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Pénale
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**International
Criminal
Court**

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TRIAL CHAMBER 1

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public

**Submission on the principles to be applied, and the procedure to be followed by
the Chamber with regard to reparations**

Source: UNITED NATIONS CHILDREN'S FUND

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

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The United Nations Children's Fund ("UNICEF")

NOTING the "Judgment pursuant to Article 74 of the Statute" ("Judgment"), issued by the Trial Chamber 1 (the "Chamber" or the "Court");¹

NOTING the "Scheduling order concerning timetable for sentencing and reparations" ("Scheduling Order"), issued by Trial Chamber I on 14 March 2012 and in particular paragraph 10 of the Scheduling Order that "[i]f other individuals or interested parties, including those who have been notified of the reparation proceedings pursuant to Rule 96 of the Rules, seek to file submissions on a) and b) above," they are to apply in writing for leave to participate, by 16.00 on 28 March;²

RECALLING UNICEF's application to the Chamber for leave to participate on 28 March 2012;

CONSIDERING the "Decision granting leave to make representations in the reparations proceedings" issued by the Chamber on 20 April 2012 granting UNICEF leave to make written representations in accordance with paragraph 8 of the Scheduling Order;³

RESPECTFULLY TRANSMITS this submission for the attention of the Court.

¹ ICC-01/04-01/06-2842

² ICC-01/04-01/06-2844. According to the Scheduling Order, a) refers to the principles to be applied by the Chamber with regards to reparations and b) refers to the procedure to be followed by the Chamber (ICC-1/04-01/06-2844, p. 4, para. 8).

³ ICC-01/04-01/06-2870

INTRODUCTION AND SUMMARY

1. UNICEF wishes to focus its submission on the following elements of paragraph 8 of the Scheduling Order: the principles to be applied with regard to reparations, and the procedure to be followed, and, in particular, whether reparations should be awarded on a collective or an individual basis and 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.⁴

2. UNICEF was established by the United Nations General Assembly through Resolution 57(I) of 11 December 1946 and is mandated by the United Nations General Assembly to advocate for the protection of children's rights, to help meet their basic needs and to expand children's opportunities to reach their full potential. UNICEF is guided by the 1989 Convention on the Rights of the Child and strives to establish children's rights as enduring ethical principles and international standards of behaviour towards children. UNICEF was awarded the Nobel Peace Prize in 1965.

3. UNICEF is widely recognised for its work for children associated with armed forces and groups. The three core objectives of such programs are to prevent recruitment of children into armed forces or groups; to advocate for the separation of children from armed forces and groups, and to support these children from the time

⁴ Paragraph 10 of the Scheduling Order reads in full:

8. The parties and participants are invited to file submissions on a) the principles to be applied by the Chamber with regard to reparations and b) the procedure to be followed by the Chamber, by 16.00 on 18 April 2012. In particular these should address, inter alia: i) whether reparations should be awarded on a collective or an individual basis (see Rule 97(1) of the Rules); 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; iii) whether it is possible or appropriate to make a reparations order against the convicted person pursuant to Article 75(2) of the Statute; iv) whether it would be appropriate to make an order for an award for reparations through the Trust Fund for Victims pursuant to Article 75(2) of the Statute; and v) whether the parties or participants seek to call expert evidence pursuant to Rule 97 of the Rules.

they are separated from armed forces and groups through their reintegration into their families and communities; and to ensure adequate responses to children in these situations who have specific needs, notably girls and children who escape or “self-release”.⁵ This work is part of UNICEF’s programming in fifteen countries, including Burundi, the Democratic Republic of the Congo (DRC), South Sudan, Sudan, Somalia, and Uganda.

4. These programmes have formed part of UNICEF’s work in the DRC since 1997. In Ituri district, in particular, UNICEF has supported the release and reintegration of children from armed groups – working with the Mission des Nations Unies en République Démocratique du Congo (MONUC), and with other United Nations organisations and international and national humanitarian agencies. This work has necessarily involved extensive consultation with the armed groups and the communities concerned, and resulted in the release and reintegration of some 4,637 children (742 girls and 3,895 boys) between September 2004 and June 2005. UNICEF continues to be actively involved in Ituri, and elsewhere in DRC, notably to prevent the recruitment and use of children, to release boys and girls from armed forces and groups, and to support their reintegration.

5. The experience of UNICEF in the DRC, and in Ituri in particular, as well as its global expertise in working with children associated with armed forces and groups, informs this submission. While UNICEF is mindful of the distinction between reparations and reintegration, and stresses that its own experience is in the release and reintegration of children associated with armed forces and groups, it believes that its knowledge may be useful and relevant for the Court as it considers the award of reparations in this case.

⁵ “Reintegration” of these children is “the process through which these children (or young adults) transition into civil society and enter meaningful roles and identities as civilians who are accepted by their families and communities in a context of local and national reconciliation”. See PARIS PRINCIPLES AND GUIDELINES ON CHILDREN ASSOCIATED WITH ARMED FORCES OR ARMED GROUPS, 2007 (“Paris Principles”), Article 2.9.

6. UNICEF respectfully submits that the following principles should be applied with regard to reparations: (a) reparations should be designed with the best interests of the victims as a primary consideration, recalling that they were children at the time; (b) the eligibility for reparations in this case should be assessed as broadly as possible; (c) reparations should do no harm and should be applied in a non-discriminatory manner; (d) in formulating reparations, the local and national contexts should be understood and respected and thus the views of the victims, their families and communities should be a major consideration in formulating reparations; and (e) reparations should be crafted to promote non-repetition of the crimes.

7. UNICEF also respectfully submits that, in this case, the Court should grant both individual and collective reparations. Individual reparations acknowledge the harm suffered by particular individuals and help address their individual specific needs; and they highlight the value of each human being, and confirm that each is an individual rights-holder, which is particularly important for child victims. Collective reparations enable the Court to take account of the damage that has been caused to communities by the criminality visited upon their children, and address the many urgent needs of these communities including the need to support the rehabilitation and on-going protection of the child victims and of other potential victims in similar conditions. Collective reparations also avoid the dilemma of granting reparations only to those victims who have been reached and who have had the ability to come forward. Whether awarded individually or collectively, should take a form that will benefit not only those victims already formally recognized by the Court. Even reparations granted on an individual basis can take a variety of forms, such as rehabilitation measures, which can benefit not only the awarded individuals, but also their communities at large.

1. GUIDING PRINCIPLES

1. UNICEF respectfully submits that the following principles and criteria should guide the Court in its decisions to award reparations.

(A) Reparations should be designed with the best interests of the victims as a primary consideration, recalling that they were children at the time

2. Lubanga has been convicted of crimes against children. With the elapse of time, many of the victims are now over the age of 18. The fact that victims were children at the time of the commission of the offense should be given great weight by the Court in assessing the harm they endured, because of their vulnerability as children. The physical and psychological effects of crimes on children are extensive, long lasting, and harmful. The victims, in addition to suffering from violations of their fundamental rights, were also denied basics needs. The denial of their rights and needs can have enduring and sometimes lifelong repercussions, for example, where children have lost access to education.

3. UNICEF recommends that the Court should be especially guided, therefore, by international principles and guidelines on children when deciding on reparations and when interacting with these victims, whether directly or through an intermediary.

4. In particular, UNICEF respectfully submits that 'the best interests of the child' – the principle envisaged under Article 3 of the the Convention on the Rights of the Child (CRC) – should guide the decision of the Court in awarding reparations to those who were victimized as children. The 'best interests of the child' refers to the core children's rights principle to protect, respect and ensure the well-being of the child as a primary consideration when decisions are made on his or her behalf, by

taking into account the child's age, gender, experience, level of maturity, presence or absence of a parent, opinion, and the context.⁶

(B) Reparations should do no harm and should be applied in a non-discriminatory manner

5. In situations of armed conflict or post conflict, the principle of the best interest of the child must be applied in tandem with a basic principle in international humanitarian work: the 'do no harm' principle. This principle emphasizes that any action should avoid (a) exacerbating disparities; (b) discriminating between affected populations on the basis of the causes of crisis; and (c) creating or exacerbating conflict and insecurity for the affected populations. It also requires that the special needs of the most vulnerable groups of girls, boys, and women are taken into account.⁷

6. The scrupulous respect of this principle is particularly crucial – yet challenging – in a context like Ituri, where armed conflict and violence are ongoing.

7. The application of this principle in the decisions on reparations means that reparations should foster the victim's personal agency and capacity for self-sufficiency, and should mitigate reliance or dependence on any awards. Also, any potential short or long-term adverse effects on the beneficiaries and their communities should be analysed and taken into account when deciding on reparations. For example, reparations should not fuel existing or latent tensions within the community. The overall effects should be positive for both the victims and their communities.

⁶ See Convention on the Rights of the Child ("CRC"), Article 3, 1989 and Paris Principles, Articles 3.4.0 and 3.4.1.

⁷ This principle guides the work of organisations operating in conflict and post-conflict situations. See, e.g., *Core Commitments for Children in Humanitarian Action* (UNICEF, 2010), p. 8, ¶ 1.9.

8. The crafting of reparations should also respect and be guided by the principle of non-discrimination: no victim should be discriminated against on any ground, regardless of age, sex, ethnicity, religion, race, nationality, class, level of education, or where they are located.

(C) The eligibility for reparations in this case should be assessed broadly

9. Eligibility for reparations can be construed pursuant to the definition of ‘victim’ under Rule 85. One hundred and twenty-nine individual victims participated in the trial.⁸ Recalling that more than thirty times that number – 4,637 children – were released from armed groups in Ituru just one year after the events of the present case took place and the definition of a child associated with an armed force or armed group contained in the Paris Principles and Guidelines (endorsed by one hundred countries, including the DRC), UNICEF respectfully submits that it is appropriate for the Court to craft reparations for a class of persons far larger than the group of witnesses who came forward at trial.⁹

10. Moreover, the principles of the best interests of the child and non-discrimination, applied when establishing who is eligible for reparations under the Court’s Statute and Rules of procedure and evidence, suggest a rather broad

⁸ *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012 (the “Article 74 Judgment”), ¶ 15. Additional victims may have already applied for reparations, or may apply as a result of the notifications undertaken over the last few weeks by the Registrar in accordance with Rule 96. UNICEF notes in this regard that Regulation 86(3) of the ICC Regulations, while encouraging the filing of applications before the start of the stage of the proceedings does not require it: “Victims applying for participation in the trial and/or appeal proceedings shall, to the extent possible, make their application to the Registrar before the start of the stage of the proceedings in which they want to participate” (emphasis added). As such, the filing and receiving of applications for participation by victims could be deemed an ongoing process.

⁹ Paris Principles, Article 2.1 states: “A ‘child associated with an armed force or armed group’ refers to any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys, and girls used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities.”

understanding of those entitled to different types of reparations. Of particular relevance are:

(a) Article 39 of the CRC, which calls on state parties to take all appropriate measures to promote the physical and psychological recovery and social reintegration of a child victim in an environment that fosters the health, self-respect, and dignity of the child;¹⁰

(b) General Comment No. 31 of the United Nations Human Rights Committee which interpreted Article 2(3) of the 1966 International Covenant on Civil and Political Rights, as requiring state parties to *“ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of persons, including in particular children”*;¹¹

(c) The 2005 Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime, which provide that *“child victims should, wherever possible, receive reparation in order to achieve full redress, reintegration and recovery.”*¹²

¹⁰ Article 39 of the CRC reads: “States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.”

¹¹ General Comment No.31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant: 26/05/2004. CCPR/C/21/Rev.1/Add.13.

¹² ECOSOC Resolution 2005/20, 22 July 2005, Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, Annex, XIII Right to Reparation, paragraphs 35-37, reads: “Child victims should, wherever possible, receive reparation in order to achieve full redress, reintegration and recovery. Procedures for obtaining and enforcing reparation should be readily accessible and child-sensitive. Provided the proceedings are child-sensitive and respect these Guidelines, combined criminal and reparations proceedings should be encouraged, together with informal and community justice procedures such as restorative justice. Reparation may include restitution from the offender ordered in the criminal court, aid from victim compensation programmes administered by the State and damages ordered to be paid in civil proceedings. Where possible, costs of social and educational reintegration, medical treatment, mental health care and legal services should be addressed. Procedures should be instituted to ensure enforcement of reparation orders and payment of reparation before fines.”

Thus, it is clear that the right to reparation for all victims, including child victims, is enshrined in several instruments. This right has been reiterated in proceedings before international and regional human rights courts, such as the Inter-American Court of Human Rights, and by States.¹³

11. UNICEF further submits that, at this stage of the proceedings, broadening the understanding of who is a victim in this case is consistent with the Court's Statute and the rules of procedure and evidence:

(a) Article 75 of the Statute and Rule 85 do not limit the award of reparations to only those victims directly affected by the crimes established in the judgment. To the contrary, Article 75(6) states that "Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law," which justifies the broadening of the category of those deemed 'victims' at this stage of the proceedings, so as to avoid causing *any* victims prejudice. Indeed, Article 75(6) should manifestly apply to *all* victims, as understood notably under the 1985 United Nations' Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,¹⁴ rather than only to those victims with participation status.

(b) Rule 96, which refers to 'victims' and 'other victims,' stipulates that victims other than those who have participated in the proceedings should be made aware of the reparations proceedings, implying, for this provision to have any meaningful purpose, that new victims may benefit from reparations.¹⁵

¹³ See, e.g., Decisión del Tribunal Superior del Distrito Judicial de Bogotá, Sala de Justicia y Paz, Fredy Rendón Herrera (alias El Alemán), Proceso 200782701 (Magistrada Uldi Teresa Jiménez López), 16 December 2011, awarding reparations to 309 victims who had been illegally recruited by a paramilitary group as minors. The decision awarded reparations including monetary compensation and medical and psychological care.

¹⁴ A/RES/40/34, adopted on 29 November 1985.

¹⁵ Rule 96 states: "Without prejudice to any other rules on notification of proceedings, the Registrar shall, insofar as practicable, notify the victims or their legal representatives and the person or persons concerned. The Registrar shall also, having regard to any information provided by the Prosecutor, take all the necessary measures to give adequate publicity of the reparation proceedings before the Court, to the extent possible, to other victims, interested persons and interested States." (emphasis added)

(c) The Trial Chamber appears to have envisaged that reparations are to constitute a separate stage of the proceedings, a post-trial procedure,¹⁶ which in turn would justify a change in the understanding of who are the victims and the broadening of the category.

(d) The Trial Chamber has further declared that it may award reparations to victims other than those participating in the proceedings: “[...] *in accordance with Rule 98 (3) of the Rules, the Court may order that a collective award for reparations is made through the Trust Fund for Victims. Consequently, victims who may benefit from an award for collective reparations will not necessarily participate in the proceedings, either in person or through their legal representatives.*”¹⁷

12. The question of individual and collective reparations is addressed below (ref.). UNICEF wishes to underline here that individual and collective reparations are not mutually exclusive, but rather mutually reinforcing. This is especially true for those victimized as children, as implied by Article 39 of the CRC, which stresses both the “physical and psychological recovery” and “the social reintegration of a child victim,” highlighting that “such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.”

¹⁶ This approach appears to have been envisaged by the Trial Chamber in its Decision on victims' participation, ICC-01/04-01/06-1119, 18 January 2008. See notably paragraphs 119 and 122.

¹⁷ Decision on the OPCV's request to participate in the reparations proceedings, ICC-01/04-01/06-2858, 5 April 2012, para. 10.

- (D) Local and national contexts should be understood and respected and thus the views of the victims, their families and communities should be a major consideration in formulating reparations

13. UNICEF respectfully submits that the Court should apply universal principles in a manner that respects and adjusts to each specific context, and takes into account the conditions and possible consequences of reparations at the community level.

14. One challenge is to ensure that reparations awarded for crimes committed almost a decade ago in the context of an ethnic conflict that involved foreign countries are not misinterpreted in light of continuing ethnic tensions. As demonstrated by the tensions which arose locally following the opening of the trial, developments in this case have the potential to pose protection concerns, for children currently or formerly associated with armed forces or groups, their communities, and for the organisations working with these victims.¹⁸

15. Another challenge is to craft reparations in a manner that respects local conceptions of rights, where the rights and obligations of individuals, especially of children and young adults, may not be clearly dissociated from collective rights and responsibilities of the community.

16. UNICEF respectfully submits that the Court should build on the opportunities created by the fundamental nature of relationships, rights and responsibilities in the DRC, and Ituru in particular, and adopt a community-based approach to reparations to address both individualist rights as well as community and collective rights. The experience of UNICEF in Ituri has strongly demonstrated the importance of such an approach to the reintegration of children associated with armed forces or groups. This inclusive approach recognizes that such children, while often vulnerable, are

¹⁸ Among these concerns are the risk that new violations would not be reported, leaving new victims without access to the services they need.

not the only most vulnerable children in their community. It helps avoid further stigmatization and ensure no additional harm is done by targeting one particular group during reintegration.

17. The community-based aspects of reintegration programmes favour the support of resources and services that can help build a protective environment and increase development opportunities for all children in a conflict affected community.

18. UNICEF recommends therefore that in determining the most appropriate forms of collective reparations in light of the financial resources available, the Court consider the views of local and international experts, as envisaged under Rule 97(2),¹⁹ who could inform the Court as to the perspectives of different sectors in Ituri, notably religious and traditional leaders, teachers and academics, government officials, civil society, and the different communities of Ituri, including their children.

(E) Reparations should be crafted to promote non-repetition of the crimes.

19. One major component of transitional justice and of the right to reparation is the 'guarantees of non-repetition'.²⁰ This principle should also guide the decisions in awarding and determining appropriate forms of reparations, so as to address not only the immediate crimes but also their underlying causes. These root causes consistently point to structural failures in the communities of the victims, and more generally in their society and in the State. Successful prevention programmes should address the underlying causes of recruitment of children, including social instability, endemic poverty and other structural violence that result in violations of children's rights.

¹⁹ Under Rule 97(2), the Court could hear experts to determine the scope and extent of any damage, loss and injury to, or in respect of victims.

²⁰ 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, C.H.R. res. 2005/35, U.N. Doc. E/CN.4/2005/L.10/Add.11 (19 April 2005); see notably paragraph 23.

20. In this regard – and while stressing that States bear the primary responsibility to protect their population, to provide them with basic services, and to comply with international obligations – UNICEF respectfully submits that, to guarantee non-repetition, reparations should seek to address ongoing violations and prevent the commission of other crimes against the victims. Indeed, although child recruitment has decreased in the DRC in general, children and young adults continue to be recruited and used by armed forces and armed groups, and remain at risk of re-recruitment and other forms of violence, such as sexual violence, killing and maiming, notably in Ituri. Specifically, the Court could support existing policies and programmes, such as sensitization campaigns, that aim to prevent and end the practice of recruitment and use of children in armed forces and groups, as well as other child rights violations.²¹ The Court could also prioritize reparations that promote and reinforce the rule of law, notably to foster accountability for the recruitment and use of children as well as other violations and abuses of children.

Further Considerations

21. UNICEF further submits that the Court could consider the following criteria in formulating reparations: (a) the nature of the harm suffered as a consequence of the crime; (b) its consequences over the short, medium and long-term; (c) the age of the victim at the time of the commission of the crime; (d) the sex of the victim and how this may increase the harm suffered given gender roles; and (e) the loss of family and community, and the loss of educational and vocational opportunities. The harm caused by missed opportunities resulting from the crimes, in particular the loss of a safe family and community environment, is profound and long-lasting.

22. Reparations, whether individual or collective, should provide a direct benefit to the victims, and, if properly designed and managed, can and should alleviate the

harm suffered and restore the dignity of the victims. As such, reparations constitute for victims a crucial acknowledgment, and can contribute to a sense that justice has been done. Reparations need therefore to recognize both the nature of the specific harm suffered by the victims when they were children, and also to address their current needs, and those of their communities.

23. To ensure a consistent approach to reparations, UNICEF recommends that the Court publicize its criteria for awarding reparations.²²

2. INDIVIDUAL AND COLLECTIVE REPARATIONS

24. UNICEF respectfully submits that, in this case, the Court should grant both individual and collective reparations. This section states the general principles associated with each, and applies these principles in the context of the present case.

Individual reparations

25. Individual reparations acknowledge and seek to address the harm suffered by an individual. They can be tailored, as far as possible, to the specific needs of the individual and thus help restore the victim's dignity. Individual reparations highlight the value of all human beings, and their status as individual rights-holders, which is particularly important for child victims in contexts where their rights may not be systematically recognized and respected.

26. Individual reparations are appropriate for victims who have sustained physical or psychological injuries; are physically or mentally handicapped; have been raped or otherwise sexually abused; were impregnated or have young, dependent children; have contracted HIV/Aids; suffer from any other chronic conditions; are addicted to drugs, alcohol, and/or other substances; are refugees or

²² This could be achieved through the adoption of the general principles governing reparations envisaged under Article 75(1) of the Statute.

internally displaced; have lost their parents or primary caregivers due to killing or disappearance; have lost their children due to killing or disappearance.

27. Individual reparations can be tailored to reach those who remain highly vulnerable as a result of the crimes that were committed against them, and who, accordingly, merit additional recognition. Where awards of individual reparations (for example, restitution, compensation) need, for whatever reason, to be managed by a parent or guardian on behalf of a victim, measures should be taken to ensure that the award is managed in the best interests of the beneficiary. The management of individual reparations could be enhanced through, for example, training of beneficiaries.

28. While individual reparations have the above advantages, they are necessarily limited, being granted to selected individuals and not others. In context of widespread, systematic or continuing criminality or violations of rights, as noted by the Trust Fund for Victims, “[t]his preferential treatment of some vis-à-vis others may lead to the stigmatization of victims receiving compensation and to tensions within the society in which they live.”²³

29. Yet even if granted on an individual basis, individual reparations can take a variety of forms, such as rehabilitation measures, which can benefit both the awarded individuals and their community at large (see examples below in section 4).²⁴

30. UNICEF is aware that many of the victims who participated in the proceedings or otherwise applied for reparations propose individual reparations,

²³ Public Redacted Version of ICC-01/04-01/06, Trust Fund for Victims' First Report on Reparations, No. ICC-01/04-01/06, 1 September 2011, paragraph 19.

²⁴ See paragraph 24 of the Public Redacted Version of ICC-01/04-01/06-2803-Conf-Exp-Trust Fund for Victims' First Report on Reparations, No. ICC-01/04-01/06, 1 September 2011, stating that: “In fact, in practice the difference between an “individual” and “collective” form of reparation may be quite subtle and manifest itself primarily in the role that the beneficiaries are to play in the design, implementation and oversight of their assistance.”

notably in the form of compensation. In the DRC, courts order reparations (*dommages et intérêts*) as the result of a criminal conviction, and these reparations are usually awarded on an individual basis.²⁵

31. UNICEF respectfully submits that in determining individual reparations the Court should take account of the specific crimes of Lubanga and, as well, the violations and harm suffered by the victims more broadly. Indeed, as specifically noted by the Court, when associated with the FPLC, many suffered harm *in addition to* being recruited and used. For instance, some children were sexually abused or were tortured, as evidenced during the trial and in the judgment.²⁶

32. As noted above, individual reparations can in some contexts better reach those most marginalized, who are at risk of not accessing or benefiting equally from collective reparations, in particular girls and young women. Because of their vulnerability and the nature of the harm that they have often suffered, including rape and sexual violence, UNICEF recommends vigilance in the process of awarding individual reparation to girls and young women, notably to preserve confidentiality and guarantee their access to the awarded benefits.

33. It is important to recall that in the difficult context of Ituri, vulnerable or marginalized victims are unlikely either to have applied for reparations or to be able to do so – for reasons ranging from lack of information (in some cases due to effective remoteness) to their very disempowerment. UNICEF submits that the Court should take particular note of the fact that of those victims represented during

²⁵ However, so far, since the adoption of the 2009 Child Protection Law which prohibits the recruitment and use of children by armed forces and groups, no alleged perpetrator has been arrested or prosecuted for this crime. Before 2009, two members of the Armed Forces of the DRC had been convicted for abducting children as violations of military orders, but their judgments did not award compensation to the victims. Therefore, there are no precedents of reparations for victims of such crime in the DRC. In other cases involving child-victims, such as crimes of sexual violence, the orders for reparations against the accused, *in solidum* with the State in cases where those convicted were members of the Armed Forces, have never been executed and the victims are yet to obtain reparations. Financial compensation is subject to the appreciation of the judges, who have granted amounts ranging from approximately US\$500 to US\$10,000.

²⁶ See, e.g., Article 74 Judgment, ¶¶ 16 and 883-896.

the trial, only thirty-four out of one hundred and twenty-nine were female.²⁷ Girls and young women are highly vulnerable in Ituri: they are often reluctant to identify themselves as having been associated with an armed force or group, and may be similarly reluctant to apply to be granted victims' status by the Court. They rarely come forward to participate in formal release and reintegration processes for fear of being stigmatized as a result of their association. These considerations should figure in the process of crafting reparations.

Collective reparations

34. UNICEF submits that in circumstances of widespread or systematic gross human rights violations or international crimes, collective reparations have several additional advantages and for these reasons should form part of the overall reparations ordered in this case.

35. Where instability or crimes continue, collective reparations may be more implementable than individual reparations, and thus could support the rehabilitation and protection of victims. In this regard, UNICEF particularly notes the following:

(a) Collective reparations carry fewer risks for the beneficiaries than individual reparations, which may fuel jealousy, resentment, and may even lead to discrimination and stigmatization. Indeed, individual reparations that are awarded in isolation from a larger collective reparations program addressing the many urgent needs of their communities may trigger aggressive reactions against the beneficiaries, as other individuals or entire communities may perceive that they are in a similar or even worse situation.

²⁷ Article 74 Judgment, ¶ 15.

(b) Collective reparations, by considering the entire community, help facilitate successful reintegration of the victims and local reconciliation by fostering community goodwill.

(c) Collective reparations are particularly appropriate in cultural contexts where local understanding of individual entitlements, especially of children and young people, can hardly be dissociated from those of their families, communities, and environment.

(d) Collective reparations are also more likely to diffuse the perception at the community-level that children associated with an armed force or group, who may have themselves resorted to violence and participated in crimes, are being compensated.²⁸

36. Based on UNICEF's experience, the general principles referred to above can be understood in the context of DRC, and Ituru in particular, as follows:

(a) First, it is imperative to diminish the risk that the victims be singled out, identified, stigmatized or alienated as the sole recipients of reparations. One important lesson learned by UNICEF in working with children associated with armed forces or groups, and specifically in Ituri, is that any support should not exclusively focus on such children but should encompass them as part of a broader group of vulnerable individuals. This important lesson is also reflected in the Paris Principles.²⁹

²⁸ Children should always be considered primarily as victims of international crimes, as provided for under paragraph 11 of the Paris Commitments which reiterates "that children under 18 years of age who are or who have been unlawfully recruited or used by armed forces or groups and are accused of crimes against international law are considered primarily as victims of violations against international law and not only as alleged perpetrators."

²⁹ See community-based approach recommended to reintegrating children in situations of armed conflict outlined in the Paris Principles, Article 7.30.

(b) A second advantage of collective reparations is that they would cater to those victims who are unwilling or unable to come forward and apply for reparations. As noted above, those most vulnerable among the children associated with armed forces or groups, notably girls and young women, as well as those who are still children, may not be sufficiently informed to apply for reparations, or may be reluctant to identify themselves as having been associated, and may similarly be reluctant to apply to be granted victims' status by the Court.

(c) A third and considerable advantage of collective reparations is the scope of the benefits they can provide. Those recruited or used by the FPLC, appear to belong predominantly to the Hema ethnic group, although children from other communities and groups were also recruited or used by other armed groups or by the armed forces.³⁰ Because children from every community were victims of recruitment and were used by armed groups, compensating mostly victims of one group may fuel ethnic tensions in Ituri. Moreover, community reparations would mitigate the serious risk that non-Hema communities, notably the Lendu community, may perceive reparations granted by the Court as a 'reward' to Hema children who were associated with Lubanga's armed group.

3. FORMS OF REPARATIONS

37. As indicated in the above section, because of the nature of Lubanga's crime and the instability, remoteness and poor communication infrastructure prevailing in Ituri, some victims may experience security concerns or financial, logistical or emotional difficulties that obstruct their capacity to apply for reparations. In these circumstances, the reparations to be awarded, whether individually or collectively, should take forms that will benefit not only those victims formally recognized by the

³⁰ It was estimated that between a third and half of all members of the five main armed groups operating in Ituri in the early 2000s were children.

Court, but a larger group. Community outreach will be needed to inform and motivate affected individuals and communities to access reparations and benefits.

38. Article 75(2) of the Statute explicitly mentions restitution, compensation and rehabilitation as forms of reparations that can be awarded by the Court. As Article 75(2) is not exhaustive, UNICEF submits that the Court should consider ordering measures aimed at guaranteeing the non-repetition of similar crimes, and at preventing future violations, as already indicated above.³¹

39. Restitution to be awarded to victims affected as children should be similar to restitution awarded to other victims, including the return of property, the provision of services and the restoration of rights. In addition, it should be understood as encompassing the restitution of lost opportunities, for instance to receive a formal education, or vocational training, or to grow up in a familiar and protective environment. As an example, restitution awarded by the Court could take the form of centers for professional training opened to older children and young adults.

40. Compensation is usually understood to include monetary compensation, material goods, and services such as education, health and housing.

(a) In light of the lessons learned from reintegration programming in numerous conflict affected countries, UNICEF and other child protection agencies no longer provide direct cash benefits to children associated with armed forces or groups to support their reintegration because of their possible negative consequences.³² This lesson learned has since been enshrined in the Paris Principles

³¹ Such measures are envisaged under the 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparations, which lists, in addition to restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition as types of reparations.

³² For example, an evaluation of the impact of UNICEF's reintegration programme for children associated with armed forces or groups in Liberia in 2006-07 determined that the payment of a 'Transitional Safety Allowance' in the form of cash to children and/or their families resulted in increased tensions, jealousies and feelings of unfairness by the community level against those children

and Guidelines.³³ While the awarding of reparations is distinct from reintegration programmes, the Court may wish to consider this experience in awarding individual cash payments to child victims, particularly in an environment such as Ituri, which continues to be unstable and polarized, and even where these individuals may now be adults.

(b) Because the experience of violence has long lasting effects on the mental health and well-being of children, many of the victims clearly remain in need of such services, as identified in several of the victims' requests for reparations. Adequate compensation should consider the long-term consequences of the violations suffered. For instance, girls who were raped and impregnated may suffer financial, social and emotional consequences such as having to support themselves and their children, being unable to marry, and being marginalized and ostracized by their communities.

41. Rehabilitation measures are important for those victimized as children and for their communities. Both individual and collective reparations can take the form of rehabilitation.

(a) Among such measures, those which would benefit both the victims and their communities would be most appropriate. Such measures may include support for existing clinics, primary and secondary schools in line with the national education strategy and current education programs, and measures to establish or strengthen services for psychosocial support accessible to all victims of the armed conflict. Individual victims could be trained in positions that would serve the whole

in the programme given that they were not necessarily considered the most vulnerable or deserving of compensation; created expectations for additional financial incentives resulting in a negative impact on school enrollment in primary school for children associated with armed forces or groups when they learnt there would be no direct cash benefit given to individual pupils; and served as a potential incentive that might trigger willingness of children (and their parents) to join the fighting forces if ever there was a renewal of conflict.

³³ See Paris Principles, Article 7.35 ("Direct cash benefits to released or returning children are not an appropriate form of assistance, as experience has repeatedly shown.")

community, such as teaching, medical, psychosocial and veterinary personnel and assistants.

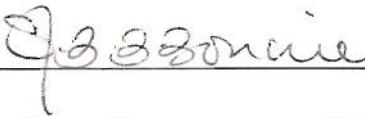
(b) Such measures should be carefully designed and implemented in partnership with the national and local authorities to avoid replacing the responsibility of the State in the provision of specific services, and also to assure the sustainability of these measures.

(c) Schools deserve special attention because they serve as a safe place of learning while promoting the socio-economic reintegration of victims. They are important not only for children but also for young adults by helping them recover their self-esteem and triggering acceptance and recognition by the community. Experience in the DRC has shown that this is particularly important for girls who were victims of sexual violence: attending school helps them find or increase self-esteem and change the community's perception of them. Conversely, many children associated with armed forces or groups who have been deprived of education continue to experience the consequences because they are less employable. As such, these uneducated and unemployed individuals are at higher risk of perpetuating the cycle of violence.

42. Culturally appropriate symbolic reparations are also important: they can take different forms, including memorials, commemorations, formal or traditional ceremonies aiming to pay tribute to the victims, etc. Symbolic reparations must result from consultation with the victims and their communities to avoid being perceived as impositions, to be meaningful in a given context and to be owned and cared for by the communities.

CONCLUSION

43. UNICEF remains at the disposal of the Court to provide it with any further information and to present its views to the Court if called to do so.



Sandra Baffoe-Bonnie, Legal Affairs Specialist
per delegation of Peter D.C. Mason, Principal Adviser to the Executive Director
On behalf of the United Nations Children's Fund

Dated this May 10th, 2012

At New York, New York, United States of America