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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

**Observations on Reparations in Response to the Scheduling Order of 14
March 2012**

Source: The Trust Fund for Victims

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1. The Trust Fund for Victims (hereinafter “Trust Fund”) welcomes the invitation to file with regard to reparations issued by Trial Chamber I in its “Scheduling order concerning timetable for sentencing and reparations” on 14 March 2011; and will share its observations on the various questions raised in the Scheduling order. The Trust Fund has structured its submission in two parts: the first section contains considerations related to reparations principles; and the second section contains observations related to procedure, including a discussion of the relative advantages and challenges of individual and collective reparations. Operational considerations, observations on financing reparations, and the involvement of experts have also been highlighted.

PART ONE – CONSIDERATIONS RELATED TO REPARATIONS PRINCIPLES

2. The Trust Fund observes that since the International Court of Justice’s decision in the *Chorzow Factory Case* in 1927,¹ the right to reparation became firmly established both in international law,² and in international human rights law. This was also reflected by the incorporation of the right to reparation into international human rights instruments³ and the

¹ 1927, P.C.I.J. (ser. A) No 9 at p. 21.

² See e.g. recent jurisprudence by the International Court of Justice in the *Case Concerning Armed Activity on the Territory of Congo (Democratic Republic of the Congo vs. Uganda)*, Judgment of 19 December 2005, ICJ Reports 2005 or *Legal Consequences of a Wall in the Occupied Palestinian Territory*, advisory opinion of 9 July 2004, ICJ Reports 2004, p. 136.

³ See e.g. Universal Declaration of Human Rights (Art. 8), the International Covenant on Civil and Political Rights (Art. 2), the International Convention on the Elimination of All Forms of Racial Discrimination (Art. 6), the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, (Art. 14) and the Convention on the Rights of the Child (Art. 39). International humanitarian law and international criminal law are also relevant, in particular The Hague Convention respecting the Laws and Customs of War on Land (Art. 3), and the Protocol Additional to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts (Art. 91).

adoption by the General Assembly on 16 December 2005 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” (hereinafter “the Basic Principles”).

3. Article 75 on reparations and Article 79 creating the Trust Fund for Victims of the Rome Statute (hereinafter “the Statute”) are an important innovation of international criminal law with an unprecedented avenue of reparative justice for victims of the most serious crimes. The uniqueness of the International Criminal Court’s (hereinafter “ICC” or “Court”) reparations system stems firstly from the fact that it mandates an international criminal court to address the right of victims of genocide, war crimes and crimes against humanity to reparations. Secondly, the Rome Statute creates the Trust Fund with specific mandates benefiting victims of crimes under the jurisdiction of the Court.
4. The establishment of principles will have to address philosophical and practical challenges stemming from the judicial nature of the reparations before the Court. The establishment of principles allows for an innovative development of the right of victims to benefit from reparations in international criminal proceedings. Based on its experience and expertise for delivering assistance to victims in the situation, the Trust Fund proposes the following principles “relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation” under Article 75 (1) of the Rome Statute (hereinafter “the Statute”).

I. Purpose of establishing principles in Article 75 (1)

5. Article 75 (1) is silent on the specific purpose of reparation principles. The Trust Fund respectfully submits that the mandate of the Court to establish reparation principles has several strata.
6. The first purpose of principles under Article 75 of the Statute will be to provide further clarity and guidance on the interpretation of the existing legal framework⁴ for all cases before the ICC to ensure consistency and a sufficient degree of legal certainty and fairness for the victims and the convicted person, therefore, making the right of victims to meaningful reparations before the ICC a reality.⁵ To achieve these aims, the principles will require addressing certain substantive, procedural and operational questions. Moreover, Article 75 (1), second sentence, obliges the Court to “state the principles on which it is acting” in its determination of the “scope and extent of any damage, loss and injury to, or in respect of, victims.” Hence, the principles will serve as basis for the reparations orders the Chamber may issue on a specific case.
7. The Trust Fund respectfully submits that the scope of the principles should, however, not be restricted to guiding the Court on how to conduct reparation proceedings. Instead, principles should also address underlying philosophical questions related to the right of victims of international crimes to reparations, such as addressing the relationship between reparations and reconciliation.
8. Furthermore, the Trust Fund observes that there is an inherent tension

⁴ In particular, the Rules of Procedure and Evidence and the Regulations of the Trust Fund contain further detailed rules on how the reparations regime should function.

⁵ In fact, the ASP voiced concern “that in the absence of such principles pre-established by the Court practical inconsistency and unequal treatment of victims may occur” (Resolution ASP-10-Res. 3)

between the limitations of judicial reparations and the kinds of harm and the number of victims usually associated with international crimes. Judicial reparations limited to individual criminal responsibility for specific charges, which in turn are the result of a prosecutorial strategy, may not be able to address this tension adequately. The reparations principles could provide a way for the Court to address this dilemma. The principles could contain specific language to remind interested parties, States, national and international institutions, civil society and the international community of their commitments and obligations towards victims of gross and systematic crimes. In this way, the Rome Statute reparations regime could strive to become a catalyst for establishing victims' rights to redress beyond the limitations of judicial reparations as ordered by the International Criminal Court.

II. Key aspects that should be addressed in the principles

9. The Trust Fund respectfully submits the following provisions for the Court's consideration when establishing reparation principles.

A. Applicable norms and practices

10. The Court may wish to include a declaratory principle to state that it will in accordance with Article 21 of the Statute apply international law and standards on victims' rights to a remedy and reparation, including relevant jurisprudence of Human Rights Courts and in particular the Inter-American Court on Human Rights.
11. Furthermore, it may wish to also add that the Court will observe best practices developed in relevant contexts, and contained in various frameworks 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” (hereinafter “the Basic Principles”),⁶ UNICEF’s “Paris Principles, principles and guidelines on children associated with armed groups,”⁷ and the “Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation”⁸ to fully appreciate best practices aimed at reparation and reconciliation.

B. On the judicial nature of the proceedings

i. Individual criminal responsibility

12. As discussed in the Trust Fund for Victims’ First Report on Reparations,⁹ the reparation regime described in Article 75 reparations is based on individual criminal responsibility. Reparations in accordance with Article 75 (2) presuppose a conviction.
13. In other words, before embarking on a reparations process the Court must establish the culpability of the convicted person of specific charges, thus linking him to the harm suffered by the victims. The repair of this harm will be the objective of the reparation proceedings and the eventual award(s).

ii. Primary responsibility of the convicted person to provide for reparations

14. Because any reparations order made pursuant to Article 75 (2) requires individual criminal responsibility, it should be first and foremost the

⁶ UN General Assembly A/Res/60/147, 21 March 2006.

⁷ Principles and Guidelines on Children Associated with Armed Forces and Armed Groups, UNICEF, Paris, February 2007.

⁸ See The Nairobi Declaration on Women’s and Girls’ Right to Remedy and Reparation, May 15, 2007, www.womensrightscoalition.org/site/reparation/signature_en.php.

⁹ See Trust Fund for Victims’ First Report on Reparations, ICC-01/04-01/06-2803-Red of 23 March 2012, paragraphs 84-109 and in particular pp 84-87.

convicted person to pay for any material costs of a reparations award. In addition, symbolic reparations will be particularly meaningful if the convicted person is willing to make them voluntarily.¹⁰

15. The Chamber may wish to consider whether in its elaboration of the reparation principles it will include language to underline the potential benefits for the convicted person to cooperate in reparation proceedings, such as making reference to Rule 145 (2) (a) (ii) of the Rules of Procedure and Evidence.
16. The Trust Fund notes that according to Regulation 56 of the Regulations of the Trust Fund, and as discussed in detail in the Trust Fund for Victims' First Report to the Chamber,¹¹ the Trust Fund may contribute to complementing the funding of a reparations award, within the limitations of its available resources and without prejudice to its assistance mandate. Because of Regulation 56, second sentence, it may do so in particular if the award is of a collective nature, or to an organisation, in the sense of Rule 98 (4) of the Rules of Procedure and Evidence. That does not, however, imply that the Trust Fund "replaces" the convicted person as the addressee of a reparations order. Consequently, given the ICC's legal framework, the Chamber should always make its reparation order against the convicted person, without regard to where the funds may eventually originate.¹²

10 One could also envisage symbolic forms of reparations administered through the Trust Fund such as activities aimed at creating a historic memory.

11 *Supra* 11, paragraphs 116-148.

12 The Trust Fund notes that from a victims' perspective reparations made directly by the perpetrator himself will in many cases be more meaningful to victims.

iii. Relationship between the source of funding and the individual or collective nature of the reparations award

17. Notwithstanding the responsibility of the convicted person to provide for reparations, the Trust Fund observes that the source of funding may affect the individual or collective nature of the reparations award.
18. Funding through the Trust Fund seems to imply a bias towards awards of a collective nature, or to an organisation, in the sense of Rule 98 (4) of the Rules of Procedure and Evidence, as referenced in Trust Fund Regulation 56.
19. For awards funded by the convicted person through fines and forfeiture, in the Trust Fund's view, there might be a bias towards individual awards to the extent that the circumstances of the case allow for it. Article 75 (2) of the Statute foresees as a first option the possibility of individual awards directly to each victim from the convicted person. This reflects the direct link between the convicted person and the eligible victim who may benefit from a reparations award responding to the individual harm caused to him or her by the convicted person. According to Article 75 (2) second sentence, only "where appropriate" the Court may order that the award (which may be either of an individual or a collective nature) may be made "through the Trust Fund."¹³
20. The Court may wish to clearly reflect the various considerations discussed under sections i., ii. and iii. in the reparation principles.

¹³ A bias of the legal framework for individual reparations made by the convicted person vis-à-vis an individual victim may also be read into the language of Rule 97 of the Rules of Procedure and Evidence, which states "...the Court may award reparations on an individualized basis or, where it deems appropriate, on a collective basis or both": the first part of the sentence referring to "reparations on an individualized basis" lacks the qualification of "where it [the Court] deems appropriate".

C. Ensuring accessible, effective and meaningful reparations proceedings

21. The Trust Fund respectfully submits that reparation proceedings, whilst guaranteeing the rights of the convicted person, should focus on the perspective of victims.
22. The Trust Fund in its First Report has already discussed procedural questions related to participation of victims in reparation proceedings. The report notes, in particular, that the Chamber may choose to order reparation awards (whether individual or collective awards, or both) for victims of crimes for which the Chamber has found the convicted person guilty. This is valid regardless of whether or not these victims have filed an individual reparations application to the Court,¹⁴ or whether victim's status has been granted for the purpose of participation on the case.¹⁵
23. Considering these provisions, the Court should address in the principles the question of equal, effective and safe access of victims to reparations before the ICC.¹⁶ In particular, the Court should ensure access for the most vulnerable victims to reparations who may be in a difficult position to apply, obtain legal representation, and ensure that the Court hears their voices.¹⁷

i. Consultative process allowing for victim involvement at all stages of the reparation procedure

24. The meaningfulness of reparations is as much about the process as it is about the award. Reparation proceedings should be about the victims

¹⁴ *Supra* 11, paragraphs 369-389

¹⁵ *Supra* 11, paragraphs 37-45

¹⁶ See Victims' Rights Working Group in its "Recommendations for key principles that should be applied by the ICC" p. 5-8 for more details, available online at <http://www.vrwg.org/VRWG_DOC/2011_Sept_VRWG_ReparationPaper.pdf>

¹⁷ *Supra* 11, paragraph 62

themselves and they should be consulted at all stages of the proceedings and have a key role in the determination of the reparations award as much as possible.

25. The Trust Fund respectfully notes that the Regulations of the Trust Fund explicitly foresee consultations with victims as part of the reparation proceedings.¹⁸ As previously noted, experience with administering reparations in a human rights context shows that for victims "their treatment, involvement and empowerment [...] can, in and of itself, constitute a valuable part of the reparative package."¹⁹ The principles may include specific language underscoring this important aspect.

ii. Operational aspects of effective victim participation

26. The principles should ensure that victims may effectively participate at all stages of the ICC reparations process. This includes procedural elements, such as the requirement that the reparation procedure is effectively publicized;²⁰ that victims are provided with proper assistance in their access to the Court, including legal representation (this is specifically true for minors who might need particular support); and protection, where needed and appropriate.²¹

¹⁸ See Regulation 49 of the Regulations of the Trust Fund, setting out the general competence of the Trust Fund to consult with victims and Regulation 70, specifically addressing the issue of victims' consultation in the context of collective reparations awards.

¹⁹ *Supra* 11, paragraph 186 with further references.

²⁰ *Supra* 8, Principle 12 (a) of the Basic Principles; and Principle 2 (a).

²¹ *Ibidem*, Principle 12 (b) of the Basic Principles could be of guidance in this respect. It proposes to: "Take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims."

iii. Non-discrimination and non-stigmatisation

27. In addressing access to reparations, the Court may wish to explicitly recognize the principle of non-discrimination on any grounds, including on the basis of gender, ethnicity, race, age, political affiliation, class, marital status, sexual orientation, nationality, religion and disability.
28. Vulnerable victims with special needs including *inter alia* women and girls, rural and slum inhabitants, victims of sexual and gender-based crimes, disabled, mutilated persons, orphans and other vulnerable children, elderly, and the illiterate will often face challenges in accessing reparations. Therefore, the Court will need to pay special attention to facilitating effective access to the reparations regime; as well as, adequate consideration to their needs in designing both the process and the substance of reparations and to avoid stigmatisation and discrimination.
29. Accordingly, the principles may include a provision providing for affirmative measures to redress any inequalities affecting vulnerable victims. Such positive discrimination will be a necessary exception to the obligation of equal treatment arising from the non-discrimination principle in order to reach out to all eligible victims.

iv. Effective access of women and girl victims

30. 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.²²

²² *Supra* 11, paragraph 27.

31. 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.²³
32. In the Trust Fund's experience from administering assistance to victims under its assistance mandate, effective access for women and girls is of particular importance.²⁴ Women and girls often face socio-economic obstacles and discrimination in seeking access to justice, including reparations.²⁵
33. 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 as described in paragraphs 189 – 214 in the Trust Fund's First Report.²⁶ In designing and administering reparations, it is also important to consider the cultural and social contexts surrounding the role of women and their access to basic services and information when designing a reparation award and implementation process.²⁷
34. Respectfully, the Court should take specific measures to facilitate women's and girls' applications and participation in all stages of reparation proceedings and in the design of the reparation programmes. The Court should ensure that any reparations award would be

²³ See 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>>

²⁴ *Supra* 11, paragraphs 27-36 on "Gender and reparations: challenges and opportunities"

²⁵ See Reparations For Women Subjected To Violence: First Thematic Report Submitted to the Human Rights Council by Rashida Manjoo, Special Rapporteur on Violence Against Women, Its Causes and Consequences, 19 April 2010; available online at http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.22_AEV.pdf.

²⁶ *Supra* 11, paragraphs 189 - 214 explaining the gender dimension related to the impact of violence in the Trust Fund's research results

²⁷ *Supra* 11 paragraph 32.

meaningful for women and girl victims. The Court may wish for example to make reference to the “Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation,”²⁸ which affirms the rights of women and girls to reparations.

v. Effective access of child victims²⁹

35. According to UNICEF, “[i]nternational standards on the rights of the child have not consistently (or even usually) served as a basis for guiding policy and the establishment of reparation guidelines, nor for informing reparation programmes or awards for children.”³⁰
36. Once reparation programmes have been set up, children face a number of obstacles in actually receiving benefits.³¹ “Girls and boys encounter significant challenges in asserting their right to reparation... They lack access to adequate information presented in a child-friendly format, often because they are not explicitly considered in the design of outreach campaigns.”³²
37. “Children also lack full legal autonomy. Most have little if any understanding of their rights or how to ensure their rights are upheld, especially when those violating them are authority figures or agents of the state. Children often lack the documentation needed to present their claims, such as deeds to land, housing or property. Children do not have bank accounts (for processing financial compensation), and most have

²⁸ *Supra* 18.

²⁹ *Supra* 11, paragraph 299.

³⁰ Children and Reparations: Past Lessons Learned and New Directions, Dyan Mazurana and Khristopher Carlson - Innocenti Working Paper, 2010 United Nations Children’s Fund (UNICEF), ISSN: 1014-7837, page 16.

³¹ Specific examples of these obstacles are detailed in Mazurana and Carlson in Rubio-Marín, Ruth ed. (2009). *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations*, Cambridge University Press.

³² *Ibidem*; and Children and Truth Commissions, prepared by the UNICEF Innocenti Research Centre in cooperation with the International Center for Transitional Justice

little knowledge of how to manage money.”³³

38. Children may be fearful to come forward to reveal the violation if it was perpetrated by those possibly still wielding power. Children who are perceived as perpetrators; those who were part of fighting forces and groups; those forcibly married, enslaved or prostituted during the conflict; those who were sexually violated; children born of rape; or children now heading households may rightly fear stigma and possible reprisals for coming forward to voice the harms committed against them and try to claim reparation.³⁴

39. Girls and boys who are victims of gross crimes and grave violations have an undeniable right to remedy and reparation under international law.³⁵ The Trust Fund respectfully submits that special consideration should be given in the reparations principles to ensure these rights are envisioned; and access for child victims to reparations and reparation proceedings promotes their right to physical and psychological recovery and social reintegration.³⁶

vi. Effective access of victims of sexual and gender-based crimes³⁷

40. Under the Trust Fund’s assistance mandate, victims of sexual and gender-based crimes have particular challenges coming forward and accepting assistance because of stigma and discrimination. This is especially relevant for former girl child soldiers who have children born

³³ Supra 32, page 24.

³⁴ Ibidem.

³⁵ Ibidem, page 33.

³⁶ See Convention on the Rights of the Child (CRC), CRC/C/113, November 7, 2001, Article 39.

³⁷ Supra 11, paragraphs 156 – 169.

during their captivity and who, upon their return, are often not accepted back by their families and communities.

41. The specific trauma related to sexual and gender-based violence, and the subsequent social alienation, may affect the possibility of these victims to fully participate in and benefit from reparation proceedings before the ICC. The Court should in its principles acknowledge this challenge and ensure that the reparation process, procedures and awards are sensitive to the special needs and circumstances of both female and male victims of sexual and gender-based violence; and in the case of female victims, their children.
42. In particular, the principles should guarantee adequate protection with suggested models for reparations, which reflect both the impact of the crimes for victims of sexual violence, and recognise the importance of agency and self determination in the reparations process.

vii. Voluntary nature of benefiting from reparations

43. In the Trust Fund's experience under its assistance mandate, a victim may or may not want to participate in an activity aimed at rehabilitation because of fear of stigma, discrimination and personal security. To further support voluntary participation at the individual and community levels, the Trust Fund has had to support sensitization and awareness raising campaigns through its integrated rehabilitation and reconciliation initiatives to reduce the added stigma and discrimination that victims of grave human rights abuses often face.
44. The Trust Fund respectfully submits that the reparation principles developed should describe the voluntary nature of victims' participation

in reparation proceedings, and whether or not they would want to benefit from reparation awards.

D. Principles related to the eligibility of victims and standard of proof

i. Defining the eligibility criteria to benefit from reparation awards

45. As discussed in the Trust Fund for Victims' First Report,³⁸ the criteria determining the eligibility of victims to benefit from reparations are already addressed in the applicable legal framework. In particular, Regulation 46 of the Regulations of the Trust Fund 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."
46. Accordingly, the definition provided in Rule 85 RPE describes who may be a "victim" before the ICC. Eligibility for reparation awards is therefore determined by whether a victim has suffered harm; and if so, whether harm is "the result of" the crime of which the perpetrator is convicted. Nonetheless, the principles may wish to further elaborate on this important and complex question to provide further clarity.
47. In particular, because of the principle of individual criminal responsibility, the specific charges for which the accused person has been found guilty will have a determining effect on the scope of the reparations order. The findings of the Chamber in the main trial will govern the temporal and the geographic dimension of the scope of crimes for which victims may seek reparations. Furthermore, the determination by the Chamber of the victim status for the purpose of

³⁸ *Supra* 11, paragraphs 37-45.

reparations is closely connected to causality. The Trust Fund respectfully submits that the use of experts may be appropriate to establish a causality link that goes beyond material damage, taking account of trauma and emotional harm.

48. The Trust Fund considers it important that the Court state in its principles that it will give due consideration to ensuring that indirect victims may benefit from reparation, such as the children of child-mothers and former child soldiers; or those who suffered harm because they tried to protect direct victims from suffering the crime. The principles should further underline that family members may be eligible for receiving reparations in particular in cases where the direct victim was killed or has disappeared.
49. Moreover, in stating that it will consider indirect victims and family members, the Court should add that it would strive to apply best practices from international frameworks, such as the Nairobi Principles, with a view to ensuring that women and girls will receive their rightful benefits without being subjected to discriminatory laws or customs.

ii. Flexible evidentiary standard

50. Principles aimed at operationalizing reparation procedures before the Court will have to address the question of applicable standard of proof. The Trust Fund respectfully submits that because of the fundamentally different nature of reparation proceedings from a criminal trial, the Court should consider applying a lower evidentiary standard to reparation proceedings than the standard of “beyond a reasonable doubt.”

51. The Trust Fund further notes that victims of gross violations often will lack capacity to prove the harm suffered. For example, victims may have lack of access to evidence, which often will be hard to obtain for victims suffering harm in situations characterized by conflict and widespread atrocities. International adjudicatory bodies have therefore relied on presumptions and circumstantial evidence.³⁹
52. In its First Report,⁴⁰ the Trust Fund provided examples of a more relaxed standard of proof in administrative reparation proceedings. The principles may reflect this practice. Furthermore, the principles may elaborate whether the Court considers that a different standard of proof may be applicable to collective and to individual reparations.

iii. Avoiding cumulative benefits

53. In the Trust Fund's experience, it will be important that the communities in which the victims live will perceive the reparation award as fair and equitable. One aspect related to this concern is the question of cumulative benefits.
54. The Trust Fund proposes that in its determination of awards, the Court take into account any benefits received by victims with respect to the harm they suffered through other national or international processes (e.g. benefits arising from national transitional justice processes, or the Disarmament, Demobilization and Reintegration (hereinafter "DDR") programme).

³⁹ See e.g. Octavio Amezcua-Noriega "Reparations Principles under International Law and their Possible Application by the International Criminal Court", p. 6 with further references;

Available online at < http://www.essex.ac.uk/tjn/documents/Paper_1_General_Principles_Large.pdf>.

⁴⁰ *Supra* 11, paragraphs 46-51

E. Principles related to the material and symbolic nature of awards for reparations

i. The importance of symbolic reparations

55. The success of any reparation award will depend upon the form the reparation award takes, and whether the award is meaningful to the victims who benefit, as well as to members of their community. The Trust Fund previously described issues to consider when defining symbolic reparations including, but not limited to, the cultural sensitivity of the awards;⁴¹ choosing the appropriate forms of reparations;⁴² and involving victims at all stages of reparations proceedings, including where appropriate, in the design process.
56. The symbolic value of reparations will be important to many victims and will hopefully have an effect beyond the victims directly recognised by contributing to the empowerment of victims within their communities and societies. It has been noted that symbolic awards are geared towards “fostering recognition.” Accordingly, “symbolic measures derive their great potential from the fact that they are carriers of meaning, and therefore can help victims in particular and societies in general to make sense of the painful events of the past.”⁴³ In this way, they may help victims to move on and transform their identity from that of a victim to that of a survivor and an empowered and accepted member of the community.

⁴¹ Supra 11 paragraphs 185-188

⁴² Supra 11, paragraphs 296-344

⁴³ See the Office of the United Nations High Commissioner for Human Rights publication on “*Reparations programmes*” in its series of *Rule-of-Law Tools for Post Conflict States*, p. 23 with further reference; available online at <<http://www.ohchr.org/Documents/Publications/ReparationsProgrammes.pdf>>

57. Therefore, the Trust Fund respectfully encourages the Court to explicitly mention in its principles that reparation can take not only a material but also a symbolic form.

ii. Adapting guarantees of non-repetition and satisfaction to the ICC context

58. Article 75 of the Rome Statute explicitly identifies three possible forms of reparation to include: restitution, compensation and rehabilitation.⁴⁴ The principles adopted by the Court may wish to elaborate that this list is not exhaustive and include adaptations of two additional forms of reparations, guarantees of non-repetition and satisfaction, which are recognised forms of reparation in existing legal obligations under international human rights law and international humanitarian law.⁴⁵ The Trust Fund further elaborates on this issue in its First Report.⁴⁶

F. Principles related to operational dimensions of implementing a reparation award

i. Timeliness and sustainability

59. Because of the complexity of cases before the Court, it may take a long time until trial proceedings are concluded and result in the implementation of a reparations award. The more time lapses between harm suffered and the implementation of reparation awards, the more difficult it will be to effectively redress harm. The Court should seek to

⁴⁴ *Supra* 11, paragraph 296

⁴⁵ They are for example part of the Basic Principles; for a detailed discussion on how these forms of reparations can be adapted to the ICC context see Frederic Megret, *The International Criminal Court and the Failure to Mention Symbolic Reparations*, 13 August 2008; available online at SSRN: <<http://ssrn.com/abstract=1275087>> .

⁴⁶ *Supra* 11, paragraphs 327-343

act as timely as possible and may wish to include a declaratory principle in this regard.

60. In addition, the design of reparation awards will also need to consider how to achieve sustainability⁴⁷ of the award (i.e. the benefits of the award will live on for the benefit of victims even once its implementation is completed). This will require consideration already at the stage of designing the reparation award.
61. Depending on the nature of the award (e.g. rehabilitation), it might require a clearly defined timeframe. The Court should include a declaratory principle stating that it will pay due respect to the sustainability and temporal parameters of the reparations it orders.

ii. Need to ensure secure environment for the reparations process

62. The Trust Fund has almost five years of experience administering its assistance mandate under challenging circumstances in conflict and post-conflict situations. Security is a necessary pre-condition for any sustainable intervention for the benefit of victims.
63. In light of the insecurity prevailing in many situation countries under the ICC's jurisdiction, the Trust Fund considers that best practice regarding protection and safety must be applied at all stages of the reparation proceedings and implementation. This concerns not only the victims themselves but anyone affected by the reparation order, including Court staff and implementing partners. The Court may wish to address this challenge in the principles.

⁴⁷ *Supra* 11, paragraph 348

G. Principles addressing potential impact of the ICC reparations system on the reality of victims in their daily lives

64. Reparations will directly affect the lives of victims and their communities, an aspect that is of great importance to the Trust Fund for Victims. The Trust Fund respectfully urges the Court to reflect on the principles it adopts to consider not only issues related to addressing the problem of “practical inconsistency and unequal treatment of victims;”⁴⁸ but to adopt principles which will ensure that the reparations regime of the Court will consider the perspectives of the individual victims together with the societies in which they live. In particular, the Court may wish to address the dimensions described in the following reparation principles.

i. Do no/less harm principle

65. Especially in post-conflict situations, reparations have the risk of becoming part of the dynamics of a conflict and may even fuel tensions. Therefore, the Court must strive to “do no harm” or to minimize the harm that may inadvertently result simply from providing reparations to victims.

66. The Trust Fund encourages the Court to take steps to minimize the harm when defining the principles, procedures and awards for reparations to ensure that awards do not exacerbate the root causes of the conflict. To minimize possible longer-term harm, the Court should provide reparations in ways that are conflict-sensitive and supportive of reconciliation and recovery.

⁴⁸ See ASP Resolution, ASP-10-Res. 3.

67. If reparations are administered without regard to local contexts, victims may be harmed again by stigmatizing them or putting them in danger with their families and communities. Poorly designed reparations may even cause additional tensions and re-ignite conflict.
68. The Trust Fund's First Report discusses some of the dangers related to the limited charges in the present case.⁴⁹ The Registry also confirms this concern in their Second Report.⁵⁰ Therefore, reparation principles should include clear language to state that reparations should not result in any further harm for the victims and the society in which they live.

ii. Reparations should aim at reconciliation

69. As the Trust Fund previously noted, "reparations should seek to, *inter alia*, rebuild trust among citizens and between citizens and public institutions. 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'."⁵¹
70. As stated in the preamble of the Rome Statute, the unimaginable atrocities of which the victims of crimes under the jurisdiction of the Court have suffered threaten peace, security and the well being of the world. Accordingly, the preamble expresses the Court's determination to put an end to impunity for the perpetrators and thus to contribute to the prevention of further crimes.

⁴⁹ *Supra* 11, paragraphs 149-184.

⁵⁰ See The Second Report of the Registry on Reparations, ICC-01/04-01/06-2806, of 1 September 2011, at paragraphs 5-13.

⁵¹ *Supra* 11, paragraphs 180 to 184 with further references in paragraph 184

71. The Trust Fund views that the prevention of crimes will not only require punishing the perpetrator. It will require sustainable peace based on the healing of victims and reconciliation of society. Therefore, the Trust Fund respectfully urges the Court to include explicit language in the principles stating that reparations should aim at reconciliation. Reconciliation and addressing the underlying causes of conflict as part of reparation activities will be crucial in preventing future conflict and re-victimisation.

iii. Transformative reparations, where appropriate

72. The Trust Fund notes that in the context of the crimes under the jurisdiction of the ICC, addressing the transformative quality of reparations may empower victims. Transformative reparations may serve not only as a form of reparative justice but also as an opportunity to overcome structural conditions of inequality and exclusion.
73. In the aftermath of war crimes, crimes against humanity and genocide, it will often not be appropriate to restore the *status quo ante* that gave rise to such crimes, in particular because the majority of victims of such crimes will likely have been the powerless and dispossessed at the time when the conflict erupted.
74. Furthermore, transformative reparations may be particularly important when addressing harm suffered by women and girls who, as the Trust Fund's research has shown, often experience harm differently and more severely than male victims.⁵² In addition, the Nairobi Declaration "reconceptualises existing understandings of reparation to state that, in the specific case of sexual violence, 'reparation must go above and

⁵² *Supra* 11, paragraphs 189-214

beyond the immediate reasons and consequences of the crimes and violations; they must address structural inequalities that negatively shape women's and girls lives.”⁵³

75. The Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo noted, “[s]ince violence perpetrated against individual women generally feeds into patterns of pre-existing and often cross-cutting structural subordination and systemic marginalization, measures of redress need to link individual reparations and structural transformation.”⁵⁴
76. Therefore, this notion of transformative reparation, combining reparations with a structural transformative approach will also be of particular importance to victims who have suffered irreparable harm and are marginalized in their communities, such as former girl child soldiers and victims of sexual and gender-based violence.
77. Regarding the forms of reparation, article 75 (1) of the Rome Statute mentions restitution, compensation and rehabilitation as measures that the ICC can implement. However, the statement is not exhaustive, so other forms of reparation can be ordered.⁵⁵ Hence, Trust Fund respectfully suggests that the transformative quality of reparations be explicitly addressed in the Court’s principles with a view to eliminating

⁵³ Nairobi Declaration on the Right of Women and Girls to a Remedy and Reparation (2007), Principle 3(h).

⁵⁴ Rashida Manjoo, Special Rapporteur on Violence Against Women, Its Causes and Consequences, “*Reparations For Women Subjected To Violence: First Thematic Report*”, cited above

⁵⁵ Reparation Principles under International Law and their Possible Application by the International Criminal Court: Some Reflections, Octavio Amezcua-Noriega, Edited by Dr. Clara Sandoval, Reparations Unit, Briefing Paper No.1, Published in August 2011, Essex Transitional Justice Network (ETJN) of the University of Essex.

the pre-existing structural inequalities that have led to or encouraged the violence.⁵⁶

H. Considerations related to proportionality

78. The Trust Fund notes that the question of proportionality will have to be addressed in the principles in its different dimensions. In the Trust Fund's view, the Chamber will firstly have to address the complex question of establishing some form of proportionality between the reparation award and the harm suffered. In addition, there will be a need for establishing a balance between the costs of the process adopted by the Court in its determination of the award and the costs of the award itself.
79. The Trust Fund notes that in the context of the right to reparations of victims of gross violations of international human rights law it has been argued based on the language in Principle 18 of the Basic Principles⁵⁷ that there is a margin of appreciation which authorizes departure from the principle of *restitution in integrum* towards providing "fair and adequate reparation."
80. In particular, the requirement of a "fair reparation" expresses the need for taking into account the overall transitional context in which reparations for massive atrocities take place (including the large numbers of victims); and on the other hand, the scarcity of available resources to be allocated for reparation purposes. Moreover, "at an individual level, *fair* reparation requires that the distribution of

⁵⁶ The Nairobi Declaration: Redefining Reparation for Women Victims of Sexual Violence, Valérie Couillard, [Int J Transitional Justice](#) • Volume 1, Issue 3, PP. 444-453.

⁵⁷ Principle 18 of the Basic principles states that victims should "as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation"

reparation is done in a fair manner. This means without discrimination among groups or categories of victims. Non-discrimination does not mean, however, uniformity of treatment of all victims, yet the reason for differentiation has to be reasonable and justified.”⁵⁸

81. The requirement of “appropriateness” of the reparation has been described as to refer to “the fact that the forms and modalities of reparation should be suitable, taking into account the harm, the victims, the violations, and the broader society”⁵⁹ with a view to optimal usage of the scarce resources, both in qualitative and quantitative terms (i.e. effectiveness).
82. The Court in applying its reparation regime will also have to address comparable challenges that gave rise to the considerations described above. In most cases, including the present case, the number of potential beneficiaries of reparation awards will be large and victims will have suffered multiple forms of harm, difficult to repair. For example, nothing will restore the loss of a loved one who has been murdered and nothing will restore a lost childhood.⁶⁰ At the same time, available resources to repair the harm suffered will likely be rather limited.
83. The Trust Fund respectfully submits that the reparation principles should acknowledge that the Court cannot and will not aim at providing

⁵⁸ See the Office of the United Nations High Commissioner for Human Rights publication on “Reparations programmes” cited above, p. 28-29 with further references; Heidy Rombouts, Pietro Sardaro and Stef Vandeginste, “The right to reparation for victims of gross and systematic violations of human rights”, in *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*, K. De Feyter and others, eds. (Antwerp, Intersentia, 2006), pp. 345–500.

⁵⁹ Heidy Rombouts et al, cited above p.459

⁶⁰ *Supra* 10, The Nairobi Principles for example acknowledge the complexity of the principle of proportionality in the context of gender-based crimes, stating that: “Just, effective and prompt reparation measures should be proportional to the gravity of the crimes, violations and harm suffered. In the case of victims of sexual violence and other gender-based crimes, governments should take into account the multi-dimensional and long-term consequences of these crimes to women and girls, their families and their communities, requiring specialized, integrated, and multidisciplinary approaches.”

restitution in integrum (which, in addition, would also go against the need for transformative reparations, as described above). Instead, it should seek to order fair and adequate reparations responsive to the complexities of the harm suffered.

84. Referring to the need to keep a balance between the process and the outcome of reparations, the Trust Fund has observed 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.”⁶¹ Furthermore, the most effective and efficient use of those resources may be a point of consideration in deciding upon the substance of any possible reparations award.

I. Considerations related to States and other stakeholders

i. Obligations related to the implementation of awards

85. The Trust Fund respectfully submits that the principles should not only address the parties to the case but also remind States of their duty under Article 75 (5) and 109 of the Statute to cooperate with regard to implementing reparation awards.
86. The Court should furthermore clarify that in spite of the fact that Article 109 (1) of the Statute provides that fines and forfeiture measures shall be implemented in accordance with the procedures of the States Parties’ national law, barriers in such national law (i.e. immunities, amnesties or statutes of limitations) must not prevent the enforcement of ICC reparation orders. Furthermore, the principles could address that States should not levy taxation affecting the implementation of reparation awards.

⁶¹ Supra 11, paragraph 424.

ii. Obligations related to cooperation on tracing, seizing and freezing

87. The principles should remind State parties of their legal obligation to cooperate in the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crime as expressly required in the legal framework of the Statute (see Article 93 (1) (k), and Articles 75 (4) and 93 (1)).

iii. Obligations of States and other actors: wider context of transitional justice

88. The ICC reparations regime will not be able to address the needs of all victims that have suffered harm in a comprehensive way in most cases. This is relevant because of the judicial nature of reparations that the Court may be able to order under Article 75 of the Statute.

89. The principles may address the wider dimension of the situation that gave rise to the violations experienced by victims, placing the Court's reparations regime in the national transitional justice context within the situation country. As the Trust Fund has previously noted, the impact of Court-ordered reparations will go beyond the scope of victims as defined by the case.⁶² ICC reparations could have a positive effect on strengthening victims' right to remedies and reparations also in a national context and be of guidance to national courts and transitional justice mechanisms.

90. The Trust Fund respectfully suggests that the principles should include clear and explicit language to remind States of their obligations towards

⁶² Supra 11, paragraph 424

victims under national and international human rights law,⁶³ making reference to Article 25 and Article 75 (6) of the Statute.⁶⁴ In particular, the Court should recognize explicitly in its decision that all victims of genocide, crimes against humanity and war crimes (and not only those who have been associated with the case) have a right to reparation, including the right to an effective remedy before national courts.

91. The Trust Fund further observes that transitional justice cannot be achieved solely through State intervention but a meaningful process has to rely on the combined efforts of the society as a whole including civil society, traditional and religious leaders, affected communities, women's and children's human right advocates, victims' groups, and individuals.
92. Therefore, the principles should call on all other stakeholders to play their part in bringing about transitional justice that repairs harm, mends the broken fabric of society, and transforms victims to become empowered citizens.

III. Conclusion

93. International law, particularly international human rights law, has developed a body of standards that can be a good reference for the ICC when creating its own principles even if the principles need to be adapted to fit the demands of international criminal law.⁶⁵
94. The drafting of the principles is a necessary step for the ICC's reparations procedures, since the principles "will be essential to ensure certainty and consistency as a general principle of law... [as well as for] the purposes of internal preparation, intra-organ coordination and the

⁶³ Including in particular the Basic Principles, mentioned in paragraph 2 above.

⁶⁴ Supra 11, paragraphs 224 and 225

⁶⁵ Supra 60, page 10.

preparation of external stakeholders.”⁶⁶

95. The Trust Fund has a critical role to play in the implementation of Court-ordered reparations, and with the assistance of the Court, States Parties, victims, civil society, reparations experts, victims’ counsel and victims, is capable of converting Court-ordered reparations into credible and tangible forms of redress for victims of crimes under the jurisdiction of the ICC.

PART TWO – SUGGESTED REPARATION PROCEDURES TO BE FOLLOWED BY THE CHAMBER

96. In this second part, the Trust Fund for Victims applies the principles suggested in part one to the present case and respectfully submits observations on questions linked to the reparations procedure. In particular, the Trust Fund outlines how the principle of “*do no/less harm*” and the need for reparations to promote reconciliation given the parameters of the present case.

I. Introduction

97. In the Scheduling order, the Chamber requested *inter alia* observations on whether reparations should be awarded b) i) “on a collective or an individual basis (see Rule 97(1) of the Rules);” and b) ii) “depending on whether there should be individual or collective reparations (or both), to whom are they to be directed; how harm is to be assessed; and the criteria to be applied to the awards.”

⁶⁶ REDRESS, Justice for victims: the ICC’s reparations mandate, REDRESS Trust, 20 May 2011, p. 24.

98. The Trust Fund respectfully submits its considerations on how to address these complex questions. In doing so, and at this stage in the proceedings, it proposes a procedure and methodology for developing an implementation plan (the process to arrive at reparations) rather than the outcome (the exact form of the benefit for the victims, which could be either individual or collective and proposed to be defined at a later stage of this process). The Trust Fund notes in its First Report that a suitable and meaningful procedure may already contribute to the healing process and will empower victims.⁶⁷ It is therefore of greatest importance to adopt the most suitable approach.

II. General observations related to the assessment of reparations as set out in Rule 97 of the Rules of Procedure and Evidence

99. Rule 97 of the Rules of Procedure and Evidence (hereinafter RPE) states “taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized bases or, where it deems appropriate, on a collective basis, or both.”

100. In its First Report, the Trust Fund has also discussed the strength and limitations of individual and collective approaches to reparations;⁶⁸ and has noted that they should be applied and combined in a culturally appropriate and locally relevant manner.

101. The Trust Fund notes that, as it has discussed in the First Report, there are two forms of individual reparations, which are set out in more detail in its Regulations. These forms include those where the Court has

⁶⁷ *Supra* 11, paragraphs 186 and 273-282, in particular 276.

⁶⁸ *Ibidem*, paragraphs 16-26

identified the beneficiary⁶⁹ in accordance with Rule 98 (1) of the RPE, and those where there is a partial or no identification of the eligible individual victims⁷⁰ in accordance with Rule 98 (2) of the RPE.

102. The Trust Fund has also discussed the benefits of collective awards in its First Report and has noted in particular that collective reparations may “help re-establish social solidarity if designed together with victim communities and include reconciliation efforts.”⁷¹ The Trust Fund will further explain in detail how in the present case these aims can be achieved.

103. The Trust Fund will in its observations build on what it has already submitted in its First Report⁷² related to the risks and advantages of individual and collective reparations. In particular, in the following section, it will explain in more detail why it endorses a community-based approach to collective reparations as an appropriate way forward in this case and how such an approach could work. In proposing a community-based approach, the Trust Fund notes that it must be conducted in a way that vulnerable victims (including *inter alia*, the former child soldiers, women and girls and their children, victims of gender-based and sexual violence, illiterates, disabled and mutilated former child soldiers) will have adequate access to reparations, a requirement that has been set out in part one on principles.

⁶⁹ See First Report Regulation 256-258

⁷⁰ See First Report paragraphs 259-272

⁷¹ Supra 11, paragraphs 20-26 at paragraph 22

⁷² Supra 11, paragraphs 16-26 and 149-184

III. Contextual analysis and reparation recommendations for the case

A. Awarding reparations based on individual identification of eligible victims

104. The Trust Fund will first discuss the merits and risks of an individual approach to reparations which, in its view, might not be the most appropriate approach to reparations in the circumstances of the present case.

i. Identifying victims through an applications-based process

105. The Trust Fund notes that in the main trial 129 victims have been granted the right to participate in the proceedings; and that so far, only 85 victim applications were submitted by the Registry to participate in reparation proceedings.⁷³

106. According to the numbers that the Trust Fund has obtained for its work under its assistance mandate,⁷⁴ the official estimate by the responsible national authority (L'Unité d'Exécution du Programme National de Désarmement, Démobilisation et Réinsertion) is that in the entire district of Ituri just under 15, 000 children under the age of 18 have been demobilized from several armed groups by different protection agencies between 2003 and 2009. Of these, around 2900 children could have been associated with the UPC/FPLC. The Trust Fund has at present no available data to make any further estimation as to how many of these children were under the age of 15 (as opposed to under 18) when they were recruited and enlisted with the UPC/FPLC.

⁷³ See Decision on the OPCV's request to participate in the reparations proceedings, ICC-01/04-01/06-2858 of 5 April 2011.

⁷⁴ The estimations are based on official data shared by the national DDR programme, "L'Unité d'Exécution du Programme National de Désarmement, Démobilisation et Réinsertion" with the Trust Fund

107. Based on these estimations, the Trust Fund notes that the number of victims currently participating in Court proceedings seems to be a small, and not necessarily representative sample of victims, who may potentially benefit from reparations in this case should the Chamber apply victim participation criteria also to reparations proceedings. In the Trust Fund's view, this speaks to the limitations of a purely applications-based approach. Access to the Court may not be possible for many of the potentially eligible victims and is likely aggravated by fear of stigma, which may hinder eligible victims to come forward. Furthermore, even if the majority of victims come forward, the Court would still have to verify their status on a case-by-case basis, which would be a resource intensive and time consuming undertaking.

ii. Identifying eligible victims under Rules 60 and 61 of the Regulations of the Trust Fund

108. As discussed in the First Report, the Court could use the option to task the Trust Fund with identifying victims under Regulations 60-61 of the Regulations of the Trust Fund (hereinafter "RTFV"⁷⁵) with a view to awarding individual reparations as an alternative to an applications based process.⁷⁶

109. Options for identifying victims include relying on relevant demographic/statistical data about the group of victims as defined in the order of the Court; targeted outreach to the beneficiary group inviting members who have not been identified through the reparations process to identify themselves to the Trust Fund; and consultations with victims or their legal representatives and the families of individual victims, as

⁷⁵ ICC-ASP/4/Res.3 , Regulations of the Trust Fund for Victims

⁷⁶ Supra 11, Paragraphs 264-265

well as interested persons, interested States and any competent expert or expert organisation. The Trust Fund notes, that in addition to the identification process, such an approach would as a second step necessitate a verification process set out in Regulations 62-65 of the RTFV to ensure that each victim identified falls within the parameters of the Court order and is indeed eligible to benefit from the award.

110. In the Trust Fund's view, such an exercise would be (at least to a large extent) technically feasible but very resource intensive. In fact, it may not stand in proportion to the outcome. Moreover, in addition to technical and procedural concerns as to why the Trust Fund does not propose identifying victims in accordance with Regulations 60-61 of the RTFV, the Trust Fund notes that important substantive considerations may be put forward why such an approach would be irreconcilable with the principles of "do no/less harm" and promoting reconciliation.

a. The national DDR database

111. The Trust Fund notes that in the DRC a national database was established to monitor the Disarmament, Demobilization and Reintegration (hereinafter "DDR") of children associated with fighting forces.
112. This database could serve as a starting point for identifying eligible victims. However, as will be explained, the usefulness of the database is limited.

aa. Problems with the reliability of data

113. Various forms were used to gather information on the DDR process (*Fiches A / B/ C/ D/ E/ F/ G/H*). In particular, 'Fiche B/ Fiche de vérification individuelle des enfants associés aux forces et groupes armés

(EAFGA)' (i.e. the form for individual verification of former child soldiers) has been used to collect relevant information related to the age and location of recruitment of child soldiers; the duration of the recruitment; the characteristic of the recruitment (forced or voluntary); the group a child soldier was associated with, as well as their respective grade and functions.

114. In Fiche B, the name of the armed group with which the child was associated is indicated with the age at recruitment and duration of the association. As a consequence, one could assume that the database could provide information on the number of former child soldiers who have been associated with the UPC/FPLC when under 15 years of age.
115. The Trust Fund notes, however, that this national database is not reliable. Problems with project management and documentation practices at both the Multi-Country Demobilization and Reintegration Programme (hereinafter "MDPR") under the auspices of the World Bank, and the programme managed by the Congolese Authorities from 2003 onwards called the *Commission Nationale de Démobilisation et Réintégration* (hereinafter "CONADER"), resulted in inaccurate information both in terms of numbers of children processed and the completion of the specific forms pertaining to each stage of the child's movement through the system.⁷⁷ Furthermore, the non-governmental organisations implementing under the MDRP did not properly coordinate with the CONADER and were not reliably transferring their data to the national database.⁷⁸

⁷⁷ Independent Evaluation of Special Projects for Child Soldiers in the Democratic Republic of Congo, Final Report Presented to The World Bank's Multi-country Demobilization and Reintegration Program (MDRP), Contract No. 7137037, February 5, 2007.

⁷⁸ Ibidem, p. 3

116. A lack of coordination amongst stakeholders implementing DDR processes and programmes in the DRC has led to cases of double registration of some former child soldiers, and the inability to track the support provided to each beneficiary. In consequence, the actual figures of former child soldiers demobilised, disarmed and reintegrated under the MDRP and CONADER cannot accurately be verified. To identify potentially eligible victim beneficiaries for the Court's reparation process, the existing national database is therefore only of limited use.
117. Moreover, because it is a confidential database, should the Court wish to access it permission from the national authorities would be required. The Chamber might then wish to address this need for cooperation in its order.

bb. Problems related to the different definitions of child soldiers from the DRC and the Rome Statute

118. The problem of unreliability of the data contained in the national database is compounded by the fact that the Rome Statute and the national law do not use the same definition when defining who is a child soldier.
119. International legal instruments outlaw the use of child soldiers. In particular, on 25 May 2000 the UN General Assembly adopted the Child Soldiers Optional Protocol to the Convention of the Right of the Child. This Protocol establishes 18 as the minimum age for direct participation, compulsory recruitment, or recruitment for use in non-governmental armed groups.

120. The DRC ratified this protocol on 11 November 2001.⁷⁹ States that ratify the Protocol are expected to reform national legislation in order to comply with its standards. Accordingly, the quantitative and qualitative data related to the status of child soldiers in Ituri are collected by the protection agencies working in the situation according to this protocol.
121. However, the definition of child soldiers used by these agencies differs from the definition applied by the Court and as outlined in the Rome Statute. While the Statute of the International Criminal Court criminalises "conscripting or enlisting children under the age of fifteen years [emphasis added] into the national armed forces or armed groups or using them to participate actively in hostilities;"⁸⁰ the various applicable national frameworks in the Democratic Republic of the Congo governing the protection of children associated with armed forces and groups define such children as:

"[TRANSLATION] any person under the age of eighteen [emphasis added] forcibly used by a regular or irregular armed force or group, regardless of the duties they perform, including but not limited to cook, porter, courier, and any person accompanying such groups who is not their family member. This definition covers girls used for sex or subjected to forced marriages. Hence, it is not solely limited to children who are armed or who have borne weapons."⁸¹

cc. Movement of former child soldiers from the L'Union des Patriotes Congolais (UPC) to other armed groups

122. The identification of former child soldiers is also made more difficult by the fact that child soldiers moved between armed groups.

⁷⁹ http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en.

⁸⁰ see Article 8 (2) (b) (xxvi) and 8 (2) (e) (vii) of the Rome Statute

⁸¹ CONADER, cadre opérationnel pour enfants associés aux forces et groupes armés (Operational Framework for Children Associated with Armed Forces and Groups), paragraph 49)

123. At the beginning of the conflict the UPC and Forces Patriotiques pour la Libération du Congo (FPLC) was one armed group. In 2003, some commanders left UPC/FPLC and created two other armed groups – the Parti pour l'unité et la sauvegarde de l'intégrité du Congo (PUSIC) and the Forces Armées du Peuple Congolais (FAPC).⁸²
124. When commanders departed from the UPC/FPLC, they left with their combatants, including child soldiers, who were under their responsibility. This means that even if former child soldiers were registered as demobilized as associated with the PUSIC and FAPC they could have initially been associated with the UPC/FLPC.
125. A multi-layered and multi-variant analysis would need to be completed to identify victims who were at the time of demobilization associated with the PUSIC and FAPC to see whether they could be eligible victims in the present case, having previously been involved with UPC/FLPC. Helpful information could be available in the national DDR database, since Fiche B documents information about the movements from one armed group to another.

dd. Self-demobilized child soldiers

126. For various reasons a number of former child soldiers left armed groups without going through the DDR process, and thus are not represented in the national statistics. In addition to those registered as having gone through the DDR process these spontaneously 'auto-demobilised' individuals, such as deserters may also be considered ex-combatants if proof of non-combatant status over a period of time can be given.⁸³

⁸² DRC: Who's who in Ituri - militia organisations, leaders, NAIROBI, 20 April 2005 (IRIN).

⁸³ Integrated Disarmament, Demobilization and Reintegration Standards, United Nations, December 2006

127. Thousands of child soldiers, including many girls, escaped, were abandoned or left the armed forces without being officially demobilized. In particular, many girls associated with armed groups went back discretely into their communities as they were unwilling to disclose that they had been “bush wives.” The head of child protection for UNICEF in Ituri has said, “Children - in particular girls - effectively become the hostages of militants.” “Girls become sex slaves, and then the fear of being rejected by society means that they may refuse to demobilise.”⁸⁴

b. Identifying the present location of potential individual eligible victims

128. Another challenge would be to trace where the former UPC child soldiers are located today. A first starting point could be the place of recruitment. The Trust Fund notes, however, that the former child soldiers are very mobile and might not live in the original place of recruitment at present, even if this information could be established.

aa. Location of origin when recruited, conscripted, and/or enlisted

129. Because one of the priorities of the DDR process was to reunite the children with their families,⁸⁵ it could be assumed that after the demobilisation process former child soldiers would have been sent back to their families and communities.

130. Based on its experience administering the assistance mandate, the Trust Fund submits that the following locations in Ituri could be considered possible places of recruitment by the UPC/FPLC: a) Djugu territory – recruitment took place in Centrale, Bule, Tchomia, Iga Barriere, Lopa, Fataki, Mongwalu, Mandro, Nizi, Drodro, Largu; b) Irumu territory

84 IRIN, Guns Out of Control: the continuing threat of small arms, May 2006, available online at <<http://www.irinnews.org/InDepthMain.aspx?InDepthId=8&ReportId=58950>>

85 *supra* 81, paragraph 57

recruitment was staged from Shari, Bunia, Kaseyni, Sota; and c) Mahagi territory where enlistment or conscription of child soldiers may have taken place in Mahagi and Ndrele.

bb. Current location of the former child soldiers

131. However, as stated, the current location may not necessarily be the places of recruitment. Family reintegration was not always possible. Parents died during the conflict and many families were not located despite the effort of family tracing. Some families also rejected the children and refused the reintegration. In addition, many were displaced during the conflict and families are still trying to return to their original localities so the issue of displacement remains a major challenge for identifying victims in Ituri.⁸⁶

132. The Trust Fund notes that another important aspect is the fact that the former child soldiers who returned to their communities do not necessarily stay in one location. Often the economic situation in the villages does not offer adequate livelihood opportunities. In addition, the former child soldiers have often experienced stigma, discrimination and post traumatic stress associated with their recruitment, enlistment and conscription. This has led to symptoms of post-traumatic stress disorder in many former child soldiers. A Trust Fund implementing partner administering assistance to former child soldiers in Ituri has documented this post traumatic stress to show that a majority of the beneficiaries are affected by hyper-stimulation. The consequence is enormous irritability, and disorganised behaviour with an intensification

⁸⁶ see Elettra Pauletto and Preeti Patel *Challenging Child Soldier DDR Processes and Policies in the Eastern Democratic Republic of Congo*, in *Journal of Peace, Conflict and Development*, Issue 16, November 2010 with a more detailed discussion on these and other challenges

of the feelings and the constant mobility of those former child soldiers who are not able to stay in the same place for a period of time.

c. Need for conducting victim identification mapping

133. The Trust Fund is at present not able to adequately provide the Chamber with the exact locations of former child soldiers associated with UPC/FPLC.

134. The Chamber would need to order a mapping exercise indicating the number, location, gender, age and names of the former child soldiers associated with UPC/FPLC should it favour an award for reparation targeting individual victims or group of individual victims.

135. In the Trust Fund's view, such a mapping would be a very resource-intensive process. The Trust Fund furthermore cautions that the continuing volatile security situation will be a constraint in identifying individual victims who could qualify for reparations in this case. The Trust Fund respectfully requests the Chamber to address, as part of its order, the necessary financial and operational support for carrying out of a mapping exercise if it deems that conducting such a mapping is necessary.

iii. Substantive considerations related to adopting an individual approach

136. The Trust Fund would like to make reference to part two of its First Report⁸⁷ where it has shared contextual concerns with respect to the functioning of the reparations regime in the present case, stemming *inter alia* from the narrow charges in the case.

⁸⁷ *Supra* 11, 149-252.

137. In the Trust Fund's view, there are in particular two major risks in an individual approach: firstly, such an approach would not be compatible with the principle of 'do no/less harm' set out in part one of this filing. Secondly, individual awards to child soldiers would be counter-productive to a reconciliation process.

a. Considerations related to "do no/less harm"

138. The Trust Fund respectfully requests the Chamber to thoroughly consider the arguments made in the First Report on the question whether targeting individual child soldier victims may violate the legal frameworks governing the rights, protection and benefits of former child soldiers and best practices established in this context.⁸⁸

139. In particular, the Paris Principles underscore the fact that measures in favour of EAFGAs: ' [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 placed at a disadvantage vis-à-vis those who have been so associated'.⁸⁹

140. In the Trust Fund's experience working under its assistance mandate, programmes targeting only child soldiers may lead to jealousy even within families, which may impede the re-establishment of a normal family life. This is all the more true because the majority of people in Ituri live in circumstances of large-scale poverty with chronic insecurity. Furthermore, it is important to recall that some of the former child soldiers have been demobilized more than eight years ago. Identifying

⁸⁸ *Supra* 11 add relevant paragraph 153-169

⁸⁹ Paris Principles, par. 3.3.

them as 'ex-child soldiers' through the Court's reparations process would have the effect of reminding the community of their past when they might prefer to have moved on and would like now to be seen only as ordinary member of their communities.⁹⁰

b. Considerations related to reconciliation

141. The Trust Fund also notes, as it has outlined in the First Report, that the war in Ituri had an ethnic dimension. Accordingly, the composition of the UPC/FPLC was ethnically based, which means that the recruitment of children (voluntary or forced) has been conducted within few ethnic communities. The consequence is that former child soldiers who could benefit reparations individually or collectively in this case would be from those ethnic groups, while members of the opposing ethnic groups would not benefit from reparation despite the fact that they might have suffered acts of violence committed by UPC, including its child soldiers. The Trust Fund further notes that the UPC was not the only group recruiting child soldiers: this issue is far broader in scope. The Report of the United Nations High Commissioner for Human Rights' Mapping Exercise states that "all parties to the conflict in the DRC recruited and used CAAFAG [i.e. child soldiers]."⁹¹

142. Ordering reparation only to former child soldiers of one side of the conflict could in the Trust Fund's view exacerbate the tensions making

⁹⁰ The Trust Fund notes the potential parallels with a project implemented by a local NGO in the District of Ituri in 2010/11 for the adult ex combatants: the project aimed at identifying those ex-combatant who never benefited from the first and second stage of DDR benefits (DDR I and II). When trying to identify the ex-combatant eligible to this third stage of DDR, the NGO could not find more than 30% of the potential beneficiaries: an analysis showed that the ex-combatant would prefer not benefiting from the DDR package in order not to be seen anymore as having been associated to an armed group.

⁹¹ Office of the High Commissioner for Human Rights, 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, Para. 723.

the peace much more fragile than it is already today. To the Trust Fund's knowledge, the communities on both sides of the conflict are worried about the impact of the verdict of the 14 March 2012.

c. Reception of the verdict of 14 March 2012 in Ituri

143. In the Trust Fund's experience, affected communities in Ituri lack an understanding concerning the crimes of which Mr. Lubanga has been found guilty.

144. As noted in the First Report⁹², in January 2009, the DRC passed a law on child protection which criminalises the recruitment and use of children in armed forces and groups and in the police, and, for the first time, provides for punishment for such offences.⁹³ Although the number of children associated with armed forces and groups has reduced,⁹⁴ their enlistment and conscription remains practice at both the national and local levels. In his 2011 annual report on children affected by armed conflict, the UN Secretary-General denounces the on-going recruitment and use of child soldiers in DRC.⁹⁵

145. In Ituri, many do not perceive the recruitment and use of former child soldiers as a crime and accordingly, former child soldiers are not viewed as victims:

⁹² Supra 11, para 231

⁹³ Law No. 09/001 of 10 January 2009 on child protection.

⁹⁴ In November 2005, MONUC Child Protection Section estimated that there were at least 30,000 EAFGAs: <http://www.unhcr.org/refworld/pd/fid/46caaafcd.pdf>.

⁹⁵ Annual Report of the UN Secretary-General on Children Affected by Armed Conflicts, 23 April 2011, A/65/820-S/2011/250, p.7: 'The Government of the Democratic Republic of the Congo has not been forthcoming in engaging with the United Nations on an action plan to end the recruitment and use of children by the *Forces armées de la République démocratique du Congo* (FARDC), despite advocacy by child protection actors, including the country task force on monitoring and reporting, over the last several years. [...] Many children released in 2010 reported that they had been recruited several times, even after family reunification. This reaffirms the urgent need for a political commitment at the highest levels of the Government in order to move forward on the action plan and ensure its coherence with ongoing security sector reform efforts'.

“In eastern DRC it is not generally known that the recruitment of children into armed groups is a war crime. [...] Children, who participated widely in the ongoing conflicts in eastern DRC since 1996, are more readily perceived as war heroes, fighting to defend ethnic or political affiliations against external aggressors or to overthrow unpopular political leaders, than as victims of crime. [...] Community feelings towards the returning soldiers are influenced by the political/ethnic relationship that the community had with the particular armed group the child was associated with and also with the nature of the circumstances surrounding the recruitment itself.”⁹⁶

146. Moreover, even where the crime of recruitment and enlistment of child soldiers is known by parts of the population, for years a different definition of that applied by the Rome Statute in the present case was promoted. In the national context, as noted above, the age limit for child soldiers is 18 as opposed to 15 years of age. Accordingly, should the Court wish to identify all child soldiers formerly associated with the UPC at an age of under 15 this may seem in contradiction to the more protective legal reality applicable in the DRC under domestic law.
147. The attitude towards the crime of recruitment and enlistment of child soldiers in the region provides the backdrop for the reception of the verdict issued by the Chamber against Mr. Thomas Lubanga in the region. There remains a lack of understanding as to why the right not to be enlisted and conscripted as a child is an important right to safeguard.
148. The Trust Fund conducted a rapid assessment in different localities of Ituri following the issuance of the verdict of the 14 March 2012, which included bringing together implementing partners and victim beneficiaries to discuss the details of the verdict. The Trust Fund documented concerns and frustration of some Hema communities, as well as the Lendu and Ngiti communities, about the guilty verdict. For

⁹⁶ REDRESS, Justice for victims: the ICC's reparations mandate, REDRESS Trust, 20 May 2011, p. 18

example, during one of these meetings with a Trust Fund local partner, the Community requested that the identity of witnesses in the case be made public in order to verify if they are real or false witnesses. Mr. John Tinanzabo the national deputy of Irumu in Oriental Province and interim president of UPC made a public statement to the same effect on Radio Okapi, on 14 March 2012.⁹⁷

149. Community discontent with the verdict has also been reported by International Refugee Rights Initiative documenting that one local activist noted that, “[y]ou can see the tension in the fact that not a single Iturian organisation has issued a public statement responding to the Lubanga [verdict]. One hears from organisations in Kinshasa, but in Ituri, people do not feel free to speak out. [...] Particular concern in this context is focused on witnesses and intermediaries, who are accused of participating in a vendetta against Lubanga. [...] In the words of one Hema, “The real child soldiers, if they exist, would be for us to produce as we know them.” The others are accused of being liars.”⁹⁸
150. In view of this public sentiment, the Trust Fund is concerned that former child soldiers and their families might choose to opt out of receiving this award for fear of reprisals within their communities. In addition, the Trust Fund thinks that addressing the crime of recruiting, conscripting and enlisting child soldiers at a community level would be a necessary precondition for the acceptance of reparations to victims in this case. Furthermore, it will be fundamental to increase the understanding of these communities that children should be protected in all circumstances

⁹⁷ <http://radiookapi.net/emissions-audio/dialogue-entre-congolais/2012/03/14/ce-soir-thomas-lubanga-reconnu-coupable-de-crimes-de-guerre-par-la-cour-penale-internationale/#more-117107>

⁹⁸ International Refugee Rights Initiative/Lubanga Trial.org, 20 March 2012

- especially during periods of armed conflict. This could be done both through outreach and community-based reconciliation efforts.

iv. Conclusion on the feasibility and appropriateness of an individual approach

151. In conclusion, while a process targeting individual victims is technically feasible it will be disproportionately costly and cumbersome. In addition, targeting victims as individuals or as identifiable members of a group for reparation purposes, while legally justifiable under the Rome Statute, risks being counter-productive as an entry point for the design and implementation of reparations in the present case. In fact, it may bring more harm to the victims than redress. In the Trust Fund's assessment, at an individual level, such an approach to reparations may lead to further stigmatization and re-traumatisation of the victim-beneficiaries. At the level of the community, it may also lead to jealousy, tension and, in the worst case, a resurgence of violence. Moreover, if the former child soldiers are seen as being "rewarded" for their role in the conflict, this may further deepen an existing lack of understanding of the crime in the affected communities.

152. To mitigate these risks, the Trust Fund advises against an individual approach towards reparations and respectfully requests the Chamber to consider a collective approach targeting communities.

B. Adopting a community-based approach to collective reparations

153. The Trust Fund respectfully asserts that harm affecting former child soldiers in this case is manifold in nature, also affecting the social fabric of communities concerned.

154. In the Trust Fund's view, the harm suffered is not limited to the harm suffered at the level of individual victims but in addition, the crimes of enlisting and conscripting child soldiers have caused a specific harm at the level of the affected communities, both those to which the former child soldiers belong and those who were attacked by the UPC/FPLC using child soldiers. Moreover, this harm continues to-date. At the present level of knowledge of the Trust Fund, harm suffered at the level of the community in the present case could include:

- Because child soldiers were not able to go to school and faced difficulties after their return to reintegrate into school, the communities lack young people with a minimum of literacy and education at present, affecting the socio-economic prospects of communities as a whole;
- The trauma suffered by former child soldiers may find expression in behaviour affecting the social fabric of a community, including substance abuse, and sexual and gender-based violence, challenge familial and traditional social structures and mechanisms, perpetuate intra-community trust and feelings of guilt, and shame on behalf of parents and other family members leading to rejection and stigmatisation of victims;
- Exclusion and segregation of child mothers and their children from their families, schools and communities;
- Community envy caused by benefits former child soldiers obtained in the DDR process;
- Harm resulting from the proximity of a training camp, if a community had to provide the UPC/FPLC with more children than the other communities; to private land and community space having been seized in order to establish the camp; to pressure on the community to

provide the camp; and to an increased risk of being affected by attacks on the camp as a military target;

- Use of child soldiers in hostilities resulted in harm for the communities attacked by UPC/FPLC, contributing to a decrease in confidence and trust between ethnic groups.

155. In order to undo the *collective harm*⁹⁹ that is caused as a consequence of widespread human rights violations, experience shows that reparation measures that involve the society as whole will strengthen the meaningfulness and appropriateness of collective awards.

156. The notion of community-based or collective reparations has been a guiding principle in many national reparation programmes. Such programmes may differ from the judicial form of ICC reparations, as they primarily involve state responsibility. The Trust Fund respectfully submits, however, that their precedent should be useful to consider when contemplating the appropriateness and usefulness of reparations measures. For instance, in South Africa, the Truth and Reconciliation Commission's reparation and rehabilitation policy was guided by a set of six principles: *development centred; simple, efficient and fair; culturally appropriate; community-based; capacity development; and promoting healing and reconciliation*.

157. The Committee stated that "[c]ommunity-based services and delivery should be strengthened and expanded to have a lasting effect on communities."¹⁰⁰ The Committee further argued that:

⁹⁹ Rosenfeld, F. 'Collective reparation for victims of armed conflicts' (2010) 870 International Review of the Red Cross 731, 732.

¹⁰⁰ South African Truth and Reconciliation Commission, *A Summary of Reparation and Rehabilitation Policy*, available at <http://www.justice.gov.za/trc/reparations/summary.htm>.

“It is important that communities which have been affected by gross human rights abuses also benefit from reparation and rehabilitation measures. It is not enough to provide individual victims with resources and services, because this does not deal with the effects of gross human rights violations on the community as a whole.”¹⁰¹

158. In Morocco, the Equity and Reconciliation Commission (IER) argued that reparations had to include a community dimension alongside the compensation and other individual reparations measures.¹⁰² According to the Rabat Report, the IER’s statute in fact refers to the notion of reparations at a public or community level. The IER additionally also made efforts to “adopt a participatory approach in arriving at what these measures of reparations should be.”¹⁰³

159. In Sierra Leone, the Truth and Reconciliation Commission (TRC) called for a range of symbolic reparations including public apologies, memorials, commemorations, and mass burials. The TRC also referred to microcredit programs for both individual and collective beneficiaries.¹⁰⁴

160. “As a result [of consultations and meetings with NGOs, civil society groups and victim groups], the Sierra Leone Truth Commission decided, “its reparations programme should be guided by principles of feasibility and sustainability [emphasis added]. These principles inform other principles such as avoiding stigmatisation and alleviating suffering.”¹⁰⁵

161. “The Commission felt that providing reparations for specific categories of people might create new or additional stigma. *Avoiding new stigma or*

¹⁰¹ Ibidem.

¹⁰² International Centre for Transitional Justice, ‘The Rabat Report: The Concept and Challenges of Collective Reparations’ (February 2009), http://www.ictj.org/static/Publications/ICTJ_Reparations_RabatReport_pb2010_en.pdf, page 26.

¹⁰³ Ibidem, page 26.

¹⁰⁴ The Final Report of the Truth and Reconciliation Commission of Sierra Leone, Volume 2, Chapter 4, Reparations, page 35.

¹⁰⁵ Ibidem page 58.

the reinforcement of existing stigma was a guiding principle behind their recommendations. As a result former child soldiers were not singled out and all children were considered together. Furthermore, *increasing awareness and understanding of the specific needs of victims* was considered integral to reducing stigma, and was also seen as a necessary measure in reducing suffering of its own right, thus providing guiding principle. [...] To ensure *sustainability*, the programme focused on the reduction of dependency and the empowerment of victims. [...] [M]any of the recommended reparations measures focus on education, skills training, micro-credit, entrepreneurship, and employment.”¹⁰⁶

162. When faced with the choice of individual reparations payments a programme based on social service packages was designed since the Commission preferred social service packages as these were in line with its principles of sustainability and feasibility. “Moreover, the Commission found that as poverty was widespread in Sierra Leone, individual cash payments could lead to division and friction between people, which it sought to avoid.” ¹⁰⁷
163. Similarly, the Trust Fund is proposing an approach to victimisation that may be suitably applied as a practical manner within a reparations initiative. Well-considered reparation initiatives, using the Trust Fund’s voluntary contribution to complement a Court-order, could take into account the operational and programmatic context that may enhance community acceptance and improve the reparatory impact on victims.
164. Reparation initiatives which target a small, distinct class of victims for redress to the exclusion of the larger victimised community from which

¹⁰⁶ Ibidem.

¹⁰⁷ Ibidem, page 35.

they originate, risk to destabilize the community and damage the very intent of such reparatory measures.

165. The Trust Fund has previously argued that "[e]xcluding 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."¹⁰⁸

166. The Trust Fund has also indicated that "[t]he 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."¹⁰⁹ "The selectivity of charges and the resulting exclusion of certain victim groups from the reparations process will [also] make it more difficult for reparation awards to promote reconciliation in Ituri region."¹¹⁰

167. A community-based approach should serve to achieve a better understanding and appreciation by communities of the crimes in this case being the trigger of reparations awards. This should help to mitigate the potential for stigmatisation of direct and indirect victims; and would in fact be conducive to reaching out to particularly vulnerable groups of victims, including women and girls in the context of the crimes in the present case.

168. A community-based approach to collective reparations awards would furthermore contribute to prospects of reconciliation at different levels,

¹⁰⁸ *Supra* 11, paragraph 153.

¹⁰⁹ *Ibidem*, paragraph 170.

¹¹⁰ *Ibidem*, paragraph 180.

including between the different ethnic groups that were party to the conflict, and support the transformative quality of reparations.

169. Strengthening and expanding community-based services and delivery linked to reconciliation efforts for collective reparations could be seen to have some of the following benefits to include, *inter alia* :

- A lasting effect on communities, restoring collective harmony and rebuilding broken relationships;¹¹¹
- Strengthening local capacities by helping to restore the sense of dignity amongst the community;¹¹²
- Creating a deeper link between protection and reparations;¹¹³
- Restitution of identity, family life and citizenship for victims may require measures that target their wider communities (including attempts to subvert cultural misunderstandings around the value of women's purity and sexuality);¹¹⁴
- The participatory dimension of community-based collective reparations provides victims with a stronger reconciliatory component.¹¹⁵

170. As the Trust Fund has previously submitted in its First Report, "[c]ollective reparation may also be the most effective way of using the limited funds likely to be available. [...]"¹¹⁶

171. Finally, in the case of collective awards, the costly and resource-intensive mandatory verification requirement does not exist."¹¹⁷

111 'A Summary of reparations and rehabilitation policy, including proposals to be considered by the President', available at <http://www.justice.gov.za/trc/reparations/summary.htm>

112 Bunch, A., 'Life is priceless: the work of the national reparations program in Guatemala' (2007), available at <http://www.internal-displacement.org/8025708F004CE90B/%28httpCountries%29/ADC95A48885DA5B3802570A7004CF4E3?OpenDocument>

113 NGO-GSW Geneva, 'Initiative: Violence against women and remedies' (2011), available at <http://www.ngocsw-geneva.ch/wordpress/wp-content/uploads/Research-final-VAW-+Remedies-2.pdf>

114 Ibidem.

115 The Rabat report, http://www.ictj.org/static/Publications/ICTJ_Reparations_RabatReport_pb2010_en.pdf

116 Supra 11, paragraph 291

C. Legal justification for applying a community-based approach to collective reparations to this case

172. The Trust Fund respectfully recalls that, in its view, a community-based approach to collective reparations may mitigate the risks of stigmatisation and re-traumatisation at the level of victims, and of jealousy, tension and resurgence in violence at the level of communities. Moreover, a community-based approach would, in the Trust Fund's view, not only be most appropriate in the particular circumstances of the present case but also fall within the parameters of what can be understood to be collective reparations in the sense of the applicable legal framework.

173. The Trust Fund notes that there is no legal definition of the term "collective reparations" in international law. In fact, the term has been used to refer to a number of different scenarios. It has for example been argued that a reparation measure can be said to be collective because it is awarded for the violation of a collective right or for the violation of a right that has an impact on a community; when the subject of the reparation is a specific group of people or because it refers to the types of goods distributed or the mode of distributing them, such as an apology addressed to the victims in general.¹¹⁸

174. The international Rabat symposium on collective reparations in 2010 has suggested that certain forms of reparations are "inherently collective and exclusive" (i.e. specialised health services for specific categories of victims), while some are "community-oriented and not exclusive" (i.e. schools). In fact, it appears that the two concepts of community-based

¹¹⁷ *Supra* 11, paragraphs 291 and 292.

¹¹⁸ See Sylvain Aubry and María Isabel Henao-Trip, edited by C. Sandoval, *Collective Reparations and the International Criminal Court*, Briefing Paper No. 2 (2011), p. 2-3 with further references.

and collective are often conflated and used interchangeably without any precise and common understandings of concepts' definitions.

175. The Trust Fund further notes that the applicable legal framework for reparation proceedings before the Court, including the Rome Statute, the Rules of Procedure and Evidence, and the Regulations of the Trust Fund do not provide an explicit definition of what the term "collective reparations" means in this context but do contain some form of guidance.
176. In particular, Rule 97 (1) of the RPE gives the Chamber the discretionary power to decide whether individual or collective reparations, or a combination of both, are most "appropriate" in the present case.
177. In addition, the applicable legal framework makes clear that the Trust Fund may play an important role in collective reparations. Rule 98 (3) of the RPE states explicitly that the Court may 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. In the Trust Fund's view, Rule 98 (3) and Rule 97 (1) of the RPE provide the starting point for interpreting how the term "collective reparation" must be understood in the Rome Statute context. The Trust Fund further notes that both Rule 97 and Rule 98 (3) contain the term "appropriate."¹¹⁹
178. The Trust Fund respectfully submits that the Chamber may wish to adopt a wide interpretation of the term "collective reparations" which gives due consideration to this "appropriateness." The appropriateness of reparations should be assessed in line with the principles, discussed

¹¹⁹ Also Reg 110 of the Regulations of the Registry refers to the "appropriateness" of collective or individual forms of reparations and provides for a possibility to request the Registry to give input on factors that would determine such "appropriateness."

in the first part of this submission, including in particular the principles of “do no/less harm;” the need for reconciliation as an underlying aim of reparations; the need for considering gender dimensions to the substance and process; and the need for reparations to be locally relevant and transformative. The best interests of the victims eligible for reparations should be a decisive factor in determining what form of reparations the Chamber may wish to order.

179. As has been discussed, the crimes of recruitment, conscription and enlistment of child soldiers have affected not only the child soldiers as direct victims but also their communities, thereby adding systemic harm to the individually experienced harm. In addition, addressing only the former child soldiers without involving the affected communities will not be in the child soldiers’ best interest.

180. Furthermore, the Trust Fund respectfully submits that the fear to be identified as a former child soldier could possibly be an important factor for why relatively few victims have come forward to submit a formal application for reparations to the Court. A community-based collective approach to defining and implementing reparations in this case would help to address these challenges. The outcome of the community-based consultations could also then result either in collective or individual benefits.

D. Procedural observations

181. Should the Trust Fund be invited by the Chamber to prepare a draft implementation plan for reparations, various provisions of the Trust Fund’s regulations will apply. Part III, Chapter II, Section III of the Regulations address the procedure to be followed, including the required approval by the Trust Fund Board, the submission of the

implementation plan to the Chamber, and the reporting to Chamber on progress. According to Regulation 55, in developing the implementation plan, the Trust Fund “shall take into account the following factors in determining the nature and/or size of awards, *inter alia*: the nature of the crimes, the particular injuries to victims and the nature of evidence to support such injuries, as well as size and location of the beneficiary group.”

182. In the case of collective reparations to victims pursuant to Rule 98 (3), Chapter IV of the Trust Fund Regulations applies. Regulation 69 indicates that “the draft implementation plan shall set out the precise nature of the collective award(s), where not already specified by the Court, as well as the methods for its/their implementation. Determinations in this regard should be approved by the Court.” The subsequent Regulations 70-72 address the consultative processes that the Trust Fund may undertake as well as the identification of intermediaries or partners for implementation and the procedure for monitoring implementation.

183. In view of the above, the Trust Fund respectfully submits that, in the case that the Chamber decides on collective reparations, the following steps may be envisaged:

- The Trust Fund conducts consultations with victims and communities by the Trust Fund, resulting in a proposed implementation plan, including an indication of how Trust Fund may complement from its “other resources” to the reparations award. The draft implementation plan is to be approved by the Trust Fund Board before submission to the Chamber, through the Registry.

- The Chamber conducts a hearing of interested parties on the draft implementation plan.
- The Chamber decides on the approval of the implementation plan, including any adjustments it deems necessary.
- The Trust Fund implements the reparations plan, monitors progress and results, and reports on these to the Chamber.

i. Observations on the development of a draft implementation plan in the case of a collective award

184. While some reparations programmes may improve the quality of life of victims and their families, the central goal of reparations is to redress the injury and harm caused by the criminal violation of the fundamental rights of victims. If instructed by the Chamber, the Trust Fund is in the position to develop a reparations implementation plan for this case.

185. The type of reparations programme and model (including decisions about the appropriate setting, the types and levels of intervention, organisation and location, etc.) will be outlined in the plan. In addition, a number of key factors associated with the successful implementation of the reparations programme will be outlined to include: cost-effectiveness, budgeting and addressing programme sustainability issues; utilizing local resources and experience; collaborative partnerships; a clear operational framework, including protocols that define areas of responsibility; and valid performance measures or indicators.

186. In order to best serve the victim population intended to benefit from the implementation of the reparations plan, the Trust Fund recommends that all reparations programmes include five distinct dimensions: “a

focus on the psycho-social support, an emphasis on participatory decision-making, sensitivity to intercultural needs, promotion of gender equality and an emphasis on the inherently symbolic nature of all reparations.”¹²⁰

187. The Trust Fund will need support from the Registry and OPCV to adequately ensure field operational support, procurement, translation and interpretation, security, and an effective communication strategy to inform and educate victims and the community about the reparations process.
188. The purpose of initial consultations would be to arrive at a transparent determination of the reparation measures and selection of beneficiaries and localities.¹²¹ This process can be considered an important and integral part of the process of collective awards for reparations; and of critical importance to the eventual successful outcome and possessing reparative value in its own right. It is also likely to be resource-intensive.
189. In view of the constrained resources of the Secretariat, the Trust Fund respectfully submits that this process should be partially funded from its reparations reserve.

a. Identifying localities for the purposes of reparations

190. To submit relevant observations to the Chamber, the Trust Fund, with the assistance of the Registry and with the eventual support of experts, would need to map the localities, which could be linked to a reparation process on the present case. The mapping would include localities

¹²⁰ See United Nations Office on Drugs and Crime, Vienna, Criminal Justice Handbook Series, Handbook on Restorative Justice Programmes, 2006.

¹²¹ “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”, U.N. Doc. A/RES/60/147, March 21, 2006, Page 10.

indicated in the judgement, and potentially other locations impacted by the crimes committed in this case.

191. The Trust Fund respectfully submits that any additional localities to be considered for reparation would need to be confirmed by the Chamber, on the basis of criteria it has set for the determination on how such additional localities could be identified.
192. Localities were already identified in the judgment on this case on 14 March 2012. The Chamber could decide to focus only on the following 18 localities for the purposes of a collective reparations award: Bunia, Rwampara, Mongbwalu, Mandro, Mamedi , Mandro, Lalo, Lipri, Centrale,, Iga Barriere, Katoto, Nyamavi Mahagi Port, Bogoro, Kaseyni, Tchomia, Songolo, Kobu. No criteria would need to be issued by the Chamber as these localities have already been established in the main trials as locations of crime.
193. However, in the Trust Fund's understanding, recruitment, enlistment and conscription of children under the age of 15 by the UPC/FPLC may in addition have also been committed in other localities in Ituri.
194. The Trust Fund respectfully proposes opening the possibility to add localities where such crimes could have happened between the 1st September 2002 and the 13 August 2003 if, in the assessment of the Chamber, these additional localities can be linked to the case. To do so, the Chamber could issue criteria to be applied for identifying localities for the purposes of reparations. Should documentation be required to be submitted to show that the criteria are fulfilled, the Chamber could consider holding a hearing in order to review and decide on the issue.

195. The Chamber could order the Trust Fund to use the criteria issued to identify localities where crimes of recruitment, enlistment and conscription of children under 15; and use of child soldiers have been committed between the 1st September 2002 and the 13 August 2003 in Ituri by the UPC/FPLC.
196. The Trust Fund could collaborate with the different organs of the Court participants, legal representatives of victims, Congolese authorities, civil society, and affected communities; and organise field assessments with the assistance of the Registry in order to submit a list of localities where the crimes would have been committed.
197. The Trust Fund respectfully proposes that the list of localities identified be included in the draft implementation plan submitted to the Chamber. Additional documents could be filed in order to prove the eligibility of those localities. The Chamber may then decide to request observations from the parties, participants and other stakeholders. The Chamber's decision on the draft implementation plan would address the validation of the list of localities that are proposed to be included in the implementation phase.

b. Consultation with victims and communities within the localities

198. Participation of victims and victim survivor groups in the design, and implementation of reparations programmes can be critical in ensuring that reparations are meaningful, timely and have the desired impact.¹²²
The participation process must be carefully designed due to

¹²² "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", U.N. Doc. A/RES/60/147, March 21, 2006, Principle 15. Page 9.

heterogeneity of the victims, the need for inclusiveness, their frequent lack of resources and organisation, and the security risks and repression they may face. The programme should be informed by the needs and expectations of victims, and in particular include adequate measures facilitating equal access for the most vulnerable. The Trust Fund notes that in the present case many direct victims may fall into the category of vulnerable victims, given the stigma and trauma attached to the experience of having been a child soldier, including sexual violence that has been experienced.

199. The Trust Fund respectfully proposes a participatory process of consulting victims within the localities validated by the Chamber. An informative and outreach campaign could be launched, with the assistance of the Registry, in all validated localities to explain the judgment; consult with victims on how they would define their reparation; work with the communities to identify the underlying causes to the recruitment, conscription, and enlistment of child soldiers; debate around the values of child protection and why the use of child soldiers is a criminal act making the former child soldiers victims; and identify the mechanisms of child protection in the communities. Where appropriate, social service agencies, non-governmental organisations, victims and families, victims counsel, women's grassroots organisations, child rights advocates, victim survivors groups, community associations, traditional leaders and faith-based organisations operating in the communities may be consulted.
200. The victims of crime, including *inter alia* girls and women, former child soldiers who were victims of violence, including sexual and gender-based violence, will be provided with an informed choice to participate in the process. This will require addressing their specific requirements

for confidentiality, to provide them with information on the right to obtain legal advice and to have legal representation at any stage of the process, the support resources that are available to them, and to give them access to the details of the reparations principles and procedure.

201. The results achieved from this consultation process would be included in the Trust Fund's draft implementation plan.

c. Assessing the harm

202. The Trust Fund submits that in its view, an assessment of harm could also be carried out during the Trust Fund's consultative phase with victims and affected communities in accordance with Regulation 55 of the Regulations of the Trust Fund, once communities and victims have been well informed about the process.
203. The Trust Fund has previously submitted in its First Report general information on the manifestations of harm suffered by former child soldiers, their families and communities. Most of this information was collected through the projects implemented within the assistance mandate. However, more specific information (i.e. locations, injuries, number of families affected, and current situation) would need to be generated to identify harm suffered accordingly to the various crimes committed in this case for the purposes of reparations.
204. The Trust Fund is proposing that an interdisciplinary team of experts (i.e. anthropologist, child protection specialist, psychoanalyst, social worker, public health specialist, conflict analyst, victims' counsel) would be needed to assess the harm suffered by the victims and communities. The Trust Fund could manage these missions with support from the

Registry, and in collaboration with the OPCV and local implementing partners.

205. In developing the conceptual framework, *Barzas* – traditional meetings – could be held and attendance could vary depending of the issue to be discussed. A questionnaire (tool) and methodology can be developed and used for documenting the ongoing process with victims and affected communities. Focus groups with former child soldiers, children, women and other vulnerable groups could be organized to collect their view about the harm suffered by the communities. The methodology will ensure that vulnerable victims and members of the communities are consulted and able to address their point of view regarding harm suffered and how they would define their reparations either publicly or confidentially.
206. The specific harm of many of the victims could be assessed at the community level as it has been done within the project TFV/2007/R2/RDC/027 under the Trust Fund's assistance mandate. This methodology leads to the recognition by the communities themselves of the status of victims and subsequent harm suffered from the crimes committed in this case. The Trust Fund believes that this community recognition is meaningful for the victims and an important aspect of the reparations process.

d. Soliciting victim and community expectations about reparations

207. The Trust Fund respectfully proposes that in each of the identifiable localities, a community-based debate about the kind of reparation appropriate to repair the harm either of the communities or of the individual victims presenting special harms.

208. The reparation principles could be explained and discussed with the victims and communities. Focus groups could be organised in order to ensure the full participation of the former child soldiers and communities including the victims who will not feel comfortable to express their view in public such as child mothers, children, women and other vulnerable groups.
209. It would be important to address the question of unrealistic expectations, as the resources available for the reparation in this case would probably be limited. The Trust Fund notes that the population in Ituri is resource poor and faces general poverty on a daily basis.
210. Regardless of how reparations will be defined, it will be important to communicate the difference between reparations and development or humanitarian aid. The Rabat Report further emphasizes this line of reasoning and states:

“In theory, development programs and collective reparations programs are two different state obligations, each with its own target population and its own objectives. Reparations should not be an instrument of social policy that is piggybacked on the state’s existing obligations to address structural problems of poverty, exclusion, and discrimination. This approach undermines the recognition of human rights violations, which is a critical element of any reparations policy. Therefore, there is a need to define reparations based on an acknowledgment of the harm suffered. As pointed out by one participant, “the distinction between reparations and social policy is clear; the challenge is how to articulate it. The distinctive feature is historical memory. [...] It is necessary to articulate the relationship between reparations and development because when poverty is widespread it is simply impossible to avoid the confusion in practice; collective reparations need to be put in the overall context of alleviating poverty.”¹²³

211. Challenges have been faced by the Trust Fund to implement in areas where there are on-going conflict and ICC investigations such as in the Eastern DRC. In this context, the Trust Fund and its implementing

¹²³ The concept and challenges of collective reparations, The Rabat Report, February, 12th - 14 th 2009, ICTJ, page 47-48

partners under the assistance mandate have not always been able to publicly brand the assistance support's association with the International Criminal Court and the Trust Fund. The Trust Fund's empirical study conducted in 2010 provided an opportunity to analyse the results according to the different understandings that victims have about where the assistance comes from, and whether this impacted the meaningfulness of this support and satisfaction. Because reparations entail an important symbolic element, such lessons about branding, outreach and community sensitisation offer important insights for the Court.¹²⁴

212. The survey measured whether the victims were aware of where the assistance support was coming, and how this might relate to attitudes about the International Criminal Court and the Trust Fund. The results provide empirical evidence that knowing that the assistance is coming from the ICC and/or the Trust Fund correlates with victims' attitudes toward justice and the positive role the ICC plays for ending impunity. Those victims who know their assistance is coming from the ICC and/or the Trust Fund are over twice as likely to name the ICC when asked in an open-ended question who is primarily responsible for resolving conflict in the community (48% vs. 22% overall).
213. At the same time, these victims are significantly more likely to say that they have *not* received justice. This holds for both male and female victim respondents. This means effective outreach and communication with victims is needed to ensure that a reparation award lives up to its fullest *symbolic potential*. In particular, outreach will play a crucial role in

124 Hamber, B. (2006). Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition. The Handbook of Reparations edited P. De Greiff, Oxford University Press: USA, pp. 560-588.

explaining and capitalizing on the differences between assistance and reparation.

214. The Trust Fund has social scientists on staff and is prepared to solicit victim and community expectations about reparations in partnership with its local implementing partners, and file a report accordingly to the Chamber. However, the Trust Fund will need support from victims' counsel; and the Registry in the area of field operation, interpretation and translation, and public information and outreach. Therefore, the Trust Fund respectfully requests the Chamber to instruct victims' counsel and the Registrar to provide this necessary support to the Trust Fund.

e. Collecting and filing requests for reparation

215. The final step of this consultation process would be the collection of proposals for collective reparation developed in each locality. The methodology could be developed at a later date and shared with the Chamber.
216. Regarding the underlying causes to the conflict and ongoing tensions in Ituri, the Trust Fund would propose including reconciliation as part of the reparation proposals. The Trust Fund notes in this context that a number of the communities are multi-ethnic and that community consultation should be open to all members regardless of their ethnic origin.
217. These proposals would indicate what type of reparation desired by victims in this case – reparation benefits could both be individual or collective; the type of measures required to implement the desired reparation; an estimation of the costs and available resources; best

practice and technical standards to be applied; the links to the case and reasons the proposed measures would be meaningful to victims and address the harm suffered. In case individual reparations are requested by the victims, the names of the identified victims would be indicated confidentially.

218. However, the Chamber would need to determine whether a victim's participation in collective reparations would exclude eligibility for individual reparation by covering the same claims and harms, should the Chamber decide to offer individual reparations alongside with collective reparations. If so, this will be communicated to each individual along with information on their options going forward.

219. Hence, the Trust Fund respectfully requests that guidelines are provided by the Chamber regarding the evidentiary standards required for qualifying for reparations. Evidentiary requirements should not be onerous on victims and should take into account the availability of different types of proof in the context of the violations

f. Operational issues to be addressed regarding the implementation plan

220. The Trust Fund intends to consult with victims of the case and to conduct an evaluation of harm stemming from the crimes committed. Such activities require logistical and security support to conduct numerous field visits to remote locations for victim consultations and assessment.

221. The fiscal constraints placed on the ICC Bunia Field Office have hindered their ability to recruit and retain sufficient numbers of drivers in support of the intended field work. The activity in the environs of

Bunia is expected to increase in the near term as the Trust Fund endeavours to fulfil obligations under its two mandates simultaneously. Six vehicles are present at the Bunia Field Office; however, only one driver is on staff to operate the vehicles in relation to mission travel. Insufficient personnel are available to meet the required level of Trust Fund field work in regards to reparations proceedings and the assistance mandate. Other organs of the Court are also reliant on these same resources to accomplish their work.

222. The Trust Fund recommends that the Bunia Field Office remain open throughout the period in which reparations may be administered and that victim accessibility to the Court through the Bunia Field Office be improved. In order to conduct assessment missions and to implement possible reparations a proximate base of operations is required to effectively implement and monitor programming.
223. The Trust Fund respectively requests the Chamber to instruct the Registrar to ensure that adequate operational support is provided to the Trust Fund to fulfil its Court-ordered obligations.
224. If the activities and projects of the Trust Fund are triggered by a decision of the Court, the Trust Fund pursuant to Regulation 58 of the RTFV shall provide updates to the Chamber regarding progress implementing a Court-ordered award. The Trust Fund shall also submit a final report – narrative and financial – to the Chamber at the conclusion of the implementation period.
225. The Board of Directors are required to submit reports to the donors who have provide the voluntary contributions; and pursuant to Regulation 76 of the RTFV to submit a written annual activities report to the Assemble of States Parties (ASP), Committee on Budget and Finance

(CBF) and the external auditor. The Board of Director shall also submit pursuant to Regulation 77, proposed Secretariat budget for review by the CBF and accounts statements for review by the External Auditor.

226. The Democratic Republic of the Congo ratified the Agreement on Privileges and Immunities of the International Criminal Court (hereinafter APIC) on 3 July 2007, thereby superseding the Provisional Memorandum of Understanding on the Privileges and Immunities between the International Criminal Court and the Democratic Republic of Congo of 12 October 2004. The APIC provides a robust particularized legal framework protecting court officials,¹²⁵ victims and witnesses in excess of the general provisions outline in Article 48 of the Rome Statute.

227. The Trust Fund notes in this context that the relationship with intermediaries is governed by agreements and contractual relations between the Trust Fund, Court and the implementing partners according to the ICC Financial Rules and Regulations. The APIC, however, does not extend privileges and immunities protection to the conduct of intermediaries acting on behalf of the Trust Fund assistance mandate or Court-ordered reparations. Hence, the Trust Fund and Court cannot stipulate in its contracts with the intermediaries the application of APIC immunities and privileges to intermediaries.

228. The Trust Fund with and through the auspices of the Office of the Registrar would be capable of entering into agreements or memoranda of understanding with relevant governmental institutions and

¹²⁵ APIC omits specific mention of the Secretariat of the Trust Fund and the Board of Directors. Because APIC specifically incorporates by reference: Representatives of States Parties, Judges, the Prosecutor, the Deputy Prosecutor, the Registrar, the Deputy Registrar, Registry staff, Counsel, Witnesses, Victims, and Experts it excludes from protection those entities not named. Trust Fund personnel and implementing partners are therefore legally exposed as they are not part of the named entities and apparently operating outside of APIC.

provincial authorities in DRC to advance and implement prospective reparation orders. Agreements with governmental institutions may be required to obtain relevant victim related information for planning purposes, such as the identification of individuals in the Disarmament, Demobilization, and Reintegration (DDR) database.

229. The Trust Fund respectfully requests that the Chamber instructs the Registrar to provide the necessary support for ensuring that the proper legal frameworks are in place with the host country for assessing information from the DDR database; for interacting with sector ministers (i.e. Justice, Health, Education, Gender and Social Affairs); and for providing the necessary protection of the implementing partners who will deliver the reparations programmes on behalf of the Trust Fund and the Court.

ii. Hearing of interested parties on the draft implementation plan

230. The Trust Fund's proposed implementation plan could be subject of a hearing of interested parties, held by the Chamber. If needed, victims or members of the community could be identified to express their views during the hearing and explain the reasons why such awards would help address the harm suffered as result of the crimes committed in this case.
231. The Trust Fund submits that this hearing would be an opportunity for the Chamber to call for experts in order to debate the propositions issued from the community-based consultation, as reported in the draft implementation plan. The Trust Fund could provide the Chamber with a list of experts in different fields after consulting with the proposed individuals. The Trust Fund respectfully encourages the Chamber to conduct a hearing *in situ* if the security, logistical and financial issues are

manageable by the Court. Such a hearing in the situation would increase the transparency of the reparations process, and value of the reparation measures ordered by the Chamber.

IV. Modalities and financing of reparations to victims

232. Reparation awards ordered by the ICC are of a judicial nature and address the individual criminal responsibility of a person convicted by the Court. This is reflected by article 75 (1) of the Statute, which states that “The Court may make an order directly against a convicted person [...]” No other party is indicated to bear direct financial liability for reparations. The Trust Fund for Victims, according to its Regulation 56, “[...] 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.”

233. Part I, Section VII of the Trust Fund’s First Report on Reparations discusses the options available for funding reparations ordered by the ICC. This document further explores possibilities that may be relevant for reparations in the present case.

A. Order against the convicted person

234. In the context of an order against the convicted person, the Trust Fund understands there to be three sources of financing reparation orders. The Court may order an award for reparation in accordance with Article 75 (2) of the Statute. Such an award for reparations is non punitive in nature but arises from the convicted person’s liability to repair the harm caused by him. As part of possible penalties, the Court may, in addition

to imprisonment, order a fine (Article 77 (2) (a)) or forfeiture of proceeds, property and assets derived directly or indirectly from the crime for which there was a conviction (Article 77 (2) (b)).

235. The Trust Fund recalls that the Pre-Trial Chamber in its decision of 24 February 2006 (ICC-01/04-01/06-8) discussed the matter of protective measures and concluded that limitation of such measures to the penalty of forfeiture under Article 77 (2) of the Statute would be contrary to the “ultimate benefit of victims” as related in article 57 (3) (e) of the Statute. Therefore, it considered that “early tracing, identification and freezing or seizure of the property and assets of the person against whom a case is launched through the issuance of a warrant of arrest or a summons to appear is a necessary tool to ensure that, if a person is finally convicted, individual or collective reparations awards ordered in favour of victims will be enforced.”

236. On 9 March 2006, the Pre-Trial Chamber I issued a request (ICC-01/04-01/06-22) to the Government of the Democratic Republic of the Congo (hereinafter “DRC”), related to the assets and property of Mr. Lubanga, in which it reiterated “that the identification, tracing, freezing and seizure of property and assets belonging to Mr. Thomas Lubanga Dyilo are necessary for the ultimate benefit of victims in order to ensure that, should Mr. Thomas Lubanga Dyilo be found guilty of the crimes of which he is accused, the said victims may, in application of article 75 of the Statute, be awarded reparations for damage which they may have suffered.”

237. The above decision and request by the Pre-Trial Chamber seem to indicate the primary purpose of any assets and property seized are to be used for financing an award for reparations to victims.
238. On 31 March 2006 (ICC-01/04-01/06-63), the Registrar provisionally found Mr. Lubanga indigent for the purpose of legal aid, pending verification by the Court of the information contained in his application. To the present knowledge of the Trust Fund, no assets or property belonging to Mr. Lubanga have yet been identified or seized by the Government of the DRC.
239. The Trust Fund respectfully suggests that following the guilty verdict, the Chamber may wish to (re)consider the options available to address Mr. Lubanga's financial liability for reparations; and may seek to obtain additional information in respect of his financial background both from Mr. Lubanga and from the Government of the DRC.
240. Moreover, in deciding the applicable penalties in the present case, the Chamber may wish to impose a fine on Mr. Lubanga. It could furthermore investigate the possibility of a forfeiture of any proceeds of crime; and should any indication that such proceeds exist, the Chamber may wish to hear related evidence in accordance with Rule 147 of the Rule of Procedure and Evidence.
241. The Trust Fund wishes to reiterate the potential symbolic value and beneficiary effect of Mr. Lubanga's financial contribution to the reparations award.

B. Award through the Trust Fund for Victims

242. The Trust Fund's First Report on Reparations, paragraphs 116-148, develops *in extenso* the Fund's views on the options of an award being made "through the Trust Fund for Victims;" in particular, the option that in case of indigence of the convicted person, the Fund complements an award from resources originating from voluntary contributions.
243. In March 2011, the Fund's Board of Directors confirmed their understanding "that the language of Trust Fund Regulation 56 suggests that 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."¹²⁶ The Trust Fund furthermore recognises its responsibility under Regulation 56, "[...] without prejudice to its activities under paragraph 50, sub-paragraph (a), [...] 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 [...]."
244. In this regard, the Trust Fund wishes to note that Board of Directors, at its Ninth Annual Meeting in March 2012, increased the amount reserved to 1.2 million Euros to complement payments for reparation awards. This amount is to serve for all reparations awards that may result from Court proceedings in all cases. In addition, the Trust Fund wishes to note that the above reference to rule 98, sub-rules 3 and 4 indicates that

¹²⁶ Eighth Annual Meeting of the Board of Directors of the Trust Fund for Victims, 21-22 March 2011, Decision 14. <http://www.trustfundforvictims.org/sites/default/files/imce/List%20of%20Decisions%20on%2021%2022%20March%202011%20FINAL.pdf>

the use of Trust Fund's "other resources" should be primarily destined to collective awards or to an award to an organisation.

245. The Trust Fund respectfully submits that a decision by the Board of Directors on financially complementing a Court-ordered award for reparations should result from a consultative process with the Court and will depend on prior decisions to be taken by the Chamber. These may include decisions on penalties, including fines and forfeiture, as well as, on the scope and form of the reparations award as ordered by the Court. This will allow the Trust Fund to decide on the volume of the financial complement, to be submitted to the Chamber as part of its draft implementation plan.

C. Additional fundraising earmarked for reparations

246. The Trust Fund's Regulation 27 allows for earmarking of voluntary contributions from governments, under certain conditions and restrictions. This provides the Trust Fund with the option to call for funds earmarked for reparations - in general, as well as case related.
247. Successful fundraising for reparations will benefit from a clear indication for what purpose funds would be used. Therefore, a fundraising initiative by the Trust Fund is considered most likely to be successful once the Chamber has decided on the parameters of a reparations award in a particular case, and preferably once it has approved the implementation plan submitted by the Trust Fund. This approach would also be helpful to raising funds from private sources, including individuals, foundations and private profit and non-profit organisations.

D. Assembly of States Parties

248. At its Tenth Session, the Assembly of States Parties stressed that “[...] as liability for reparations is exclusively based on the individual criminal responsibility of a convicted person, under no circumstances shall States be ordered to utilize their properties and assets, including the assessed contributions of States Parties, for funding reparations awards, including in situations where an individual holds, or has held, any official position.”¹²⁷

249. Apart from this consideration, the Assembly of States Parties does dispose of a non-compulsory means to financially contribute to a reparations awards, if it so desires. According to the Trust Fund’s Regulation 21, sub-paragraph d, the Trust Fund may be funded by “[s]uch resources, other than assessed contributions, as the Assembly of States parties may decide to allocate to the Trust Fund.” Such resources, if they materialise, would be of significant symbolic value representing the commitment by the ASP, as a collective body, to the Rome Statute’s promise of reparative justice to victims.¹²⁸

E. Methods of financing reparations

250. In part one on reparations principles, the Trust Fund noted that different sources of financing reparations may affect the nature of the award. Use of the Trust Fund’s resources, including resources made available by the Assembly of States Parties, would imply a collective award or an award

¹²⁷ ICC-ASP/10/Res.3

¹²⁸ See Regulations 35 and 36 of the RTFV on resources allocated by the ASP to the Trust Fund

to an organisation, while resources originating from fines and forfeiture would primarily but not exclusively benefit eligible individual victims.

251. Considering the collective nature of a community-based approach as developed in part two of this filing, the use of resources originating from the convicted person could be envisaged to be used to coincide with this approach - either towards the effect of collective awards, or to benefit individual victims identified within the framework of this approach, or both.
252. The Chamber and the Trust Fund may also consider the sequence in which resources may be, or become, available for the purpose of implementing awards. The Trust Fund submits the following observations in the context of the present case. While at this point these are of a speculative nature and should be appreciated as such, they may be helpful in considering the scope of the award and any eventual prioritisation of victim beneficiaries.
253. At the inception of implementing the reparation award, the resources available directly from Mr. Lubanga's assets and belongings are unlikely to be of a significant volume. The collection of a fine imposed on Mr. Lubanga could take time and could also be in the form of instalments, as may be decided by the Chamber. Additional resources resulting from fundraising by the Trust Fund or stemming from a decision by the Assembly of States Parties are unlikely to be fully available from the onset. Therefore, the financial complement to be decided by the Trust Fund's Board of Directors in accordance with Regulation 56 is most likely to constitute the "starting capital" of a reparations award in the present case.

254. At present, the Trust Fund considers it inappropriate to speculate in any measure of detail on how the sequencing and eventual earmarking of financing reparations in the present case may affect an implementation plan. This should be informed by the Trust Fund's findings from an eventual field mission in preparation of an implementation plan.

V. The role of experts at various stages of the reparation proceedings

255. Finally, the Trust Fund respectfully replies to the Chamber's question under b) v) of the Scheduling order whether the Trust Fund would seek to call expert evidence in accordance with Rule 97 (2) of the RPE, in which the option is provided to hear experts to assist in "determining the scope, extent of any damage, loss and injury to, or in respect of victims and suggest various options concerning the appropriate types and modalities of reparations."

256. The Trust Fund submits that the use of experts should not be limited to the reparations hearing but also take place at the stage of the implementation of the awards. If the Chamber agrees to a community-based approach to collective reparations, there would be various stages and circumstances in which experts could and should play a role. In particular, there are two scenarios to be distinguished.

A. First scenario: Court experts

257. Firstly, experts in the capacity of expert witnesses may be of use during the hearings and written procedure before the Chamber, as set out in Rule 97 of the RPE. The Trust Fund believes that experts could play an

important role at this more formal stage of the proceedings. As previously stated, the use of experts could be important in the present case to establish the causal link of damage that goes beyond material damage, taking into account trauma and psychological harm typical for child soldiers. Experts could also be useful to address the need for adopting a suitable reparations process that pays respect to the need for reconciliation and gender-sensitive approaches in order to avoid further harm. Experts could also speak as to how these aims were achieved in similarly difficult circumstances of administrative reparation processes in transitional justice contexts; or provide expertise on the current security situation in Ituri, as well as, on understandings and customs related to justice and reconciliation in the communities affected by the case. Furthermore, the Trust Fund itself, as well as other parts of the Court, has expertise in specific technical areas and in the situation. Other areas of the Court who could be heard by the Court could include OPCV, OTP, and the Registry (in particular VWU, VPRS, Field Operations and Security).

258. The Trust Fund submits that experts testifying under this scenario should be appointed by the Chamber upon proposal by the parties and other interested participants, such as the Trust Fund, following the established practice for appointing expert witnesses under the guidance of the Chamber.

B. Second scenario: Trust Fund experts

259. Secondly, experts will also be useful for achieving practical tasks related to implementation of the reparations proceedings, in a role somewhat different from that of expert witnesses that testify in hearings and

produce expertise in form of a document for consideration of the parties in written proceedings.

260. The Trust Fund notes in particular that according to Regulation 70 of the RTFV for the implementation of collective awards, the Board of Directors may not only consult with victims and their legal representatives but also with “competent experts and experts organisation” on both the “nature of the collective awards,” as well as on “the methods for its/their implementation.” In the Trust Fund’s view, the appointment of experts in this scenario will be guided by the choice of the Board of Directors and will not need to follow the formal procedure for expert witnesses who would testify before the Court. It may also be useful that other parts of the Court assist in this undertaking. However, the expertise will be provided at the request and under the final guidance of the Board of Directors.

261. The Trust Fund respectfully submits that these two scenarios are, however, directly linked. In particular, it may be useful that the Trust Fund relies on the same experts the Chamber hears during the Court proceedings and at the implementation stage.

262. If the Chamber decides to adopt the proposal for designing a community-based approach to collective reparations, the Trust Fund foresees the use of experts at the following stages:

- The Chamber may in accordance with Rule 97 of the RPE hear expert witnesses during a hearing before the Court. These experts would be appointed upon request by the convicted person, victims or their legal representative or on the Court’s own motion. The Trust Fund submits

that for the determination of scope and the assessment of harm, this may be a useful step to take and is offering to provide names of potential experts after consulting with the proposed persons. In terms of expertise the Trust Fund considers experts who are anthropologists, child protection specialists, psychoanalysts, social workers, public health specialists, and conflict analysts with relevant knowledge of Ituri and the conflict underlying the present case.

- Should the Court decide to request a mapping of victims and the localities (for either individual or collective reparations approaches) then experts could play an important role in the mapping.
- The Trust Fund furthermore proposes that an interdisciplinary team of experts of comparable expertise to the one suitable for a possible hearing and written procedure before the Chamber (i.e. anthropologist, child protection specialist, psychoanalyst, social worker, public health specialist, conflict analyst, victims' counsel) could assist in the assessment of the harm suffered by the victims and communities in the community-based consultations. As proposed earlier, the Trust Fund could manage this process with the support from the Registry, and in collaboration with the OPCV and local implementing partners.
- The Chamber may then decide to conduct a second hearing to discuss the outcome of the community consultations at which stage it may again, at the request of the victims or the convicted person, or on its own motion, pursuant to Rule 97 (2) of the RPE want to hear expert witnesses who could e.g. assess the viability of the proposals made by the communities or whether and in how far they address the needs also of vulnerable groups of victims.

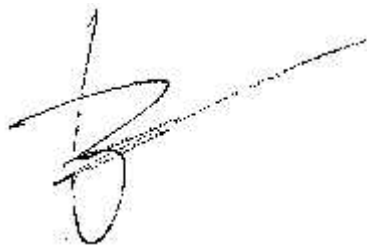
- At the implementation stage, the Trust Fund could in accordance with Regulation 70 of the RTFV rely on experts of its choice, to assist with the implementation of the award eventually ordered by the Court. It could also “identify intermediaries or partners, or invite proposals for the implementation of the award” (Regulation 71 of the RTFV). While this process would take place under the guidance and supervision of the Trust Fund the appointment of experts would not have to follow the appointment procedure for expert witnesses. However, the Trust Fund would report in the implementation plan on the outcome of these consultations. Determinations made by the Trust Fund on the precise nature of the collective award would be subject to approval by the Chamber in accordance with Regulation 69 of the RTFV. Hence, the Chamber would have the final say on the outcome rather than on the process of the expert consultation at this stage.

C. Identifying suitable experts

263. The Trust Fund notes that together with the Registry it has already informally shared with the Chamber a list of fields of expertise. The Trust Fund would like to add that based on its experience of working with victims in the field it is aware of suitable experts that could assist the reparations process, and, after consulting with these experts on their willingness to testify before the Court, is willing to propose their names for inclusion on the list of eligible expert witnesses. The Trust Fund will informally consult with suitable experts and partners on their willingness to assist the Trust Fund in its role of implementing reparations.

FOR THE FOREGOING REASONS

The Board of Directors respectfully submits its observations and informs the Chamber of its willingness and availability to appear on any specific issue addressed in this filing 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 25 April, 2012

At The Hague, The Netherlands