79 of the Rome Statute, Rules 85 and 94 to 99 of the Rules of Procedure and Evidence (the “RPE”), Regulations 21 to 36 and 42 to 75 of the Regulations of the Trust Fund for Victims (the “Trust Fund Regulations”), Regulations 23*bis* and 88 of the Regulations of the Court (the “RoC”), Regulations 110-111 of the Regulations of the Registry (the “RoR”) as relevant to this filing;

CONSIDERING that the Trust Fund submits this filing under the classification “Confidential *Ex Parte* – Trust Fund for Victims, Registry only” - under Regulation 23*bis* of the RoC in compliance with the Chamber’s instruction of 16 March 2011;

RESPECTFULLY TRANSMITS this filing for the attention of the Chamber.

PART ONE - LEGAL AND REGULATORY BACKGROUND

I. Introduction and overview of the report structure

1. The Trust Fund for Victims (hereinafter “the Trust Fund”) welcomes the opportunity to submit its views and observations regarding possible reparation proceedings in the case *the Prosecutor v. Thomas Lubanga Dyilo* (the “*Lubanga* case”) to the Chamber.
2. Reparations form an integral part of proceedings before the International Criminal Court (hereinafter “the ICC”), according to Article 75 of the Rome Statute (hereinafter “the Statute”). Delivering meaningful reparations will be fundamental for the ICC’s credibility in the eyes of victim communities and the public at-large.
3. Although the *Lubanga* case offers the first opportunity for the Trust Fund to provide its views and advice on reparations, the present observations apply to the *Lubanga* case only and shall not be read in the context of other cases pending before the Court. Furthermore, the present observations shall not be construed as the Trust Fund’s elaboration of the ICC’s general principles governing reparations under Article 75(1) of the Rome Statute.
4. Moreover, the views expressed are preliminary and do not intend to prejudice in any way the question of guilt or innocence of the accused. Further submissions on more specific topics may also be submitted at a later stage, as appropriate, in light of any judgments delivered by the

Chamber. The Trust Fund is pleased to provide continued support and cooperation to the Chamber as needed.

5. The filing consists of five sections: 1) the general legal and regulatory background; 2) contextual considerations related to the *Lubanga* case, including valuable information presented based on the experience gained implementing under the Trust Fund's general assistance mandate; 3) considerations related to the implementation of a reparations order in the context of the situation and what this implies both in legal terms and in practice; 4) procedural considerations related to the *Lubanga* case; and 5) conclusions.

II. Considerations defining the reparations award

6. Reparations are essential to any transitional justice process because reparations focus most directly and explicitly on the victims' situation by providing redress for rights that have been violated, for harms suffered, and for indignities endured. Reparations should not be understood or designed in isolation from other reconstruction efforts. Conceptually, as well as in practice, reparations should be understood to be one part of a much larger restorative and transitional justice agenda.¹ With these considerations in mind, the Trust Fund would respectfully like to submit some general points for consideration by the Chamber in the following section.

¹ International Center for Transitional Justice, (ICTJ), Lisa Maggarrell), *Reparations in Theory and Practice*, electronically available at <http://es.ictj.org/static/Reparations/0710.Reparations.pdf>

A. Applicable law

7. The general principle of what law the ICC shall apply is described in Article 21 of the Rome Statute. Accordingly, the Court shall apply the Statute, the Elements of Crimes, and its Rules of Procedure and Evidence (hereinafter “RPE”). The central norm in the Statute guiding reparations for victims is Article 75 on “Reparations to victims”.
8. The Rules of Procedure and Evidence in section III, sub-section 4, entitled “reparations to victims”, set out more details on substance and procedure of reparation proceedings before the Court. In particular, Rule 98 RPE, titled “Trust Fund”, sets out the various forms that a reparation order may take, i.e. individual awards (98 (1 and 2)), RPE, collective awards (98 (3)) RPE, and award for reparations to be made through the Trust Fund to an intergovernmental, international or national organisation (98 (4)) RPE.
9. Furthermore, on 3 December 2005, the Assembly of States Parties (hereinafter “ASP”) adopted the Regulations of the Trust Fund (hereinafter “RTFV”) describing the basis for governing the Trust Fund under Article 79 (3) of the Rome Statute. These RTFV contain a detailed legal framework on the implementation of reparations if administered through the Trust Fund.

B. Sources that could be of guidance on reparations

10. Article 75(1) of the Statute explicitly mentions “restitution, compensation and rehabilitation” as forms of reparation. However, the wording of

Article 75(1) makes it clear that this list must be understood to be non-exhaustive.

11. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law² (hereinafter “Basic Principles”) developed for a human rights context, can also give further guidance on the principles of reparations, including:

Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property;

Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

(a) Physical or mental harm;

² The Basic Principles were adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005 and are publically available at <<http://www2.ohchr.org/english/law/remedy.htm>>

- (b) Lost opportunities, including employment, education and social benefits;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Moral damage;
- (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.; and

Rehabilitation should include medical and psychological care as well as legal and social services.

12. The Basic Principles also describe other types of reparation not explicitly included in the Statute, but widely used in the context of gross human rights violations, including *satisfaction* (e.g. public apology, an official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim, disclosure) and *guarantees of non-repetition*.³

13. In addition to the Basic Principles there is a wealth of other sources that could be of guidance to the Court. These include the draft International Law Association Guidelines on reparations for victims of armed conflict,⁴ which also describes the principles of reparations to include: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The development of these guidelines is indicative of a growing acknowledgement that victims of armed conflict should be entitled to reparations.

³ See Basic Principles, Principles 22 and 23.

⁴ Elke Schwager, *The Right to Compensation for Victims of an Armed Conflict*, Chinese Journal of International Law (2005), Vol. 4, No. 2, 417–439, Published by Oxford University Press, 26 September 2005.

14. Furthermore, there are related areas of law in which a practice of reparations to victims of crimes has developed and that may provide inspiration to the Court, in particular (i) proceedings before international human rights courts, such as for example the Inter-American Court of Human Rights (ii) international mass claims processes, such as for example the UN Claims Commission (iii) domestic transitional justice mechanisms in countries emerging from a period of massive human rights abuses, such as for example transitional justice processes in Argentina, Colombia, Hungary, Morocco and (iv) domestic criminal proceedings in violent crime cases.

15. Moreover, most countries with a criminal justice system inspired by the “Continental European system” (including the DRC) allow victims to take part as secondary parties in the criminal proceedings and to file a compensation claim against the alleged perpetrator in the context of the criminal trial (*constitution de partie civile* in French legal terminology).

C. Modalities of Reparations: collective/individual reparations

16. According to Rule 97 (1) RPE, the Chamber may award reparations on an individualised basis or, where it deems appropriate, on a collective basis or both. In accordance with Rule 97 (2) RPE, the Court could decide to hear experts to determine the scope and extent of any damage, loss and injury to, or in respect of victims. These experts may suggest various options concerning the appropriate types and modalities of reparations for the Chamber’s consideration.

17. Understanding the strengths and limitations of individual and collective reparations is necessary in order to combine them in a culturally appropriate and locally relevant manner. The Trust Fund respectfully submits the following general observations in this regard.

1. Individual awards

18. Individual reparation awards require a precise identification of the persons entitled, as well as a way to deliver the concrete benefits to the individual recipient. Individual measures are important because “international human rights standards are generally expressed in individual terms. Reparation to individuals therefore underscores the value of each human being and their place as rights-holders.⁵ Individual reparations are able to respond more adequately to the specific experiences of each victim in terms of the harm suffered as a result of the crimes that have occurred.
19. However, individual awards, depending on the specific circumstances and on how they are complemented by other forms of redress, are necessarily more selective: the fact that some victims may be entitled to individual reparations while others, whether also victims or just fellow citizens in general, will not receive anything is even more acute with individual awards than with collective awards. This preferential treatment of some vis-à-vis others may lead to the stigmatization of victims receiving compensation and to tensions within the society in which they live.⁶

⁵ ICTJ, *Reparations in Theory and Practice*, cited above

⁶ ICTJ, *Reparations in Theory and Practice*, cited above, p. 5.

2. Collective awards

20. Collective reparation awards in the spirit of Rule 98 (3) and Regulations 69 to 72 of the RTFV, on the other hand, respond to the shared experience that has manifested itself both in the form of shared suffering and in the form of offering a reparation award. A collective approach to defining reparation can address the collectivity in a context where mass atrocities have occurred and where it proves challenging to involve all victims in an individual reparation application process.
21. There is an emerging trend in reparation theory towards “collective” or “community” reparation.⁷ Collective reparations deliver a benefit to people that suffer harms as a group which as a consequence often affects the social cohesion and community structures (especially in places with a strong sense of collective identity).
22. Collective reparations can help to re-establish social solidarity if designed together with victim communities and include reconciliation efforts. Collective reparations can also maximise the use of minimal resources available to fund reparations. Furthermore, they may be particularly appropriate when one seeks to simplify the delivery of reparations because of practical limitations or of concerns about “drawing a too stark line between classes of victims or between victims and non-victim groups”⁸.

3. Distinguishing between collective and individual awards

⁷ De Greiff, Pablo. 2009. “Articulating the Links between Transitional Justice and Development” in *Transitional Justice and Development: Making Connections*, de Greiff, Pablo and Roger Duthie eds., New York: Social Science Research Council.

⁸ International Center for Transitional Justice, *Reparations in Theory and Practice*, cited above, p. 6

23. The relative advantages and limitations of each approach to reparation changes depending on the particular local context. Depending on how a reparation award is categorised, this will trigger different procedural requirements from a legal perspective, as will be explained in more detail in Section I of Part Three of this report.

24. Individual reparations cannot be reduced to disbursing cash and collective reparations may be far wider than offering an institution such as a school or hospital for the use of a community. In fact, in practice the difference between an “individual” and “collective” form of reparation may be quite subtle and manifest itself primarily in the role that the beneficiaries are to play in the design, implementation and oversight of their assistance.

25. For example, would a scholarship fund set up to finance education of former child soldiers have to be considered a collective or an individual form of reparation? One could imagine both: on one hand, such a scholarship fund could be conceived as a collective award in the sense that it may be set up to be managed by a community and it may be addressing the collective harm experienced by a group of beneficiaries: the OTP has argued⁹ that the use of child soldiers destroys the very fabric of society- to educate and reintegrate these children and adolescents benefits the former child soldiers as a group as well as it could restore the social fabric and heal the community. On the other hand, scholarship to child soldiers who have been individually identified by the Court or the TFV might have to be considered to be

⁹ Press release of the OTP of 23.06.2004; ICC-OTP-2004 0623-59

individual reparations. And in practice, to the recipient of the scholarship this distinction will most likely not matter.

26. By designing a comprehensive and integrated individual and collective award, reparations could address the multiple dimensions of victimisation due to the conscription, enlistment and participation of child soldiers including, but not limited to the fact that the child soldiers may have been actively engaged in active conflict as well as served as cooks, porters, or messengers. Victimisation may also include girls and boys recruited sexual abuse and/or forced marriage.

D. Gender and reparations: challenges and opportunities

27. If reparation awards are to be considered, it could be argued that the female victims, because of the nature of their experience and because of their social and cultural surroundings, need distinct mechanisms that facilitate their recovery and reintegration in a different way than their male peers.
28. Integrating a gender dimension to reparation orders will ensure that women are involved in the design, implementation and monitoring of the reparation process; and that reparations are responsive to the particularities of women's vulnerability and their roles vis-à-vis their communities.¹⁰

¹⁰ UN WOMEN, *In Pursuit of Justice, 2011-12, Progress of the World's Women*; electronically available at <<http://progress.unwomen.org/pdfs/EN-Report-Progress.pdf>>

29. A gender sensitive approach to defining and administering reparations is further validated by the Trust Fund's research conducted with victims in the situation and described in detail in Part Two, Section III, titled "Learning from the Trust Fund's rehabilitation mandate" of this report.
30. In the *Lubanga* case, the accused stands trial on charges limited to the enlistment and conscription of child soldiers and 87% of victim participants in the main trial are male.¹¹ However, reparation orders must also address in a meaningful way the suffering of women and girls who have been victims of the enlistment and conscription.
31. As Radhika Coomaraswamy, Under-Secretary General and Special Representative of the Secretary General of the UN for Children and Armed Conflict stated in her expert testimony on 7 January 2010, when girls are being recruited to actively participate in conflict they play multiple roles which may differ from the men and boys, including: combat, scouting and partnering; as well as sexual slavery and forced marriage. She advised that "the central abuse perpetrated against girls during their association with armed groups after they have been recruited or enlisted, regardless of whether or not they mostly engaged in direct combat functions during conflict should not be ignored."¹² She also claimed that the practical barriers that women face in accessing reparations should be a priority for consideration.¹³
32. In designing and administering reparations, it is important to consider the cultural and social contexts surrounding the role of women and their

¹¹ Women's Initiatives for Gender Justice, *Gender Report Card*, 2010, p. 190.

¹² *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, transcript, ICC-01/04-01/06-T-223-ENG, p 15 line 25, p 16 lines 1-2.

¹³ *Ibid.*

access to basic services and information when designing a reparation award and implementation process. For example, “women’s greater difficulties in complying with formal requirements for obtaining reparations (such as identification, certificates, official documents, etc.); their greater difficulty in accessing information (linguistic barriers, illiteracy, etc.) or having a bank account; their degree of involvement in civil society organisations that function as intermediaries in either the identification and registry of victims or the delivery of services; and their geographical distance from the agencies that decide on reparations or deliver services.”¹⁴

33. If appropriately designed and delivered with the aim of addressing underlying gender inequalities in mind, reparations can also play a significant role in bringing about transformative change in the lives of women and girls.
34. Reparation programmes could be broad in scope to encompass the specific suffering that women have faced. Reparations that support women’s economic empowerment can contribute to transformative justice by placing them in a better position to break with historic patterns of subordination and social exclusion.¹⁵
35. This does not mean that monetary compensation would be the most appropriate means of reparation because cash settlements can also create

¹⁴ Ruth Rubio Marin, International Center for Transitional, *Gender and Reparations: Challenges and Opportunities, Justice*, 2010, white paper., electronically available at <<http://es.ictj.org/static/Gender/0602GenderReparations.eng.pdf>>

¹⁵ UN WOMEN, *In Pursuit of Justice, Progress of the Women’s World 2011-12*, cited above, with further references to decisions of the UN Human Rights Council 2010 and C. Chinkin 2008.

tensions if they are not administered sensitively. It is important to ensure that women can actually access the money, in contexts where they may not have bank accounts, the necessary forms of identification, or exercise little control over their own income.¹⁶

36. If monetary compensation was to be considered as part of a reparations order, a gender sensitive approach would be to administer this type of compensation through a community savings scheme called "MUSO" (*la mutuelle de solidarité*) that already exists in the Democratic Republic of the Congo (DRC). The Trust Fund is now integrating this type of activity through its rehabilitation projects so that victim survivors (and often women and girls) organise savings groups to provide both a sustainable source of credit, and a source for emergency funds to cover personal emergencies as they arise.

III. Defining the eligibility criteria to benefit from reparation awards

37. Regulation 46 of the RTFV defines who may benefit from resources collected through awards for reparations. It states that "resources collected through awards for reparations may only benefit victims as defined in rule 85 of the Rules of Procedure and Evidence, and, where natural persons are concerned, their families, affected directly or indirectly by the crimes committed by the convicted person." Furthermore, organisations and institutions may also be victims if they meet the requirements of Rule 85 of the RPE.

¹⁶ Ibid., reference to UN Human Rights Council 2010c.

38. The definition given in Rule 85 RPE sets out who may be a “victim” before the ICC. Accordingly, eligibility for reparation awards is determined by whether a victim has suffered harm, and if so, whether harm “the result of” the crime of which the perpetrator is convicted.
39. The Chamber will need to define the concept of victims affected directly and indirectly (as referred to in Regulation 46 of the RTFV) by the crimes as indicated for the purposes of reparations. In the case of defining indirect victims, the level of causality will need be recognised for the purpose of a reparations order.
40. The Trial and Appeals Chambers have in a series of decisions clarified the boundaries of the concept of victim for the purposes of participation in ICC proceedings. Based on these decisions, the following three categories of persons have qualified as victim participants in the *Lubanga* case: “direct victims” have been defined as the children used as soldiers;¹⁷ and “indirect victims” have been defined as persons with a close relationship to the child soldiers (such as their parents) and those who have suffered as a result of their attempts to prevent the recruitment of child soldiers (this latter category may include organisations or institutions).¹⁸
41. Conversely, the Chamber found that “excluded from the category of ‘indirect victims’, however, are those who suffered harm as a result of the conduct of direct victims”, i.e. persons who are victims of crimes committed by child soldiers in Lubanga’s forces.¹⁹

¹⁷ *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on ‘indirect victims’, 8 April 2009, ICC-01/04-01/06, paragraph 48.

¹⁸ Decision on ‘indirect victims’, cited above, paragraph 51.

¹⁹ Decision on ‘indirect victims’, cited above, paragraph 52.

42. Accordingly, should the Chamber decide to apply the same criteria set forth for participation purposes to the reparation process,²⁰ then reparations ordered in the *Lubanga* case could be limited to benefitting child soldiers of the *Union of Congolese Patriots* (UPC)/the *Forces patriotiques pour la libération du Congo* (FPLC), their next of kin, and those who were victimised as a result of efforts to prevent use of child soldiers by the UPC/FPLC only.
43. However, from a procedural perspective, reparation proceedings may have a different objective than the trial, namely to provide redress for the victims following a guilty verdict. Hence, the role of victims in these proceedings would not only be limited to that of participants; they would become parties to the reparation proceedings.
44. According to Article 75 (2) of the Statute, the Court may order reparations not only to, but also “in respect of victims”. The TFV recalls that it has been argued that the purpose of ordering reparations “in respect of” victims may be to extend the scope of application of Article 75 to persons indirectly affected by the crime, or the heirs of victims, and thus to enable the Court to award reparations to the benefit of as many of those affected by the crimes under the jurisdiction of the Court as possible, including family members of direct victims, other indirectly harmed persons or collectives of victims.²¹

²⁰ Procedurally, as discussed above, victims may apply for participation in the proceedings without seeking reparations, or may apply for reparations without having previously sought participating victim status.

²¹ See E. Dwertmann, *The Reparations System of the International Criminal Court*, Martinus Nijhoff Publishers, Leiden 2010, p. 111,112 with further references.

45. In the Trust Fund's view, while it will be difficult for every victim that his or her case is not addressed in a trial, victims whose harm is not covered by the charges may also be unable to benefit from a reparations award. The consequences of the strategic choice of the prosecution on which charges to make, may be particularly difficult for certain groups of victims to understand and accept. This may lead to reparation awards being perceived as inequitable and unfair in a context where victims have very little access to justice and redress measures.

IV. Determination of the nature of harm, including the applicable standard of proof

A. General considerations

46. Determining the nature of harm suffered by the victims is a necessary pre-requisite for making determinations about how that harm can be remedied. The Chamber will have to identify the different forms of harm suffered by victims (e.g. loss of opportunity, damage to life plan, material or psychological harm) on an individual basis. In addition, the recruitment and enlistment of child soldiers may also have caused "collective harm" to a community, its social fabric and way of life.
47. The Chamber will have to decide the applicable standard of proof that victims need to attain in order to benefit from a reparations award. The question of what may be the applicable standard of proof relates the content of the principles which are to be established by the Court under Article 75(1).

48. In the absence of general principles already established, the standard of proof for reparation proceedings should be set by the Chamber.

B. Forms of proof that may be accepted

49. It will be desirable in reparation proceedings to implement methods which would reduce the burden placed on victims to produce evidence to support their claims. Such an approach not only responds to the practical difficulties likely to be faced by victims in securing evidence in respect of their claims but could also serve to reduce the likelihood of fraud. Depending also on what form of reparation is chosen, there may be a difference in the standard of proof suitable with respect to collective awards and individual awards.
50. By way of example, in some instances administrative reparation processes have sought material relating to claims directly from third parties (usually organisations or institutions) rather than requiring that such material be presented by applicants themselves. For example:
- The *First Claims Resolution Tribunal for Dormant Accounts in Zurich, Switzerland* operated under a system by which claims arbitrators themselves were empowered to make inquiries into the factual circumstances of claims. This was implemented, *inter alia*, by contacting relevant financial institutions to seek information directly from them, in addition to making inquiries of claimants.
 - The *German Forced Labour Compensation Program*, implemented through the International Organisation for Migration (IOM), involved the latter

seeking evidence through cooperation from independent archives and by conducting its own research.

- The *United Nations Claims Commission* collected information from external sources (such as residency databases from Kuwait and Iraq, border control records and airline flight manifestos) in order to verify claims.
- The *Commission for Real Property Claims for Displaced Persons and Refugees in Bosnia and Herzegovina* also adopted an active fact-finding process of its own, referring for example to cadastral and other municipal records to locate information missing from claims.

51. In the *Lubanga* case, the Chamber could seek cooperation from national and international organisations engaged in the disarmament and demobilisation of child soldiers in the Ituri region. However, not least because of the inevitable public attention that reparation proceedings before the Court will attract, organisations may be hesitant to cooperate with the Court. Depending also on what form of reparation is chosen, and there may be a difference in the standard of proof suitable to collective awards and that suitable to individual awards, the Chamber might, at its discretion, apply a more relaxed standard than that it applied during the main trial.

V. Available sources of information in reparation proceedings/hearings

52. In deciding on reparations awards and the procedures to be followed during reparations proceedings in a particular case, the Chamber may wish to seek information from various sources.
53. Article 75 (3) of the Rome Statute states that before taking a decision, the Court “may invite and shall take account of representations from and on behalf of convicted person, victims, other interested persons and interested States”. Giving victims a voice in the process to explain their needs and concerns will be vital in ensuring meaningful reparation proceedings.
54. The Trust Fund submits the following observations on possible sources that in its view may be of guidance to the Chamber, irrespective of the procedural approaches adopted for reparation proceedings.

A. Representation of the views of victims

55. The participation and representation of victims and victim groups in the design and the implementation of reparation awards will be crucial to ensuring that the reparation awards ordered respond the harm suffered, and are meaningful, locally relevant and culturally appropriate.
56. Involving the community in which the reparations are to be implemented may also contribute to the awards being appreciated as fair and legitimate. The selection of the victim beneficiaries must also be transparent to ensure support for the implementation of the reparation

awards within the affected communities. Public acknowledgment both by the Court but also within the affected communities of the harm suffered will help to legitimize the award.²²

1. Individual victims

57. Under Article 75(3) of the Rome Statute, the Chamber may invite victims to make representations regarding reparations proceedings.
58. In the Trust Fund's view, Article 75(3) refers to victims in general, rather than to victims who are participating in the proceedings, allowing for a broad interpretation by the Chamber of this provision if deemed appropriate.
59. Accordingly, it would be open to the Chamber to consider victims of crimes other than those in respect of which a person has been convicted as "victims" under Article 75(3). Alternatively, the Chamber could allow representations as "other interested persons," if it deems this to be useful. Thus, the Chamber may receive input from victims not linked to the case regarding the possible impact of a reparations order within and between victim communities.
60. Given the scale of crimes on the case, it does not seem feasible that the majority of victims could travel to The Hague to give testimony. There are a number of technical options as to how individual victims may be heard if they cannot appear in themselves, including the option of an *in situ* hearing; victims could appear in person through video-link; or

²² See ICTJ, *Reparations in Theory and Practice*, cited above

individual victims may present their views in writing or by video recording.

61. Given that the crimes charged affect first and foremost children and youth, some victims may still be minors today. It will be necessary for the Chamber to consider how victims who are minors can voice their views regarding reparations, and whether their legal guardians could or should speak on their behalf.
62. Furthermore, the needs of vulnerable victims, such as disabled victims, girl and young women victims, may be different from the majority of victims heard. The Court will have to ensure that the necessary measures will be put in place to protect those who may be stigmatised by testifying while ensuring the fairness of proceedings to all parties involved, including the accused.
63. Even if the Chamber adopts an approach which is not based on individual applications, it will also need to consider the reparation forms filed by individual victims already received by the Registry. Details provided on these applications may contain valuable information as to what victims want and need in terms of reparations.

2. Victims' counsel

64. There is an important role to play in reparations proceedings for counsels who have represented victim participants or have been asked by victims to represent their interest in the reparation hearings. This representation is more straightforward in a strictly applications-based approach.

65. In case the Chamber adopts an approach that does not solely rely on applications, the Chamber may consider instructing victims' counsel to also reflect on, as part of their representation, the concerns of those victims who were not able or willing to come forward to apply to the Court but who still may be deemed eligible for reparations.
66. The Chamber may also wish to rely on Regulation 80 of the Regulations of the Court in order to appoint a legal representative of victims, if desired.

3. Community leaders/representatives

67. Community leaders or representatives could speak on behalf of those victimized in their communities. However, community leaders' perceptions are invariably more politically conscious and therefore victims' perceptions of their needs may often differ greatly from their views. In fact, community leaders may have a tendency to ensure widely inclusive programs or peace building programs as opposed to addressing the individual or collective suffering of particular group of individual victims. In particular, they may not reflect the needs of those victims who have suffered from specific forms of harm. Accordingly, reaching and involving women victims will be crucial given the particular social stigma and prevalence of sexual violence in violent conflicts, including the Ituri conflict before the Chamber.

68. Reaching out to and involving women community leaders and representatives will be important to ensure their voices are represented and heard.
69. Moreover, it is important to note that community leaders in the areas where the Registry missions were conducted in March to June 2010 often denied that there were any former child soldiers in their area. However, when asked about possible reparations, they were willing to provide ideas about what form of reparation might be appropriate (most mentioned are education and vocational training, in particular).²³
70. It is very difficult to predict at this point, whether or not community leaders would be ready to participate in reparations proceedings, should they arise. The response might also vary depending on whether reparation were to be limited to direct victims of the case or targeted at wider victim communities.
71. Community leaders who are willing to appear in Court may be allowed to speak on behalf of their communities. However, this would have to be done in a sensitive way, ensuring that the needs of vulnerable groups, such as women and children, and their access to the decision-making processes so that they are fairly represented. The Chamber will also have to bear in mind that these leaders may not necessarily be neutral agents but have their own agendas. Moreover, they might not necessarily be able to represent the diverse views of all victims as defined by the Court.

²³ see email of the Trust Fund and the Registry to Trial Chamber I, containing informal *Responses of the Registry and the Trust Fund for Victims to Questions on Reparations Procedure posed by Trial Chamber I*, of 5 November 2010, answers to question 4

B. The Parties

72. Article 75(3) empowers the Chamber to invite and take into account representations from convicted persons. Convicted persons are to be notified of requests for reparations received in order to enable them to make representations (Rule 94(2) RPE). Under Rule 97(2) RPE, convicted persons may also request the Court to appoint appropriate experts in reparations proceedings, and the Court may invite convicted persons to make observations on the reports of any experts heard.
73. The role of the Prosecutor in reparation proceedings is less clear. None of the Court's legal texts provide a clear basis for the involvement of the Prosecutor in this stage of proceedings, although neither do they prohibit it.

C. Interested States

74. The Chamber may invite, under Article 75(3), representations from interested States. This possibility is deliberately broad and not intended to be limited to States parties or the State, in which the crime is committed. The provision could therefore be given a broad interpretation so as to include any State which is potentially affected, whether directly or indirectly, by an award of reparations in the case before the Chamber. Furthermore, "interested States" are among those who are to be notified of requests for reparations (Rule 94(2)) and/or of a Chamber's decision to proceed under Article 75(1) on its own motion (Rule 95(1)). In such instances, it may be necessary for the Chamber to determine which States are "interested" and accordingly should be notified.

D. Other interested persons and organisations

75. The Chamber may also consider it useful to take into account the views of other persons during reparations proceedings. This might include other persons who are affected by a contemplated reparations award, such as other members of the community where victims reside, or victims not linked to the case. Under Article 75(3), "other interested persons" may make representations in the context of reparations proceedings, however, the scope of this term has not yet been judicially determined.
76. Another avenue to involve other interested persons to be considered could be to do so through consultations and reports by the Registry and the Trust Fund.
77. It is noted that the Trust Fund under its Regulation 49 RTFV has an explicit mandate to also consult with victims.
78. Additional views on the questions of reparations might be solicited or accepted by the Chamber through the use of Rule 103 RPE.

E. Trust Fund for Victims

79. The Trust Fund's own experience of working in the situation with victims of crimes within the jurisdiction of the Court may be of assistance to the Chamber in reaching a determination regarding reparations.

80. In particular, the Trust Fund considers that its multi-disciplinary knowledge and expertise with more than four years of implementing its general assistance mandate to victims of comparable crimes in the Ituri region qualifies it for participation in reparations proceedings, especially if also the source of funding these orders is expected to be complemented by or provided for by the Trust Fund.
81. Accordingly, the Chamber may wish to invite the Trust Fund to share its expertise in the course of the reparation hearings, in spite of the fact that Article 75 (3) of the Statute does not explicitly name the Trust Fund for Victims as an interested party.

F. Experts

82. Under Rule 97(2) RPE, the Chamber may appoint appropriate experts to assist it in reparations proceedings. This may be done either on the request of the convicted person, the victims, or on the Chamber's own motion.
83. The Registry and Trust Fund have prepared a list identifying possible categories of experts which might be relevant to the decisions arising in the course of potential reparation proceedings²⁴. Both parties are ready to assist the Chamber with identifying individual experts in these categories upon request.

²⁴ see email of the Trust Fund and the Registry to Trial Chamber I, containing informal *Responses of the Registry and the Trust Fund for Victims to Questions on Reparations Procedure posed by Trial Chamber I*, of 5 November 2010, annex on list of experts

VI. Addressee of the Chamber's order for a reparation award

A. The convicted person

84. The central norm in the Rome Statute that guides reparations to victims is Article 75 of the Rome Statute. Paragraph 2 of Article 75 addresses the question of a Court order on reparations. It states:

“The Court may make an order directly against a convicted person specifying appropriate reasons to, or in respect of, victims, including restitution, compensation, and rehabilitation.

Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in Article 79.”

85. According to Article 75 (2), first sentence, if the Court decides to make a reparations award, the Chamber's orders are to be made “against a convicted person.”
86. The term “against the convicted person” reflects the logic underlying ICC proceedings as criminal trials about the guilt or innocence of the accused and implies that awards for reparations are directly related to the conviction. Accordingly, the reparation award ordered by the Chamber implies the recognition of the personal harm that the victim benefitting from this order has suffered and the criminal responsibility of the convicted person for having caused this harm in violation of the law.

87. In cases without a conviction -whether because the accused has not been found guilty, has died in the course of the proceedings, or when the Court has not been able to conduct a main trial (e.g. due to lack of an arrest)- victims will not be in a position to benefit from a reparations order under Article 75 (2).

B. States and non-State actors

88. Under human rights law and other legal and moral principles, States can be held responsible for the suffering of the victims.²⁵ The Statute, the Rules of Procedure and Evidence and Trust Fund Regulations, however, are silent on the possibility of ICC reparations awards against States.
89. In fact, reparation orders against States were considered and rejected by the State Parties when the Rome Statute was negotiated.²⁶ Moreover, fundamental reasons of procedural fairness (due process) rule out that a reparations award against a State could be based on the facts as established in the context of a case in which the State is not the respondent party but in which the individual culpability of an accused is the objective of the trial, as is true for all cases before the International Criminal Court.

²⁵ See e.g. Permanent Court of Arbitration, Chorzow Factory Case (Ger. V. Pol.), (1928) P.C.I.J., Sr. A, No.17, at 47 (September 13); International Court of Justice: Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), Merits 1986 ICJ Report, 14, 114 (June 27); Corfu Channel Case; (UK v. Albania); Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, p. 184; Interpretation des traites de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, deuxième phase, avis consultatif, C.I.J., Recueil, 1950, p. 228. See also Article 1 of the draft Articles on State Responsibility adopted by the International Law Commission in 2001: "Every internationally wrongful act of a State entails the international responsibility of that State. (UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001" (ILC draft Articles on State Responsibility)).

²⁶ See *Report on the Establishment of an International Criminal Court, Draft Statute and Final Act*, UN Doc. A/Conf.183/2/Add. 1 (1998) as cited in E. Dwertmann, *The Reparations System of the International Criminal Court*, cited above, p.52, footnote 212.

90. Nonetheless, “interested States” have an important role to play in reparation proceedings in the *Lubanga* case and they do have the right to present their views in this context.²⁷ Their active cooperation will be vital when implementing a meaningful reparations order, in particular with respect to collective reparations or reparations under Rule 98 (4) RPE.
91. The role of States in reparation proceedings is set out in various provisions: in addition to Article 75 (3), which explicitly lists States as a source of information for the Chamber to rely on in making the reparation order, Article 75 (5) Rome Statute refers to Article 109 and provides that States shall give effect to a reparations order through the enforcement of fines and forfeitures.
92. According to Rule 96 RPE, interested States shall be informed in case the Court decides to publicize a reparations proceeding on its own motion and states may be asked by the Court to cooperate to assist in giving wide publicity to reparation proceedings. According to Rule 98 RPE *inter alia* interested States shall be invited to make observations in the assessment of reparations.
93. Furthermore, according to Rule 98 (4) RPE the Court may order an award for reparation to be made through the Trust Fund to an intergovernmental, international or national organisation approved by the Trust Fund, following consultations with the Trust Fund and interested States.

²⁷ Article 75 (3) states explicitly that before making a reparations order “the Court may invite and shall take account of representations” *inter alia* of interested states.

94. In addition, the Rome Statute emphasises that an ICC reparations order does not diminish any responsibility of the State to make reparations to victims that rest upon States under other treaties,²⁸ including human rights treaties.
95. The same reasoning given in the context of States applies to excluding the possibility of reparations awards against non-State actors. This category includes organisation of a political and/or (para-) military nature, such as the *Union of Congolese Patriots* allegedly led by the accused.

C. Trust Fund for Victims

96. As previously stated, the Court's order for reparation is to be made "against the convicted person". However, Article 75 (2) in the second sentence states that "where appropriate, the Court may order that the award for reparations be made **through** the Trust Fund provided for in Article 79". [*emphasis added*]
97. The meaning of this second sentence and its interplay with the first sentence may give rise to debate, in particular when looking at the English version of the second sentence of Article 75 (2). Questions may arise as to what the role of the Trust Fund and its "other resources" with regard to reparations orders may be within this context. It may seem open for debate whether the Court may order the Trust Fund to use its

²⁸ Article 75 (6) states explicitly "nothing in this Article shall be interpreted as prejudicing the rights of victims under national or international law." Article 25 (4) states that "no provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law."

“other resources” (i.e. voluntary contributions collected through donations) to pay a reparations order where there are insufficient funds to be expected from the convicted person.²⁹

1. Under the Statute and the Rules of Procedure and Evidence

98. A closer examination of the legal text may bring clarity. Article 75 states in the first sentence that the Court may make an order directly against a convicted person and continues in the second sentence with “where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in Article 79”. One plausible interpretation of Article 75 (2) second sentence is therefore that only once **an order for reparations has been made against a convicted person, the award can be ordered to be made through (the intermediary of) the Trust Fund.**
99. Furthermore, while the term of the English version “through the Trust Fund” already indicates an intermediary quality, the wording of other official language versions can be of assistance in bringing clarity as to what is meant. In particular, the language in the French version of Article 75 (2) second sentence is quite clear. It reads: “Le cas échéant, la Cour peut décider que l’indemnité accordée à titre de réparation est versée **par l’intermédiaire** du Fonds visé à l’article 79.” [*emphasis added*]
100. Accordingly, the term “through” [the Trust Fund] is to be understood to indicate the intermediary/implementation role of the Trust Fund in the

²⁹ see e.g. Decision of Pre-Trial Chamber 1, ICC-01/04-492 of 11 April 2008, in the situation in the Democratic Republic of Congo reasoning on page 7, which may be interpreted that the Pre-Trial Chamber considers that the Court may order the Trust fund to use its voluntary resources to fund a reparation order that the Court issues because of the use of the term “comply”.

Court's reparation system as juxtaposed to the word "directly" [against the convicted person] used in the first sentence.

101. Rule 98 of the RPE paragraphs 1 to 4, confirm this reading. Paragraphs 2 to 4 of the RPE describe a number of situations in which it is not practicable for funds seized from the convicted person to be directly paid out to victims for reparations. It is in these situations that the reparation awards shall be made "through the Trust Fund"; in other words in those cases the Trust Fund shall have a role as an intermediary and administrator of the funds³⁰. Rule 98 (2) of the RPE reads that "the Court may order that an award for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim." It continues to state that "the award for reparations thus deposited in the Trust Fund shall be separated from other resources of the Trust Fund and shall be forwarded to each victim as soon as possible".
102. The Trust Fund may also be the most convenient body to administer collective awards (Rule 98 (3))³¹ and in cases where a reparations order is to be made through the Trust Fund to an intergovernmental, international or national organisations (Rule 98 (4)).³²

³⁰ The Regulations of the Trust Fund contain a detailed legal framework setting out how different scenarios foreseen under Rule 98 of the RPE will have to be addressed at implementation stage. This will be discussed in more detail in Part Three, Section I below.

³¹ In fact, 98 (1) (2) and (3) explicitly state that the award is an award against the convicted person and may be in the case of 98 (2) and (3) be ordered to be made "through" the Trust Fund.

³² In this context one must note also that Rule 98 (5) of the RPE, as opposed to 98 1-4 of the RPE, does not contain any explicit reference to reparation awards. It states more generally that other resources of the Trust Fund may be used for the benefit of victims subject to Article 79 of the Statute which in its third paragraph makes reference to the authority of the ASP to set the criteria for the management of the Trust Fund. As discussed earlier, the ASP made use of this authority by adopting the Regulations of the Trust Fund. Regulations 47 and 48 address "other resources". Regulation 48 reiterates that the "other resources" should be used to benefit

103. At the time of the drafting of the Rules of Procedure and Evidence, the option to include into the text a specific rule to allow the Court to order the Trust Fund to make funds available for specific reparations was proposed by some delegations and discussed. It was eventually rejected based on the fact that the Court did not have the necessary control or authority over the Trust Fund as to be able to do so³³ because the Trust Fund's accountability for the management of received voluntary contributions is directly to the Assembly of States Parties, rather than to the Court.
104. It is also noteworthy that Article 75 (3), which lists those who can be heard in reparation proceedings, does not mention the Trust Fund explicitly. Moreover, also Article 82 (4) of the Statute, which lists those who can appeal against the Trial Chamber's order for reparations, mentions the legal representative of victims, the convicted person, and a good faith owner of property seized, but not the Trust Fund. If the Trial Chamber could order the use of Trust Fund's "other resources" for the reparations award, due process would require that the Trust Fund be allowed firstly to be heard in reparation proceedings and then, should it be concerned by it, also to appeal against the Chamber's order.

victims of crimes as defined in Rule 85 who have suffered physical, psychological, and/or material harm. Regulation 50 a) which gives the basis for the Trust Fund's general assistance mandate mirrors the forms of harm listed in Regulation 48 by providing that the Trust Fund shall be seized "when the Board of Directors considers it necessary to provide physical or psychological rehabilitation or material support for the benefit of victims". It therefore seems that Rule 98 (5) refers to the Trust Fund's general assistance mandate.

33 See E. Dwertmann, *The Reparations System of the International Criminal Court*, page 273; P. Lewis, H. Friman: "Reparations to victims" In :*The International Criminal Court – Elements of Crime and Rules of Procedure and Evidence*"; Ed. R.S. Lee Ardsley, NY 2001, pp. 474 ff. at p. 487,488.

2. Under the Regulations of the Trust Fund

105. On 3 December, 2005 the Assembly of States Parties at the 4th plenary meeting adopted the Regulations of the Trust Fund. Art 75(2) of the Statute and Rule 98 of the RPE must be read in light of these Regulations: both Art 75(2) of the Statute and Rule 98 of the RPE explicitly refer to Article 79 of the Statute, which the ASP has further interpreted and elaborated upon by setting out a detailed legal framework to ensure the proper functioning of the Trust Fund in the Regulations.
106. The Trust Fund is obliged in Regulation 34 of the RTFV to separate resources collected through awards for reparations from the convicted person away from the resources of the Trust Fund. In doing so, the Trust Fund must “note the sources and amounts received, together with any stipulations contained in the order of the Court as to the use of the funds.” Accordingly, the Court may in its order clearly set out how these funds are to be used and the Trust Fund will comply with the “stipulations of the Court” in using these resources.
107. Regulations 43 to 46 of the RTFV provide substantive and procedural details as to how the Trust Fund shall implement any stipulations and instructions of the Chamber regarding these funds, and give the Trust Fund in Regulation 45 the option to seek further instruction from the Court, if necessary. Specifically, Regulation 43 of the RTFV states:

“When resources collected through fines or forfeiture or awards for reparations are transferred to the Trust Fund pursuant to article 75, paragraph 2, or article 79, paragraph 2, of the Statute or rule 98, sub-rules 2-4, of the Rules of

Procedure and Evidence, the Board of Directors shall determine the uses of such resources in accordance with any stipulations or instructions contained in such orders, in particular on the scope of beneficiaries and the nature and amount of the award(s)."

108. The Regulations of the Trust Fund not only address what the Trust Fund shall do with any funds received through awards for reparations. They also contain in Regulation 56 the only legal provision expressly providing for the use of 'other resources'³⁴ by the Trust Fund for reparation awards. The first sentence of Regulation 56 states:

"The Board of Directors shall determine whether to complement the resources collected through awards for reparations with "other resources of the Trust Fund" and shall advise the Court accordingly."

109. Regulation 56 of the RTFV will be discussed in the following section of the funding of a reparation award. However, for the purpose of determining who may be considered a possible addressee of the Chamber's reparation order, it is important to note the clear difference in language between Regulation 43 and Regulation 56. Regulation 56 lacks any reference to "stipulations and instructions" and its language makes

³⁴ The term 'other resources' is legally defined in regulation 47 RTFV, which states: "For the purpose of these regulations 'other resources' of the Trust Fund set out in rule 98, paragraph 5 of the Rules of Procedure and Evidence refers to resources other than those collected from awards for reparations, fines and forfeiture."

clear that Regulation 56 leaves the discretion to decide upon the use of Trust Fund's "other resources" to the Board of Directors.³⁵

VII. Funding of a reparation award

110. For Court-ordered reparations at the International Criminal Court to be considered fair and responsive to the rights and needs of victims concerned, securing a sound financial foundation will be of paramount importance.
111. The various forms of administrative reparation programs such as national transitional justice efforts e.g. in Argentina, Colombia, Hungary or Morocco and reparations ordered in proceedings before international human rights courts, e.g. cases before the Inter-American Court of Human Rights, the European Court of Human Rights and, although these are not judicial bodies, the UN Human Rights Committee and UN Committee on Torture, rely on State responsibility. State sponsorship of reparations programs may thus be in a position to ensure sufficient and predictable resources. However, this is not an option foreseen under the Statute.

³⁵ At its annual meeting in March 2011, the Board of Directors of the Trust Fund for Victims discussed the meaning of Regulation 56 with a view to preparing for the Trust Fund's reparation mandate in light of the progress of the trial proceedings in cases pending before the Court so as to be in a position to share its interpretation with the Court. The Board took a formal decision that according to its interpretation, the use of the Trust Fund's "other resources" to pay for reparations awards can only take place upon decision by, and at the discretion of, the Trust Fund Board.

A. The convicted person

112. In contrast, reparations awarded by the ICC are of a judicial nature, flowing from the principle of individual criminal responsibility. Therefore, the primary financial responsibility to pay for reparation awards lies with the convicted person.³⁶
113. It is of very great importance that the Court does everything in its power to protect any available assets of accused persons at a very early stage for the purpose of possible future reparation proceedings.
114. In fact, in its the decision of 31 March 2006 (ICC-01/04-01/06-62), Pre-Trial Chamber 1, with Judge Steiner acting as a single judge, required the States Parties to the Statute “to take all necessary measures, in accordance with the procedures provided in their national law, in order to identify, trace, freeze and seize the property and assets of Mr Thomas Lubanga Dyilo (...).”³⁷
115. Nonetheless, the assets to be expected from the accused in the present case appear to be limited at best and may most likely be insufficient to redress the harm of victims who have suffered as a result of crimes of which the accused may be found guilty. However, even symbolic

³⁶This becomes clear when looking at Article 75 (4) which allows the Court, after a conviction, to seek measures of cooperation from State parties under Article 93 (1) k to freeze or seize proceeds, property and instrumentalities of crime. Furthermore, the Court may also at a much earlier stage, at the moment of the issuance of an arrest warrant under Article 57 (3) e or a summons to appear (Article 58) make a request to a State Party in accordance with Article 93 k to protect the assets for the purpose of possible future reparation proceedings. Rule 99 of the RPE gives further details as to how such cooperation and protective measures of forfeiture shall be carried out.

³⁷ The assets of Mr. Lubanga have also already been frozen in 2005 by virtue of United Nations Security Council resolution 1596, UN document S/RES/1596 (2005), a fact of which the Pre-Trial Chamber decision takes note.

gestures of support provided by the convicted as a form of reparation could have great meaning for the victims.

B. Trust Fund for Victims

116. The Regulations of the Trust Fund make clear that it administers two categories of resources for funding reparation awards, which it is obliged to keep strictly separate: *money and property collected through fines and forfeiture* (referred to in Regulation 21b), and *awards collected for reparations pursuant to Rule 98 RPE* (referred to in Regulation 21c).
117. *Other resources* (legally defined in Regulation 47), include in particular those collected through voluntary contributions, (referred to in Regulation 21a) and any resources allocated by the ASP in accordance with Regulation 21d of the RTFV.
118. The first category of funds, *money and property collected through fines and forfeiture* (referred to in Regulation 21b), and *awards collected for reparations pursuant to Rule 98 RPE*, can only be used for reparations awards against the person the funds were seized from (i.e. the convicted person). These funds cannot be used to support the Trust Fund's general assistance mandate.
119. As previously indicated, in accordance with the Statute, the Rules of Procedure and Evidence, Regulation 34 and Regulations 43 to 45 of the RTFV, the Trust Fund will use funds received through awards for reparations or fines and forfeiture as stipulated by the Chamber in a particular case.

The use of “other resources” (Regulation 47)

120. To mitigate the effects of insufficient funds (or even the total absence of assets or financial resources) from a convicted person, while maintaining the principle of individual criminal responsibility, the Assembly of States Parties adopted Regulation 56 RTFV, which provides the legal basis for the use of the Trust Fund’s “other resources” for the purpose of reparations.

121. These “other resources” have two purposes: firstly, they are the sole source of funding for the Trust Fund’s general assistance mandate under which the Trust Fund provides, in accordance with Regulation 48 and 50a) of the RTFV, assistance for the benefit of victims and their families in form of physical and psychological rehabilitation and material support; and secondly, they may be used for complementing reparation awards against convicted persons. Specifically, Regulation 56 of the RTFV states:

“The Board of Directors shall determine whether to complement the resources collected through awards for reparations with “other resources of the Trust Fund” and shall advise the Court accordingly.

Without prejudice to its activities under paragraph 50, subparagraph (a) [*i.e. the general assistance mandate*], the Board of Directors shall make all reasonable endeavours to manage the Fund taking into consideration the need to provide adequate resources to complement payments for awards under Rule 98, sub-Rules 3 and 4 of the Rules of Procedure and Evidence

and taking particular account of ongoing legal proceedings that may give rise to such awards.”

First sentence of Regulation 56

122. Once the Court has made an order for reparations against a convicted person, the modalities of this order, including whether it should be implemented “through the Trust Fund” will be indicated by the Chamber. The Trust Fund Board of Directors will then need to take a decision, in accordance with Regulation 56, determining whether (and how much) to complement³⁸ the resources collected through awards for reparations with “other resources of the Trust Fund.” Once the Board has approved the allocation of this funding, it will then respectfully advise the Chamber of its decision.
123. The authority of the Board to determine the use of its “other resources,”³⁹ including for the purposes of reparation, results not only from the clear language of Regulation 56 but also from the establishment of the Trust Fund within the Rome Statute alongside the Court and directly under the authority of the ASP as provided for in Article 79 (3) of the Statute. Within this structure, it is the Board’s role to be the directly responsible and accountable custodian over the available funds that the Trust Fund has collected in the form of “other resources.” The Board also has an obligation to report directly to the Assembly of States Parties on a

³⁸ There may be a problem with the term “complement” in cases where there is no financial contribution to be expected from a convicted person. In the view of the Trust Fund, even if the contribution of the convicted person to the financing of a reparations award will only be minimal or symbolic, this will not preclude the Trust Fund from offering its resources towards financing such an award.

³⁹ For the fact that voluntary contributions, also in the context of Regulation 56, are to be used as the Board of Directors seems appropriate see Carla Ferstman, and Mariana Goetz *Reparations and the International Criminal Court in “Reparations for victims of genocide, war crimes and crimes against humanity- systems in place and systems in the making”*, edited by Carla Ferstman, Mariana Goetz and Alan Stephes, Martinus Nijhoff Publishers, 2009 at pages 345 and 346.

regular basis in accordance with Article 79 (3) of the Statute, and Regulations 34 and 35 of the RTFV on the use of “other resources,” including the submission of the annual financial statement signed by the Chair of the Board.

Second sentence of Regulation 56

124. To ensure that Regulation 56’s first sentence may come to play in reparation proceedings, the second sentence of the RTFV contains an obligation for the Trust Fund to “make all reasonable endeavours to manage the Fund taking into consideration the need to provide adequate resources to complement payments for awards,” without prejudice to its general assistance mandate.
125. In this context, the Trust Fund notes that the second sentence of Regulation 56 may pose legal questions as to what form of reparation award the TFV may complement. According to this provision, the TFV Board must manage the funds available to it in order to be in a position to offer TFV “other resources” to complement collective reparations awards and awards “to an intergovernmental, international or national organisation” (under Rules of Procedure and Evidence Rule 98 (3) and (4)).
126. The lack of a reference to RPE Rule 98 (2), however, seems to exclude that it must manage its funds also with respect to retaining an adequate reserve for individual awards.
127. In accordance with Regulation 56 of the RTFV second sentence, and in compliance with a recommendation contained in the decision of Pre-Trial Chamber 1, ICC-01/04-492 of 11 April 2008 in the situation in the

Democratic Republic of Congo, the Trust Fund has reserved €1 million for complementing reparation orders in the cases currently pending before the Court.⁴⁰ This amount translates roughly into one third of the voluntary contributions currently available to the Trust Fund. The other two-thirds have been budgeted to assist up to 42,300 direct victim beneficiaries under the general assistance mandate in the DRC and northern Uganda, and for the upcoming programme to benefit victims of sexual and gender-based violence in the Central African Republic.

Interplay of the Trust Fund's mandates

128. The Trust Fund will consider the interplay between its two mandates, bearing in mind the second sentence of Regulation 56 stating that it should do so “without prejudice”, on a case by case basis. The interplay between the two mandates will need to consider certain legal and policy dimensions.
129. The Trust Fund’s mission to support programmes which address the harm resulting from the crimes under the jurisdiction of ICC by assisting victims to return to a dignified and contributory life within their communities, incorporates the complementary value to the ICC’s judicial reparations regime. This value needs to be appreciated in the context of the interplay between the Trust Fund’s two mandates.

40 In the non-operative part of the decision, the Pre-Trial Chamber stated: “The implementation of activities and projects in the execution of this further mandate [the Trust Fund’s second mandate under rule 98 (5)], including those referred to in the Notification of the Trust Fund, is on one hand, unrelated to Court ordered reparations, and on the other hand, subject to the responsibility of the Trust Fund to ensure that there are sufficient funds to comply with any reparations order that the Court may make under article 75 of the Statute.” The use of the word “comply” may suggest that in the view of the Pre-Trial Chamber the Court has the power to order the Trust Fund to use its other resources over and above any discretion on the Trust Fund’s part, based on 75 (2), 79 and Rule 98 (5) of the RPE. The Pre-Trial Chamber, however, did not engage in a more in-depth analysis of the wider regulatory framework for reparations, in particular Regulation 56 of the RTFV. However, based on the arguments made in the main text of this submission, the Trust Fund does not agree with such an interpretation of the non-operative part of the decision.

130. Furthermore, while the Trust Fund's reparations and general assistance mandates may reinforce each other, according to specific circumstances, each mandate does possess distinctive and intrinsic qualities and independent dynamics. Neither mandate stands in a hierarchical relationship *per se* to the other.

131. At the same time, there is functional accountability of the Board to the Court in well-defined circumstances related to both mandates, such as:

- *Court-ordered reparations* – accountability for use of fines, forfeitures and awards for reparations; and for reparation implementation plans approved by Court.
- *General assistance mandate* - accountability to the Court to avoid prejudice against on-going proceedings in a situation, and to parties associated in those proceedings.

132. As part of its financial management, and in accordance with the second sentence of Regulation 56, the Trust Fund monitors all cases pending before the Court, assesses the scope of charges, number of victims, and potential needs for reparations on an ongoing basis. The Trust Fund thus has a centralised overview over the availability of the funds it can dedicate to each reparation proceeding, and general assistance activities related to any particular situation before the Court.

133. The general assistance mandate allows the Trust Fund to deliver assistance to victims in the situation before trials have commenced. Because of its direct experience in assisting victims in the situation

through this mandate, the Trust Fund is a valuable source of operational and programmatic expertise for the Court, especially vis-à-vis the design and implementation of reparation awards.

134. Resources allocated to the general assistance projects need to be managed with a timeframe of several years in mind, which requires the Trust Fund to be able to make medium-term plans and allocate resources accordingly. Such planning by the Board may be jeopardized if Chambers could unilaterally decide on the use of the Trust Fund's "other resources" for the purpose of the reparation orders without the agreement by the Trust Fund Board of Directors.
135. Donors may make earmarked voluntary contributions in accordance with Regulations 27 and 28 of the RTFV (e.g. for victims of sexual and gender based violence). These monies cannot be diverted to fulfil reparation orders on charges that are not related to the gender justice crimes.
136. Furthermore, the Trust Fund may sign donor agreements together with the Registrar for the use of the voluntary contributions, and all parties are accountable to these agreements. If the Trust Fund is not seen to be able to control and manage the use of voluntary contributions as discussed and detailed in legal agreements with donors, this might negatively impact on whether and how much donors will give in terms of voluntary contributions and might ultimately affect the availability of funds for complementing reparation awards under Regulation 56 of the RTFV.

Observations on fundraising

137. The innovative feature of the Rome Statute and the related regulatory framework that allows voluntary contributions to be donated to the Trust Fund as a possible complementary source of funding for reparations awards is untested, not only from a legal perspective but also from a fundraising perspective.

138. The Trust Fund Board of Directors has allocated its reserve for reparations from the Fund's "common basket" (i.e. resources originating from non-earmarked voluntary contributions).

139. According to RTFV 27, the prohibition to earmark voluntary contributions by governments is waived "when the funds have been raised at the initiative of the members of the Board of Directors and/or the Executive Director." Therefore, the Board has the possibility to launch a donor appeal to raise funds specifically in relation to Court-ordered reparations. Some governments, foundations and individuals may find it difficult to financially contribute to the reparation of harm caused by a convicted person. Many may feel (including the victims themselves) that reparation orders should be fulfilled by the person who is convicted of committing the crimes in question.

140. Regulation 21(d) of the RTFV states that the Trust Fund shall be funded by "[s]uch resources, other than assessed contributions, as the Assembly of States Parties may decide to allocate to the Trust Fund." This may provide an alternative to 'regular' voluntary contributions to directly engage States in making resources available to the Trust Fund,

specifically to complement reparations awards, as a result of a fundraising call by the TFV Board, an invitation made directly by the Trial Chamber, or both.

141. In the absence of a conviction and Court-ordered reparations to-date, the Board has refrained from efforts to raise funds earmarked for reparations, believing that this will only have a chance to be successful once the parameters of the Court-order is known. The Trust Fund Board would then be in a better position to convincingly advocate for the need of sufficient resources to repair the harm caused to victims in cases before the Court.
142. Therefore, a fundraising donor appeal issued by the Trust Fund Board would be appropriate only once the Court has issued its decision on the award of reparations.
143. The Trust Fund Board is fully committed to work in partnership with the Court to develop an effective and successful advocacy campaign, including during meetings of the Assembly of States Parties, in order to ensure sufficient resources are available to complement reparations awarded by the ICC.

Accountability of the Trust Fund towards the Court

144. Notwithstanding its discretion to complement awards pursuant to the first sentence of Article 56 of the RTFV, the Trust Fund will be accountable to the Court in a number of ways.

145. The Trust Fund will be accountable to the Court in regard of the use of resources put at the disposal of the Trust Fund pursuant to Regulations 21 (b) and (c) and 34 of the Regulations of the Trust Fund for Victims (i.e. resources collected through awards for reparations and fines and forfeitures) from the moment that it receives such funds. In accordance with the various provisions pertaining to such funds (e.g. Rule 98 (2) RPE, Regulation 34 RTFV) it will clearly separate any funds received through awards for reparations from its other funds and will act in accordance with any stipulations contained in the Chamber's order.
146. At the implementation stage, the Board will submit to the Chamber, in accordance with RTFV 57 and 58, an implementation plan on the use of funds for its approval, no matter whether these funds stem from the convicted person or were allocated to complement the reparation award in accordance with Regulation 56. It will then will up-date the Chamber on implementation. Furthermore, it will provide the Court with a final narrative and financial report once the reparation awards have been fully implemented
147. In addition, the Trust Fund Board will continue to report annually on the use of all its funds to the ASP and to donors, where agreements stipulate such reporting. The Board will also continue to notify the Pre-Trial Chamber in accordance with Regulation 50a) of the RTFV with regard to any proposed activities under its general assistance mandate.

Conclusion

148. In conclusion, the Trust Fund has a strong and positive commitment to be faithful to manage its resources – in line with the Rome Statute - in such a way as to satisfy, to the extent possible, the needs and

expectations of victims with the jurisdiction of the Court, whether reached through reparations or general assistance. In its view, however, such a commitment can only reasonably be expected to be maintained by an institution that is sufficiently robust in its – perceived as well as real – authority to independently and responsibly manage its resources originating from voluntary contributions so as to balance all interests related to the Trust Fund's two mandates.

PART TWO – CONTEXT CONSIDERATIONS

I. Considerations on limited charges

149. The specific circumstances of the Lubanga case stem from the nature and selection of charges which the Prosecutor brought before the Chamber. Thomas Lubanga faces counts of war crimes consisting of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities in the Democratic Republic of the Congo. The prosecutorial strategy of only presenting child soldier charges in this case, while at the same time testimonies highlighted Thomas Lubanga's alleged responsibility for a much wider range of war crimes, including mass murders, rapes, torture and pillaging, has a direct impact on reparation orders and proceedings.⁴¹

⁴¹ For reports on mass atrocities committed in Ituri, see for example:

- Human Rights Watch, *Ituri covered in blood*, July 2003, electronically available at <<http://www.hrw.org/en/reports/2003/07/07/covered-blood>>,
- *Appel à l'inclusion du viol dans les charges contre Lubanga*, 12 mai 2008, electronically available at <<http://iwpr.net/fr/report-news/appele-C3%A0-l%E2%80%99inclusion-du-viol-dans-les-charges-contre-lubanga>>,
- Amnesty International, *DRC: Systematic Rape and Torture of Tens of Thousands of Women and Girls Leaves Public Health Crisis*, 24 October 2004 electronically available at <http://www.amnesty.org.uk/news_details.asp?NewsID=15660>;

150. This limited scope of the charges raises a number of issues.⁴² In particular, the provision of reparations to a relatively small category of victims in the Ituri conflict context, where many other serious crimes seem to have occurred, may appear unfair and inequitable to victims and communities, both to those who benefit from an award and those who will not⁴³.
151. Reparations should redress harm and not create any further harm. In particular, they should not result in further tension or even conflict. One must therefore consider the potential ethnic repercussions in the Ituri region of possible reparations orders in the *Lubanga* case, as well as in the case of *the Prosecutor versus Germain Katanga and Mathieu Ngodjolo Chui*.⁴⁴ As a result of the particular constellation of charges in both cases, participating victims of both trials are predominantly from one and the same ethnic group; and only represent a small and not necessarily

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- United Nations, OHCHR, *Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003*, (hereinafter OHCHR Mapping Report), August 2010, electronically available at <http://www.ohchr.org/Documents/Countries/ZR/DRC_MAPPING_REPORT_FINAL_FR.pdf>

42 The Trust Fund recalls that when opening the investigation into the situation in DRC in June 2006, the Office of the Prosecutor (OTP) reminded us that “millions of civilians have died as a result of conflict in the DRC since the 1990’s” and clarified that “the Court’s jurisdiction extends to crimes committed after 1 July 2002, when the Rome Statute of the ICC came into force.” It continued saying that: “States, international organisations and non-governmental organisations have reported thousands of deaths by mass murder and summary execution in the DRC since 2002. The reports allege a pattern of rape, torture, forced displacement and the illegal use of child soldiers.” See press release of the OTP of 23.06.2004; ICC-OTP-2004 0623-59.

43 Serious concerns have been raised by civil society and human rights groups that the narrow charges in the situation of the DRC may not do justice to all victims of alleged crimes of Mr. Lubanga because the crimes of which they became victim will not be subject of proceedings before the ICC. See “*Joint letter to the Chief Prosecutor of the International Criminal Court*” of 31 July 2006 by Avocats Sans Frontières, Center for Justice and Reconciliation, Coalition Nationale pour la Cour Pénale Internationale – RCD, Fédération Internationale des Ligues des Droits de l’Homme, Human Rights Watch, International Center for Transitional Justice, Redress and Women’s Initiatives for Gender Justice, available online at <<http://www.hrw.org/en/news/2006/07/31/dr-congo-icc-charges-raise-concern?print>>

44 See *Prosecutor v. Germain Katanga and Mathieu Ngodjolo Chui*, ICC-01/04-01/07-717

representative section of all those who have suffered from crimes under the Rome Statute as a result of the conflict in Ituri.

152. Therefore, the Trust Fund would like to respectfully share some considerations that the Chamber may wish to bear in mind when designing its reparations order.

A. Stigmatisation of victims

153. Excluding victimised communities from reparation orders could lead to re-stigmatisation of the former child soldiers within their communities of origin by creating envy and resentment. When ordering reparations that address child soldiers, stigmatisation should be avoided because they constitute a particularly vulnerable kind of victims.

154. The UNICEF “Paris Principles, principles and guidelines on children associated with armed groups” (hereinafter “the Paris Principles”) ⁴⁵ underscore the fact that measures in favour of former child soldiers:

“[s]hould 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

⁴⁵ The Paris Principles and Paris Commitments to Protect Children were adopted at the UN in Paris in February 2007, and are an expression of strengthened international resolve to prevent the recruitment of children and highlight the actions governments can and should take to protect children affected by conflict. The Paris Principles are the operational guidelines related to sustainable reintegration of children formerly associated with armed forces and groups. The Paris Principles and Paris Commitments to Protect Children (Consolidated version). February 2007, <http://www.un.org/children/conflict/english/parisprinciples.html>.

placed at a disadvantage vis-à-vis those who have been so associated."⁴⁶

155. A recent Children and Truth Commissions study also recommends the same principles of non-discrimination for administering reparations to conflict-affected children, stating that:

"Care must be taken in determining [the applicable criteria] for eligibility to [reparations] in a manner which avoids categorizing children, which could aggravate disparities or stigmatize groups identified. Assigning victims to categories can also lead to a false hierarchy in which some violations are considered to have inflicted greater suffering. A related and important issue concerns how to assist children who may be described or perceived as both victims and perpetrators. For example, if former child soldiers are designated as eligible for reparations when other groups of children are left out, the result may exacerbate the stigma against children formerly associated with armed forces and groups."⁴⁷

⁴⁶ Paris Principles, par. 3.3.

⁴⁷ UNICEF Innocenti Research Centre in cooperation with the International Transitional Justice Centre, *Children and Truth Commissions*; electronically available at <http://www.unicef.at/fileadmin/medienv/pdf/truth_commissions_eng.pdf>

B. Sexual and gender-based violence

156. The selectivity of charges will make it more difficult to specifically address the sexual violence experienced by the direct victims of the case, the child soldiers, as a result of their conscription or enlistment.⁴⁸
157. Since the time when the charges against Mr. Thomas Lubanga Dyilo became public, women's human rights groups⁴⁹ have expressed their concern that charges for gender-based crimes, including both sexual violence in the form of rape committed by UPC soldiers against civilians, and the sexual abuse of girl and boy child soldiers, were not included in the case against Thomas Lubanga Dyilo in spite of the alleged availability of strong evidence that such crimes had taken place on a large scale.
158. On 22 May 2009, the legal representatives of the victims filed a request before the Chamber seeking a change in the legal characterisation of the facts. They argued that on the basis of evidence already in the record, the charges against Lubanga should be supplemented to include in-

⁴⁸ The OTP chose not charge Thomas Lubanga Dyilo with crimes of sexual violence in the current proceedings. Accordingly, the decision on the confirmation of charges of 29 January 2007 does not contain any information on such crimes.

⁴⁹ See e.g. :

- Letter from Brigid Inder, Executive Director, Women's Initiative for Gender Justice to Louis Moreno Ocampo, Prosecutor, International Criminal Court (Aug. 2006), electronically available at <http://www.iccwomen.org/news/docs/Prosecutor_Letter_August_2006_Redacted.pdf>; and
- Congolese Women's Campaign Against Sexual Violence in the Democratic Republic of the Congo, International Justice (ICC), available at <<http://www.rdcviolencesexuelle.org/site/en/node/55>> stating that ("[D]espite voluminous evidence of sexual violence brought to the attention of the Prosecutor and the International Court in the Lubanga case, the warrant made no mention of any accusation of violence committed against Congolese women and girls");
- Beni Declaration by Women's Rights and Human Rights NGOs from the Democratic Republic of the Congo on the Prosecutions by the ICC, Beni, North Kivu, DRC (Sept. 16, 2007) (cited in Julie Flint and Alex DeWaal, *Case Closed: A Prosecutor without Borders*, WORLD AFFAIRS, n.14 (Spring 2009)).

human/cruel treatment and sexual slavery.⁵⁰ In response, the Trial Chamber issued a decision in which a majority of the chamber held that a re-characterisation of charges in the Lubanga case could be possible under Regulation 55 of the Regulations of the Court.⁵¹ This Trial Chamber decision was overturned upon appeal on procedural grounds.⁵²

159. Nonetheless, it seems indisputable that sexual enslavement and other forms of sexual and gender-based violence was perpetrated widely against girl and boy child soldiers. In fact, the Prosecutor claimed in his opening statements of the case that:

"[i]n the camps child soldiers were exposed to the sexual violence perpetrated by Thomas Lubanga's men in unspeakable ways. As I said before, young boys were

⁵⁰ *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court (May 22, 2009).

⁵¹ *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts may be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court, 28-30 (July 14, 2009) (quoting Regulation 55(1)).

⁵² Appeals' Chamber decision of December 2009 (ICC-01/04-01/06 OA15 OA16 of 8 December 2009) The Appeals' Chamber decision makes two important findings: Firstly, it stated that Regulation 55 is of a single and indivisible nature and that Trial Chamber I improperly bifurcated Regulation 55 (1) and (2) and (3). The Trial Chamber's interpretation of Regulation 55 could result in final judgments adjudicating facts that were introduced during trial through re-characterization but are not described in the charges, a result that would be incompatible with Article 74(2) of the Rome Statute, which states that: "The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges." Secondly, it found that Trial Chamber I's justification for permitting a change in the legal characterization of the facts in Lubanga was "extremely thin" because no details on the elements of the offences to be considered were included, nor was there any analysis on how such elements might be covered by the facts described in the charges. The Appeals Chamber declined to consider the Trial Chamber's findings where the Trial Chamber itself had failed to do so and where the Trial Chamber remained in the best position to assess the charges and evidence presented to date.

instructed to rape. In the training camps, girl soldiers were the daily victims of rape by the commanders.⁵³

160. This allegation is fully supported by the observation made in the OHCHR Mapping Report: "[n]early all female CAAFAG [Children Associated with Armed Forces and Armed Groups, i.e. child soldiers] were raped, often gang raped, or sexually exploited by the officers and soldiers of all the previously mentioned armed groups. Some male CAAFAG also told of similar experiences."⁵⁴
161. Furthermore, also MONUC has reported that "the Ituri militia allegedly committed acts of sexual violence against the girls associated with their group, both abducted and enlisted."⁵⁵
162. Sexual and gender-based violence associated with conscription, enlistment and participation is been addressed in key United Nations instrument such as *The Paris Principles*.⁵⁶ They specifically state that:

"In many contexts, girls who have been associated with armed forces or armed groups are highly likely to have been subjected to gender-based violence (GBV), including sexual violence. Boys can also be subjected to such violence. The provision of support services (including health, psychosocial and legal support) to survivors of SGBV should follow international guiding principles of respect, dignity, non-

⁵³ *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Transcript of the session of Monday, 26 January 2009, ICC-01/04-01/06-T-107-ENG ET WT 26-01-2009, lines 21-24.

⁵⁴ OHCHR Mapping Report, Para. 709.

⁵⁵ MONUC, *Special report on the events in Ituri (S/2004/573)*.

⁵⁶ Paris Principles

discrimination, safety, security and the best interests of the survivor.”⁵⁷

163. The Trust Fund’s experience administering general assistance to former child solders in Ituri region fully confirms these findings. A study conducted by the Trust Fund among former child soldier beneficiaries of the assistance projects highlighted the sexual violence suffered by former child soldiers during their conscription, enlistment and/or participation. Over 48% of former child soldiers (of which 66.7% were girls and 32.2% boys) interviewed in 2010 declared that they had been victims of sexual violence. Thirty-five percent of former child soldier boys interviewed affirmed that they had been forced to commit sexual violence.
164. The psychological impact of this type of violence added to the forced conscription and enlistment conflates the injuries and should be considered in any reparative package for former child soldiers.
165. The OHCHR Mapping Report concluded that “[t]he feeling of loss and trauma caused by the violence they [the former child soldiers] suffered, by the crimes to which they were exposed or which they were forced to commit has had a devastating impact on the physical and mental integrity of these children.”⁵⁸
166. The Paris Principles also caution that girl child soldier victims of sexual violence, "face specific consequences from their time in armed forces or armed groups. The social stigma facing these girls is fundamentally

⁵⁷ Paris Principles, Section 7.72.

⁵⁸Paris Principles, paragraph 208.

different in kind – it lasts much longer, is critically more difficult to reduce and is more severe – especially if children are born out of this experience."⁵⁹

167. A report submitted to the Trust Fund from a psychoanalyst supporting an assistance project,⁶⁰ highlighted the intellectual and emotional trauma presented by girl child soldiers who were young mothers. These girls "appeared to accept their family's anger and humiliation caused by the rape as demonstrated against these girls. It is as if they were trying to strike an impossible balance between that anger, their family's rejection and the opportunity to receive [the organisation's] assistance without which they would be in great difficulty."⁶¹ The girl child soldier beneficiaries who were raped and interviewed in the Trust Fund's victims' survey also expressed it themselves - 68.4% of them declared that they are poorly treated by their communities of origin all the time, compared to 26.3% of child soldier boys interviewed.

168. The Women's Initiative for Gender Justice argued in the context of the closing arguments of the *Lubanga* case that: "[d]espite the many challenges in this case, we believe based on the information before the judges - the testimony from witnesses, the filings from legal representatives and the voices of victims - that there is every possibility important and substantive jurisprudence could emerge from this case. A decision which recognises the gender dimensions of enlistment, conscription and the forced participation of children in hostilities, could

⁵⁹Paris Principles, para. 7.59

⁶⁰ TFV/RDC/2007/R2/029.

⁶¹ [REDACTED], *Report on the limited self-protection capacity of former EAFGA (Children Associated with Armed Forces and Groups) teenage mothers in Bunia and its surroundings*, May 2011, on file with the Trust Fund, p.2.

transform the legal definition of child soldiers and pave the way for similar prosecutions. It could also allow for reparations for individuals and communities who have suffered, it would undoubtedly deepen our collective understanding of the terror and impact on children who are forced to participate in armed conflicts and renew our common resolve to affirm the human and legal rights of children.⁶²

169. The Chamber will have to decide how to address the particular harm suffered by the child soldiers who were subjected to sexual and gender-based violence when awarding reparations in the present case. While the Chamber will have to bear in mind the Appeals Chamber's decision on the re-characterisation of charges, the Trust Fund respectfully submits that the Chamber could find a way to address the particular suffering of sexually abused child soldiers by considering to order relevant forms of collective reparations (e.g. trauma-based counselling, and reconciliation efforts to address stigma and discrimination within families and communities).

C. Potential for further conflict

170. The selectivity of charges and the resulting exclusion of certain victim groups from the reparations process could result in further tensions and conflict in Ituri region. There are various factors to consider in this context.

⁶² see Bridgid Inder/Women's Initiative for Gender Justice, *Gender issues and Child Soldiers, Prosecutor versus Thomas Lubanga Dyilo*, 25 August 2011, online article, electronically available at < <http://www.iccwomen.org/documents/Lubanga-Statement-August-2011.pdf>>

1. Inequity

171. The Trust Fund respectfully submits that the narrow charges and subsequent reparations orders with narrowly defined victims may as a consequence create additional tensions and fuel conflict between communities and (alleged) former child soldiers.

172. The concern that communities who do not benefit might feel treated unfairly has been raised in the context of the disarmament, demobilisation and reintegration (DDR) of former combatants programme in the DRC:

“[...] the huge expectations [of victimised communities] in terms of reparations and their frustration at the privileges granted to combatants who were demobilised as part of the DDR programme, while they still receive nothing. It should also be emphasised that these populations, most of whom are in a disastrous economic situation, desperately wish for tangible steps towards reparation”.⁶³

173. The problem is exacerbated by the absence of any functioning national extra-judicial reparation mechanism at present that could satisfy those victims of crimes committed as part of the Ituri conflict who will not be considered by the cases before the International Criminal Court.

⁶³ OHCHR Mapping Report, Para. 1074 on p.500.

2. Ethnic dimension

174. Limited charges and narrow definitions of victims are further exacerbated by the ethnic dimension of the case. It appears that most of the children allegedly recruited by Thomas Lubanga come from the Hema and Alur ethnic groups. This may be problematic when the present case is considered in the context of the only other Ituri case currently pending before the Court, the case of *the Prosecutor versus Germain Katanga and Mathieu Ngudjolo Chui*.⁶⁴ It has for example been claimed that:

[TRANSLATION] "...although civilians suffered on all sides, the Hemas supported by the outside world could very well receive reparations in both cases, while the Lendus and other civilians will not benefit from any of the case"s⁶⁵ [except children recruited by the militia allegedly led by Germain Katanga and Mathieu Ngudjolo Chui].

175. The Ituri localities mentioned in the warrant of arrest and the confirmation of charges decision reflect the ethnic diversity of the area whose inhabitants may be awarded reparations: the majority ethnic groups are the North Hemas (also called Gegere) in Mandro and Bule; the Biras and North Hemas in Centrale; the South Hemas in Rwampara

⁶⁴ See *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-717

⁶⁵ Lubangatrial.org, "*The Lubanga Trial Resumes: Responses from Ituri*", electronically available at <http://www.lubangatrial.org/2010/10/13/the-lubanga-trial-resumes-responses-from-ituri/>. The report states that: "The seed of the view on the part of the Lendu that the ICC is not treating their cause fairly had already been planted by the court's approach to charges and the situation of victims. Although the victims of the Bogoro attacks (which are the basis of the charges against Ngudjolo and Katanga) are visible reminders of the victimization of Hema in the conflict, Lubanga's victims do not provide a parallel. Because of the nature of the charges against Lubanga—recruitment of child soldiers—those who are recognised as victims are in fact mostly Hema, not Lendu."

and Sota; the Biras and South Hemas in Irumu; the Lendus in Libi, Mbau and Lipri; the North Hemas and Lendus in Largu; the North Lendus in Djugu; the Nyalis, Hemas, Lendus, Alurs and Nandes in Mongwalu; the South Hemas and Lendu Bindis in Bogoro; and the Biras, Hemas and Lendus in Bunia.

176. This ethnic dimension may have an impact on whether victims may come forward to the Court to request reparations. In fact, certain victims of the case (the direct victims are pre-dominantly Hema) may be reluctant to come forward to the Court for fear of reprisals by the communities allegedly victimised by the UPC (especially Ngitis and Lendus).
177. Eligible victims may also be reluctant to come forward based on their fear of reprisals of their own communities. Furthermore, it has been claimed that "because the trial is naturally unpopular within the Hema community, [the victims] are also less visible: most who could be considered victims attempt to conceal rather than draw attention to their status."⁶⁶
178. A mapping of the victims of the present case is, therefore, crucial to identifying their location to effectively implement a reparation order.

3. Ongoing volatile security situation in Ituri

179. Furthermore, the situation in Ituri remains extremely delicate and insecure. All territories are affected by structural vulnerabilities and

⁶⁶ Lubangatrial.org, "The Lubanga Trial Resumes: Responses from Ituri", electronically available at <http://www.lubangatrial.org/2010/10/13/the-lubanga-trial-resumes-responses-from-ituri/>

persistent land disputes rooted in age-old interethnic conflicts. In designing its strategy for 2011/2012, the Protection Cluster for Orientale Province makes the following assumptions with respect to the situation in the district:

“Although the situation is generally stable in Ituri, it is not expected to evolve on the whole, even if insecurity factors exist: fighting in South Irumu, land disputes which are inadequately resolved, elections scheduled to hold in late 2011 [...]. The potential yet expected radicalization of community leaders prior to the elections also generates fears on an increase in tension [...]. It is probable that the politicians who will participate in campaigning will use land as a rallying theme to get the votes of displaced persons who are waiting for a chance to return home.”⁶⁷

D. The need for reconciliation

180. The selectivity of charges and the resulting exclusion of certain victim groups from the reparations process will make it more difficult for reparation awards to promote reconciliation in Ituri region.
181. The Paris Principles very clearly state that programmes addressing former child soldiers should not "place [the children, families and communities] at greater risk for being part of any programme"⁶⁸ and recommend "ways that facilitate local and national reconciliation".⁶⁹

⁶⁷ Protection strategy for the province, May 2011, Protection Cluster in Orientale Province.

⁶⁸ Paris Principles, para. 3.19

⁶⁹ Paris Principles, para. 7.31

182. Reparations should seek to, *inter alia*, "rebuild trust among citizens and between citizens and public institutions."⁷⁰ The victims equally declare that reconciliation is a necessity: for example, when interviewed by the panel set up by the Office of the United Nations High Commissioner for Human Rights (OHCHR) during consultations on reparations modalities, victims reiterated "their call for forgiveness so that people can live together as they used to".⁷¹
183. The selectivity of charges in the present case, which as noted above may seem to favour one ethnic group fighting in the conflict over the other, while both sides seem to have committed atrocities on a similar scale, will make it extremely challenging to promote reconciliation in the region and reduce tensions stemming from the underlying causes fuelling the conflict and dividing the pastoral (Hema) and the agricultural lifestyle (Lendu) that underlies the conflict.
184. In this context, it is important to note that the problem of conscription, enlistment and participation of children in armed conflict in the DRC far exceeds the charges of the present case. The United Nations OHCHR Mapping report states that "all parties to the conflict in the DRC recruited and used CAAFAG [i.e. alleged former child soldiers]."⁷² This problem will have to be addressed beyond the limits of the present case in order to bring stable peace to the region.

70 UNICEF Innocenti Research Centre in cooperation with the International Transitional Justice Centre, *Children and Truth Commissions*, report of January 2011, p.75.

71 UN OHCHR, *Report of the Panel on Remedies and Reparations for Victims of Sexual Violence in the Democratic Republic of Congo to the High Commissioner for Human Rights*, March 2011, (hereinafter OHCHR Panel Report), p. 25.

72 OHCHR Mapping report, para. 1074, p. 485., Para. 723.

II. The importance of meeting local expectations and perceptions

185. Reparation proceedings will need to consider the expectations and perceptions of victims and affected communities in a resource-poor setting plagued by chronic conflict and instability. What victims want may in part be determined by the process used to consult them. Furthermore, it will depend on the scope of the group of those involved in the consultations. The consultative process will also require dedicated resources to conduct outreach and ensure effective participation of victims.
186. Consulting extensively with victims in defining and implementing reparation programmes will ensure that the final results satisfy, to a large extent, victims' demands for justice and reparations⁷³ because experience shows that for victims "their treatment, involvement and empowerment of victims [...] can, in and of itself, constitute a valuable part of the reparative package."⁷⁴
187. Knowing that reparations are different from and more profound than assistance, and that there is a need for reparation,⁷⁵ they will need to be differentiated from humanitarian assistance and development projects in these eyes of both the victims receiving them and those implementing them. Furthermore, one may question whether programmes for

⁷³ See International Center for Transitional Justice, *Unfulfilled Expectations Victims' perceptions of justice and reparations in Timor-Leste*, electronically available at <http://ictj.org/sites/default/files/ICTJ-TimorLeste-Unfulfilled-Expectations-2010-English.pdf>.

⁷⁴ REDRESS, "Collective Reparations: Concepts & Principles,"

electronically available at <http://www.redress.org/downloads/events/CollectiveReparationsMG.pdf>

⁷⁵ OHCHR Panel Report, cited above, p. 29.

reparation and assistance are sustainable in conflict zones or whether they can only come after stabilisation.⁷⁶

188. In addition, it may be important to link reparation programmes to informal justice and reconciliation mechanisms that are culturally and locally relevant.⁷⁷ However, difficult issues may arise in relation to the protection of international human rights standards and the rights of women under traditional or informal mechanisms.⁷⁸ In order to get more clarity, existing traditional mechanisms within the victims' communities could be evaluated to see whether there are any opportunities to adapt them so that they could be used in the context of the implement reparation awards.

III. Learning from the Trust Fund's rehabilitation mandate

189. The Trust Fund initiated a multi-method, quasi-experimental, longitudinal impact evaluation with its implementing partners in early 2010. As a cross-sectional study, it captured the views, attitudes and experiences of 2,585 victims of war crimes and crimes against humanity in northern Uganda (1,625) and the eastern DRC (960). The sample was drawn randomly from the beneficiary population across the areas in both situations where the Trust Fund is currently supporting rehabilitation projects and is highly representative of some 15,000 beneficiaries of the active projects.

⁷⁶ OHCHR Panel Report, cited above, p. 25, concerning interviews with victims of the Orientale Province (Bunia).

⁷⁷ Widner, Jennifer, *"Courts and Democracy in Post conflict Transitions: A Social Scientist's Perspective on the African Case."* The American Journal of International Law, 2001, No. 95(1) 64-75.

⁷⁸ See e.g. Human Rights Watch. 2003. *"Double Standards: Women's Property Rights Violations in Kenya."* 15(5(A)) Human Rights Watch, March.

190. These 15,000 victims are those that the Trust Fund targets as “victims of specific crimes,” which fall into five broad, cross-cutting categories: children and youth, victims of sexual and/or gender-based crimes, victims of mutilation or physical and/or psychological torture, victims of pillage and/or attacks directed upon a civilian population, and family members of victims, including those widowed by war, those caring for orphans, etc.
191. While the study limits the representativeness to these 15,000 direct beneficiaries, it is reasonable to treat the sample as representative of the entire population of Trust Fund direct beneficiaries - estimated at 42,300 at the time the interviews were conducted.
192. The study administered an extensive questionnaire and preformed in-depth interviews (individual and group), and consultations with stakeholders and secondary sources, to measure the Trust Fund's impact across four areas and two cross-cutting themes:

Physical and Mental Health: victims’ physical health, attitudes toward forgiveness and reconciliation, and cognitive functioning;

Economic Security, Food Security, and Shelter: victims’ access to economic security, food, and shelter;

Social Support and Integration: victims’ social support and integration in their families and communities; and

Transitional Justice: victims’ experiences with and perceptions of the

ICC and Trust Fund, knowledge of their rights, empowerment, perceptions of local conflict, and attitudes toward key concepts like *justice, reparation, peace, and rights*;

Gender Mainstreaming: victims' experience of gender justice, attitudes toward sexual and gender-based violence, and knowledge of their rights;

Children, youth and the elderly: victims' experience of violence across age categories, with special attention on the experience of child mothers⁷⁹ and widows.

193. Overall results of the study showed a gender dimension related to the impact of violence. Violence impacts men and boys differently than it impacts women and girls; and findings suggested that among the Trust Fund's beneficiaries, female victims had experienced more severe psychological and social consequences. This, in turn, showed that women approached the issues of rehabilitation, reparation, and reconciliation differently than men.
194. In reply to all questions, except one, women reported experiencing more severe psychological symptoms and more negative relations vis-à-vis their families and communities. Women and girls were twice as likely to report that their family was "not at all" caring. Twice as many women as men reported feeling "sad" a lot of the time, and just under twice as many reported feeling "lonely" a lot of the time. A third of women and girls said they felt "distant or cut off from others" a lot of the time,

⁷⁹ The term "child mothers" is used to refer to girls and young women who became mothers as a result of the fact that they served as child soldiers, at an age when they were still to be considered children themselves.

compared to a fifth of men and boys. Overall, ten per cent of female respondents said they did not trust their community at all. And just as many said they did not feel important in their community at all.

195. The results also suggest that both the very real and urgent needs that victim survivors live with day-to-day in resource poor settings, as well as the violence that they have experienced during conflict, together influence their opinions about reparation and justice. These experiences and consequences of violence can translate into different attitudes toward concepts of justice, reconciliation and accountability. When asked if they feel they had received justice, over 70% of child mothers said no, versus 21% of former child soldiers and 17% of children made vulnerable by war. Over half of victims of sexual violence in the sample also reported feeling that they had not yet received justice.
196. The Trust Fund's results suggest that there is a relationship between "Trust Fund" recognition and "ICC" recognition. This means that there is evidence that many victim survivors receiving rehabilitation assistance from the Trust Fund view this support as a form of recognition by the International Criminal Court, which in turn, impacted the way they viewed the ICC and its role in ending impunity in their communities. However, this perception depended largely on the manner in which the ICC, Trust Fund and implementing partners communicated and branded the support provided to victims and affected communities – an important issue to consider when designing outreach strategies for implementing reparations.
197. It is noteworthy that in respect of all indicators related to social wellbeing, women and girls reported negatively, experiencing more

severe symptoms of harm, bad feelings towards them and bad treatment by their communities. Women were also more likely than men to say they preferred that reparations be given to “individuals” rather than to “communities.” However, after reviewing the focus group discussions against these findings, it seems this outcome reflected the feelings women had toward their communities and their experience of receiving trust, reintegration and acceptance within those communities (or, moreover, they often perceived a lack of trust, reintegration and acceptance) than that it concerns the particular legal debate over ‘individual versus collective’ reparations – in other words, the analysis shows that often women seemed to be afraid that if reparations were given to their communities rather than to women victims individually they would not be able to benefit as much because of the difficulties that they experienced within their communities in terms of integration and acceptance. Accordingly, these findings show the high importance of involving women and girls in a meaningful way in the course of reparative and transitional justice – especially related to defining their reparation and rehabilitation.

198. The Trust Fund disaggregated and analysed the findings of the subgroup of former child soldiers in the DRC who participated in the study to provide Chambers with additional information on this victim population.
199. The Trust Fund interviewed 217, mostly male (72%) children associated with armed groups, so-called EAFGA (*enfants associés aux forces et groupes armées*) from three territories in Ituri: Mahagi, Djugu, Irumu. The male EAFGA were generally older than the females in this population, and were generally engaged in income-earning activities, primarily

agriculture and livestock/breeding (as opposed to being in school). This was likely related to the fact just under half said they were the head of their households, versus just 7% of the females.

200. Conversely, a large majority of the 28% females interviewed (78%) said they lost years of education because of the conflict, versus 46% of male former child soldiers. This underscores that the girls in the sample were generally younger at the time of abduction/conscription/enlistment.
201. Male and female former child soldiers also experienced the conflict differently. The majority of the males described themselves as “combatants” (porter and spy were other commonly cited roles), while the majority of females were forced wives and/or victims of sexual and gender based violence (SGBV).
202. The male former child soldiers came from four Trust Fund rehabilitation projects implemented by three Congolese organisations. The female former child soldiers also came from these same projects; however, the majority (66%) came from one project providing accelerated education to girls who were abducted and who gave birth while in captivity. These girls are young enough to reenrol in the standard school system, and are therefore receiving accelerated education in order to rejoin their peers.
203. There was a clear trend among both male and female former child soldiers regarding the loss of education. Male former child soldiers were almost as likely to report having lost animals (42%) as education. The Trust Fund is unable to say to what extent this loss of animals related to the larger pastoralist/agriculturalist conflict between Hema and Lendu as it does not collect information on the ethnic background of its beneficiaries.

204. Other questions asked of the former child soldiers sampled include: what should victims in your community receive in response to your losses resulting from conflict? Victims could select up to three choices were offered: monuments, agriculture, physical/psychological rehabilitation, apologies from those responsible, economic development, justice, and education. The breakdown of what was reported by gender is described in the following tables:

Male Victim Respondents (N=156) (former child soldiers)

Hierarchy of needs	Rehabilitation	Justice	Education	Agriculture	Development	Apologies	Monuments
1 st Choice	23.4%	24.1%	11.0%	12.4%	18.6%	2.8%	7.6%
2 nd Choice	27.3%	18.2%	18.9%	20.3%	10.5%	3.5%	1.4%
3 rd Choice	16.2%	12.0%	21.8%	13.4%	16.2%	16.2%	4.2%

Female Victim Respondents (N=61) (former child soldiers)

Hierarchy of needs	Rehabilitation	Justice	Education	Agriculture	Development	Apologies	Monuments
1 st Choice	69.6%	5.4%	.0%	12.5%	5.4%	5.4%	1.8%
2 nd Choice	8.9%	3.6%	60.7%	14.3%	5.4%	7.1%	
3 rd Choice	1.8%	67.9%	12.5%	3.6%	10.7%	1.8%	1.8%

205. Additional questions included: Have you forgiven the person(s) who harmed you? The majority (83%) of the male former child soldiers responded that they had forgiven the person (s) that harmed them, with considerably less (60%) female victims indicating that they had forgiven their perpetrators. Former child soldiers in eastern Congo were also asked what needs to happen for you to be able to forgive. The following table details the responses by gender:

Male Victim Respondents (N=40) (former child soldiers)

Victim should receive rehabilitation	Perpetrator should be tried and punished	Perpetrator should confess and tell truth	Victim should receive compensation	Perpetrator should ask for forgiveness
60%	58%	58%	53%	18.6%

Female Victim Respondents (N=26) (former child soldiers)

Perpetrator should ask for forgiveness	Perpetrator should be tried and punished	Victim should receive compensation	Perpetrator should confess and tell truth	Victim should receive rehabilitation
58%	42%	23%	7.7%	4%

206. These questions reveal a variety of trends among male and female former child soldiers. First, the first questions reveal a clear preference for rehabilitation as part of a reparative process among both male and female former child soldiers. Justice also features prominently, as did the need for agricultural support and economic development for males and education for females. The male former child soldiers in the sample were

predominantly older than their female cohorts. Therefore, education did not matter to them as much as economic and agricultural support. This means a reparation order would need to consider both the gender and generational aspects of the former child soldiers.

207. For the female former child soldiers in the sample, the need for justice featured more prominently in their responses than for male former child soldiers. Further analysis suggests that since male and female former child soldiers experienced profoundly different sides of the conflict (the male former child soldiers in the study were predominantly “combatants” while the female former child soldiers in the study were predominantly enslaved wives), they therefore had different conceptions of forgiveness and what was required in order to repair their harm.
208. The Trust Fund used a series of general questions about reparative support without directly mentioning the word “reparations” i.e. (1) what should be given to victims of the conflict in your community?; and (2) should these be given to individuals, to communities or to both? The Trust Fund’s overall results from both questions reflected the results of other research conducted in the area with the general population.⁸⁰ In northern Uganda, the majority of former child soldiers stated “individual” with a small minority saying either “both” or “the community”. In the DRC, the majority of alleged former child soldier respondents favoured “both” while very few said “the community.”

⁸⁰ UC Berkeley Human Rights Center, *Living with Fear – A population based survey on attitudes about peace, justice and social reconstruction in the Eastern Democratic Republic of the Congo*, August 2008, electronically available at <<http://www.law.berkeley.edu/HRCweb/pdfs/LivingWithFear-Exec-Summ.pdf>>

209. The only major exception in the DRC was among those victims who had been displaced from their communities to the city of Bukavu, South Kivu, including both victims of both sexual and gender based violence and other forms of violence. Among female victims of SGBV who had been displaced to Bukavu, 55% they replied “individual” and 45% replied “both”. Not a single former child soldier who experienced SGBV said “the community”.
210. The Trust Fund verified these results in Bukavu during a workshop with local partners in March 2011 and all agreed that for those displaced to a big city from their rural villages, “community” can come to mean something foreign, even threatening. An important question to ask of “collective” reparations, partners noted, is *‘who is the collectivity’* and *‘how does the intended beneficiary of a reparations order fit in?’*
211. Among former child soldiers in the DRC, the results were overall similar between males and females - there was a clear preference for receiving “both” individual and community support with 70% for males and 79% for females. Male former child soldiers were slightly more accepting of awards targeted to the community, but at only 13%.
212. During a workshop in Bunia in March 2011 the Trust Fund discussed at length the idea of “individual” reparation awards with local partners from the Kivus and Ituri and what they implied to victims and affected communities. One story summed up particularly well the dilemma of an “individual” award and how it may lead to stigmatisation of the beneficiary: a local partner had received funding to provide livelihood support to victims of SGBV and was distributing goats, which created

jealousy among the community members who were not receiving support. The goats became known as “les chèvres des violées” or “the goats of the raped women”.

213. For many victims, integration into the community is a part of the rehabilitation process. Therefore, a reparation award that further *distinguishes* them from the larger community is antithetical to this goal. This is particularly important for former child soldiers and victims of SGBV. For former child soldiers, integration into the community is also particularly problematic because many were forced to commit grave crimes against those communities into which they are now trying to reintegrate.
214. Over two-thirds of male former child soldiers in the Trust Fund sample (68%) reported that their role in the armed groups was that of a “combatant”: 78% said they were forced to destroy property, 48% said they were forced to beat someone, 36% said they were forced to sexually abuse someone and 34% said they were forced to kill someone. Many of the victims of these crimes – or their family members – today constitute “the community”. Former child soldiers might therefore feel that they risk being seen as being rewarded for their acts if reparations were too “individual” in nature.

IV. Administering reparations in a context of ongoing conflict

215. So far there has not been a security assessment of possible reparation proceedings carried out by the relevant units within the Court on victims, intermediaries, legal representatives or others. The main reason

for this seems that the Court does not want to appear as prejudging the outcome any of the pending proceedings.

216. However, the Trust Fund has considerable concerns about possible security repercussions if reparation proceedings occur. It would advise that should there be a conviction, the Court requests an assessment from the Victims and Witnesses Unit and the Court's Safety and Security Section at the earliest appropriate opportunity. This should occur before any formal steps regarding reparation proceedings, such as notification and/or the collection of applications are systematically undertaken in order to anticipate from a security perspective the impact of any such steps.
217. In addition, the Trust Fund expects that at the stage of implementing reparation awards in the field there may be security concerns that may directly influence the implementation: implementing reparation within the context of ongoing conflict is unique in nature. In the Trust Fund's view it will be necessary for the Court to develop a protection strategy for victim beneficiaries of reparations and implementing partners administering the reparations orders on behalf of the Trust Fund, in order to deal with security risks and possible stigmatisation. Not least, dedicated resources may be necessary in order to address such concerns and protect implementing partner who are administering reparations on behalf of the Court. However, at the present stage the scope of possibly necessary protective measures is impossible to evaluate and has not been budgeted as may become necessary.

V. Harmonisation with national transitional justice and conflict/post-conflict initiatives

218. In the post-conflict context, transitional justice must be the main focus, both to confront and address the culture of violence and impunity and the massive human rights violations that took place during the conflict; and to begin a healing process within the community through truth and reconciliation, accountability and reparations.⁸¹
219. "Key features of transitions from civil conflict include a devastated infrastructure, destroyed institutions, breakdown of societal structures and roles (especially related to gender), a lack of professional and bureaucratic capacity, an inflammatory and violent political culture, and a traumatised and highly divided society"⁸². Other common problems include a lack of political will, judicial independence, materials and finances, and the government respect for human rights.
220. "In addition, in the conflict and post conflict context, a 'shadow' or criminalised economy is likely to be entrenched and there is likely to be widespread access to small arms, reflected in a high level of violence in the society. Given the lack of law and order, accountability, and trust, it is difficult to entrench major reform, and ultimately the reforms that are sustainable may be somewhat limited."⁸³ It is within such a context that the Court would issue any guilty verdict and reparations order for victims in the present case.

⁸¹ Kirsti Samuels, *Conflict Prevention and Reconstruction, Rule of Law Reform in Post-Conflict Countries Operational Initiatives and Lessons Learnt*, WorldBank Social Development Papers, Paper No. 37/ October 2006, p. 10 ; full report electronically available at <http://siteresources.worldbank.org/INTICPR/Resources/WP37_web.pdf>

⁸² Kirsti Samuels, *ibid*, p.6

⁸³ Kirsti Samuels, *ibid*, pages .6 and 7.

221. Moreover, as previously discussed, reparations ordered by the Chamber in the present case will only address a narrowly defined group of victims who suffered during the conflict of harm related to the charges against an individual accused in the criminal trial. Any reparations order by the Chamber will be issued in a situation where many victims of crimes of comparable severity will not be able to benefit from reparation awards.
222. The United Nations High Commissioner for Human Rights in a comprehensive report (the UN mapping report) documenting atrocities in the Democratic Republic of Congo during the 1993-2003 conflicts, however, observed that “[h]undreds of thousands of victims have suffered psychological and physical damage as a result of the terrible violence they experienced between March 1993 and July 2003.” The report highlights the extent of the damage suffered in the affected communities. The report also stresses the huge expectations on the part of victims in terms of reparations and their frustration at the privileges granted to combatants who were demobilised as part of the DDR programme. Most of the victims interviewed indicated that had not received any assistance and that they desperately wished for tangible steps towards reparation. These high expectations make the issue of administering ICC-ordered reparations a particularly difficult one.⁸⁴

⁸⁴ OHCHR Mapping Report, cited above. The UN OHCHR mapping exercise took place between October 2008 and May 2009. A total of 33 staff worked on the project in the DRC (including Congolese and international human rights experts). Of these, some 20 human rights officers were deployed across the country, operating out of five field offices, to gather documents and information from witnesses to meet the three objectives defined in the terms of reference. The mapping team's 550-page report contains descriptions of 617 alleged violent incidents occurring in the DRC between March 1993 and June 2003. Each of these incidents points to the possible commission of gross violations of human rights and/or international humanitarian law. Each of the incidents listed is backed up by at least two independent sources identified in the report. As serious as they may be, uncorroborated incidents claimed by one single source are not included. Over 1,500 documents relating to human rights violations committed during this period were gathered and analysed with a view to establishing an initial chronology by region of the main violent incidents reported. Only incidents meeting a

223. Under public international law and international human rights law⁸⁵ the State has the obligation to provide reparation for acts and omissions that can be attributed to the State, on its own territory or abroad. Furthermore, the Basic Principles state that “States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.”⁸⁶
224. The Trust Fund observes that in accordance with Article 25 of the Rome Statute these obligations are not affected by proceedings before the International Criminal Court. Moreover, Article 75 (6) of the Statute underlines that reparation proceedings in accordance with Article 75 of the Statute shall not prejudice the rights of victims under national and international law.
225. The Trust Fund respectfully encourages the Chamber to consider this wider transitional justice context and situation within the DRC when deliberating about possible reparations in the present case. Ideally the impact of ICC-ordered reparations will go beyond the scope of victims as defined on the case and have a positive effect on harmonising and strengthening the jurisprudence of national courts and transitional justice mechanisms in respect of victims’ right to remedies and

‘gravity threshold’ set out in the methodology were considered. Field mapping teams met with over 1,280 witnesses to corroborate or invalidate the violations listed in the chronology. Information was also collected on previously undocumented crimes.

85 See e.g. the Universal Declaration of Human Rights (article 8), the International Covenant on Civil and Political Rights (article 2.3), the International Convention on the Elimination of all forms of Racial Discrimination (article 6), the Convention against Torture (article 14), and the Convention on the Rights of the Child (article 39)

86 Resolution 60/147 of the General Assembly concerning Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles), para. 16.

reparations. In the following, the Trust Fund will discuss some aspects of this transitional justice context that it considers relevant for the Chamber.

A. Judicial reparations at national level

226. The right to reparation is clearly recognised in Congolese law.⁸⁷ In practice, however, so far only few judgments have been rendered against perpetrators of international crimes in the DRC and consequently only a very small number of victims have obtained a Court ruling which recognises them as victims.⁸⁸

227. Moreover, it has been claimed that the persistence of impunity seems mainly due to the lack of capacity of domestic mechanisms:

“Despite the reforms initiated and the international support the Congolese justice system has received, it lacks the capacity in the short or medium term to meet the challenges of seeking prosecution for crimes under international law committed in the past.”⁸⁹

87 Civil code, article 258: “[TRANSLATION] Any act whatsoever which causes harm to another shall oblige the one by whose fault it occurred to compensate for it”. Civil code, article 259: “[TRANSLATION] A person is liable not only for the damages he causes by his own act, but also for that which is caused by the acts of persons for whom he is responsible, or by things which are in his custody.”

88 A 2009 report of *Avocats Sans Frontiers* names list only 13 cases involving serious crimes that were effectively prosecuted in military courts: the Ankoro case, Biyoyo case, Bongibong case, Gédéon case, Cety/Bavi case, Kahwa case, Kalonga Katamasi case, Kilwa case, Milobis case, Mitwaba case, Mutins de Bunia case, Mutins de Mbandaka case and the Songo Mboyo case. These cases were heard in a handful courts, mostly the garrison courts of Mbandaka and Bunia, and, to a lesser extent, those of Bukavu and Kipushi; see *Avocats Sans Frontières, Étude de jurisprudence: l’application du Statut de Rome de la Cour pénale internationale par les juridictions de la République démocratique du Congo*, March 2009, electronically available at http://www.asf.be/publications/ASF_EtudeJurispr_StatutRome_FR.pdf; the report also contains as an annex an overview over the outcome of these trials, including the sums awarded as damages to victims. From this overview it becomes clear that the various courts did not adopt a harmonised standard with respect to damages.

89 OHCHR Mapping Report, p. 458, paras. 1017, 1018.

228. However, the only reparations possible in the DRC are those awarded through judicial proceedings and following the trial of an alleged perpetrator of international crimes. Accordingly, the vast majority of victims have never been awarded reparations.
229. Even where trials were conducted, this was not unproblematic. A study conducted by the International Center for Transitional Justice in 2009 of five international crimes trials before Congolese military courts revealed both the challenges, and to a more limited extent, the potential for DRC to respect its obligations to investigate and prosecute international crimes. The report indicated that victims expressed satisfaction at seeing perpetrators on trial and in seeing the government exercise its potential to render justice to promote the rule of law. The report observed also that “[t]hese positive reactions, however, were offset by two important facts. First, most convicted perpetrators subsequently fled from prison. Second, as of May 2010, the government had not paid court-ordered civil damages to victims”.⁹⁰

B. Relevant legislative developments

230. Many treaties prohibit the recruitment and use of children in armed forces and groups in the DRC. Yet, the same treaties have not recognised these acts as crimes for which the perpetrators bear individual responsibility.

⁹⁰ International Center for Transitional Justice, *Democratic Republic of Congo: Impact of the Rome Statute and the International Criminal Court*; June 2010; electronically available at <http://allafrica.com/download/resource/main/main/00020148:21fd241aa962447ed3474d1a434ea719.pdf>

231. The DRC adopted a new child protection law in January 2009 which criminalises the recruitment and use of children in armed groups and police forces, thus providing a legal basis for punishment of such offences. However, national courts have not handed down any rulings against those who recruit and use child soldiers to-date.⁹¹

C. Truth and reconciliation commission

232. One of the few transitional justice initiatives undertaken in the DRC was the truth and reconciliation commission⁹² established to review all political, economic and social crimes committed from 1960 to 2003. Since the start of its mandate, the commission has included the promotion of peace, justice, reparations, forgiveness and reconciliation. The commission has unfortunately not advised the government on reparations as part of this process.⁹³

D. The *brassage* process

233. After the end of the Ituri conflict, the DRC initiated a *brassage* process whereby rebel groups were integrated into the national army. In his March 2009 report to the Security Council, the Secretary-General stated:

“Despite some cases of prosecution of low-ranking officials responsible for human rights violations, the fight against impunity at higher levels of the police and military hierarchies remain a major challenge and a contributing

⁹¹ Before 2009, only child abduction and slavery were considered as crimes in the Penal Code: some sentences have been handed down on this ground. OHCHR Mapping Report, paras. 678, 679.

⁹² Resolution DIC/CPR/04.

⁹³ OHCHR Panel Report

factor to the dire human rights situation in the country. The integration into FARDC of CNDP officers accused of war crimes, in particular Bosco Ntaganda, is a matter of grave concern.”⁹⁴

234. The UN OHCHR report notes that the *brassage* process had been conducted without any vetting procedures, let alone prosecution of offenders, which makes the national army of the DRC “a ‘free zone’ for sexual and other serious offenders.”⁹⁵
235. In conclusion, one of the results of this process is that perpetrators of crimes against child soldiers have not been prosecuted nationally and victims have not received reparations.

E. Efforts by civil society and international organisations

236. A number of initiatives have been undertaken by international and national stakeholders with a view to improving the justice system in the country and ending impunity. It is worthwhile noting that many such international initiatives in favour of justice in the DRC have focused on sexual crimes.
237. In August 2010, the United Nations High Commissioner for Human Rights tasked a high-level panel⁹⁶ “to assess the functioning of existing

⁹⁴ Twenty-seventh report of the Secretary-General on MONUC (S/2009/160), para. 67.

⁹⁵ OHCHR Mapping Report, para. 964, with further references

⁹⁶ OHCHR Panel Report, cited above. The panel was chaired by Kyung-wha Kang, the Deputy High Commissioner for Human Rights, with Elisabeth Rehn, former Minister of Defense of Finland and co-author of the UNIFEM report on Women, War and Peace, and Dr. Denis Mukwege, Medical Director of Panzi Hospital in Bukavu (South Kivu) serving as members. They travelled to Kinshasa, Bukavu, Shabunda, Bunia, Komanda, Mbandaka and Songo Mboyo from 27 September to 13 October 2010. They met a total of 61

judicial mechanisms for remedies and reparations for victims of sexual violence, and to make recommendations on the strengthening of these mechanisms as well as the need for additional mechanisms, particularly to provide access to remedies for victims whose perpetrators are not known.” The panel’s report on remedies and reparations for victims of sexual violence in the DRC to the High Commissioner for Human Rights was released on March 2011.⁹⁷ It calls for the creation of an extra-judicial reparations fund for victims of sexual violence, in particular with a view to benefit victims whose perpetrators are unidentified or insolvent.

238. The Open Society Foundation (OSI) and the American Bar Association (ABA) established a mobile court programme focusing on sexual crimes. Mobile courts already existed in the DRC to address a variety of crimes, but what distinguished this particular initiative was that the mobile court sponsored by OSI and ABA focused in gender justice crimes. Under this programme, Congolese judges, prosecutors, and defence lawyers travelled to some of the worst crime sites, typically remote locations with lack of access to justice. Cases were heard over a period of months before the court moved to its next location. The mobile court had both civilian and military jurisdiction and focused on sexual violence, but had discretion to hear other crimes. Often, the entire community turned out to attend the trials. In 2010, nine mobile gender justice courts were held by Congolese officials, hearing a total of 186 cases. Of these, 115 were rape cases and 95 resulted in convictions (plus another 42

victims, representing a broad spectrum of cases: known and unknown perpetrators, national security forces, illegal armed groups and civilians as perpetrators, and diverse ethnic background of victims and perpetrators (like for instance, the Democratic Forces for the Liberation of Rwanda).

⁹⁷OHCHR Panel Report, 55 p.

convictions for non-sex cases). The prison sentences ranged from 3 to 20 years.⁹⁸

239. Earlier mobile courts ordered men convicted of rape to pay civil damages amounting to upwards of the equivalent of \$10,000 US Dollars in Congo currency. Word of these damage awards has spread throughout the country. For people suffering penury, the size of these awards represents an enormous sum and may fuel additional conflict, insecurity and stigma for victims and their communities.⁹⁹
240. International initiatives have also analysed justice initiatives for international crimes more generally in the DRC with a view to providing recommendations to the national stakeholders. There are a great number of reports, studies and findings from workshops.
241. In a series of workshops organised in 2010 by International Center for Transitional Justice (ICTJ), for example, Congolese victims of war crimes, crimes against humanity and gross human rights violations spoke about the challenges they face seeking reparations through domestic courts.
242. According to an unpublished ICTJ report on the workshops, since 2006, several victims have won judgments from Congolese courts ordering convicted perpetrators belonging to the Congolese military to pay compensation and for the State to assume subsidiary civil liability if the

⁹⁸ See articles about gender mobile courts on the Open Society Foundations website: http://blog.soros.org/2011/02/fizi-diary-mobile-court-tries-landmark-rape-case/?utm_source=twitter&utm_medium=tweetdeck-shortener&utm_campaign=social-media;
http://www.soros.org/initiatives/justice/focus/international_justice/projects/gender-justice-court.

⁹⁹ Chuck Sudetic, *Congo Justice: Unintended Consequences*, compiled on 23 Aug 2011., available online on <
<http://blog.soros.org/2011/04/congo-justice-unintended-consequences/>>

convicted persons are unable to pay. However, it appears that none of these orders have been enforced and no victim has ever received compensation. ICTJ reports that many victims said that while the trials of their cases had strengthened their belief in the rule of law and offered significant acknowledgement of their suffering and loss, the overall inability of the State and its courts to fulfill their right to reparations erodes confidence in the justice system and undermines the effective implementation of the principle of complementarity.¹⁰⁰

243. The Open Society Institute's Africa Governance Monitoring and Advocacy Project¹⁰¹ and the Open Society Initiative for Southern Africa published a study on the military justice system in the DRC.¹⁰² This study "is intended to highlight general trends in the functioning of military justice and the observance of constitutional and international rules regarding the jurisdiction of the military courts, the independence of magistrates, the observance of rights of defendants, and the right to a fair trial."¹⁰³

¹⁰⁰ See also

- FIDH, *Briser l'impunité*, March 2008, N°490, 20 p., which had already reported the inefficiency of national justice, impunity for perpetrators of sexual violence, prison's porosity, and the non payment of damages allocated to victims, see pp. 10-11 and p. 13;
- Avocats Sans Frontières, *Étude de jurisprudence: l'application du Statut de Rome de la Cour pénale internationale par les juridictions de la République démocratique du Congo*, March 2009, 144 p., ("ASF report"), which explains how military judges based their decisions on the relevant provisions of the Rome Statute in cases of international crimes;
- Club des amis du droit du Congo, *La repression des crimes internationaux par les juridictions congolaises*, 2010, 86 p.

¹⁰¹ The four African foundations of the Soros Foundation network, which include the Open Society Initiative for Southern Africa (OSISA), together established AfriMAP. Its objective is to monitor closely the degree to which African countries and their development partners ensure the observance of African and international standards on human rights, the rule of law, and government responsibility.

¹⁰² AfriMAP and The Open Society Initiative for Southern Africa, *Military Justice and Human Rights: An urgent need to complete reforms*, 2010, 84 p.

¹⁰³ AfriMAP and OSISA's report, cited above, p. 7

F. Conclusion on transitional justice efforts

244. In conclusion, while there are a range of efforts to address the needs and rights of victims at national level, the overall response, including access to meaningful reparation, has been mixed and often out of reach for most victims. In the TFCV's view, as mentioned at the beginning of this section, Court-ordered reparations could have an impact beyond the scope of victims that they directly address, and have an influence on national forms of judicial and/or non-judicial reparations in DRC. It will therefore be important that the Chamber bears in mind the wider context in which the reparation awards that it might order will be implemented and affect victims.

VII. Coordinating with national disarmament, demobilisation and reintegration (DDR) processes

245. Any reparations programme administered to former child soldiers will need to take into consideration the programmes administered already for the benefit of former child soldiers implemented by the DRC government, the United Nations, child protection organisations and donors.

246. The disarmament, demobilisation and reintegration (DDR) process is designed to contribute to security and stability in post-conflict environments so that recovery and development can begin. The DDR of ex-combatants is a complex process, with political, military, security, humanitarian and socio-economic dimensions. It aims to deal with the post-conflict security problem that arises when ex-combatants are left

without livelihoods or support networks, other than their former comrades, during the vital transition period from conflict to peace and development.¹⁰⁴

247. In the context of its nationwide DDR process, on 7 May 2004, the DRC adopted an operational framework for children associated with armed forces and groups in a bid to address the problem of former child soldiers.¹⁰⁵ This document is based on the relevant international and national legal instruments signed and ratified by the DRC.¹⁰⁶ It lays down the guiding principles, norms and procedures to be followed "[TRANSLATION] to harmonise approaches and guarantee minimum quality for the responses given to children's affairs."¹⁰⁷ Accordingly, special measures were included to ensure the unconditional return of demobilized child soldiers to family and civilian life within their communities through the DDR process.
248. The programme set out in the framework contains a global and holistic strategy comprising of: "a) Identification, verification and orientation; b) Medical and psycho-social care; and c) Reintegration: through family reunification or reintegration into their communities of origin or alternatively, school reintegration, economic reintegration through vocational training and income-generating activities (IGAs)".¹⁰⁸

¹⁰⁴ United Nations Disarmament, Demobilisation and Reintegration Resource Center, <<http://www.unddr.org/whatisddr.php>>.

¹⁰⁵ http://unddr.org/docs/Programme_National_de_DDR-7.5.pdf.

¹⁰⁶ http://unddr.org/docs/Programme_National_de_DDR-7.5.pdf, para. 53.

¹⁰⁷ http://unddr.org/docs/Programme_National_de_DDR-7.5.pdf, para. 16.

¹⁰⁸ [REDACTED], *Summary of the Internal Appraisal Report: Socio-economic reintegration of ESFGAs and other vulnerable persons in Ituri* 2007-2009, page 3.

249. The framework document guided and continues to guide the DDR process of child soldiers and former child soldiers on the entire DRC territory. It could therefore be a valuable source of information for the Chamber.
250. The Trust Fund would in this context like to emphasise that it has a long standing relationship with the parties implementing the DDR programme in the DRC through its general assistance mandate supporting former child soldiers.
251. For example, the Trust Fund coordinates with [REDACTED] at different levels to design, implement and evaluate rehabilitation support provided by the Trust Fund to the former child soldiers in the Ituri region. The Trust Fund is actively engaging with the Congolese government and [REDACTED] to ensure that the implementing partners are accessing referrals from the DDR (UEPNDDR) database in order to ensure effective coordination and referrals to rehabilitation assistance.
252. The Trust Fund field staff also actively participates in the Protection Cluster and the [REDACTED], two relevant interagency working groups. These contacts will be important to leverage for the purposes of planning and implementing reparation programmes.

PART THREE—CONSIDERATIONS RELATED TO IMPLEMENTATION AND SUBSTANCE

I. Implementation Scenarios under the TFV Regulations

253. Rule 98 of the RPE foresees four different forms of reparation awards for consideration separately and/or in combination.
254. The Rules of Procedure and Evidence and in particular, the Regulations of the Trust Fund provide a detailed legal framework on their implementation, setting out four different procedural scenarios corresponding to the options provided for in Rule 98 of the RPE.
255. The Trust Fund would like to respectfully share with the Chamber its considerations of the consequences of the various procedural requirements when deciding upon the reparation award.

A. First Scenario: Rule 98 (1) RPE

256. The first scenario concerns individual awards to be made in accordance with Rule 98 (1) of the RPE. Rule 98 (1) states that individual awards shall be made “directly” from the convicted person to the previously identified beneficiary.
257. In practical terms this implies that after the victim makes a “request” in accordance with Rules 94 and 95 (2) a) RPE, (i.e. that the victim fills out a reparations claim form provided for by VPRS), the Court assesses the scope of damage, loss and injury of each respective victim who has filed a claim. Based on this assessment the Court decides to make an award

on an individualised basis (which it may, according to Rule 97, if it deems it appropriate, combine with a collective reparation award).

258. The Court then orders the transfer of the individual award (presumably in the form of a cash payment) with regard to each individual victim. The transfer is made directly from the assets of the convicted person to each victim. However, in the present case where no significant assets are to be expected from the accused, it remains unclear how this should be put into practice.

B. Second Scenario: Rule 98 (2) RPE

259. The second scenario consists of cases in which the Chamber decides to award individual awards but does so under Rule 98 (2) of the RPE. Rule 98 (2) states that when, at the time of the Court order for reparation, it is impossible or impractical to make the individual awards directly from the convicted person to the individual victim, then the Court “may order that an award for reparations against a convicted person be deposited with the Trust Fund.”
260. Furthermore, the award thus deposited, “shall be separated from the other resources of the Trust Fund, and shall be forwarded to each victim as soon as possible.” In other words, the Trust Fund creates a special, separated holding account. The money comes into this account from the perpetrator and then goes out from the account to the victims in accordance with the instructions given by the Chamber.

261. According to the Regulations of the Trust Fund, this scenario has two sub-scenarios:

- The first sub-scenario concerns cases in which the Court has some data on the victims: the victims have probably filled out a formal application for reparations but the information provided is incomplete.
- The second sub-scenario concerns cases where the Court in its order does not identify the victims and only establishes general parameters and then asks the Trust Fund to identify the beneficiaries.

1. Regulation 59 (i.e. partial identification of eligible individual victims)

262. The first sub-scenario refers to all those cases in which the information that the Court has at its disposal is incomplete but the victims are nonetheless for the purpose of the RTFV considered to be “identified” beneficiaries at the time of the Court order. The most likely imaginable situation for this constellation to take place is the case of individual victims who have filled out an incomplete reparation claims forms with the Court. The form might be incomplete because details are missing or have changed since filling out the form e.g. because victims have moved location since they filed the claim. However, in order to be considered individually “identified”, at least the name and the identity of the requesting victim must be known to the Court.

263. These cases are addressed by Regulation 59 of the Trust Fund Regulations, titled “cases where the Court identifies each beneficiary”. Regulation 59 requires the Trust Fund to develop a draft implementation

plan which shall set out “the names and locations of victims to whom the award applies, where known (and subject to confidentiality), any procedures that the Trust Fund intends to employ to collect missing details, and methods of disbursement.” The Trust Fund submits that the usage of the word ‘disbursement’ seems to indicate that the law has a disbursement of cash awards in mind in this scenario.

2. Regulations 60 and 61 (i.e. no identification of eligible individual victims)

264. The second scenario concerns cases of individual awards where the Court does not identify the beneficiaries. Regulation 60 and 61 RTFV stipulate that in such cases the Trust Fund shall use statistical and demographic data to determine eligible victims. The nature of the proceeding would then be comparable to that of a mass claims proceeding. A large group of individuals, initially only identified by parameters set out in the Chamber’s decision, will be addressed by a reparations measure as individuals rather than as a group.

265. In practical terms this means that the Trust Fund would have to identify the (individual) victims and solicit communications from them. In doing so, the Trust Fund could seek cooperation and collaboration with interested States, intergovernmental organisations, as well as national or international non-governmental organisations. Furthermore, the Trust Fund may consult with victims or their legal representatives and the families of individual victims, as well as interested persons, and any competent expert or expert organisation.

3. Verification requirement; Regulations 62 – 65

266. For both sub-scenarios that fall under Rule 98 (2), i.e. cases where individuals have been (partly) identified and cases of a mass claims scenario where only the parameters for eligibility are determined by the Court, the Trust Fund Regulations set out in Regulations 62 to 65 of the RTFV a two-stage verification process.
267. At a first stage, the Trust Fund would have to verify that the individuals it has identified on the basis of the available data would be in fact eligible to receive any reparations award in accordance with any principles set out in the order of the Court. Subject to any stipulations set out in the order of the Court, the Board of Directors would then determine applicable the standard of proof for the verification exercise, having regard to the prevailing circumstances and once compiled, approve a list of beneficiaries. The Board may also decide “to institute phased or priority verification and disbursement procedures” in order to prioritize a certain sub-group of particularly vulnerable victims.
268. At a second stage of verification, the TFV would have to ensure that only those eligible victims for reparations would receive exactly what they are owed in accordance with the Chamber’s ruling.

4. Analysis of mandatory verification procedure

269. In the context of the present case there are strong arguments against embarking on such an elaborate verification procedure at the implementation stage: there are only limited resources available and the accused is likely not able to finance the reparations award. At the same

time, there are potentially hundreds if not thousands of direct and indirect victims who live in an area with limited infrastructure where security concerns persist at present.

270. Establishing systems for carrying out the two step verification process outlined above would necessarily be a costly and resource intensive process. Most likely, the Trust Fund would need additional resources to those it has at its disposal at the moment. In particular, the verification process might necessitate the setting-up a secretariat in Ituri with staff that have the appropriate language and IT skills. Such an elaborate and expensive process may not stand in proportion to the potentially available funds to pay for the substantive awards.
271. In addition, on a substantive level the process may result in creating a 'class of victims', which may in turn lead to the stigmatisation of victims falling within this 'class'. This is particularly true if there is a case that falls under the second sub-scenario, i.e. where the Chamber has not identified the victims other than by setting parameters.
272. The danger of stigmatisation seems in particular true in the context of child soldiers: because of their relatively young age and the dual perception of child soldiers as alleged perpetrators and as victims they are a group particularly vulnerable to stigmatisation.

C. Third Scenario: Rule 98 (3) RPE

273. Rule 98 (3) of the RPE gives the Chamber the option to order "that an award for reparations against a convicted person be made through the

Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate.”

274. This rule is expanded upon in Regulations 69-72 of the RTFV. According to Regulation 69 to 72, the Trust Fund shall develop a draft implementation plan to set out the precise nature of the collective award(s), as well as, the methods for its implementation. Determinations made in this regard should be approved by the Court.
275. In doing so, the Trust Fund may carry out consultations with the victims as defined in rule 85 of the Rules of Procedure and Evidence and, where natural persons are concerned, their families, as well as consultation with their legal representatives, and any competent expert or expert organisation on both, the nature of the collective award(s) and the methods for its/their implementation. In the understanding of the Trust Fund, these consultations would add an additional level of consultations to that which will take place during the reparations hearing/phase before the Chamber will have made its order.
276. Already the process to consider the victims’ needs can form part of the reparation award itself: the award could be the result of a two step-process consisting of a rich consultation, leading to a substantive award. The consultation would provide the victims with an opportunity to tell their story and express their needs. The consultation could also serve as a moment of reflection by the wider affected community and the public at large about the crimes and the harm suffered and could thus contribute to building up a historical memory recognizing the rights and the role of victims in the conflict, as a first step of a healing process.

277. Furthermore, in particular in case that the Chamber orders a collective award, the Trust Fund could draw upon lessons-learned from identifying beneficiaries in its work under its assistance mandate to develop strategies to ensure that a reparation award will target victims appropriately.
278. For example, if a collective reparation order is issued by the Court then the Trust Fund suggests applying a victim participation conceptual framework based on the Technology of Participation (ToP) methodology to ensure effective community mobilisation and victim consultation.¹⁰⁹ This type of framework is best used to develop victim consultation and collaboration in situations which require problem identification and generate concrete results in a brief period of time.¹¹⁰
279. The key to a successful participatory process is good design and the following strategies will ensure effective victim outreach and involvement:

Inform the public and affected communities about the Court-order and keep victims informed as they take part in the consultation process;

Educate the public, affected communities and victims about the details of the provisions of the Court-order, the role of the Trust Fund and Court, and information related to the reparations process;

¹⁰⁹ Technology of Participation (ToP) covers three methods for group facilitation developed by the Institute of Cultural Affairs (ICA), a US- based organisation long involved in organizing work in marginalised communities and vulnerable populations.

¹¹⁰ , United States Agency for International Development, *Technology of Participation: Basic Group Facilitation Methods Course Manual for Trainers. Governance and Local Government Project*, Manila 1999

Solicit information from the public to augment other sources of information;

Consult with the public the public, affected communities and victims to learn what they know and how they feel about the consultation and implementation process;

Involve the public, affected communities and victims in planning to develop programme goals, strategies and visions for the future;

Obtain responses from the public, affected communities and victims about the impact of the Court-order and the implementation process;

Provide comments on how public, affected communities and victims respond to issues or the impact of the Court-order and the implementation process; and

Involve members of the public, affected communities and victims directly in decision-making through participation in on-going consultations.

280. For the implementation of a collective award, the Trust Fund may according to its Regulations identify intermediaries or partners, or invite proposals for the implementation of the award. The Secretariat shall put in place procedures to monitor the implementation of a collective award.
281. Procedurally, the requirements of a verification process set out in Regulation 62 to 65 RTFV are not applicable to collective reparation awards. Furthermore, the term 'disbursement', very prominent in the

rules of individual awards, is never used in the context of collective awards.

282. Bearing in mind the particular circumstances of the case before the Chamber, the option of collective awards may, at least from a procedural perspective, seem to be the preferable option. However, again only consultations with victims will determine whether collective reparations are also the most appropriate reparations in the present case.

D. Fourth Scenario: Rule 98 (4) RPE

283. Rule 98 (4) RPE sets out the last of the four options of how a reparation award could look like it states. It states that following consultations with interested States and the Trust Fund, the Court may order that an award for reparations be made through the Trust Fund to an intergovernmental, international or national organisation approved by the Trust Fund.
284. This rule is expanded upon in Regulations 73-75 of the RTFV which tasks the Trust Fund with developing a draft implementation plan which should contain the following elements: the names of concerned organisation(s) and a summary of their relevant expertise; a list of the specific functions that the concerned organisation(s) is/are to undertake in fulfilment of the Court's order; and a memorandum of understanding/contractual terms between the Board of Directors and the concerned organisation(s) setting out roles and responsibilities, monitoring and oversight.

285. The Trust Fund Secretariat would then have the task to oversee the work of the concerned organisation(s) in fulfilling the Court's orders, subject to the overall oversight of the Court.
286. Furthermore, the RTFV state that the regulations that relate to individual awards to victims pursuant to rule 98, sub-rule 2, and collective awards to victims in accordance with rule 98, sub-rule 3, shall apply as appropriate, depending on whether the Court has indicated that the award shall be considered to be an individual or collective award.
287. The last point implies that the verification process set out in Regulations 62 to 65 of the RTFV shall apply, in as far as it can be appropriate, if the Chamber states in its decision that it considers the Rule 98 (4) RPE award is to be considered an individual award.
288. In terms of viability of this option, the Trust Fund submits that at this current stage it is not aware of any appropriate organisation which would be willing and able to carry out a reparations order in the sense of 98 (4) RPE. However, the Trust Fund would welcome the opportunity to discuss this option further with the Chamber at a later stage, if an order under Rule 98 (4) is something that is seriously considered in the present case, and if this is within the realm of what the victims would like to receive in terms of a reparation award.

E. Conclusion with respect to the various scenarios

289. Based on the examination of the procedural implications of implementing the four different forms of reparation awards established

in Rule 98 of the RPE, the arguments speak in favour of ordering collective awards in the present case.

290. Collective forms of reparations would allow a second level of victims' consultation and their involvement in the design of the award, which could add additional meaning to the reparations proceedings and be of symbolic importance to them.
291. Collective reparation may also be the most effective way of using the limited funds likely to be available. Furthermore, there are reasons to suppose that collective reparations may be considered to have a less divisive effect on those community members not eligible to benefit from Court-ordered reparation awards which may also reduce the risk of stigmatisation of the beneficiaries of the award. Collective forms of reparations seem particularly suitable for implementing measures aimed at rehabilitation, a form of reparation that, as discussed, may be particularly suitable in the present context. Finally, in the case of collective awards, the costly and resource-intensive mandatory verification requirement does not exist.
292. An alternative could be a combination of collective and individual awards. Such a combination might enable the Chamber to combine the advantages of both forms of awards set out above.¹¹¹ However, the individual part of the award should not consist of cash payments which may be problematic in the context of child soldiers.¹¹²

¹¹¹ See paragraphs 16-26 above

¹¹² See paragraphs 304-314 above

293. Instead, alternative and more symbolic forms of individual reparations should be considered. The Chamber could inquire about symbolic measures suitable for addressing the individual recognition of victims that are particularly relevant and appropriate in the local context of Ituri.
294. However, unless the Chamber orders the part that consists of individual awards in accordance with Rule 98 (1), a verification process as described with all its challenges would be necessary for the individual component of a combined award.

II. Operational considerations

295. The following section will contain observations related to operationalising reparations. In particular, it will discuss possible forms of reparations in the present case, how monitoring and evaluation could take place, and exit strategies.

A. Possible forms of reparations in the Lubanga case

296. Article 75 of the Rome Statute explicitly identifies three possible forms of reparation to include: *restitution*, *compensation* and *rehabilitation*. This list is not exhaustive and the Chamber is not necessarily limited to these three forms. In particular, two more symbolic forms of reparations, *guarantees of non-repetition* and *satisfaction*, constitute recognised forms of reparation.

297. Given the nature of the crimes related to the enlistment and recruitment of child soldiers, the present case requires a careful deliberation of appropriate forms of reparations awards.
298. The present case concerns victims, who at the time that they suffered harm as a result of the crimes committed against them, were still children. This poses a number of obligations as well as problems.
299. The right of children to reparations is clearly stipulated in many instruments, including the Convention on the Rights of the Child¹¹³ and its Optional Protocol on the Involvement of Children in Armed Conflicts.¹¹⁴ The UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime stipulate that "[c]hild victims should, wherever possible, receive reparation in order to achieve full redress, reintegration and recovery."¹¹⁵
300. The identification as a former child soldier in the reparations process may in fact prohibit these victims from coming forward to claim their awards because of the stigma and discrimination attached to the conscription and enlistment. Furthermore, the present case has also confronted the Court with the intricacies of proving the ages of victims who were presented as former child soldiers given the absence of birth certificates and school records. "While experts conceded that age-determination techniques were not foolproof, they nonetheless said studies of x-rays of the hands, wrists, and mandibles of these individuals

113 Article 39 of the Convention on the Rights of the Child.

114 Article 6 of the Convention on the Rights of the Child.

115 UN EcoSoc Resolution 2005/20, "Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime", par.35, in Chap XIII titled "The right to reparation"

indicated some were as young as 10 or 11 years old at the time that they were allegedly used as child soldiers.”¹¹⁶

301. The Chamber will also have to give consideration to the fact that more than eight years have passed since the end of the conflict and that the former child soldiers are now adolescents and young adults. Therefore, understanding the normative life cycle, including key developmental milestones and how the social systems that support them have been affected, is important in assessing, designing and implementing reparations for these former child soldiers.¹¹⁷ Studies have shown that over time, the vast majority of former child soldiers may become productive and capable adults but never truly free from their pasts. “They all struggle with psychological distress connected to their experiences as child soldiers, and rely solely on themselves, families and friends for comfort and support when they get in psychological trouble.”¹¹⁸
302. With these considerations as a background, the Trust Fund would like to share some observations based on its experience of working in the field under the general assistance mandate related to the various forms that reparation awards may take.

116 Wairagala Wakabi , *DR Congo: Lubanga Trial Highlights Plight of Child Soldiers*, October 8, 2010, Open Society Institute, electronically available at < <http://blog.soros.org/2010/10/lubanga-trial-highlights-plight-of-child-soldiers/>>

117 Neil Boothby, *What happens when child soldiers grow up? The Mozambique case study Intervention 2006*, *Intervention Journal* Volume 4, Number 3, Page 244-259, electronically available at < <http://www.interventionjournal.com/downloads/43pdf/boothby.pdf>>

118 Ibid.

1. Restitution

303. Restitution seeks to restore the victim to the original situation before the harm caused by the violations.¹¹⁹ In the Lubanga case, although the specific harm suffered by former child soldiers differs from one victim to another, the harm generally relates to deprivation of an unperturbed childhood, the loss of schooling, and trauma resulting from the experience of being a child soldier including involvement in and exposure to the commission of acts of violence. It is unlikely that such forms of harm can be repaired through restitution. Consequently, this form of reparation would not seem to be the most suitable means of addressing harm resulting from the enlistment and use of child soldiers.

2. Compensation

304. Compensation "should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case."¹²⁰

305. Accordingly, if compensation were to be considered as part of a reparation order in the Lubanga case, then Chambers would need to determine an amount equivalent to the harm suffered by the child soldiers and indirect victims. Chambers will also need to consider factors related to the fact that the damage varies from one victim to another, depending on gender, age, duration of time with the militia, and violence suffered or committed by the child.

¹¹⁹ For more detail as to how the Basic Principles define restitution see paragraph 11 above

¹²⁰ for more information as to how the Basic Principles define compensation see paragraph 11 above

Domestic practice

306. The reparation mechanism applied so far by Congolese courts is to order compensation, commonly referred to as “damages.” In particular, domestic military courts in the DRC have ordered damages to be paid to the victims of war crimes and crimes against humanity perpetrated by DRC military armed forces.¹²¹
307. The awards ordered by domestic tribunals are often quite substantial and likely exceed the resources that may be available for funding reparation orders in the present case. For example, in the decision of the military tribunal in Ituri, *Military Prosecutor v. Bongi Massaba*, a criminal trial judgment was issued directly applying the Rome Statute and accompanying civil action for damages on 26 March 2006. The families of deceased victims were awarded the equivalent of US \$75,000 each as compensation.¹²²
308. Perpetrators in domestic trials in the DRC generally have not had the necessary funds to pay the compensation ordered by the domestic courts to the victims. And although the Congolese State is convicted *in solidum* in many cases, the State referral procedure appears to be too complicated and costly for most victims to enforce their rights. This has created

¹²¹ Cases include the cases of Songo Mboyo (2006), Mbandaka (2007), Bongi (2006) and Mulesa (2007). These cases have been presented as flagship trials, showing the political will of the DRC to put an end to impunity.

¹²² The case concerns Bongi Massaba, a captain in the Congolese army, and a group of soldiers under his command, who arrested five pupils (the victims) and stole goods from civilians in various locations in Ituri. The pupils were obliged to carry the stolen goods, and later Massaba ordered his soldiers to shoot the victims on the pretext that they were members of the armed militias in Eastern DRC. The military prosecutor instituted criminal proceedings against Massaba, and the victims’ relatives filed a civil claim against both him and the DRC, seeking damages for the killings. For a more detailed case summary see <http://www.adh-geneva.ch/RULAC/pdf_state/DRC.National-decision-on-IL.pdf>

feelings of frustration, shame, and abandonment in victims who have had the courage to take legal action.¹²³

309. The Trust Fund further notes that the enlistment and conscription of child soldiers is not included in the Congolese *code pénal militaire* and thus not applied by military courts and only been criminalised by the Child Protection Law passed in January 2009. As a result, at present there are no the decisions of domestic courts that provide any jurisprudence related directly to reparations of child soldiers in the DRC context.

Cash payments in the particular context of child soldiers

310. The fact that compensation will most likely consist of a cash payment is problematic in the particular context of child soldiers and will need to be examined carefully.
311. The Paris Principles state that "while material assistance and particular attention may well be necessary, for instance, for children with disabilities or girl mothers, inappropriate assistance can impede reintegration, particularly if it is perceived to be rewarding children who have committed acts harmful to their community."¹²⁴ Furthermore, the Paris Principles underline that "direct cash benefits to released or returning children are not an appropriate form of assistance, as experience has repeatedly shown."¹²⁵

¹²³ International Center for Transitional Justice, *Presentation on judicial reparations in the DRC at invitation of the Registry*, held at the ICC on 23 and 24 March 2011.

¹²⁴ See Paris Principles, at para. 7.33..

¹²⁵ See Paris Principles, para.7.35.

312. Paying money to child soldiers as a reparation award might also appear, in the eyes of the community and the victims of the former child soldiers, as rewarding them for their time as child soldiers, a time during which they may have been involved in carrying out atrocities. In addition, instead of preventing the use of child soldiers, such compensation could rather encourage the enlistment of children in the future. In the context of extreme poverty, even a vague prospect of eventually receiving reparation awards may be an incentive for families to send their children to join militias in future conflicts. Bearing this in mind, the Trust Fund under its rehabilitation mandate has deliberately refrained from distributing cash to child beneficiaries or from giving the impression in general that cash is being distributed. Alternative means of granting former child soldiers access to funds may, however, be employed.
313. For example, the four ongoing Trust Fund-supported child soldier rehabilitation projects¹²⁶ have identified the need for child soldiers and other conflict-affected children to obtain access to financial resources needed to improve their economic livelihoods. Trust Fund supported projects for the reintegration of former child soldiers include vocational training and assistance in launching an economic activity through access to village savings and loans schemes. This form of assistance was deemed important to empower former child soldier in order to progressively rehabilitate and reintegrate them back into their communities. The Trust Fund administers this programme in collaboration with a microcredit institution in Bunia to assess the extent to which victims could benefit from microcredit to improve their livelihoods

¹²⁶ Projects no. TFV/RDC/2007/R1/011, TFV/RDC/2007/R1/026, TFV/RDC/2007/R2/028, TFV/RDC/2007/R2/030.

314. Trust Fund's partner organisations in the DRC have also recently been trained on the techniques of establishing a local system of "mutual solidarity," a community savings scheme that integrates reconciliation efforts. This sustainable model involves all members of a community, thereby strengthening solidarity amongst victims and affected communities. In practice it means that former child soldier may save and borrow together with other members of their community. Such community savings schemes have already been established in various locations where the Trust Fund implementing partners implement rehabilitation activities and they could provide an important model for delivering reparations within the context of this case.

3. Rehabilitation

315. Rehabilitation is another form of reparation expressly mentioned in Article 75 of the Rome Statute.

316. The Basic Principles do not actually define this concept, but rather include a non-exhaustive list of activities that could facilitate rehabilitation: "rehabilitation should include medical and psychological care as well as legal and social services".¹²⁷ It has been argued that "[t]his lack of a strict legal definition rehabilitation could partly be explained by the fact that in its nature, rehabilitation requires multidisciplinary and interdisciplinary work to secure a holistic treatment of victims."¹²⁸

¹²⁷ Principle 21, UN Basic Principles and Guidelines, *supra*.

¹²⁸ REDRESS, *Rehabilitation as a Form of Reparation Under International Law*, December 2009, p.6.

317. After the child soldiers are removed from the war zones, they are subjected to a rehabilitation process through the DDR programme, which is meant to reintegrate the under-aged soldiers into society and at the same time to restore their status as children. Rehabilitation is expected to rescue the children from their newly acquired identity of a young person who exerts violent power over adult civilians by bringing them back to a pre-war state of innocence, vulnerability and need for guidance. "Thus, rehabilitation is envisaged as a sort of 'antidote rite,' which is expected to have the same transformative potential as that of militarization: to reverse power relations so as to make its subjects not only capable of living in a peaceful society but capable of resuming their roles as children who will be taken care of and controlled by adults."¹²⁹
318. The consequences of victimisation through enlistment and conscription are many and will vary depending on the victim's age, gender, duties, length of service within the armed group, and the type of violence suffered or committed. The fact whether they have already participated in a DDR programme will also be of importance. Compared to compensation and restitution as forms of reparation, victim rehabilitation - which can be "defined around the aspirational notion of a functional life"¹³⁰ - seems to be an appropriate form of reparations award "to reflect the complex and diffuse nature of the harms victims experienced before, during and after the conflict."¹³¹

¹²⁹ Kyulanova, Irina, *From Soldiers to Children: Undoing the Rite of Passage in Ishmael Beah's 'A long way gone' and Ashley's Little Soldiers*, in *Studies in the Novel* by, April 1, 2010.

¹³⁰ Ruth Rubio-Marín, *What Happened to the Women? Gender and Reparations for Human Rights Violations*, The Social Science Research Council, 12, 2006, at p.46.

¹³¹ Ibid.

319. The Trust Fund's experience with rehabilitation programmes could provide operational know-how and inspiration for reparation orders to the benefit of former child soldiers. Specific interventions that that support and strengthen individuals' coping skills for anticipated trauma and grief, as well as those that supported normative life cycle milestones such as access to vocational training, including in form of apprenticeships, access to education e.g. in form of accelerated literacy programmes, access to employment e.g. through income generation projects, and the provision of seeds and tools for farming, are positive forms of rehabilitation reparations. Additionally, rehabilitation should instil a sense of social responsibility. Over and above all this, however, rehabilitation should take account of the need of former child soldiers to be accepted by their families and communities.
320. The Trust Fund's experience with rehabilitation programmes could provide operational know-how and inspiration for reparation orders to the benefit of former child soldiers. For example, former child soldier girls who leave the armed forces and groups with children that were born during their time as child soldiers are given assistance to return to the school system.¹³² This process is started by attending a special class for one year, during which the teachers try to bring these former child soldiers up to an educational standard corresponding to their age. If they succeed, these girls will join the classes at their level.¹³³ Under this Trust Fund project, implementing partners provide three-year scholarships for each of the girls.

¹³² TFV/RDC/2007/R2/029.

¹³³ In case they fail to achieve the necessary educational level to join their class at school, the girls are reoriented towards vocational training.

321. In addition, the project also established a day-care centre for their children of the former girl child soldiers. In this day-care centre, childcare workers help the girls to develop a motherly relationship with their babies – reconciling the bond between mother and children which is particularly important because often these children born as a result of sexual abuse during the time of their mothers as child soldiers are not accepted by their families and communities.
322. Many of the girls face stigmatisation by their communities because of their past as child soldiers and the sexual violence that they have experienced as a result of this. In fact, they are often not even supported by their own parents. Rehabilitation has therefore also focused on sensitising parents of the former girl child soldiers to their responsibilities, so that they become involved in the education and rehabilitation of their daughters and grandchildren – reconciling the bond between these girls, their children and their families. The Trust Fund has for example supported parent committees and encouraged efforts of these committees aimed at income-generating activities in order to generate the money needed to pay for school fees. This long-term effort is accompanied by psychological support, outreach and peace education.
323. Another form of rehabilitation supported by the Trust Fund under its general assistance mandate that may be suitable in the present case is physical rehabilitation. The Trust Fund uses a community reconciliation project as the avenue to identify suitable beneficiaries and to suggest referrals to medical institutions capable of providing prostheses to amputees or surgery to victims of physical mutilation. The goal is to address physical disabilities caused by violence committed against

victims during conflict, as part of an integral package together with reconciliation efforts.

324. Finally, the experience of the Trust Fund has shown that in order for rehabilitation to be sustainable, the design of the activity aimed at providing rehabilitation to the victim needs to bear certain considerations in mind. In particular, it is important to consider that rehabilitation is a complex task that takes time. According to the International Rehabilitation Council for Torture Victims (IRCT), "[r]ebuilding the life of someone whose dignity has been destroyed takes time and [...] long-term material, medical, psychological and social support is needed. Treatment must be a coordinated effort that covers both physical and psychological aspects."¹³⁴
325. In addition, rehabilitation as a form of reparation also requires local capacity to deliver these services. It has been argued that "although medical and psychological services might in principle be chosen to play a crucial role in the psychosocial rehabilitation of victims, they may arguably also be problematic for a number of reasons, including the fact that they often rely on existing service infrastructure which is often weak."¹³⁵ This is relevant to the present context because in the experience of the Trust Fund, the existing infrastructure in Ituri in the field of medical and psychological services as well as in economic capacity building is unfortunately at present still seriously underdeveloped.

¹³⁴ International Rehabilitation Council for Torture Victims, information electronically available on < <http://www.irct.org/what-is-torture/rehabilitation.aspx>>.

¹³⁵ Ruth Rubio-Marín, *What Happened to the Women? Gender and Reparations for Human Rights Violations*, at p.33

326. Therefore, the Chamber may consider including a local capacity-building component into any rehabilitative measure it may order as a reparation award. This would ensure that technical expertise is programmed alongside the delivery of rehabilitation activities as part of Court-ordered reparations. The Trust Fund notes that in programmes under its rehabilitation mandate, it has made local capacity-building a priority as a cross-cutting strategy throughout the duration of its projects, in order to ensure quality and sustainability of rehabilitation activities.

4. Satisfaction

327. The Basic Principles describe satisfaction by stating that it could consist of "effective measures aimed at the cessation of continuing violations; verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations; the search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities; an official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; public apology, including acknowledgement of the facts and acceptance of responsibility; judicial and administrative sanctions against persons liable for the violations; commemorations and tributes to the victims; inclusion of an accurate account of the violations

that occurred in international human rights law and international humanitarian law training and in educational material at all levels."¹³⁶

328. Satisfaction accordingly aims at the restoration of dignity, reputation and the rights of the victims by seeking the uncovering of the truth and a public recognition for the crimes suffered, including by ordering a judicial sanction against the perpetrator. This symbolic form of reparation can be very important, in particular if victims themselves express their need for such measures.
329. While certain of the satisfaction measures listed in the Basic Principles seem to constitute forms of reparation that can only be ordered against a State, it has been argued that "some of the requests from victims falling within the concept of satisfaction could be possible against individuals if considered and implemented creatively."¹³⁷
330. In the context of the present case, the publication of the judgment or of selected findings or statements made during the course of the trial that relate to the truth regarding underlying causes of the Ituri conflict and in particular to the crime of conscripting and enlisting child soldiers could constitute a form of satisfaction. Such a publication of the judgment could be accompanied by consultations reaching out to the affected communities in Mandro, Bule, Centrale, Rwampara, Sota, Irumu, Libi, Mbau, Bunia, Largu, Djugu, Bogoro, Mongwalu, Lipri during community *barzas* [meetings].

¹³⁶ See Basic Principle 22;

¹³⁷ REDRESS, *Justice for Victims: the ICC's reparations mandate*, 20 May 2011, p.13, electronically available at <http://www.redress.org/downloads/publications/REDRESS_ICC_Reparations_May2011.pdf>

331. The Trust Fund encourages the Chamber to consider promoting education for peace as part of reparation programmes so that former child soldiers and other young people are engaged and are taught the values of peace and reconciliation as part of redress efforts.
332. In particular, in the Trust Fund's view collective memory initiatives supported through the Court order could be a component of a reparation programme for former child soldiers. As part of such activities, the former child soldiers, together with other conflict-affected children and youth, could be encouraged to address themes related to the conflict through art therapy, theatre, music, and dance. This could serve to provide an outlet for expressing their experiences and trauma and the shared activities could help to reduce the stigmatisation that they might be experiencing. As will be explained in the following, the Trust Fund experiences also demonstrate that community reconciliation activities can and should be combined with other forms of reparation awards, such as rehabilitation
333. The Trust Fund under its general assistance already supports two community reconciliation projects which could be adapted for a reparation order.
334. The first example is a Trust Fund sponsored project called [REDACTED] seeks to restore a culture of peace among children who have been victims of violence in eastern DRC. Its objective is to promote dialogue between child and adolescent victims and their community to ensure a better understanding and expression of past events, with the ultimate goal of coming together to build a future free of violence. Through peace

education activities,¹³⁸ adapted instructional material is used to teach children about the underlying causes of the conflicts and develop plans for resolving these issues. The young people who graduate from the [REDACTED] become peace ambassadors tasked with propagating and transmitting messages of peace within their families, neighbourhoods and communities using various media such as drama, poetry, music and community work.

335. In the Trust Fund's experience, with the [REDACTED] has had a large impact with little funding needed to support such an intervention. The positive impacts that the Trust Fund has observed are many and varied to include: establishment of a "conflict resolution committee" set up in a playground; children beginning to address adults that act violently asking them to change their behaviours; students who some months ago showed reluctance to interact with another ethnic group declared their willingness to live together with members of another ethnic group; children began to contribute to school fees for other vulnerable children; and students started to smile again after months of depression as a result of the conflict.

336. An album of songs, sung by four groups of young Iturians is being recorded and in general the educational materials developed by the project are not only suitable for children of secondary school but for all community members.

337. In addition, within the Trust Fund's [REDACTED] *project*, communities themselves have also identified the most vulnerable victims who are

¹³⁸ This project is implemented in Ituri, North and South Kivu and directly benefits over 14,000 children. In Ituri, activities are carried out in Bunia, Bogoro, Mongwalu, Komanda, Mahagi, Badiya and Gety.

granted access to physical rehabilitation in the form of prostheses or orthopaedic surgery for the mutilations that they suffered as a result of the conflict. The feedback received from local implementing partners and victims indicates that the physical rehabilitation measures associated with the community reconciliation process gave the victim the feeling that their harm had been recognised and repaired and was not a form of humanitarian assistance, which is an important added symbolic value in the eyes of the victims.

338. The second example is a Trust Fund supported community reconciliation project. In this project, communities in twenty localities have started a process of writing a collective history of the conflict. This process is aimed at revealing the trauma and experiences of each victim in the community and will help to produce a collective memory for future generations. It relies on the community *barzas* of the twenty localities in Ituri identified by local stakeholders as the most hard-hit by the conflicts. The project works with communities and various community groups, such as [REDACTED] and [REDACTED], to identify the causes of past conflicts and the risks of a possible resurgence of conflicts.

5. Guarantees of non-repetition

339. Guarantees of non-repetition are aimed at "preventing crimes" by ensuring that they are not committed again. This form of reparation is often associated with "a series of reforms, particularly within the security forces and judicial system"¹³⁹ as well as measures to contribute to

¹³⁹ OHCHR Mapping Report, Para. 1079.

prevention such as ensuring effective civilian control of military and security forces, protecting human rights defenders, providing human rights education and reviewing and reforming laws contributing to or allowing gross violations of international human rights law.¹⁴⁰

340. In the present case, guarantees of non-repetition would aim at ensuring that no re-recruitment of child soldier victims takes place.
341. Guarantees of non-repetition seem very important within the context of the DRC because there is "constant fear on the part of the affected populations that history would repeat itself"¹⁴¹ and, according to the United Nations, the recruitment of child soldiers is a practice that has continued.
342. However, the question for the Chamber to address will be in how far guarantees of non-repetition can be adapted to the limitations of a criminal trial based on the individual criminal responsibility of the convicted person and his/her ability to repair the harm caused by the crimes of which the Chamber found him/her guilty.
343. Reconciliation activities described above under the heading "satisfaction" may be a first step towards addressing underlying causes of conflict. The Chamber may also consider whether it wishes to highlight the need to ensure guarantees of non-repetition in its explanation leading up to the reparation order against the convicted person by calling upon the international community, the interested

¹⁴⁰ see Basic Principles, cited above

¹⁴¹ OHCHR Mapping Report, Para. 1143

States, political leaders and affected communities to act responsibly in accordance with international standards and law, to promote reconciliation and to address any existing conditions that may give rise to renewed conflict.

6. Conclusion

344. In conclusion, and bearing in mind the particular circumstances of the case, it seems that a combination of material and symbolic forms of reparation awards, such as measures aimed at rehabilitation and satisfaction may be considered as appropriate forms of reparations, Restitution or (cash) compensation, however, seem less suitable.

B. Monitoring, evaluation, reporting

345. Regulations 68 and 98(4) and of the Trust Fund describe the monitoring and reporting requirements for the Secretariat of the Trust Fund when implementing Court-order reparations.
346. As part of this effort, the Trust Fund recommends employing a participatory monitoring and evaluation strategy, meaning all key actors—e.g., victim survivors, implementing partners, and other relevant stakeholders—are involved in reparation project development, implementation, monitoring and evaluation. The participatory monitoring and evaluation strategy is a collaborative process that brings the various actors together to decide what will be monitored and evaluated on a reparation order and how the monitoring and evaluation will be conducted. Jointly, the stakeholders gather and analyse data and

assess the reparation programme goals, outcomes and outputs to decide if the interventions are on track or need to be adjusted.

347. Confidentiality is part of all components of the Trust Fund monitoring, evaluation, and reporting. Moreover, the Trust Fund is guided by Article 68 (1) of the Rome Statute stating that the Court “shall take appropriate measures to protect the safety, physical and psychological well being, dignity and privacy of victims.”

C. Exit strategies of reparations programme

348. Sustainability in the present context concerns the question of what will last once the implementation of the reparation award has been completed. Some types of reparations, such as symbolic forms of reparations, will by their very nature live on. Other forms of reparations, such as rehabilitation activities will have to be taken up by other stakeholders and be transformed in order to be sustainable. There will need to be an assessment at the end of implementing Court ordered reparations as to what activities that the order has initiated should be sustained, how this can be done, for how long, and by whom.
349. Planning, implementation and monitoring of reparation programmes will need to involve local stakeholders such as governments, local authorities, community structures and representatives, cooperatives, women’s associations, local groups and beneficiaries. This will help ensure relevance and sustainability. An exit strategy should be planned together with key stakeholders from an early stage onwards and already be part of the design of the award. Furthermore, communicating exit

strategies with the affected population during the early stages of programme implementation should be a priority in the outreach strategy.

III. International Cooperation

350. International cooperation and, in particular the cooperation of the State where reparation awards will be implemented, is vital to turn the Chamber's order into reality. There may even be need to conclude a specific memorandum of understanding with the State concerned at the implementation stage of reparations.

351. The President of the Court has announced at a conference on reparations held at the Peace Palace in The Hague in May 2011 that ICC Presidency would take a leading role in facilitating international cooperation related to the implementation of Court-ordered reparations.

352. The Trust Fund very much welcomes this involvement of the Presidency which will be very important to facilitate the implementation of reparation awards.

IV. Consultation, community mobilisation and outreach

353. Consultation, community mobilisation and outreach on reparations through the implementation process are critical, including prior to the reparations phase/hearing, during the reparations hearing but also at the implementation stage.

354. There are likely to be high expectations towards the Court in terms of reparations. Given that the unique and groundbreaking reparations mandate of the International Criminal Court, expectations will exist not only on part of the victims and their communities, but also at the level of local and international civil society, States parties, and the international community as a whole. The large number of varied stakeholders with expectations towards the Court also implies that some of these expectations may be conflicting.
355. If reparation orders are collective in nature than community mobilisation approaches through a community action cycle (CAC)¹⁴² can be used to encourage victim survivors (community members) to work together to identify and prioritise issues related to reparations, define and identify the type of reparations and implementation modalities, and take action to improve or remedy the situation together with the Court, Trust Fund and implementing partners.¹⁴³
356. Community mobilisation is not limited to raising community awareness about the conviction and details of the reparation award. Instead it should consist of a comprehensive strategy that includes all of the following activities: carrying out careful formative research to understand the victims' community context and design the process entering the community (if reparation awards are to be facilitated by external actors) with a view to establishing credibility and trust; raising community awareness about the conviction and details of the reparation award; working with community leaders and others to invite and organise victim participation of those most affected by the Court-order;

142 Paul, S. (1987) 'Community Participation in Development Projects', World Bank Discussion Paper 6. Washington DC: World Bank.

143 IDS Bulletin 'Making Rights Real: Exploring Citizenship, Participation and Accountability', Vol. 23, No. 2, April 2002.

exploring the issues to understand what is currently being done to support victims (obtaining an overview over what are considered to be helpful/harmful practices', beliefs and attitudes) so that the community can assist the Court to set priorities; planning; implementing the reparations programme plan; and monitoring and evaluating progress.

357. The Trust Fund considers that there will be multiple cultural, socio-economic, gender and language barriers to overcome in order to ensure the quality of consultations and outreach. For example, outreach will have to take a gender sensitive approach due to cultural factors since the risk of stigmatisation of girls, including within their own families, is even stronger than that of male victims. Special attention also needs to be given to the methods and means of communicating with victim populations, particularly in order to reach the most vulnerable victims, who may be disabled, women, children, elderly, and/or illiterate.
358. The question of community mobilisation and outreach is also very much a question of timing. It should take place only once there is a clear message to disseminate related to any reparations proceedings before the Court. Many questions are still open, including first and foremost the outcome of the trial but also concrete ideas about the principles and procedure that the Court will apply to reparation proceedings.
359. With this consideration in mind, no public outreach or community mobilisation on reparations is planned by the Trust Fund for the moment other than giving very general replies in response to questions asked in the field. That being said, the Trust Fund has made the

necessary preparations to start outreach activities as soon as this may become appropriate.

360. Outreach activities will need to be a coordinated effort of the entire Court and the Trust Fund, involving the Registry, and in particular, the PIDS, VPRS, Office of the Public Counsel for the Victims (OPCV), and other relevant sections of the Court.

PART FOUR – PROCEDURAL CONSIDERATIONS, LUBANGA CASE

361. In the following section, the Trust Fund would like to provide observations on the possible procedural framework concerning reparations proceedings before the Chamber.
362. In case of conviction, resources collected through fines or forfeiture and awards for reparations against Thomas Lubanga will most likely be negligible as has been discussed in paragraphs 112 to 115 above. This will impact both the procedure and the substance of any potential reparations award. In particular, individual reparation awards for victims directly from the convicted person as set out in Article 75 (2) first sentence and Rule 98 (1) are only possible if the convicted person provides assets to fund these orders and impossible, if the funding of the reparation award is dependent on funds offered by the TFV.
363. The Trust Fund submits that it will be important to keep things in proportion: the Court and the Trust Fund should not embark on a very costly process if there are only limited funds for supporting an award. Furthermore, in the Trust Fund's view the most effective and efficient

use of those resources may be a point of consideration also in deciding upon the substance of any possible reparations award.

364. Further consideration by the Chamber and the Court as a whole for securing adequate funding related to managing the *process* of reparations, including hearings and implementation, is very important. Support will be needed for procedures related to the implementation of awards such as the victim verification process; community mobilisation and outreach; consultations with victims and their communities, in particular in case of collective reparation awards; and providing security measures for victims and implementing partners in a context where there is ongoing conflict and insecurity. Such budgeting will depend upon several factors, including the number of victims seeking reparations and certain legal considerations made by the Chamber.
365. Any reparation order that necessitates a verification process will be more costly to implement. Furthermore, a purely applications-based reparations process will also be more costly. Soliciting and processing large numbers of victim applications will require resources, staff and time. These costs are currently not foreseen in the Court and Trust Fund's regular budget and the costs should not be sourced from the Trust Fund's voluntary contributions.
366. The question of whether an appeal against a possible guilty verdict and/or an appeal against the reparations order will have a suspense effect may affect the budget year in which implementation costs occur.

367. While the limitation of available funds is an important factor, in the Trust Fund's view, the question of who provides the funding for the reparation award, the convicted person or the Trust Fund under Regulation 56 of the RTFV, does not have a decisive impact on the procedures from a legal perspective. As previously discussed,¹⁴⁴ all reparation orders are to be directed against the convicted person; and resources used to "complement resources collected for awards for reparations" are only a substitute of resources that the convicted person is unable to provide toward these orders.

368. In consideration of these issues, the Trust Fund would like to respectfully share observations on the possible procedural steps in a chronological order in which they may become relevant:

I. Initiation of reparation proceedings

369. The legal framework envisions that, as a general rule, reparation proceedings are to be triggered by requests (applications) for reparations filed with the Court by, or on behalf of victims. The Chamber can, however, also initiate reparation proceedings upon its own motion "in exceptional circumstances" As indicated in Article 75 (1) of the Statute, Rule 95 (1) RPE.

370. In the present case, this should not pose challenges. Even though the Court received only a small number of requests for reparations, such requests have already been made to the Court in the present case.

¹⁴⁴ See discussion of Regulation 56 in Part Two Section VII.

II. Procedural relevance of individual applications by victims for reparation proceedings

371. Separate from the question as to how reparation proceedings before the Court are triggered, there must be consideration of the question as to whether a victim will need to submit a request for reparation in form of an application to the Court. In other words, the question arises whether the legal framework could be interpreted in such a way as to obviate the need for applications by victims to be submitted to the Court for them to be eligible to benefit from reparations.
372. Next to an application based approach, the Chamber could consider awarding reparations to victims - both individually and collectively - who have not (yet) applied to the Chamber. The Chamber may also decide to combine these approaches.
373. In particular, rule 94 of the RPE sets out the formal requirements for a victim's request for reparations under Article 75 of the Statute. In doing so it appears to treat a "request" as an individual application¹⁴⁵, similar to those presented by victims wishing to participate in proceedings. One possible interpretation of Article 75 is that, other than in "exceptional circumstances", only those victims who make an "request" or application under Rule 94 may receive reparations.
374. However, this interpretation is difficult to reconcile with the Regulations of the Trust Fund, which envisage two categories of individual awards: firstly those in which the Court identifies each beneficiary, and secondly

¹⁴⁵ Accordingly, the Victims Participation and Reparations Section (VPRS) of the Registry has developed application forms which are available to any victim who wants to apply for reparations already at this stage.

those in which it entrusts the identification or verification of individual beneficiaries to the Trust Fund. In the latter case, the procedure followed will not rely on individual applications under Rule 94 but is set out in Regulations 60 and 61 of the RTFV.

375. In the Trust Fund's view a need for receiving individual applications may be limited in cases the Chamber decides not to harm consider harm on an individual basis.
376. The Chamber could consider several scenarios: firstly, because it opts to order collective reparations in the sense of Rule 98 (3) RPE based on the fact that the number of the victims, scope, forms and modalities make a collective award more appropriate; secondly, because it opts for ordering reparations to be made through the Trust Fund to an intergovernmental, international or national organisation in the sense of Rule 98 (4) RPE; and/or finally, because it opts to order individual reparations under Rule 98 (2) and requests the Trust Fund to identify victims in accordance with Regulation 60 and 61 of the RTFV.
377. An alternative interpretation of Article 75 (1) second sentence is that it only refers to the mechanism that triggers a determination of damage, loss or injury as part of reparation proceedings. Unless the Court, in exceptional circumstances, decides to act on its own motion, at least one or several requests for reparations would be required to *trigger* reparations proceedings to take place. However, reparation awards would not be limited to those victims submitting such a request. This narrow interpretation of Article 75 (1) may seem more convincing because it takes account of the possibility of the Chamber to award

reparations to victims who have not filed an application as explained in paragraph 374 above.

378. Accordingly, the legal framework set out in the Rome Statute and the Rules of Procedure and Evidence, allows the Chamber to choose between an applications-based processes, an approach which does not rely on individual applications, or a combination of these approaches. The Trust Fund in the following would like to address the appropriateness of these possible approaches with regard to the present case.
379. As previously discussed, the process leading up to issuing a reparations order (i.e. reparations proceedings before the Court) and its outcome (i.e. substance and implementation process) should stand in proportion to each other. The most appropriate approach will depend on how the Chamber decides to assess the harm suffered by victims, and how it will intend to carry out such an assessment. The Chamber will have to ensure that the process it adopts will enable victims to share their experiences of the different forms of harm suffered and their different needs.
380. The Chamber may be guided in its decision as to whether or not to invite individual applications for reparations by the following considerations: the size and nature of the victim population; the ability to provide all victims with a sufficient opportunity to safely complete and submit an application; and the type of information needed by the Chamber for making its decision, which will in turn be informed by the nature of the reparations award.

381. Given the particular circumstances of the present case, a purely applications-based approach does not seem to be the most appropriate solution.
382. In the present case, the potentially large number of victims who may be eligible to apply for reparations is not reflected in the number of applications for reparations actually received by the Court to-date. The Registry has so far received less than 40 applications for reparations in the Lubanga case.
383. Possible reasons for the low number of applications received for reparations in the present case include: the limitations on the capacity of the Registry to reach all victims, taking into account the logistical and security restraints that prevent the Court from reaching all areas as well as the limited resources at its disposal; concerns on the part of the intermediaries assisting victims and the legal representatives of victims to avoid raising expectations in a context where it is not yet known whether the accused will be found guilty and a lack of information regarding how and when any reparations proceedings might occur; and problems for potential victims to access the Court in this case because of, for example, their young age, the high rate of illiteracy among the victim communities, the fact that being identified as a former child soldier might expose the victim to stigma and the seemingly ambivalent or even critical attitudes of the victims' communities towards the Court.
384. The Chamber should bear in mind that submitting an application may subject victims to risks including re-traumatisation, stigmatisation and security threats.

385. In spite of these concerns, the number of potential victims to claim reparations could, however, likely go up following a conviction but it is hard to estimate whether this would be true at this stage. In fact, there could be a rather large number of victims¹⁴⁶ eligible to apply for reparations, even if the same criteria the Chamber used for the participation in trial.¹⁴⁷
386. Furthermore, the procedure adopted with respect to applications should reflect the procedure the Chamber intends to adopt to determine harm in the reparation proceedings. A primarily applications-based approach is most suited if the Chamber will assess the individual harm that victims have suffered on a case-by case basis and award individual reparations according to its determination.
387. An applications-based approach is, however, less suitable if the Chamber already knows that it will award primarily collective forms of awards. As noted, in the present case the funds available to pay for the financial implications of reparation awards seem rather limited. Furthermore, collective forms of reparations, such as measures aimed at rehabilitation, seem the most appropriate and relevant.

¹⁴⁶ Human Rights Watch (HRW) stated in their report *Ituri covered in Blood*, cited above: "Human Rights Watch researchers observed a large number of child soldiers among UPC combatants. In an interview with Human Rights Watch researchers, UPC President Lubanga claimed to have 15,000 troops. Local experts and observers believe that nearly 40 per cent of these are children under the age of eighteen. In February 2003, witnesses saw newly recruited children, still in their school uniforms, on the streets of Bunia." The Trust Fund notes that the Rome Statute only considers the recruitment of children under 15 as child soldiers as a crime whereas HRW talks about children under the age of 18. All the same, it is likely that the number of child soldiers under 15 is still quite significant.

¹⁴⁷ I.e. as 'direct victims' child soldiers in the forces allegedly under Thomas Lubanga Dyilo and as 'indirect victims': firstly, persons with close personal relationships, such as those between parents and children, and secondly, persons who have intervened to prevent one of the crimes alleged against the accused, i.e. the conscription and enlistment of the child soldiers. See: *Lubanga* case, Decision on 'indirect victims', 8 April 2009, ICC-01/04-01/06, cited above.

388. The Trust Fund respectfully suggests to the Chamber to adopt a procedure that does not rely primarily on applications. Instead, the Chamber could either combine an application-based approach with an approach that does not rely on applications. Alternatively, the Chamber may wish to adopt an approach which will not at all rely on individual applications, in particular if the Chamber will not make any individual determination of harm on a case-by-case basis.
389. In conclusion, the Trust Fund submits that should the Chamber determine the guilt of the accused, it may wish to as soon as possible also publicly give an indication on the approach to the reparation procedure it intends follow. This will serve as guidance to all parties and victims as well as to the Trust Fund and the Registry. In doing so, the Chamber will have to consider granting enough time for the victims to engage with the reparations process; and, if necessary, file and process applications and to allow time for the Registry to process any applications thus received.

III. Notification mechanism under Rule 96 RPE

390. Related to the question of the most appropriate procedural approach is the question of the notification of victims as set out under Rule 96 of the RPE. Rule 96 tasks the Registrar with notifying, insofar as practicable, the victims or their legal representatives and the person or persons concerned. Furthermore it must take all the necessary measures to give adequate publicity of the reparation proceedings before the Court, to the extent possible, to other victims, interested persons and interested States.

391. The Trust Fund proposes that notification and outreach should take place as soon as the Chamber has announced that it will consider reparations. The notification should explain to victims and affected communities what they can expect; and/or if the Chamber requires victims to submit applications by a certain date; or take other specific steps in order to be considered.
392. In this context, the Trust Fund notes that depending on the intended purpose and scope of the Rule 96 notification process this may take time. This holds especially true if the Chamber intends to use this notification mechanism to reach all potential victims and allow them to file individual applications.

IV. Reparations phase/hearings before the Chamber

393. In the Trust Fund's view, the fact that Article 76 states that any representations related to reparation proceedings shall be heard during any further hearing on sentencing makes clear that the reparation hearing and decision is part of the first instance proceedings (just as the sentencing). While the Chamber has already heard evidence related to reparations during the main trial, it may also organise one or several hearings on reparations to take into account the representations of victims, other interested persons or interested States in accordance with Article 75 (3) and 76 (4) at the same time as it will hold any hearing on sentencing. Accordingly, the reparation hearing(s) should take place after the Chamber has issued a decision on the guilt or innocence of the accused.

394. During the reparations hearing, the Chamber “may invite representations and take account of input from the convicted person, victims, other interested persons or interested States” as set out in Article 75 (3) as well as from experts and the Trust Fund and the Registry.
395. The Chamber will have to determine the scope of victims eligible to benefit from reparation awards; the way it intends to go about the determination of scope and extent of damage, loss or injury to or in respect of victims; the applicable standard of proof; and specify the appropriate reparation awards, including their form.
396. In the view of the Trust Fund, a very important avenue for the Chamber to consider is the possibility of a site visit and *in situ* hearings in the Democratic Republic of the Congo to enable direct communication with the victims and their affected communities. If this is not feasible for the entire Chamber, an alternative could be to send a single judge (as *judge rapporteur*) for a hearing who then reports back to the Chamber and the parties to the proceedings via video-link. However, any *in situ* hearing must always ensure the rights of the accused to a fair trial. Accordingly, he must be given the opportunity to ask questions.
397. In determining the appropriate reparation awards, the Chamber will have to be aware of the availability of funds to pay for any financial implication of such awards. Accordingly, the Chamber may request during the reparations hearing/phase the convicted person and the Registry whether any funds are available from the convicted person to fund the reparation awards that it intends to order.

398. Furthermore, the Chamber may also request the Trust Fund to indicate the amount of funds at its disposal and reserved for complementing reparation awards in the *Lubanga* case with a view to the possibility of providing funding towards a reparation award under Regulation 56. In addition, the Trust Fund will inform the Chamber whether it intends to issue a donor appeal to fundraise for a reparations order.
399. The Trust Fund stresses that such a specific fundraising call would only take place after the order has been issued because in the experience of the Trust Fund fundraising is more successful if the potential donor can be told what exactly the money donated will be used for.
400. At the conclusion of the reparation phase/hearings the Chamber may then make an order for reparations against the convicted person, specifying the reparation awards for the benefit of victims, and bearing in mind the financial resources that have been indicated to be available.
401. The Trust Fund suggests that the Chamber's decision should be flexible so that in case dedicated fundraising efforts of the Trust Fund to support the funding of the reparations order raise any significant amount of funds, this additional money can be put to use. In the view of the Trust Fund the Chamber could do so by either providing for various scenarios set out in the order or an order which sets out a flexible framework.

V. Steps to be taken by the TFV after a reparations order has been issued

402. Once the reparation order has been issued by the Court against the convicted person indicating its modalities, including whether it shall be made “through the Trust Fund,” the Board of the Trust Fund will take a decision in accordance with Regulation 56 of the RTFV, and will advise the Chamber accordingly. At this stage, the Board may also launch a specific donor appeal with a view to raising further funds to be used for financing the reparation making reference to the Chamber’s order. The Board will inform the Chamber of this appeal and up-date it on the outcome.

VI. Consequences of an appeal on the Chamber’s reparations order

403. The implementation of reparation awards ordered by the Court could be affected by an appeal at two levels: firstly, an appeal could be addressed against the reparations order as such as set out in Article 82 (4) of the Statute. Secondly, it seems that any appeal against the conviction/guilty finding as such would have direct consequences for the reparations order: based on Article 75 (2) first sentence, a conviction is a necessary condition of the Court ordering a reparation awards.
404. The consequences of an appeal against the reparations order itself are clearly set out in the law and seem straightforward. An appeal only against the reparations order as such would not have any suspense effect, unless the Appeals Chamber decides to grant such suspense effect upon request of one of the parties that according to Article 82 (4) of the

Statute may appeal the reparations order. In its decision upon appeal, according to Rule 153 of the Rules of Procedure and Evidence, the Appeals Chamber may confirm, reverse or amend any reparations order made under Article 75.

405. More problematic is the question whether an appeal against the conviction/decision on guilt in the sense of Article 81 of the Statute would have an impact on the implementation of the reparations award.
406. Based on Article 76 (3), it is the Trust Fund's view that reparation proceedings should proceed even if there is an appeal immediately following a decision convicting the accused –as stated above, just as sentencing reparation proceedings are part of the first instance proceedings and an appeal against the guilty verdict generally would also not halt the sentencing to take place. However, an appeal challenging the guilty finding could have repercussions on the fact whether the order for reparations, once it has been made by the Chamber, may be implemented.
407. Article 81 of the Statute addresses the question of an appeal against a decision of acquittal or conviction or against a sentence. However, it does not mention the question of whether an appeal of a conviction would have any impact on reparations. Article 81 (4) addresses the question of a suspensive effect. In making reference to 81 (3) (a, b) it sets out that the convicted person shall remain in custody pending the appeal of a conviction or sentence, unless the time spent there exceeds the sentence imposed in which case he/she shall be released. Article 81 (4)

further states that with this exception, the execution of the decision (of acquittal or conviction) or sentence shall be suspended.

408. The Trust Fund recalls that the order for a reparations award addresses the harm victims have suffered due to crimes committed under a particular charge of which the accused has been found guilty. An appeal in the sense of Article 81 of the Statute that challenges the conviction would put the basis for the reparations order set out in Article 75 (2) into question.
409. In the view of the Trust Fund, therefore, while this is not expressly addressed in the law, it seems that it would make sense to suspend the implementation of any reparations order analogous to Article 81 (4) of the Statute until a final decision by the Appeals' Chamber is reached to confirm the conviction of a particular charge or to overturn it. Particularly on a practical level it would be very difficult to reverse the implementation of reparations once carried out, should the conviction related to a particular charge be overturned upon appeal.
410. It will be up to the Court to clarify this issue but in the Trust Fund's view the implementation of any reparations order should be suspended until there is a finally confirmed conviction. All the same, the Trust Fund will endeavour to make all possible preparations for a draft implementation plan as set out in Regulation 54 and 55 of the RTFV based on the decision of the first instance Chamber so that it will be in a position to implement the reparation award without any further delay. It may for example already informally contact potential implementing partners to discuss their availability to carry out activities related to the reparations award

and discuss the feasibility of certain kinds of activities. In making these preparations, the Trust Fund will pay particular attention in order not to raise undue expectation of victims.

411. Upon confirmation of the conviction, the Chamber's order for reparations would become immediately implementable. Should, however, the Appeals' Chamber overturn fully or in part the conviction, the decision of the Appeals' Chamber will have to address the implication of its finding on the reparation order made by the first instance Chamber. Ideally therefore the reparations order should be designed in such a way that it may be easily adapted to reflect the Appeals' Chambers' finding.

VII. Procedural aspects related to the implementation phase

412. Once the reparations order becomes implementable, and in cases in which the reparations order is made "through the Trust Fund," the Trust Fund will present the implementation plan to the Court in accordance with the procedure set out in the relevant regulations of the RTFV, depending on whether the award is an individual, a collective or a RPE 98 (4) award or a combination of these options.¹⁴⁸
413. At this stage, the full amount available to the Trust Fund raised through fundraising efforts and stemming from the reserve kept in accordance with Regulation 56 of the RTFV to complement reparations will be known and can therefore be reflected in the implementation plan.

¹⁴⁸ For a more detailed discussion see section on implementation scenarios, Part Three, Section I above

414. The Trust Fund will then submit the implementation plan, which it has made in accordance with its regulations and the ICC's Financial Rules and Regulations. The Trust Fund will also indicate where appropriate the processes for consulting victims, their families, legal representatives, competent experts and expert organisations; and the identification of intermediaries and partners for inviting proposals for the implementation of the award.
415. Once approval is received from the Chamber, practical implementation may begin. The Trust Fund will in accordance with Regulation 58 of the RTFV then begin to regularly up-date the Chamber on the progress of the reparations award; and at the end of the implementation period, submit a final narrative and financial report to the relevant Chamber.

PART FIVE – CONCLUSIONS

416. The recognition of the plight of victims of the most serious crimes is a cornerstone of the Rome Statute. The rights of victims to participate in proceedings and to benefit from Court-ordered reparations are without international precedent. The establishment of a Trust Fund for Victims, linked to the International Criminal Court, with mandates to redress harm to victims of crimes within the jurisdiction of the Court in relation to situations and specific cases is generally accepted to be an important innovation of international criminal law.
417. The Court's first decision on reparations will be a landmark event in the development of international criminal law. As the Trust Fund is fully

aware, the implementation of reparation awards should be of particular relevance to the lives of the victims concerned and their families. Articulating the values of international reparative justice, then turning these into a valuable reality in the experience of victims, will be an undertaking in which the Court and the Trust Fund will share a joint responsibility of critical importance. The Trust Fund therefore greatly appreciates the opportunity provided by the Chamber to submit a filing on issues that it finds worthy of consideration in this regard.

418. In the present filing, the Trust Fund has refrained from commenting on the principles on reparations to be adopted by the Court in accordance with Article 75 (2) of the Statute, believing that the deliberation on and adoption of principles belongs to the discretion of the Court itself. However, the Trust Fund has used this opportunity to share its legal opinion, for the Chamber's further consideration, on the Court's reparations regime as outlined in the Rome Statute and the relevant regulatory framework, including the Regulations of the Trust Fund for Victims. The Trust Fund argues that in the present legal régime, any award and implementation of a reparations order by the Court should maintain a clear link to the individual criminal responsibility of the convicted person. This implies that an award for reparations can only be ordered against the convicted person.

419. Next to legal questions and procedural preferences, the Court's first reparations award should also address the financial challenges related to the Rome Statute's reparations régime, finding a way to resolve the conundrum of scarcity of available resources in the face of a high level of expectations to be met. The Trust Fund is fully aware of the likelihood that a convicted person may not have the resources required to

adequately finance a reparations award. Therefore, the possibility offered by RTFV 56 for the Board of Directors to complement a reparations award reflects a unique and unprecedented mission to satisfy the rights and needs of eligible victims for reparative justice on behalf of the international community.

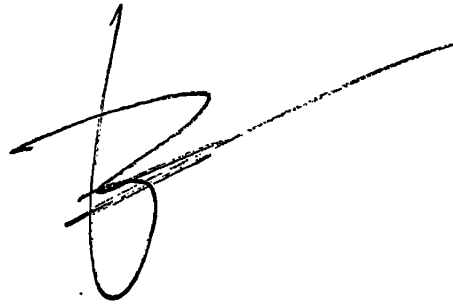
420. The Trust Fund's Board recognises the importance of ensuring the transparent management of the resources put at its disposal by way of voluntary contributions. As this filing indicates, the Trust Fund is fully committed to assume this responsibility as part of a faithful intent to develop a strong and effective collaboration with the Court for implementing reparation orders, without prejudice to activities under the Trust Fund's general assistance mandate.
421. The Trust Fund has made observations on based on its operational experiences over the last four years. This filing documents how the experiences and lessons gained administering the Trust Fund's general assistance mandate in the Ituri region, may help to inform the Court in deciding on the scope and form of reparations that may be appropriate in the *Lubanga* case.
422. The Trust Fund observes that the narrow charges may be of concern if a limited definition of eligible victims is maintained, including in regard to the sexual and gender-based violence allegedly experienced by the former child soldiers. The Trust Fund argues for adopting a flexible and inclusive approach to reparations in this regard.
423. The filing also highlights the need to address the particular vulnerabilities of child victims. Considering the local context in the Ituri

region, in which reparations would take place, as well as the need to avoid further harm resulting from re-stigmatisation of victims, the Trust Fund recommends to the Chamber to ensure a collective quality to reparations awards in the *Lubanga* case. The Trust Fund considers it important that the reparations process should stand in proper proportion to the scope and form of the eventual award. The Trust Fund points out that success for implementing a reparations award will in particular depend upon the quality of local consultations with victims and affected communities which it deems of crucial importance.

424. The impact of ICC reparations is likely to be felt far beyond the court room and the boundaries of the particular case at hand. Providing redress for harm suffered by victims eligible for reparations remains the primary concern for the Court and the Trust Fund. The credibility of the Rome Statute's regard for the plight of victims is also at stake. The quality of reparative justice as rendered by the International Criminal Court and as implemented by the Trust Fund may well be of inspirational value to similar initiatives in domestic and other international jurisdictions. At the end of the day, however, ICC reparations should serve to send a powerful message to those suffering from the most serious crimes in different parts of the world: Justice can be done for the sake of dignity of victims.

FOR THE FOREGOING REASONS

The Board of Directors respectfully submits its first filing on reparations and informs the Chamber of its willingness and availability to appear on any specific issue addressed in this notification and/or on any other issue the Chamber deems necessary.



Pieter W.I. de Baan
Executive Director of the Secretariat of the Trust Fund for Victims,
on behalf of the Board of Directors of the Trust Fund for Victims

Dated this 1 September 2011

At The Hague, The Netherlands