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

Public Document

Observations on the reparations regime

Source: *Justice Plus, Terre des Enfants, Centre Pélican-Training for Peace and Justice/Journalistes en Action pour la Paix, Fédération des Jeunes pour la Paix Mondiale and Avocats Sans Frontières*

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1. On 14 March 2012, Trial Chamber I delivered its *Judgment pursuant to Article 74 of the Statute*, by which it found Mr Thomas Lubanga Dyilo guilty.¹ The Chamber determined that the evidence established beyond all reasonable doubt that children under the age of 15 were conscripted and enlisted into the UPC/FPLC forces between 1 September 2002 and 13 August 2003.

2. In the Chamber's view, the evidence demonstrates that Thomas Lubanga Dyilo was simultaneously the Commander-in-Chief of the UPC/FPLC forces and its political leader. The Chamber adjudged that, as the highest authority within the UPC, the Accused and his co-perpetrators agreed to, and participated in, the implementation of a common plan to build an army for the purposes of establishing and maintaining political and military control over Ituri. This resulted, in the ordinary course of events, in the conscription and enlistment of children under the age of 15 years and their active participation in hostilities. The Chamber concluded that Thomas Lubanga Dyilo's contributions were essential to a common plan that resulted in the conscription and enlistment of girls and boys below the age of 15 years into the UPC/FPLC and their use to participate actively in hostilities. Furthermore, it was proven beyond all reasonable doubt that Thomas Lubanga Dyilo personally used children below the age of 15 as bodyguards and that he regularly saw children being used by other UPC/FPLC members as bodyguards.

3. On the same day, the Chamber issued its *Scheduling order concerning timetable for sentencing and reparations*, by which it invited all interested parties to apply in writing for leave to file submissions on the principles it should apply in awarding reparations.² The non-governmental organisations *Justice Plus*, *Terre des Enfants*, *Centre Pélican-Training for Peace and Justice/Journalistes en Action pour la Paix*, *Fédération des Jeunes pour la Paix Mondiale* and *Avocats Sans Frontières* are honoured to submit their observations herein, conveying the views of the members of the affected communities and opinion leaders in Ituri.

¹ Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo, Judgment pursuant to article 74 of the Statute*, ICC-01/04-01/06, 14 March 2012.

² Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo, Scheduling order concerning timetable for sentencing and reparations*, ICC-01/04-01/06, 14 March 2012, para. 10.

I. Preliminary Observations

4. The opportunity afforded to victims to obtain reparations for crimes under the jurisdiction of the International Criminal Court is a key innovation for international criminal justice. Nonetheless, the lack of *de facto* precedents in this area should not lead to the inference that it is for the Chamber to *establish* the victims' right to reparations.³ The existence of this right already confers on victims the standing to participate at all stages of the proceedings.

5. Whilst, for the purposes of victim participation, the concept of personal interests must be construed in a relatively broad sense, as these interests are not limited to the question of reparations,⁴ various rulings have established the nexus between "victims' core interest in the determination of the facts, the identification of those responsible and the declaration of their responsibility"⁵ and their rights to reparations for harm suffered. Pre-Trial Chamber I thus found that victims' personal interests are affected in general at the investigation stage, since "the participation of victims at this stage can serve to clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered".⁶ Similarly, concerning victims' participation in the confirmation of charges phase, the Pre-Trial Chamber concluded that: "The interests of victims to participate in these appeal proceedings is obvious, as the appellant is requesting that the decision confirming the charges be quashed, which would mean the end of the prosecution and, as such, would preclude any possibility for the victims to later seek compensation for the harm they have suffered."⁷

6. *Scilicet*, the victims' interests in the identification, trial and punishment of the perpetrators of the harm suffered "are at the root of the well established right to justice for victims of serious violations of human rights",⁸ but also their interest in ensuring that their right to reparation is not imperilled in the determination of the innocence or guilt of the accused.

³ See Registrar's Observations on Reparations Issues, ICC-01/04-01/06, 18 April 2012, para. 6.

⁴ See ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, paras 97 – 100. See also ICC-01/04-01/07-1788, Trial Chamber II, 22 January 2010, paras. 53-57.

⁵ ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, paras. 31-44. See also ICC- 02/04-01/05-252, Pre-Trial Chamber II, 10 August 2007, paras. 9-11.

⁶ See Pre-Trial I, *Prosecutor v. Thomas Lubanga Dyilo, Decision on the application for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6*, 17 January 2006, ICC-01/04-101, para 63. See also ICC-02/05-111, Pre-Trial Chamber I (Single Judge).

⁷ Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, Joint Application of Victims a/0001/06 to a/0105/06 concerning the 'Directions and Decision of the Appeals' of 1 February 2007, ICC-01/04-01/06, 2 February 2007.

⁸ See ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, paras. 31-44. See also 02/04-01/05-252, Pre-Trial Chamber II, 10 August 2007, paras. 9-11.

7. Thus, whilst formal recognition of victims' rights to reparations is obviously desirable in the context of the International Criminal Court, it would appear that the Chamber's role is limited primarily to identifying the ways and means of ensuring the effective implementation of this right and ensuring that the procedural guidelines do not serve to undermine the right itself.⁹

II. The beneficiaries of the reparation measures

8. At the outset, the effective implementation of the right to reparations begs the question of who will benefit from a reparations order. The question of whether only victims who applied for reparations will receive reparations is of the utmost importance because of the discrepancy between the number of victims with standing and those who actually submitted an application for participation.

9. Generally, to consider that only victims who were authorised to participate in the proceedings should benefit from a reparations order would negate the principle that *all victims* of crimes committed by the accused, and not only victims who wished to participate and were so authorised, are entitled to reparations. This consideration is central to this case given the temporal separation between the conviction, the sentencing and the reparations phases, made more pronounced by the holding of a separate sentencing hearing.

10. The Registry's report of 28 March 2012 documents the receipt of 85 applications for participation.¹⁰ Although new applications can be submitted at a later stage, this figure represents only approximately two-thirds of the number of victims authorised to participate in the first stage of the proceedings.¹¹ It would seem paradoxical at the very least to conceive that those whose interest in participating – specifically understood as the interest to ensure that their right to reparation is not imperilled – was recognised in the first phase of the proceedings would be deprived of the opportunity effectively to exercise this right at the second stage of the proceedings. This is in exclusion of, among others, victims who neither participated in the first stage nor sought to participate in the second.

⁹ According to Pre-Trial Chamber I: "With regards to article 68(3) of the Rome Statute, the use of the present tense in the French version of the text ("*la Cour permet*") makes it quite clear that the victims' guaranteed right of access to the Court entails a positive obligation for the Court to enable them to exercise that right concretely and effectively", *Prosecutor v. Thomas Lubanga Dyilo, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6*, 17 January 2006, para. 71.

¹⁰ See Registry, First Report to the Trial Chamber on Application for Reparation, ICC-01/04-01/06, 28 March 2012, paras. 4 and f.

¹¹ 129 victims were authorised to participate in the first stage of the proceedings, see, Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo, Judgment Pursuant to Article 74 of the Statute*, ICC-01/04-01/06, 14 March 2012, para. 15.

11. The circumstances prevailing in Ituri do not appear to suggest that this discrepancy translates a greater interest on the part of victims in participating in the Accused's conviction than in obtaining reparations. Nor does it evidence a waiver of their right to reparations. The outreach campaigns and training conducted by various non-governmental organisations have in fact largely helped to alleviate the concerns of some victims who fear reprisals from members of their community, loyal to Thomas Lubanga Dyilo, if they claim reparations.¹² Owing to the support programmes of Children Leaving Armed Forces and Groups and the resumption of socio-economic activities throughout Ituri district, victims are gradually becoming more confident and are no longer concealing their status.

12. Above all, it seems that the negligible number of applications to participate can be attributed to the difficulties of informing and apprising victims of the procedural mechanisms for participation before the Court, the size of the territory on which the conflict occurred, difficulties locating victims and accessing certain areas. Additionally, the lack of clear principles governing reparations complicates understanding of the reparations procedures for potential beneficiaries. In these circumstances, it would appear particularly problematic to assert that the victims have waived their right when they are not fully conversant with the modalities for exercising this right.

13. Furthermore, the number of children authorised to participate in the proceedings represents only a fraction of those who have an interest in participating and obtaining reparations for their suffering. This discrepancy could be problematic. If it is perceived that the Children Associated with Armed Forces and Groups (CAAFAGs) are receiving benefits that are inaccessible to other children living in vulnerable communities, this could indeed exacerbate resentment and hamper their reintegration. Caution should be exercised in the comparative analysis of situations; nonetheless it would appear that a reparations order benefitting children other than those authorised to participate in the proceedings, whether former CAAFAGs or not, would be of particular importance for the reintegration of the Children Leaving Armed Forces and Groups.¹³

14. Some victims may be marginalised or excluded from the reparations process due to their special status. This is particularly true for Children Associated with Armed Forces and

¹² See Public Redacted Version of ICC-01/04-01/06-Conf-Exp-Trust Fund for Victims' First Report on Reparations, ICC-01/04-01/06, 1 September 2011, para. 177.

¹³ P. de Greiff, Establishing Links Between DDR and Reparations", in Disarming the Past: Transitional Justice and Ex-combatants, New York: Social Science Research Council, 2009, available on <http://www.ictj.org/en/research/projects/ddr/thematic-studies/3502.html#REPS>.

Groups, who are eligible for reparations as victims of recruitment, but also committed crimes in their communities or against members of other communities. Singling them out: “as victims of war crimes, and ascribing to them a particular status to the exclusion of other children who are also victims, may inadvertently lead to discrimination”.¹⁴

15. The guiding principle of Children Associated with Armed Forces and Groups emphasises that any measures in favour of CAAFAGs:

should not stigmatise or make any negative distinction between children who have been recruited or used and those who have not, [...] It is also detrimental to all conflict-affected children if other vulnerable children who have not been associated with armed forces or armed groups are placed at a disadvantage vis-à-vis those who have been so associated.¹⁵

In their recent report, *Children and Truth Commissions*, UNICEF echoes this view, applying the non-discrimination principle to reparations:

However, care must be taken in determining eligibility to avoid 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.¹⁶

According to Sierra Leone’s Truth and Reconciliation Commission, “considering all children together” and “increasing awareness and understanding of the specific needs of victims”¹⁷ is essential to prevent retraumatization.

16. To address these circumstances, article 75(1) of the Rome Statute provides:

The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

17. The distinction between the reparations to, or in respect of victims has been interpreted as giving the Court power to make a broad-based reparations order, beyond the circle of victims authorised to participate in the proceedings.¹⁸

¹⁴ Redress, “Victims, Perpetrators or Heroes? Child Soldiers before the International Criminal Court, 2006, available on http://www.essex.ac.uk/armedcon/story_id/000403.pdf, p.32.

¹⁵ UNICEF, Principle 3.3 of The Paris Principles, Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, <http://www.unicef.org/protection/ParisPrinciples310107English.pdf>.

¹⁶ UNICEF, Innocenti Research Centre, “Children and the Truth Commission”, UNICEF, January 2011, available on http://www.unicef-irc.org/publications/pdf/truth_commissions_eng.pdf, p. 54.

¹⁷ Redress, “Victims, Perpetrators or Heroes? Child Soldiers before the International Criminal Court”, *op. cit.*, pp. 32 and 58.

18. This appears to be confirmed in regulation 60 of the Regulations of the Trust Fund for Victims, which specifies that:

Where the names and/or locations of the victims are not known, or where the number of victims is such that it is impossible or impracticable for the Secretariat to determine these with precision, the Secretariat shall set out all relevant demographic/statistical data about the group of victims, as defined in the order of the Court, and shall list options for determining any missing details for approval by the Board of Directors.

This provision envisages “individual awards to victims pursuant to rule 98(2) of the Rules of Procedure and Evidence,” even without the submission of an individual application pursuant to the conditions set out in rule 94 of the Rules of Procedure and Evidence.¹⁹

19. The practical consequences of such a cumulative approach would be far-reaching: to depart from a strict individualised assessment of each damage suffered by the victims authorised to participate in the proceedings and award an amount of reparations other than the exact amount requested or an amount which does not reflect the nature of individual damage suffered makes it possible to progress from a quantitative assessment of damages arising from past violations to a qualitative assessment of current needs. It is respectfully submitted by the non-governmental organisations *Justice Plus*, *Terre de Enfants*, *Centre Pélican-Training For Peace and Justice/Journalistes en Action pour la Paix*, *Fédération des Jeunes pour la Paix Mondiale et Avocats Sans Frontières* that the Chamber should explore this possibility.

III. The appropriate modes of reparations

20. The Chamber has the discretion to determine the most adequate reparations measures. The Chamber’s wide discretion on reparations under the Rome Statute and Rules of Procedure and Evidence is resonant of the Common Law maxim *ubi jus, ibi remedium*, according to which courts have an inherent power to order the most appropriate means of reparations.

21. Concerning the appropriateness of the reparations, the forms and modalities of reparations must be suitable, appropriate, and mindful of the nature of the violations and damage suffered not only by the victims but also by the whole community.²⁰ A collective reparations award may therefore be more suitable than individual awards.²¹

¹⁸ See in this regard E. Dwertmann, “The Reparation System of the International Criminal Court” Martinus Nijhoff Publishers, Leiden, 2010, pp. 111-112.

¹⁹ See Second Report of the Registry on Reparations, ICC-01/04-01/06, 1 September 2011, para 48 and 191.

²⁰ See UN Secretary General, “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies”, submitted to the Security Council on 23 August 2004, UN Doc. S/2004/616, para. 55.

²¹ *Ibidem*.

22. The principle that reparations serve to erase “all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed,”²² should not be imposed as it is contradicted by the fact that full reparations for damage suffered would be difficult to implement, not only with regard to the nature of the harm suffered²³ but also due to budgetary and logistical constraints. An alternative approach would be the promotion of social reconciliation. In this regard, it was apparent during the consultations between community leaders and these organisations that collective reparation measures were favoured due to their inclusive nature and sustainable impact (the community-based approach).

A – Difficulties in implementing compensation measures

23. The modes of reparation provided for under the Rome Statute have a strong materially element. Pursuant to article 75(2): “The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.” Despite the term “including”, it is evident from the Rules of Procedure and Evidence that the emphasis is on monetary reparations. Rule 98, for example, provides that, “The Court may order that an award for reparations against a convicted person be deposited with the Trust Fund.” It is difficult to envisage any measure other than a financial award being “deposited”. By the same token, the emphasis on the monetary assessment of damage suffered reinforces the apparent preference for an individualised assessment of damages.

24. However, it does not seem inevitable that a strictly individualised reparations process should prevail, since, as by their nature, crimes falling within the jurisdiction of the Court are widespread and systematic, the harm they cause indeed transcends the purely individual level and have repercussions for the entire society. Atomising the damage suffered by the victims and their ensuing plight could obscure the social and collective dimension of mass crimes, which often targeting groups or entire segments of the population rather than specific

²² Permanent Court of Arbitration, *Chorzow Factory Case* (Germany v. Poland), (Claim for indemnity) 13 September 1928, Series A, No.17, p. 29.

²³ It is impossible to recover completely from the loss of family and friends, the interruption of learning and education, and damage to social and emotional development. See in this regards UNICEF, Innocenti Research Centre, “Children and the Truth Commission”, January 2011, available at: http://www.unicef-irc.org/publications/pdf/truth_commissions_eng.pdf, p. 51. The ICTJ Rabat Report emphasises that: “In reality all reparations measures are symbolic because reparations can never really reverse the crimes committed and the harms suffered by their victims. It is impossible to assess the harm suffered by each individual and just as impossible to fully repair the damage done. Taking this limitation into account, material measures must have some symbolic component to give them meaning beyond their material impact; conversely, reparations may be comprised of important symbolic gestures that do not necessarily have a significant material component.” ICTJ Rabat Conference Report, “The Concept of and Challenges of Collective Reparations”, 12 - 14 February 2009, pp. 49-50.

individuals or people as individuals; they cause collective suffering which cannot be circumscribed to any victim personally, regardless of his or her individual suffering. Down-scaling the category of victims into aggregates of individuals could in this regard atomise the global or collective effect of reparations.²⁴ Furthermore, it is worth emphasising that monetary reparations are ephemeral; their restorative effect is dissipated by the fact of their being awarded.²⁵ Obviously, the sums received as reparations will be used to improve the individual and collective futures of the victims, but without additional measures, they are unlikely to leave much of a concrete legacy.

25. The specific circumstances in the Iturian context reinforce these general considerations. On the one hand, it emerges from the consultations that awarding reparations on a strictly individual basis and with preference to Children Leaving Armed Forces and Groups could be perceived as unfair by parts of the population who believe that these children committed atrocious crimes and often wonder why the international community should “reward, compensate” them. At the very least, if such reparations are to be granted, they should be accompanied by outreach campaigns about the rights of children in a community to combat the heinous reputation of former child soldiers and to encourage respect for and solidarity with these victims.

26. On the other hand, the means of allocating monetary reparations mentioned in the Report of the Trust Fund for Victims,²⁶ through direct cash payments, raises a number of questions in the context of Ituri.²⁷ The greatest predicament highlighted during the consultations is the fact that the beneficiaries feel obliged to redistribute these monetary reparations to their relatives and/or traditional chiefs, either to maintain relations, avoid curses relating to their cultural beliefs or otherwise reduce the insecurity due to the presence of

²⁴ See Megret, F., “Of Shrines, Memorials and Museums: Using the International Criminal Court’s Victim Reparation and Assistance Regime to Promote Transitional Justice”, 16 *Buff. Hum. Rts. L. Rev.* 2010, p. 20. See also P. de Greiff, M. Wierda, “The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints”, in “Out of the Ashes: Reparations for Victims of Gross and Systematic Human Rights Violations”, Intersentia, 2005, p. 233.

²⁵ Megret, F., “Of Shrines, Memorials and Museums: Using the International Criminal Court’s Victim Reparation and Assistance Regime to Promote Transitional Justice”, *ibid.*, p. 17 ; See also Parmentier, S., Rombouts, H., “The International Criminal Court and Its Trust Fund are coming of Age : Towards a Process Approach for the Reparation of Victims”, “International Review of Victimology”, 2009, vol. 16, pp. 50 *et seq.*

²⁶ Public Redacted Version of ICC-01/04-01/06-Conf-Exp-Trust Fund for Victims’ First Report on Reparations, ICC-01/04-01/06, 1st September 2011, para 258.

²⁷ Ituri is not an isolated example. See Mazurana, D, Carlson, K., “Reparations as a means for Recognizing and Addressing Crimes and Grave Rights Violations against Girls and Boys during Situations of Armed Conflict and under Authoritarian and Dictatorial Regimes”, in “The Gender of Reparations, Unsettling Social Hierarchies while Redressing Human Rights Violations”, Cambridge University Press, 2009, pp. 190 and 193-194. See also UNICEF, “The Disarmament, Demobilisation and Reintegration of Children Associated with the Fighting Forces: Lessons Learned in Sierra Leone, 1998-2002”, New York, 2005.

former militia leaders. Similarly, unsupported and untrained beneficiaries may lack the relevant frame of mind and skills to use the money wisely. Finally, in the absence of rigorous supervision and mentoring, the risk of corruption or misuse cannot be discounted. Therefore, even if victims might prefer “monetary” reparations, it would be inappropriate to limit their needs to this one aspect.

27. The arguments advanced hereunder should not oppugn the principle of individual reparations, as a certain amount of compensation may even be necessary in certain circumstances. For instance, victims of sexual crimes who contracted HIV, amputees, or disabled people may not only require recognition of their specific harm, but could also suffer irreparable damage if their reparation awards are not prioritised and implemented more quickly than others. Such victims may require “interim” reparations to prevent exacerbation of the harm they have already suffered. In these circumstances, rehabilitation may be vital, in that the focus is more on immediately accessible and effective assistance as opposed to monetary awards. In this regard, the consultations led to the conclusion that reparation measures should first benefit the direct and indirect victims identified by the Chamber before being earmarked for the training and support of direct and indirect victims, medical facilities, schools and universities, community associations or protection networks, socio-economic reintegration and education and training programmes.

B – Rehabilitation measures

28. International law has no real working definition of rehabilitation as a means of reparation. Article 75 of the Rome Statute merely makes reference to “restitution, compensation and rehabilitation” without actually distinguishing them.

29. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law provide that, in certain situations, individuals who are victims of serious human rights violations should receive reparation for harm suffered by means of, *inter alia*, rehabilitation, which is understood to include medical and psychological care as well as legal and social services.²⁸ They state:

In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the

²⁸ See Principle 21 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 16 December 2005, available at: <http://www2.ohchr.org/english/law/remedy.htm>.

gravity of the violation and the circumstances of each case, be provided with full and effective reparation, [...] which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.²⁹

30. Thus construed, orders for rehabilitation must take account of the individual circumstances of each case, where they appear appropriate and proportional to the gravity and scope of the violations. Although the Principles state that forms of rehabilitation other than medical and psychological care as well as legal and social services are possible, such other forms are merely mentioned, without any further indication as to what they may comprise. Nor is the means of distributing these reparation measures mentioned. There are, however, some indications in the preparatory works for the Principles.

31. In his report which he submitted to the Sub-Commission in 1993, Professor Van Boven stated that: “rehabilitation shall be provided, to include legal, medical, psychological and other care and services, as well as measures to restore the dignity and reputation of the victims”.³⁰ Furthermore, when defining compensation as a means of reparation, the report clarifies that the sum of money which may be paid may also be a means of rehabilitation where its purpose is to cover: (a) “reasonable medical and other expenses of rehabilitation”, (b) “harm to reputation or dignity” and (c) “reasonable costs and fees of legal or expert assistance to obtain a remedy”.³¹

32. The Principles revised by Professor Bassiouni in 2000 follow the same approach. They define rehabilitation as including “medical and psychological care as well as legal and social services”.³² Similarly, when defining compensation, the new principles state that a sum of money may be used to cover “cost[s] required for legal or expert assistance, medicines and medical services, and psychological and social services”.³³

33. For the rehabilitation ordered to be effective, it must build on the efforts already undertaken in Ituri and must address the various types of difficulties encountered:

- weakness of the National Demobilisation, Disarmament and Reintegration Programme (PNDDR);

²⁹ *Ibid.*, Principle 19.

³⁰ See UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, E/CN.4/Sub.2/1993/8, 2 July 1993, principles 3-4 and 9-10, pp. 56-57.

³¹ *Ibidem.*

³² Bassiouni, C., *Report of the Independent Expert on the Right to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms*, E/CN.4/2000/62, 18 January 2000 paras. 23-24.

³³ *Ibidem.*

- difficulty identifying Children Associated with Armed Forces and Armed Groups (CAAFAGs) and Child Victims of Armed Conflicts (CVACs) over the whole District of Ituri, due to their high number and their change of temporal and geographical status;
- shortage of basic education programmes: development of core competencies and vocational training;
- shortage of initiatives in open environments for child victims, psychological support and reintegration into school or work;
- poor awareness in local populations of the child soldier issue and challenges faced in reintegrating them in the most remote environments, where financial and logistical resources are in short supply;
- lack of synergy between potential partners and the intermediaries who train and support the victims.

34. In order to participate effectively in the rehabilitation of former child soldiers, the reparations awarded should aim to restore the victims' dignity and reputation by means of:

Enhanced community outreach and involvement to encourage communities to play an active part in the social, economic and cultural reintegration of the Children Associated with Armed Forces and Armed Groups and Child Victims of Armed Conflicts. This can also be achieved by increasing the influence of local committees for the promotion and protection of the rights of the child, or by creating them where none exists.

Improved management of behavioural difficulties observed in Children Associated with Armed Forces and Armed Groups and Child Victims of Armed Conflicts.

Development of social, cultural and sporting activities necessary to enable former child soldiers to regain a normal mental and physical development cycle and self-esteem and to establish harmonious relations with others. These activities must take a multi-disciplinary approach which is required for mental and physical rehabilitation.

Setting up alternative education for Children Associated with Armed Forces and Armed Groups and Child Victims of Armed Conflicts, and also for other children without schooling – such as education on peace, health, citizenship or values, literacy and even occupational therapy.

Encouragement of social and economic reintegration, intended to facilitate self-reliance and autonomy in Children Associated with Armed Forces and Armed Groups and Child Victims

of Armed Conflicts and also in other children who are not attending school, by guiding and training them in an income-generating activity.

C – Collective measures stricto sensu

35. Neither the Rome Statute nor the Rules of Procedure of Evidence provide any indications as to how collective reparations are to be understood. Rule 97 of the Court’s Rules of Procedure and Evidence merely states: “Taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both.”

36. However, it seems that there is no reason to construe the term strictly. On the contrary, rule 98 of the Rules of Procedure and Evidence provides that the measures awarded should be made through the Trust Fund for Victims “where the number of victims and the scope, forms and modalities of reparations makes a collective award more appropriate”. This rule appears to indicate that the concept of collective reparations should be construed broadly, since the intention of the drafters of the Rules of Procedure and Evidence was to provide the Court with a range of tools to deal appropriately with a range of different situations. Furthermore, the organisation of common representation of victims as from the initial stages of the proceedings and even a recent joint drafting of a “Draft Application Form For Collective Participation”³⁴ also suggest that there is a place for collective reparations.

37. Furthermore, the specific circumstances of the *Lubanga* case, in which the victims are from the same ethnic group as the convicted person, are cause for concern. Awarding reparations solely to one of the parties to the conflict, whereas several other communities were victims of crimes perpetrated by the Children Associated with Armed Forces and Armed Groups, could be perceived as unfair not only by members of the Lendu community but also within other communities which suffered. This is particularly so because in the field, poor circulation of information on how the charges are brought has led the communities to doubt the impartiality of the International Criminal Court.

38. When awarding reparations, the Court must endeavour to avoid artificially accentuating the ethnic divisions at the root of the conflict. For these reasons, collective reparations focusing on “non-excludable goods” – i.e. goods that, once made available, it is

³⁴ Registry, “Proposal on a Partly Collective Application Form for Victims’ Participation”, ICC-02/11-01/11, 29 February 2012, Annexes A and B.

difficult to keep others from consuming,³⁵ thereby permitting room for reconciliation and renewal of trust – would be greatly welcomed.

39. As can be seen from the consultations, the consensus is in favour of building centres in the territory's capital in areas affected by conflict which can receive all community members regardless of ethnicity. In particular, the construction of cultural centres in the capitals of the five territories of Ituri district (Aru, Djugu, Irumu, Mahagi and Mambasa), and of a large University of Peace in the capital of Bunia district, is perceived to be of utmost importance if transitional justice is to serve as a means of fostering reconciliation and peaceful co-existence.

40. These proposals do not call into question the principle of individualisation of reparation measures. In fact, the principle itself has no impact on the chosen means of distribution. Where reparations are financial, the amounts awarded to the victims are fungible and hence there is no requirement that they should be transferred, as such and unchanged, to the victims. On the contrary, the amount may be used for restorative purposes or mechanisms of transitional justice which make sense for the victims, especially where they do not express an absolute preference for individual forms of compensation for the harm they suffered.³⁶

41. Redirecting the payment of individual reparations into systems which provide collective benefits does not transform individual reparations into measures designed to provide reparation for collective harm suffered as a result of a violation of a collective right. When conceived in this way, the reparations awarded are not reparations granted indivisibly to a group. They are effectively reparations awarded individually but *whose effects are collective*, whose impact is felt at community level³⁷ as a result of the type of reparation awarded or the means of distribution.³⁸

42. The view that “the issue of whether reparations should be individual or collective may depend, at least to some extent, on the existence of an individual or collective right of victims to reparations before the Court”³⁹ seems highly questionable to us. The fact that claims for

³⁵ Office of the United Nations High Commissioner for Human Rights, “Rule-of-Law Tools for Post-Conflict States: Reparations programmes”, United Nations, 2008, p. 26.

³⁶ This seems to be corroborated by the consultations carried out by the Trust Fund for Victims and the Registry of the Court. See Public Redacted Version of ICC-01/04-01/06-Conf-Exp, “Trust Fund for Victims’ First Report on Reparations”, ICC-01/04-01/06, 1 September 2011, paras. 204 *et seq.*; “Second Report of the Registry on Reparations”, ICC-01/04-01/06, 1 September 2011, paras. 45-47.

³⁷ See Inter-American Court of Human Rights (IACHR), *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Merits, Reparations and Costs, 31 August 2001, Series C No. 66; *The Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations and Costs, 17 June 2005, Series C No. 125; *The Sawhoyamaya Indigenous Community v. Paraguay*, Merits, Reparations and Costs, 29 March 2006, Series C No. 146.

³⁸ Rubio-Marín, R., De Greiff, P., “Women and Reparations”, *International Journal of Transitional Justice*, 2007-3, p. 335.

³⁹ See “Registrar’s Observations on Reparation Issues”, ICC-01/04-01/06, 18 April 2012, para. 3.

“rehabilitation and other forms of remedy” may be submitted on an individual basis pursuant to rule 94(1)(f) of the Rules of Procedure and Evidence suggests that collective reparations are not necessarily linked to the violation of a collective right or to the existence of a collective right to reparation. In any event, the Court has some latitude to develop principles tailored to the circumstances, and a principle of appropriateness and fairness should be given much more weight than a rigid legal solution.

43. We may also look to examples of national or regional principles of civil compensation used for reparations of harm suffered by a multitude of victims as a result of a breach of a single obligation. Thus, article 432 of the German Civil Code provides: “[TRANSLATION] If more than one person is to demand indivisible performance, then to the extent that they are not joint and several creditors, the obligor may only effect performance to all of them jointly and each obligee may only demand performance for all of them.” Similarly, article 10.201 of the Principles of European Contract Law provide for the possibility of “solidary claims” by which “all the debtors are bound to render one and the same performance and the creditor may require it from any one of them until full performance has been received”.⁴⁰

44. Furthermore, it is not uncommon for victims’ interests to be taken into account jointly with the interests of “the public as a whole”⁴¹ or those of the community to which they belong. The case law of the Inter-American Court of Human Rights is instructive in this respect and shows that a decision to award collective measures need not be founded on a breach of a collective right borne by a community. It may also flow from the large number of bearers of the individual right.⁴² Such was the case, *inter alia*, in *Moiwana Community v. Suriname*, in which the court awarded development measures directly to the community, without the community having previously been identified as a beneficiary in the judgment.⁴³

45. The judgment handed down in *Villagran-Morales et al. v. Guatemala* is also noteworthy in this respect. In that case, the court emphasised the need to take into account not only the pecuniary damage, but also the effects of the violations which could not be assessed in monetary terms. Concerning reparation for the latter type of harm, the court, emphasising the need to preserve the memory of the victims and to prevent the recurrence of such acts,

⁴⁰ Commission on European contract law, *The Principles of European Contract Law – Additional Chapter of Part III*, 2002, available at <http://www.law.kuleuven.be/web/mstorme/PECL3en.html>. See also Rosenfeld, F., “Collective reparation for victims of armed conflict”, *International Review of the Red Cross*, vol. 92, No. 879, September 2010, pp. 735-736.

⁴¹ See, for example, Supreme Court of Judicature, Court of Appeal (Civil Division), *Anufrijeva v. London Borough of Southwark*, Case No. A2/2002/2709; C1/2003/0402; C1/2003/0705, 16 October 2003, para. 56.

⁴² IACHR, *Moiwana Community v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, 15 June 2005, Series C, No. 124, paras. 168-215.

⁴³ *Ibid.*, para. 187.

ordered Guatemala to name an educational centre after the victims and to erect a plaque in the centre with the victims' names.⁴⁴

46. In none of these cases were the measures intended to provide reparation for collective harm. Similar reparations, on identical grounds, were ordered in cases involving only one victim.⁴⁵ Such decisions reflect not only the validation of a collective right, but more so the fact that the right to reparation for individuals – who, of course, do not live outside of society – may comprise measures to impact upon their environment in such a way as to strengthen their dignity.

47. A second idea flowing from the first is that, although there is nothing to prevent reparations awarded individually from having a collective purpose, the instruments guiding the Court in its determination of the appropriate reparations – such as the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law – also do not exclude the possibility of collective reparations being charged to the convicted persons. The Basic Principles merely rely on a general affirmation of a right to reparation, without explicitly restricting the target of such reparation to any particular subject. This is particularly noteworthy since consultations have revealed the importance for both victims and the members of their community of feeling that reparation is owed by the accused himself.

48. Hence it is permissible to restrict the issue to the means by which reparation is implemented. Collective reparations need only be collective in purpose and impact. Technically and formally, they may flow from and be presented as material reparations.⁴⁶ In this scenario, the accused as such is not ordered to pay collective reparations, but to pay a sum of money corresponding to the entirety of the harm he caused, which may subsequently be used for collective measures benefiting the individuals who are members of the collective. The convicted person has no claim on the particular use that those monies are put to as reparations, since any monies paid are no longer his.⁴⁷

⁴⁴ IACHR, *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala*, Reparations and Costs, 26 May 2001, Series C, No. 77.

⁴⁵ See, for example, IACHR, *Trujillo-Oroza v. Bolivia*, Reparations and Costs, 27 February 2002, Series C, No. 92.

⁴⁶ Mégret, F., "The International Criminal Court and the Failure to Mention Symbolic Reparations", McGill University, <http://ssrn.com/abstract=1275087>, p. 12.

⁴⁷ *Ibidem*.

D – Symbolic reparations

49. As the Office of the United Nations High Commissioner for Human Rights states: “symbolic measures derive their great potential from the fact that they are carriers of meaning, and therefore can help victims in particular and society in general to make sense of the painful events of the past. Symbolic measures usually turn out to be so significant because, by making the memory of the victims a public matter, they disburden their families from their sense of obligation to keep the memory alive and allow them to move on.”⁴⁸

50. Awarding symbolic measures has been widely recognised as an appropriate form of reparation in situations of grave, widespread and systematic human rights violations. Thus the Inter-American Court of Human Rights frequently orders a public act to commemorate the victims, considering that such measures are necessary “in order to repair the damage to the reputation and honor of the victims and their next of kin, and in order to avoid a repetition of acts such as those in this case”.⁴⁹ A similar approach was adopted by the Extraordinary Chambers in the Courts of Cambodia, which recently held:

The ‘moral’ requirement is satisfied by the fact that memorials restore the dignity of victims, represent a public acknowledgement of the crimes committed and harm suffered by victims, and, as lasting and prominent symbols, assist in healing the wounds of victims as a collective by diffusing their effects far beyond the individuals who were admitted as Civil Parties. Additionally, memorials contribute to national reconciliation by strengthening public knowledge of past crimes, promoting a culture of peace among the current and future generations, and contributing to a global message of concord to all potential visitors.⁵⁰

51. The lack of an explicit reference to symbolic forms of reparation in the Rome Statute does not appear to mean that such an option should be ruled out. In negotiations on the Statute, a fairly broad approach to reparations was adopted. An amendment submitted by France in 1997 thus made reference to “appropriate forms of reparation, *such as* restitution, compensation and rehabilitation”.⁵¹ Use of such a conjunction suggests that shortly before the adoption of the Rome Statute, the list of reparations which could be awarded was not contemplated restrictively.

⁴⁸ *Op cit.*, pp. 26-27.

⁴⁹ See, for example, IACHR, *19 Tradesmen v. Colombia*, Merits, Reparations and Costs, 5 July 2004, Series C, No. 109, para. 274; *Myrna Mack-Chang v. Guatemala*, Merits, Reparations and Costs, 25 November 2003, Series C, No. 121, para. 278; *Juan Humberto Sanchez c. Honduras*, Merits, Reparations and Costs, 7 June 2003, Series C, No. 99, para. 188; *Bamaca-Velasquez v. Guatemala*, Merits, Reparations and Costs, 22 February 2002, Series C, No. 91.

⁵⁰ ECCC, Supreme Court Chamber, Case File/Dossier No. 001/18_07_2007/ECCC/SC, 3 February 2012, para. 683. See also the findings of the South African Truth and Reconciliation Commission, which construes satisfaction broadly, as all measures aimed at “restoration of dignity” and which “facilitate the communal process of remembering and commemorating the pain and victories of the past”, *Report of the Reparation & Rehabilitation Committee*, volume 6, section 2, chapter 1, paras. 8(d) and 13-15.

⁵¹ UN Doc. A/AC.249/1997/WG.4/DP.3 and A/AC.249/1998/L.13, 4/2/1998, p. 150. See also Megret, F., “The International Criminal Court and the Failure to Mention Symbolic Reparations”, McGill University, <http://ssrn.com/abstract=1275087>, p. 10.

52. Similarly, the strategy document on victims drafted by the Court notes that its broad mandate leaves scope for reparations which may include symbolic measures or any other measure with the purpose and effect of promoting conciliation within divided communities.⁵² In fact, it would be surprising if the Court were able to award pecuniary reparations but did not have the option of awarding symbolic reparations. Generally, the instruments of international criminal justice should be able to focus on the satisfaction of victims, particularly when it comes at a low cost. By consciously engaging in a policy of symbolic reparations, the Court would be aligning itself with the requirements of international law and the practice of many courts of human rights. It would thus contribute to developing the law on reparations, rather than entrenching itself in a self-referential reparations regime inspired by civil-law logic and more suited to domestic criminal law.

53. In the instant case, the idea of memorials celebrating the memory of the child soldiers killed during the war being erected close to the child recruitment centres has frequently been raised during consultations. Since the Children Associated with Armed Forces and Armed Groups are not considered to be victims by part of the population in Ituri, it is important to change community perception of these child victims and not forget that being used as child soldiers cheated them of their childhood. Symbolic reparations, such as building memorials, are of paramount importance in this respect. When children speak of reintegration, they say that they want to have a feeling that they belong and that they are loved and accepted, particularly by their parents and siblings. They seek very concrete evidence that they are respected.

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Dated this 10 May 2012

At Bunia, Democratic Republic of the Congo

⁵² The draft text stated: "Reparation is in no way limited to [...] monetary compensation; it could instead include [...] symbolic or other measures that could promote conciliation within divided communities", Draft ICC Strategy in Relation to Victims, 18 August 2009, p. 29.