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TRIAL CHAMBER II

Before: Judge Marc Perrin de Brichambaut, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Péter Kovács

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

Confidential

**Observations on the Draft Implementation Plan for Reparations Filed by the Trust
Fund for Victims on 3 November 2015**

Source: Office of Public Counsel for Victims

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

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I. INTRODUCTION

1. The Principal Counsel of the Office of Public Counsel for Victims (“the OPCV”), acting as legal representative of some of the applicants for reparations and of the victims who may benefit from an award for collective reparations,¹ submits her observations on the filing made on 3 November 2015 by the Trust Fund for Victims (“the TFV”) regarding the draft implementation plan for reparations (“the Draft”).²
2. In compliance with the Order of Trial Chamber II (“the Chamber”) of 12 November 2015,³ the Principal Counsel also includes her observations on those filed by the Office of the Prosecutor⁴ and by the *Ligue pour la Paix, les Droits de l’Homme et la Justice* (LIPADHOJ)⁵ on 18 December 2015.
3. The Principal Counsel notes that the TFV needs to file an operational implementation plan as soon as possible. The existing Draft lacks a practical methodology for implementing reparations. With respect to the TFV’s approach to reparations, the Principal Counsel supports the gender-inclusive component adopted and the proposed presumption of psychological harm, both of which are necessary in the light of the situation of the victims concerned.
4. Moreover, the Principal Counsel submits that consideration might be given to initiating the procedure to determine Mr Thomas Lubanga Dyilo’s

¹ See the “Decision on the OPCV’s request to participate in the reparations”, (Trial Chamber I) ICC-01/04-01/06-2858, 5 April 2012.

² See the “Filing on Reparations and Draft Implementation Plan”, ICC-01/04-01/06-3177-Conf and ICC-01/04-01/06-3177-AnxA, 3 November 2015 (respectively, “the Filing” and “the Draft”).

³ See the “Order fixing the schedule for the submission of observations on the draft implementation plan submitted by the Trust Fund for Victims”, (Trial Chamber II), ICC-01/04-01/06-3179, 12 November, 2015.

⁴ See the “Prosecution’s observations on the Trust Fund for Victims’ Filing on Reparations and Draft Implementation Plan”, ICC-01/04-01/06-3186, 18 December 2015 (“the Prosecution’s Observations”).

⁵ See the “Observations of the *Ligue pour la Paix, les Droits de l’Homme et la Justice* (LIPADHOJ) on the draft implementation plan filed by the Trust Fund for Victims on 3 November 2015”, ICC-01/04-01/06-3187-tENF, 18 December 2015 (“the Observations of LIPADHOJ”).

indigence for the purposes of reparations, and that it is incumbent on the Chamber to establish his degree of liability, fall within the judicial remit of the Chamber, and to give a ruling, as appropriate, on the supplementary amount that the Board of Directors of the Trust Fund for Victims wishes to earmark for reparations.

5. With respect to judicial reparations, the Principal Counsel also highlights the Presidency's role at the stage of enforcement of orders for reparations or forfeiture, as applicable.
6. The Principal Counsel also considers that there should be some flexibility at the stage where the eligibility of victims is checked, considering the difficulties they face in producing identification documents. Lastly, the Principal Counsel underscores the important role of victims' lawyers in the implementation of the Draft.

II. BACKGROUND

7. On 3 March 2015, the Appeals Chamber delivered its judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" ("the Appeals Judgment") and the annexed "Order for Reparations (amended)" ("the Order"), directing the TFV to submit the Draft within six months.⁶

⁶ See the "Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2" (Appeals Chamber), ICC-01/04-01/06-3129 A, A2 A3, 3 March 2015 (respectively, "the Appeals Judgment" and "the Order").

8. On 13 August 2015, the TFV submitted a request for extension of time to submit the said Draft.⁷ On the following day, the Chamber granted the request.⁸
9. On 3 November 2015, the TFV submitted its draft implementation plan for reparations to give effect to the principles and procedures adopted in the Order.⁹
10. On 11 November, the Principal Counsel of the OPCV submitted a request for an extension of time to respond to the said Draft.¹⁰
11. On 12 November 2015, the Chamber rendered the “Order fixing the schedule for the submission of observations on the draft implementation plan submitted by the Trust Fund for Victims”,¹¹ instructing (i) the Prosecution and interested States to submit observations on the Draft by 11 December 2015 and (ii) the Legal Representatives of Victims, the OPCV and the Defence to submit observations on the Draft, as well as on any observation made by 11 December 2015 by interested persons or States, by 11 January 2016.
12. On 13 November 2015, the Office of the Prosecutor requested an extension of time to file observations on the Draft.¹²

⁷ See the “Request for extension of time to submit the draft implementation plan on reparations, 11 August 2015, ICC-01/04-01/06”, ICC-01/04-01/06-3157-Conf, 13 August 2015 (“the Request for extension of time”).

⁸ See the “Decision on the ‘Request for extension of time to submit the draft implementation plan on Reparations’” (Trial Chamber II), ICC-01/04-01/06-3161, 14 August 2015.

⁹ See Draft, footnote 2, above.

¹⁰ See the “Request for an extension of time to respond to the submission filed by the Trust Fund for Victims on 3 November 2015”, ICC-01/04-01/06-3178-tENG, 11 November 2015.

¹¹ See the “Order fixing the schedule for the submission of observations on the draft implementation plan submitted by the Trust Fund for Victims”, above, footnote 3.

¹² See the “Prosecution’s request for extension of time to file observations on the Trust Fund for Victims’ Reparations and Draft Implementation Plan”, ICC-01/04-01/06-3180, 13 November 2015.

13. On 19 November 2015, the Principal Counsel of the OPCV submitted a request for access to confidential *ex parte* Annex 1 to the Draft.¹³
14. On 20 November 2015, the Chamber rendered the “Decision on the Prosecution request for extension of time to file observations”, granting one additional week for the submission of observations, hence setting new time limits of 18 December 2015 and 18 January 2016, respectively.¹⁴
15. On 26 November 2015, the V02 team of legal representatives of victims submitted a request for an extension of time to respond to the Draft.¹⁵
16. On 15 December 2015, the confidential redacted version of Annex 1 appended to the Draft was disclosed to the parties.¹⁶
17. On 18 December, the Office of the Prosecutor and LIPADHOJ submitted their observations on the Draft.¹⁷
18. On 13 January 2016, the Chamber rendered the “Decision on the request of the Office of Public Counsel for Victims and the request of the Legal Representatives of Victims V02,” finding as moot the OPCV’s request for access to Annex 1 confidential *ex parte* to the Draft, since, in the interim, a redacted version of the said Annex had been submitted by the TFV, and

¹³ See the “Request for access to Annex 1 confidential *ex parte* annexed to the filing ICC-01/04-01/06-3177-Conf”, ICC-01/04-01/06-3181-t-ENG, 19 November 2015.

¹⁴ See the “Decision on the Prosecution request for extension of time to file observations” (Trial Chamber II), ICC-01/04-01/06-3183-tENG, 20 November 2015.

¹⁵ See the “Request for an extension of time to respond to the submission filed by the Trust Fund for Victims on 3 November 2015”, ICC-01/04-01/06-3184-Conf-tENG, 26 November 2015.

¹⁶ See the “Confidential redacted version of Annex I to Filing on Reparations and Draft Implementation Plan”, ICC-01/04-01/06-3177-Conf-Exp-AnxI-Red, 15 December 2015.

¹⁷ See Prosecution’s observations, footnote 4 above, and Observations of LIPADHOJ, footnote 5, above.

granting additional time until 1 February 2016 for the submission of observations.¹⁸

19. This submission is being filed as “confidential” under regulation 23 *bis*(2) of the Regulations of the Court. However, as the submission contains no confidential information the Principal Counsel requests the Chamber to reclassify the document as “public”.

III. OBSERVATIONS

20. As a preliminary remark, the Principal Counsel emphasises the need to award effective reparations to victims. Therefore not only should reparations be commensurate to available resources, but they should also address the needs and the current situation of the victims concerned in order to provide appropriate and effective reparations.

A. Observations concerning certain general principles arising from the Draft

1. The implementation plan filed by the TFV

The need to promptly draft an operational implementation plan

21. The Principal Counsel submits that the Draft cannot be considered as a reparations implementation plan. The TFV’s filing is no more than a theoretical elaboration of the principles applicable to reparations.

¹⁸ See the “Decision on the request of the Office of Public Counsel for Victims and the request of the Legal Representatives of Victims V02” (Trial Chamber II), ICC-01/04-01/06-3190-tENG, 13 January 2016, p. 6. The Principal Counsel notes that, without access to the Annex in its entirety, she is unable to evaluate some of the observations it contains – observations that seem relevant for victims who might be affected by the order for reparations.

Furthermore, whereas great care was taken in the research and information gathering effort, no concrete operational guidelines emerge.¹⁹

22. As a result, once the Chamber approves the TFV's proposed Draft – after ordering certain amendments as appropriate – it will be crucial for a concise document to be produced containing only specific operational guidelines for the application of the principles in the said Draft. As the TFV must *implement* reparations in the instant case, the Principal Counsel submits that all the stakeholders, and the reparations procedure itself, will be more efficient if the TFV produces such a document as soon as the Chamber approves its Draft. The document would finally set in motion the implementation stage of reparations, almost 13 years after the commission of the crimes.

23. The Principal Counsel submits that the production of such a plan by the TFV will serve as a fundamental practical tool providing appropriate guidance and advice to victims concerned. Moreover, the Principal Counsel suggests that the plan should become the reference document for all stakeholders, in order to guarantee better visibility for the process.

The need for a clear distinction between expertise gained from the TFV's assistance mandate and expertise developed for the purpose of implementing reparations

24. At all events, the Principal Counsel notes the numerous references to the TFV's assistance mandate in the Draft²⁰ and, by way of contrast, the scant operational information provided at this stage regarding the implementation of reparations themselves. Although the TFV has

¹⁹ The Principal Counsel does not, therefore, agree with the Office of the Prosecutor's interpretation of the Draft in its present form. See Prosecution's Observations, footnote 4, above, para. 3.

²⁰ Whereas the TFV does highlight the difference between its two mandates, it relies heavily on experience gained from its assistance mandate when providing the Chamber with clarification and formulating its proposals. See Filing, footnote 2, above, *inter alia*, paras. 38, 80, 91 *et seq.*, 127(d), 147, 151-158, 204, 208, 263, 265-267, 270, 272, 279-281, 286, 287, 292, 296, 301, 306, 311 and 312. See also, Draft, footnote 2, above, paras. 39, 83 *et seq.* and 236 *et seq.*

undertaken numerous assistance projects since it was set up, this procedure is the TFV's first opportunity to implement an order for reparations. It is in this context that the Principal Counsel highlights the differences in the above-mentioned two mandates and the need for those differences to be taken into account. Should the Chamber decide to order the TFV to produce an operational plan, as suggested above,²¹ the Principal Counsel contends that this could in fact afford the TFV the chance to further specify how the expertise which it already garnered under the assistance mandate could be used and/or adapted with a view to efficient implementation of reparations in the instant case.

25. Furthermore, whereas the Principal Counsel supports the TFV's approach of using the current procedure to design a solid framework for future enforcement of orders for reparations, she insists, however, on the need to develop an operational plan on the basis of principles tailored to the specific needs of the victims in the instant case.²²

26. The Principal Counsel further considers that the TFV should draw lessons from its experience in the Democratic Republic of the Congo (DRC) in a transparent manner, so as to take into account not only the expertise gained from its separate assistance mandate, but also difficulties that may be encountered when that mandate is exercised – for example, by local partners in charge of implementation in the field.²³ Apart from the lessons drawn

²¹ See paras. 22 and 23, above.

²² See the "Observations on issues concerning reparations", ICC-01/04-01/06-2863, 18 April 2012, para. 11. See also the "Second Report of the Registry on Reparations", ICC-01/04-01/06-2806, 1 September 2011, para. 12 (reclassified as Public upon instructions of Trial Chamber I of 9 March 2012).

²³ See the Trust Fund for Victims, *Programme Progress Report 2015, Assistance & Reparations Achievements, Lessons Learned, and Transitioning*, The Netherlands, 2015. See p. 33, with respect to the suspension of the KAF project in late February 2014. The document is accessible at: http://www.trustfundforvictims.org/sites/default/files/media_library/documents_pdf/FinalTFVPPR201 See also, the Trust Fund for Victims and the International Center for Research on Women (ICRW), *External Evaluation of the Trust Fund for Victims Programmes in Northern Uganda and the Democratic Republic of Congo: Towards a Perspective of Upcoming Interventions*, November 2013, p. 39. The document is accessible at:

from any difficulties that may have been encountered during the implementation of the assistance projects, the Principal Counsel also notes the importance of planning specific measures to address the prevailing volatile security situation in Ituri. For example, special measures will have to be taken to make reparations available to former child soldiers living in the same places as Mr Lubanga's supporters.

The need to draft an operational implementation plan focusing on the individual component of the harm

27. In concrete terms, concerning the operational aspect itself, the Principal Counsel suggests adopting a plan that implements collective reparations that nonetheless are founded on the individual component of the harm. In this respect, the Principal Counsel suggests it would be preferable to reverse the order of priorities: instead of focusing effort on the communities, it may be necessary to refocus projects on individual members of the said communities.²⁴

28. The Principal Counsel has observed that her clients, and a large number of victims who might benefit from reparations, in particular former child soldiers, are still suffering the effects of being uprooted for enrolment/conscription, especially as they could not be sent back to school or reintegrated into their communities after being demobilised.²⁵ According to her, therefore, the priority in collective reparations ought to be refocused on the desired individual impact on each victim beneficiary.

29. If there is such a reversal in perspective, the Principal Counsel submits that the measures for raising awareness, encouraging dialogue and supporting

http://www.trustfundforvictims.org/sites/default/files/media_library/documents/pdf/ICRWTFVExternalProgEvaluation2013Final.pdf

²⁴ See Observations of LIPADHOJ, footnote 5, above, para. 6.

²⁵ See UNESCO, EFA Global Monitoring Report, 2011, *The hidden crisis: Armed conflict and education*. The report is accessible at: <http://unesdoc.unesco.org/images/0019/001907/190743e.pdf>

communities that have been developed by the TFV will retain all their importance but should take second place, while all the time being further developed.

30. To be more precise, the development of collective reparations which focus on individuals themselves should revolve around two very important needs that are identified in the TFV's Draft: the medical and psychological component and the educational component.

31. Regarding the medical component, the Principal Counsel notes that victims refer to their most pressing needs which, it would seem, have yet to be taken into account in the Draft.²⁶ During the period when they were compelled to fight in the ranks of the UPC/FPLC, boys and girls were forced to take drugs and alcohol in order to brave the tasks they were made to perform, or simply to make them more docile. Some of them later became addicted, when they were left to their own devices and abandoned to their own fate, because the rare assistance given to former child soldiers was at best inadequate. Consequently, a very large number of victims are now in urgent need of medical attention to overcome their addictions.²⁷ From a more holistic perspective, the TFV might consider partnering with the DRC to provide medical coverage, by setting up a permanent facility to receive victims, guide them and provide them with medical assistance, in a way that, as suggested by LIPADHOJ, is dynamic.²⁸ Regarding the psychological component, which is given ample consideration in the TFV's Draft, the Principal Counsel refers to her observations below.²⁹

²⁶ See Draft, footnote 2, above, paras. 157-159.

²⁷ See, in this respect, the "Confidential redacted version of Annex I to Filing on Reparations and Draft Implementation Plan", above, footnote 16, footnote 27.

²⁸ See Observations of LIPADHOJ, footnote 5, above, para. 10.

²⁹ See paras. 46 *et seq.* below.

32. The Principal Counsel wishes to lay particular emphasis on the educational component:

Every person – child, youth and adult – shall be able to benefit from educational opportunities designed to meet their basic learning needs. These needs comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning.³⁰

33. In fact, several specialised studies have acknowledged that education contributes to normality in daily life (ensuring routine, offering structure and providing hope in the future) and to psychosocial stability for populations affected by violence; education can play a decisive role in the protection of children and women; education is a major asset in building a particular form of resilience within affected communities; education contributes to citizenship and good governance at various levels – government, community and individual; education supports the development of other sectors and hence improves the livelihoods of communities.³¹ Consequently, implementing reparations measures in the area of education also amounts to an implementation of the presumption of psychological harm proposed by the TFV since education helps children and adults build coping mechanisms.³²

³⁰ See UNESCO, World Conference on Education for All, *Framework for Action to Meet Basic Learning Needs*, Jomtien, Thailand, 5-9 March 1990. The document is accessible at:

http://www.unesco.org/education/nfsunesco/pdf/JOMTIE_E.PDF

See also, UNESCO, World Education Forum, *Education in Situations of Emergency and Crisis: Challenges for the New Century*, Dakar, Senegal, 26-28 April 2000.

The document is accessible at: <http://unesdoc.unesco.org/images/0012/001234/123484e.pdf>

³¹ See IBIS – Education for development, *Concept Paper, Education in fragile situations*, p. 2.

The document is accessible at:

http://ibis-global.org/sites/default/files/media/pdf_global/methods_and_approaches/concept_paper_la_yout_final-fragile_-_fragile_situations.pdf See also Smith Ellison (C.), “A Review for Norad: Education in Fragile Situations”, Oxford Policy Management, October 2013. The document is accessible at:

[http://uir.ulster.ac.uk/28155/1/Education_in_Fragile_Situations_A_Review_for_Norad_\(2\).pdf](http://uir.ulster.ac.uk/28155/1/Education_in_Fragile_Situations_A_Review_for_Norad_(2).pdf)

³² See INEE, *An international network for education in emergencies*, and INEE *Minimum Standards for Education: Preparedness, Response, Recovery – A Commitment to Access, Quality and Accountability*. This document is accessible at: <http://www.ineesite.org/en/minimum-standards>

34. Initially, the reparations measures developed will have to address daily needs arising from the current situation faced by victims. In fact, for many of them, it is now too late to attend primary school. Nevertheless key primary school knowledge will have to be conveyed to them in a manner adapted to their current personal situation. Reparations measures will therefore have to provide victims who are now young adults with tools to help them find their place within their own society, in particular through vocational³³ and career-centred³⁴ training as well as civic awareness guidance to develop their communication and socialisation skills (equal access to appropriate programmes for learning and acquiring knowledge and skills needed for daily life, basic and ongoing education).³⁵ These measures will also have to include numeracy and literacy, as applicable, as they have a direct impact on victims' self-esteem, self-confidence and self-reliance as well as on their civic and community involvement.³⁶ Reparations measures must also take into account the different roles played by the beneficiaries during the conflict so as to propose programmes that address each person's their personal experience. A former child soldier who fought and killed other combatants and former child soldiers who were forced to act as spies, porters or the wives of soldiers would not react in the same way to the programmes proposed, as the type of trauma they have experienced will differ.³⁷

³³ See, in this respect, Observations of LIPADHOJ, footnote 5, above, para. 7.

³⁴ See, in this respect, the Education for All campaign goals set by the United Nations Educational, Scientific and Cultural Organization. The goals are accessible at:

<http://www.unesco.org/new/en/education/themes/leading-the-international-agenda/education-for-all/efa-goals>, in particular goals 3 and 4.

See also, UNESCO, EPT Global Monitoring Report, 2006, Literacy for Life, in particular p. 26. The document is accessible at: <http://unesdoc.unesco.org/images/0014/001416/141639e.pdf>

³⁵ See United Nations General Assembly, Human Rights Council, Thirtieth session, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, 7 September 2015, A/HRC/30/42, para. 93. This document is accessible (in English only) at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G15/202/04/PDF/G1520204.pdf?OpenElement>

³⁶ See EFA Global Monitoring Report, 2006, Literacy for Life, footnote 34, above, in particular pp. 22 and 23.

³⁷ See Protect Education in Insecurity and Conflict (PEIC) and New York University, *The Education of Former Child Soldiers: Finding a Way Back to Civilian Identity*. The document is accessible at: <http://educationandconflict.org/sites/default/files/publication/BurdeEducation%20of%20Former%20Child%20Soldiers.pdf>

35. For example, the Principal Counsel cites the reparations programme of the Truth and Reconciliation Commission in Peru, which is designed on the basis of the loss of educational opportunity resulting from the armed conflict. The measures taken have targeted civil rights, health, collective reparations, symbolic reparations, housing, economic reparations, and education; and the measures have specifically covered individuals whose education had been interrupted owing to the violence, as well as victims' children and former child soldiers.³⁸

36. Furthermore, in the specific case of female former child soldiers, as well as their offspring³⁹ from rape of which they were victims during the events, the education component is also central to the reparations to be proposed to them (protection and early childhood education). The children of such victims have a right to education and must have access to primary schools. Direct consultations with these victims show that their priority now lies with their children, who in actual fact are the indirect victims of the events.⁴⁰

See also: Protect Education in Insecurity and Conflict (PEIC) and Columbia University, *Child Soldiering: Impact on Childhood Development and Learning Capacity*. The document is accessible at: http://educationandconflict.org/sites/default/files/publication/Boothby-Impact_on_Learning.pdf

³⁸ See Guillerot (J.) and Magarrell (L.), APRODEH and ICTJ, *Reparaciones en la transición peruana, Memorias de un proceso inacabado*, 2006, p. 43. The document is accessible at: <https://www.ictj.org/sites/default/files/ICTJ-Peru-Memory-Process-year-2006-Spanish.pdf> See also, British Institute of International and Comparative Law (BIICL) and Protect Education in Insecurity and Conflict (PEIC), *Education and the law of reparations in Insecurity and Armed Conflict*, p. 89. The document is accessible at: http://www.biicl.org/documents/204_6755_reparations_report21.pdf

³⁹ See United Nations General Assembly resolution 3318 (XXIX), Declaration on the Protection of Women and Children in Emergency and Armed Conflict, 14 December 1974, article 6. The Declaration is accessible at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtectionOfWomenAndChildren.aspx>

⁴⁰ In this respect see: Commission on Human Rights, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*. Final report submitted by Mr Theo van Boven, Special Rapporteur, E/CN.4/Sub.2/1993/8, 2 July 1993, pp. 12-13. This document is accessible at: <http://www.refworld.org/docid/3b00f4400.html> See also, United Nations General Assembly resolution 44/25, Convention on the Rights of the Child, 20 November 1989, Preamble and article 38 sub 4. The document is accessible at: <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

The Principal Counsel considers, therefore, that when implementing reparations the TFV needs to pay special attention to these children.

37. The Principal Counsel also considers that necessary reparations measures with respect to education could draw inspiration from the concept of “peacebuilding education”:

Peacebuilding education – like peacebuilding itself – would be a bottom-up rather than top-down process driven by war-torn communities themselves, founded on their experiences and capacities. It would be firmly rooted in immediate realities, not in abstract ideas or theories. It would be applied, immediate, and relevant, which means that it cannot be restricted to the classroom.”⁴¹

38. The underlying principles for this are as follows: this is a process, not the end product; the process must be designed for the long term, not the short term; it relies on local contributions and resources rather than external ones; and it seeks to create opportunities rather than impose solutions.⁴²

2. The integration of a gender-inclusive approach throughout the Draft and at all stages of the implementation of reparations

39. The Principal Counsel supports the **gender-inclusive approach** adopted by the TFV throughout the Draft. Distinctions are to be made between, on the one hand, the “restrictive” framework of the charges and the non-inclusion of sexual crimes and, on the other hand, the integration of a **gender-inclusive approach** into the reparations procedure. In fact, far from reflecting any sexual crimes referred to during the proceedings, this

⁴¹ See Bush (K. D.) & Saltarelli (D.), “Towards a Peacebuilding Education”, in *The Two Faces of Education in Ethnic Conflict: Towards a Peacebuilding Education for Children*, United Nations Children’s Fund Innocenti Research Centre, Florence, pp. 23, 24 and 34. The document is accessible at: <http://www.unicef-irc.org/publications/pdf/insight4.pdf> See also, Weinstein (H. M.), Warshauer Freedman (S.) and Hughson (H.), “School voices, challenges facing education systems after identity based conflicts, education, citizenship and social justice”, *Education, Citizenship and Social Justice*, SAGE Publications, Vol. 2(1) 41-71, 2007, p.46. The document is accessible at: <https://gse.berkeley.edu/sites/default/files/users/sarah-freedman/07ecsj.pdf> See also, UNICEF, Learning for Peace Programme: <http://learningforpeace.unicef.org/about/learning-for-peace/>

⁴² *Idem.*

approach is becoming a fundamental factor to be taken into account in connection with reparations. Reparations have to be consistent with reality (or different realities), the cultural specificities of the communities affected and the resultant specific needs of victims. To achieve this, the involvement of victim beneficiaries in the implementation of reparations from a **gender-inclusive approach** should guarantee reparations that are tailored and aimed at integration, and that will enable the affected communities and each stakeholder to offer a fair chance to all victims concerned.⁴³

40. Moreover, the gender dimension cannot be disregarded in the instant case, especially as the beneficial impact of reparations on victims depends to a large extent on individual or group perceptions, bearing in mind the suffering by other victims.⁴⁴ As emphasised by the TFV, perceptions within the affected communities regarding the needs and the situation of former child soldiers – male or female – have a very significant bearing on the former child soldiers' possibility to reintegrate now or in the future into their own family and community.⁴⁵

41. Taking into account the gender dimension of the crimes of which Mr Lubanga was found guilty, as well as of the forms of reparations proposed to the victims of those crimes, offers important guarantees for reintegrating victims into social life. A tailored approach to integrating a gender dimension would improve understanding of each victim's suffering, and

⁴³ Following the example of the Office of the Prosecutor, the Principal Counsel refers to *Policy Paper on Sexual and Gender Based Crimes* issued by the Office of the Prosecutor. See Prosecution's Observations, footnote 4, above, paras. 3-4. The document is accessible at: <https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014-ENG.pdf>

⁴⁴ See the "Observations on the sentence and reparations by Victims a/0001/06, a/0003/06, a/0007/06 a/00049/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0523/08, a/0610/08, a/0611/08, a/0053/09, a/0249/09, a/0292/09, a/0398/09, and a/1622/10", ICC-01/04-01/06-2864-tENG, 18 April 2012, para. 13.

⁴⁵ See Filing, footnote 2, above, paras. 59 *et seq.*, 62, 91-94 and 184. See also, Draft, footnote 2, above, para. 145.

offer them social support, by reviving the respect and solidarity of their families and communities.⁴⁶

42. The Principal Counsel reiterates the pressing need for the reparations to enable victim beneficiaries to rebuild their lives as individuals and as a community, and hence go beyond the *survival* mind set into which many of them lapsed as a result of the events in the instant case. The Principal Counsel maintains that any project that will allow each individual's role in Congolese society to count, especially in Ituri, and acknowledge the gender dimension of their roles will be even more significant in terms of reparations and will stand an even greater chance of success in the short and long terms.⁴⁷

43. Moreover, the projected lasting peace is intrinsically linked to the implementation of justice and efficient reparations;⁴⁸ this may be achieved through measures taken to help each victim involved to resume a stable life and guarantee non-recurrence of the crimes committed. As emphasised in the recent report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence:

“[t]he core function of guarantees of non-recurrence is preventive in nature. It is one to which truth, justice and reparation are themselves supposed to contribute: criminal justice mainly through deterrence; truth commissions through disclosure, clarification and the formulation of recommendations with a preventive intent; and reparations by strengthening the hand of victims to claim

⁴⁶ See A. Kito Masimango, “*Attentes des victimes à la réparation en République Démocratique du Congo*”, Round table on the rights of victims, Tenth Session of the Assembly of States Parties to the Rome Statute, New York, 13 December 2011. The document is accessible at: http://www.iccnw.org/documents/Attentes_des_victimes_Rdc.pdf

⁴⁷ See Mottet (C.) and Pout (C.), “*La justice transitionnelle: une voie vers la réconciliation et la construction d’une paix durable*”, Conference Paper, Dealing with the Past-Series, 1/2011, pp. 106-107: the document is accessible at:

<http://www.ohchr.org/Documents/Countries/Africa/ActesConf2JusticeTransit.pdf>

⁴⁸ See Chen (S.), Loayza (N.V.) and Reynal-Querol (M.), *The Aftermath of Civil War*, September 2006. The document is accessible at:

<http://siteresources.worldbank.org/INTCONFLICT/Resources/EventStudyChenLoayzaReynalQuero.pdf>

redress for the past and future violations and to enforce their rights more assertively.”⁴⁹

44. If women and minority groups are involved in reparations projects that will allow effective implementation of the guarantee of non-recurrence, by fostering and sustaining a culture of respect for human rights and restoring peoples’ confidence in their own societies. In this regard, the ethnic dimension that permeated the events in the instant case could also be addressed by the reparations measures taken. It should be noted in this regard that “community” reparations are “[TRANSLATION] an act of acknowledgment of the damage caused, as well as part of reparation of harm, aimed at restoring victims’ confidence in the State; strengthening the sense of civic belonging; fostering acceptance of reforms; consolidating the social fabric and national solidarity; and, consequently, contributing to reconciliation.”⁵⁰

45. Furthermore, the Principal Counsel highlights the need to deploy measures whose sustainability can be guaranteed, by ensuring that expertise and skills in terms of assistance are also developed locally and that the sustainability triggered as a result of learning to live together again is entrenched. In the long run, support given by the Congolese Government for the sustainability of certain measures offers some guarantee.⁵¹ As emphasised by Special Rapporteur, Mr Theo van Boven, “there exists a definite link between effective remedies to which the victim(s) is (are) entitled, remedies aimed at

⁴⁹ See Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, footnote 35, above, para. 24 (emphasis added).

⁵⁰ See Mottet (C.) and Pout (C.), *op. cit.*, footnote 47, above, p. 109.

⁵¹ In this respect, information on Congolese case law and legal instruments, see FIDH, DRC: *Victims of Sexual Violence Rarely Obtain Justice and Never Receive Reparation. Major changes needed to fight impunity*, October 2013. The report is accessible at: https://www.fidh.org/IMG/pdf/rapport_rdc_.pdf

the prevention of the recurrence of similar violations and the issue of the follow-up given by the State party concerned".⁵²

3. The TFV's proposed presumption of psychological harm

46. The Principal Counsel emphasises the significance and appropriateness of the presumption proposed by the TFV, when faced with victims, families and communities who inevitably were psychologically damaged during the events.⁵³

47. Not only does personal exposure to violence leave individual psychological scars, it seriously ruptures the social fabric.⁵⁴ The intergenerational handing down of trauma⁵⁵, therefore, must also be addressed by the reparations programmes implemented:⁵⁶

[TRANSLATION] The family is the first belonging system where the child is protected and finds role models [...]. The family is also the intermediary between the internal and external world; every new experience transforms the family and constitutes a change. In wars and disasters, the functioning of the family unit is disrupted and its balance is lost. [...] When either parent is overcome by the intensity of psychological trauma, the family as a whole is affected by an experience life of suffering and crisis resulting from the psychological repercussions on each family member.⁵⁷

⁵² See, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*. Final report submitted by Mr Theo van Boven, Special Rapporteur, footnote 40, above, para. 55.

⁵³ See Randall (M.) and Haskell (L.), *Trauma-Informed Approaches to Law: Why Restorative Justice Must Understand Trauma and Psychological Coping*, in *The Dalhousie Law Journal* 501, pp. 501-534. The article is accessible at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2424597

⁵⁴ *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*. Final report submitted by Mr Theo van Boven, Special Rapporteur, footnote 40, above.

⁵⁵ See World Bank, "Les intelligences citoyennes", in *Briser la spirale des conflits: Guerre civile et politique de développement*, De Boeck, Brussels 2005, p. 48. See also, Hazem (G.), Huth (P.) and Russett (B.), "Civil Wars Kill and Maim People Long After the Shooting Stops", in *American Political Science Review*, vol. 97, 2(2003), pp. 189-202.

⁵⁶ If the reparations measures to be implemented in the field of education target both direct victims (former child soldiers, above all) and indirect victims (children of former child soldiers, in particular), they will enable the cycle of intergenerational transmission of trauma to be broken.

⁵⁷ See Farida (B.), "La transmission intergénérationnelle du psycho traumatisme liée à la violence", doctoral thesis presented for the certificate of Master's in clinical psychology, University of Mentouri, Constantine, 26 June 2009, pp. 8 and 12. The document is accessible at: <http://bu.umc.edu.dz/theses/psychologie/BEN1004.pdf> See also, Le Chevalier (B.), "Les conséquences des traumatismes de guerre pour les générations suivantes. Transmission de la destructivité et du non-sens", in *Perspectives Psy*, 2014/1 (Vol. 53), pp. 25-29.

The Principal Counsel notes that the presumption proposed by the TFV allows this critical dimension to be taken into account in respect of the crimes for which Mr Lubanga was convicted.

48. In fact, the aftermath of the conflict is at the centre of the victims' lives. The issue of that aftermath cannot be ignored and its ramifications are felt on several levels: economic, human and medical, cultural and environmental. Unlike the term damages of war, the expression "effects of war" refers to the delayed consequences of war, on local and global scales, in space or time, and thus covers a much broader area:

[TRANSLATION] [A]ll survivors, be they wounded or physically unharmed, soldiers or civilians, men or women, young or old, bear another wound — the unseen injury in their psyche, inflicted by the violence of war: haunting memories, hallucinations, nightmares, starts, bouts of oddness and anguish, sense of insecurity, phobic fear of any reminder of war or violence, weariness, impression of being misunderstood, irritability and tendency to withdraw into bitter ruminations. This is what the circle of military psychiatrists refer to as "war neurosis", a chronic if not unending after-effect of the "psychological traumas of war" resulting from the miseries and horrors endured in hostilities or the extreme terror felt during a single event, such as close combat, an ambush, bombardments, arrest, deportation or torture.⁵⁸

The Principal Counsel submits that the TFV's proposed presumption will usher in a much more inclusive approach and effective consideration of the aftermath of war.

49. With respect to her clients, the Principal Counsel confirms the psychological dimension of the harm which they continue to endure and which is associated with the extreme violence of the realities they faced, on the one hand, and the loss of opportunities for the future, on the other. Literally uprooted from their childhoods and normal lives, the victims were flung into a life of violence that has continued ever since and, today, they are saddled with this new baggage. They are neither equipped nor given the

⁵⁸ See Crocq (L.), *"Les traumatismes psychiques de guerre"*, Odile Jacob, 1999, pp. 9-10.

support to build a future for themselves. That is why the TFV's presumption will pave the way for giving them effective support of the right kind and at the right level so that they can then rebuild their lives and benefit from any other projects implemented as part of reparations.

50. Furthermore, most victims in this case are *particularly vulnerable*, owing to the nature of the crimes and to the fact that many of them were victimised when they were children and have since been marginalised.⁵⁹ This additional factor demonstrates that the presumption of psychological prejudice suits reparations in the instant case. In law, as a general rule, minors enjoy rights to additional, tailored protection. This should also be applicable to measures taken to repair the harm they suffered and continue to suffer.⁶⁰

51. Emphasising the transformative potential this approach has for victims, the Principal Counsel fully endorses its implementation, as suggested by Trial Chamber I itself.⁶¹ Whereas reparations in general are meant, to the extent possible, to restore victims to the *status quo ante*, they can also improve victims' current situation with a view to helping them to rebuild their lives.⁶² Moreover, as emphasised by the TFV, the reparations measures taken would

⁵⁹ See the "Public redacted version of VPRS mission report in Ituri in November 2011", ICC-01/04-01/06-2851-Anx2-Red, 28 March 2012, p. 16. See also, the "Report of Ms Schauer, The Psychological Impact of Child Soldiering", ICC-01/04-01/06-1729-Anx1 (EVD-CHM-000010), p. 3, quoted in the "Decision on Sentence pursuant to Article 76 of the Statute" (Trial Chamber I), ICC-01/04-01/06-2901, 10 July 2012, paras. 39 *et seq.*: "[a]mong a number of at risk populations, children of war and child soldiers are a particularly vulnerable group and often suffer from devastating long-term consequences of experienced or witnessed acts of violence".

⁶⁰ See IACHR, *Case of the "Mapiripán Massacre" v. Colombia*, Merits, Reparations and Costs, Judgment of 15 September 2005, Series C, No. 134, para. 284. The Judgment is accessible at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_134_ing.pdf

⁶¹ See the "Decision establishing the principles and procedures to be applied to reparations" (Trial Chamber I), ICC-01/04-01/06-2904, 7 August 2012, para. 192. See also, "Public Redacted Version of ICC-01/04-01/06-2803-Conf-Exp-Trust Fund for Victims' First Report on Reparations", ICC 01/04-01/06-2803-Red, 23 March 2012, paras. 72-77.

⁶² See Education and the law of reparations in Insecurity and Armed Conflict, footnote 38, above, pp. 38 *et seq.*

thereby also target the root causes of violations themselves, such as socio-economic structural inequalities.⁶³

52. The Principal Counsel cannot over-emphasise the vital need for reparations to include developing the skills of individual victims so that they can, each in their own way, reintegrate. Like Expert Witness Ms Schauer, the Principal Counsel notes that her clients, as well as most prospective victim beneficiaries, have been marginalised ever since the events:

children who have been child soldiers for a significant period of time usually do not demonstrate “civilian life skills” as they have difficulties socialising, they missed schooling, and as a result they are at a disadvantage, particularly as regards employment.⁶⁴

53. It is also along these lines that the Appeals Chamber amended the Trial Chamber Decision when defining the harm suffered by direct victims in the instant case.⁶⁵

B. Observations concerning certain specific questions raised by the Draft

1. Extent of the convicted person’s liability and review of his indigence with respect to reparations

54. As stated in the Order of the Appeals Chamber :

⁶³ See IACHR, *Case of Rosendo-Cantú et al. v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment of August 31, 2010, Series C No. 216, para. 206: “The Court reiterates that Mrs. Rosendo Cantú is an indigenous woman, a girl at the time when the violations occurred, whose situation of particular vulnerability will be taken into account in the reparations awarded in this Judgment”. The Judgment is accessible at:

http://www.corteidh.or.cr/docs/casos/articulos/seriec_216_ing.pdf; and IACHR, *Case of González et al. (“Cotton Field”) v. Mexico*, Preliminary Objection, Merits, Reparations and Costs, Judgment of November 16, 2009, Series C No. 205, paras. 450 *et seq.*: “[...] bearing in mind the context of structural discrimination in which the facts of this case occurred [...], the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification. In this regard, reestablishment of the same structural context of violence and discrimination is not acceptable.” The Judgment is accessible at:

http://www.corteidh.or.cr/docs/casos/articulos/seriec_205_ing.pdf

⁶⁴ See the “Decision on Sentence pursuant to Article 76 of the Statute”, footnote 59, above, para. 42, referring to the testimony of the expert Ms Schauer at the hearing of 7 April 2009, ICC-01/04-01/06-T-166-ENG CT WT, p. 32, line 25, to p. 33, line 7.

⁶⁵ See Appeals Judgment, footnote 6, above, para. 191.

Reparations fulfil two main purposes that are enshrined in the Statute: they oblige those responsible for serious crimes to repair the harm they caused to the victims and they enable the Chamber to ensure that offenders account for their acts.⁶⁶

The Appeals Chamber also agreed with the principle set forth by Trial Chamber I that “it is the obligation of the convicted person to remedy the harm caused by the crimes for which he or she was convicted”.⁶⁷

55. The Accused’s conviction in the instant case is a historic acknowledgement of certain events and in the future could serve as a building block for common acknowledgement paving the way for community reconciliation.⁶⁸ It is against this background that the operational implementation plan for reparations could contribute to restoring relations within the affected communities.

56. Mr Lubanga’s participation in the implementation plan for reparations is important if the reconciliation and reconstruction of communities are to be considered a shared project. When reparations are implemented after the truth has been established and after due process, they may, in addition to being perceived as a shared project, bring to the victims of the crimes the

⁶⁶ See Order, footnote 6, above, para. 2. See also, United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”, A/RES/60/147, 21 March 2006 (Resolution adopted by the General Assembly on 16 December 2005), part IX, para. 1. The document is accessible at:

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>

⁶⁷ See Appeals Judgment, footnote 6, above, para. 99. See also, article 9 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings imposed on Member States of the European Union to take “appropriate measures to encourage the offender to provide adequate compensation to victims”. See 2001/220/JHA, Official Journal No. L 82, 22/03/2001, pp. 0001-0004. The document is accessible at: <http://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:32001F0220&from=EN>

⁶⁸ See the Extraordinary Chambers in the Courts of Cambodia (ECCC), *Kaing Guek Eav alias Duch*, Supreme Court Chamber, Case/Dossier No. 001/18-07-2007/ECCC/SC, 3 February 2012, para. 708. The Judgement is accessible at:

<http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Case%20001AppealJudgementEn.pdf>

acknowledgement they need to rebuild their lives and promote social trust.⁶⁹

By the same token, reparations may contribute to reconciliation and social integration.⁷⁰

57. The Principal Counsel submits, therefore, that at this stage of the process it is crucial to trigger the procedure to determine whether the convicted person, who was found to be indigent within the framework of legal assistance paid by the Court, is also indigent for the purposes of reparations. Irrespective of whether or not the indigence is established, and whether or not it is temporary, it is vital to communicate the said judicial finding to the victim beneficiaries of reparations. Moreover, like the Appeals Chamber and the TFV, the Principal Counsel emphasises that such a determination, if any, should not affect reparations for the victims concerned.⁷¹

58. Pursuant to rule 99(1) of the Rules of Procedure and Evidence,⁷² the Principal Counsel therefore requests the Chamber to trigger the necessary procedure for checking the existence and availability of any asset and/or property owned by Mr Lubanga and seizes it, as appropriate.⁷³ To the best knowledge of the Principal Counsel, since the Decision of Trial Chamber I of

⁶⁹ The Paris principles and guidelines on children associated with armed forces or armed groups (Paris Principles), February 2007, Paris, Principle 2.8.

The documentation is accessible at: <http://www.unicef.org/emerg/files/ParisPrinciples310107English.pdf>

⁷⁰ See, Office of the United Nations High Commissioner for Human Rights, Preliminary observations and recommendations by the Special Rapporteur on his visit to the United Kingdom of Great Britain and Northern Ireland, London, 18 November 2015. The documentation is accessible at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16778&LangID=E#sthash.nuEIBOQV.dpuf>

⁷¹ See Draft, footnote 2, above, para. 100. See also, Appeals Judgment, footnote 6 above, para. 105.

⁷² See the “Decision on the implementation of the request to freeze assets” (Trial Chamber V (B)), ICC-01/09-02/11-931, 8 July 2014, para. 12. See also, rule 93(1)(k) of the Rules of Procedure and Evidence, and article 75(4) of the Rome Statute.

⁷³ See the “Decision concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo” (Pre-Trial Chamber I), ICC-01/04-01/06-8-Corr, 17 March 2006, para. 135. See also, article 109 of the Rome Statute concerning the enforcement of forfeiture measures.

7 August 2012 no such procedure has been undertaken.⁷⁴ In that Decision the Chamber indicated:

The convicted person has been declared indigent and no assets or property have been identified that can be used for the purposes of reparations. The Chamber is, therefore, of the view that Mr Lubanga is only able to contribute to non-monetary reparations.⁷⁵

In the Sentencing Decision, Trial Chamber I, pursuant to article 77(2) of the Rome Statute, considered “it inappropriate to impose a fine in addition to the prison term, given the financial situation of Mr Lubanga. Despite extensive enquiries by the Court, no relevant funds have been identified.”⁷⁶

59. However, it should be noted that the forfeiture ordered under Part 7 of the Rome Statute is different from the measures under article 75 of the same Statute. The Statute does not view reparations as a fine imposed on the convicted person but rather as a tool for reparative justice.⁷⁷

60. As stated by the Assembly of States Parties:

Future Trial Chambers will have to assess the specific facts of the case concerned when deciding which standards to apply for the determination of assets of a convicted person for the purpose of reparations as well as whether and how to issue reparation orders if indigence is at issue.⁷⁸

⁷⁴ See the “Decision establishing the principles and procedures to be applied to reparations”, footnote 61, above, para. 269. See also the “Second Report of the Registry on Reparations”, footnote 22, above, para. 10. The Principal Counsel notes that, to date, and to the best knowledge of the TFCV, no property or assets belonging to the convicted person have yet been forfeited for reparations. See Draft, footnote 2, above, paras. 102 and 114.

⁷⁵ See the “Decision establishing the principles and procedures to be applied to reparations”, footnote 61, above, para. 269.

⁷⁶ See the “Decision on Sentence pursuant to Article 76 of the Statute”, footnote 59, above, para. 106. This finding was not overruled by the Appeals Chamber in the “Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the ‘Decision on Sentence pursuant to Article 76 of the Statute’”, ICC-01/04-01/06-3122 A4 A6, 1 December 2014.

⁷⁷ See the reference to article 109 of the Rome Statute contained in article 75(5) of the Statute. In the same vein, see the “Decision on the implementation of the request to freeze assets”, footnote 72 above, para. 16. The preparatory work of the Rome Statute also bears out this interpretation given that the same relationship – which was included in the texts at the beginning of negotiations – was deliberately removed in the final version of articles 57(3)(e) and 93(1)(k) of the Rome Statute.

⁷⁸ See Assembly of States Parties, Twelfth Session, “Report of the Court on the criteria for the determination of disposable means relating to reparations”, ICC-ASP/12/40, 8 October 2013, para. 14. The document is accessible at: https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-40-ENG.pdf

The Principal Counsel therefore emphasises the urgent need to reopen a financial investigation of Mr Lubanga's property and assets and, when doing so, to bear in mind the aim of the procedure, which is not legal representation,⁷⁹ but rather, reparations procedures.

61. At this stage of procedure, bearing in mind the remit of the legal representatives of victims, it is all the more important for them to be informed of steps taken to identify, trace, freeze or seize the convicted person's property.⁸⁰

62. Concerning the applicable criteria in such a procedure to assess property and assets owned by the convicted person, the Principal Counsel submits that the Chamber needs to identify the specific factors to be taken into consideration. The existing provisions and procedures for determining indigence with a view to providing legal assistance paid by the Court cannot apply when determining indigence in the case of the convicted person's liability for reparations.

63. The core legal texts of the Court do not lay down specific procedures concerning the determination of indigence with respect to reparations. However, in its report dated 8 October 2013 on the criteria for the determination of disposable means relating to reparations, the Assembly of States Parties noted:

In 2012, in its resolution ICC-ASP/11/Res.7 on victims and reparations, the Assembly of States Parties ("Assembly") "[r]ecall[ed] that the declaration of

⁷⁹ See the "Registrar's Decision on Mr Thomas Lubanga Dyilo's Application for Legal Assistance Paid by the Court", ICC-01/04-01/06-63, 31 March 2006. The Principal Counsel notes that, in that Decision, the Registrar provisionally found Mr Lubanga to be wholly indigent considering that (p. 2): "a preliminary assessment of this information pursuant to regulation 84(1) of the *Regulations of the Court* suggests, *a priori*, that the applicant does not have the means to pay all or any of the costs of his legal representation before the Court" (emphasis added). See also, the "Decision reviewing the Registry's decision on legal assistance for Mr Thomas Lubanga Dyilo pursuant to Regulation 135 of the Regulations of the Registry" (Trial Chamber I), ICC-01/04-01/06-2800, 30 August 2011.

⁸⁰ Although it was issued at a different stage in the procedure, see the "Corrected version of 'Decision on 'Request for access to filings which may relate to steps taken to identify, trace, freeze or seize assets of the accused'" (Trial Chamber V(B)), ICC-01/09-02/11-909-Corr, 4 April 2014, para. 7.

indigence of the accused for the purpose of legal aid bears no relevance to the ability of the convicted person to provide reparations, which is a matter for judicial decision in each particular case, and further request[ed] the Court to review this matter and to report to the Assembly at its twelfth session.⁸¹

The ASP [Assembly of States Parties] also noted that:

[...] it is important to note that “indigence” as such is not mentioned in the Rome Statute, nor as part of the criteria for the payment of reparations under article 75 of the Rome Statute. While criteria have been established by the Registry for determining whether a suspect, accused or a victim is eligible for legal aid pursuant to rules 21 and 90 of the Rules of Procedure and Evidence [...], there are no criteria to establish the convict’s disposable means from the point of view of reparations.⁸²

64. Similarly, the Supreme Court Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) states in the Appeal Judgement of 3 February 2012 that:

The civil action under the 2007 Code of Criminal Procedure presupposes that even where the civil defendant is indigent, he may receive income in the future or third parties may pay in his/her stead. The Civil Code of Cambodia explicitly foresees, for example, that “an obligation may be performed *by a third party* as well as by the obligor,” and regulates subrogation in the performance of obligations. The obligation may also devolve upon the accused’s heirs following their acceptance of the succession.⁸³

65. In that respect the said Chamber makes an important clarification:

With that said, considering the *sui generis* and dual private/public character of the ECCC reparations regime, this Chamber holds that an award that, in all probability, can never be enforced, i.e., is *de facto* fictitious, would belie the objective of *effective* reparation and would be confusing and frustrating for the victims.⁸⁴

66. The Chamber emphasises its duty to verify the “tangible availability of funds”:

Unlike in the civil action, where seeking a title of execution against an indigent defendant is based on a choice and private interest of the plaintiff, in proceedings that have elements of reparations, the effectiveness requirement mandates that there be a tangible availability of funds.⁸⁵

⁸¹ See the “Report of the Court on the criteria for the determination of disposable means relating to reparations”, footnote 78, above, para. 1.

⁸² *Idem*, para. 4.

⁸³ See *Kaing Guek Eav alias Duch*, footnote 68, above, para. 666.

⁸⁴ *Ibid.*, para. 667.

⁸⁵ *Ibid.* In this respect, an importance nuance exists between the existing procedures before the ICC and those developed by the ECCC, namely the existence of procedures at the ICC which allow the Court to order, as from the pre-trial stage, the accused’s assets and property to be traced, seized and frozen. See, for the ECCC, *Ieng Thirith*, “Decision on Appeal of Co-Lawyers for Civil Parties Against Order on Civil Parties’ Request For Investigative Actions Concerning All Properties Owned by the Charged Persons” (Pre-Trial Chamber), No. 002/19-09-2007-ECCC/OCIJ (PTC 57), D193/5/5, 4 August 2010, paras. 20-41. This Decision is accessible at:

In this respect, one of the peculiarities of the core legal texts of the Court is that they recognise victims' right to reparation, unlike the right to *request* reparation in the texts establishing the ECCC.

67. Article 75(4) of the Rome Statute allows the Trial Chamber to request assistance from States Parties pursuant to article 93(1)(k), during the reparations stage. Yet, according to the Appeals Chamber,

the specific reference in article 75(4) of the Statute to the possibility of seeking assistance of States Parties in, *inter alia*, the identification and freezing of property and assets indicates that indigence is not an obstacle to the imposition of liability for reparations on the convicted person,⁸⁶

especially as an order in that respect “may be implemented when the monitoring of the financial situation of the person sentenced reveals that he or she has the means to comply with the order”.⁸⁷

68. On 9 and 31 March 2006, Pre-Trial Chamber I made requests to the DRC and to the States Parties for the purpose of obtaining the identification, tracing, freezing and seizure of property and assets belonging to Mr Lubanga. In the requests the Pre-Trial Chamber emphasised that the measures

“[are] necessary in the best interest of the victims in order to guarantee that, should Mr Thomas Lubanga Dyilo be found guilty of the crimes of which he is accused, the said victims, by virtue of article 75 of the Statute, will obtain reparations for the harm they may have suffered.”⁸⁸

http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D193_5_5_EN.PDF

⁸⁶ See Appeals Judgment, footnote 6, above, para. 103. See also, articles 75(4) and (5) and 109 of the Rome Statute.

⁸⁷ See Appeals Judgment, footnote 6, above, para. 104.

⁸⁸ See the “Request to the Democratic Republic of the Congo for the purpose of obtaining the identification, tracing, freezing and seizure of property and assets belonging to Mr. Thomas Lubanga Dyilo” (Pre-Trial Chamber I), ICC-01/04-01/06-22, 9 March 2006, pp. 2-3. See also, “Request to States Parties to the Rome Statute for the Identification, Tracing and Freezing or Seizure of the Property and Assets of Mr Thomas Lubanga Dyilo” (Pre-Trial Chamber I, Single Judge), ICC-01/04-01/06-62, 31 March 2006, pp. 2-3.

69. In the Decision of 8 July 2014 on the implementation of the request to freeze the property and assets belonging to the accused person, Trial Chamber V(B) emphasised that:

an order for protective measures for the purpose of reparations should be appropriately tailored to the circumstances, including consideration of the claims of victims and the personal circumstances of an accused, as appropriate.⁸⁹

70. Further, in its Draft, the TFV identified a series of factors which the Chamber could draw upon in assessing Mr Lubanga's financial liability.⁹⁰ The Principal Counsel supports the application of all the criteria suggested.

71. The Principal Counsel also states the need to check whether or not the situation of the convicted person has changed in the course of implementation of reparations are implemented, and, if so, if that change could enable Mr Lubanga to participate reparations to the benefit concerned. In this respect, the Principal Counsel suggests the introduction of a parallel procedure to the one under regulation 132(4) of the Regulations of the Registry casting a duty on the person concerned to communicate to the Registry any change in his or her financial situation. Further, the core legal texts stipulate that the Presidency has the duty to monitor the seizure of the property and assets belonging to the convicted person.

72. In order to determine the amount of Mr Lubanga's contribution, the Principal Counsel suggests a case law review of compensation for civil parties before national courts in the DRC for harm relating to international crimes. However, and before suggesting examples of existing case law, the

⁸⁹ See the "Decision on the implementation of the request to freeze assets", footnote 72, above, para. 17.

⁹⁰ The factors suggested by the TFV on the basis that Mr Lubanga's financial liability must be proportionate to the harm caused by the crimes of which he was convicted, are the following: the number of direct and indirect victims who could be victim beneficiaries; the types of harm that the victims suffered as a result of the crimes of which the accused was convicted; the costs of redressing the different forms of harm; the costs of implementation proper of the reparations. See the "Draft", footnote 2, above, paras. 213 *et seq.*

Principal Counsel emphasises that the amounts stated below have to be reviewed in the light of the different context in which they were determined. In this respect, the Principal Counsel cites a recent study published by Avocats Sans Frontières, which notes differences in treatment received by victims depending on the military court adjudicating; financial compensation as the sole form of reparation; the absence of special compensation criteria; the systematic generalisation of harm and the meagre compensation awarded to victims.⁹¹

73. For example,⁹² in *Songo Mboyo*, the Military Tribunal of Mbandaka garrison awarded USD 5,000 to each surviving victim of rape and USD 10 000 to victims who died as a result of rape; in *Gédéon*, the compensation amounts ranged from USD 25 000 to USD 300 000; in *Fizi*, the Sud-Kivu Military Court awarded each surviving victim USD 10 000 in compensation.⁹³ In *Maniraguha Jean Bosco alias Kazungu et al*, the Military Tribunal of Bukavu garrison ordered the Congolese State, separately, to pay compensation for harm suffered to 400 civil parties as follows: the equivalent in Congolese francs of USD 700 for each victim of rape, USD 550 for each victim of torture, USD 400 for each victim of imprisonment or other severe deprivation of physical liberty, USD 5,800 for each victim of murder.⁹⁴ In *Mupoke*, the same tribunal ordered the accused persons jointly with the Congolese State to pay the following compensation for any harm suffered: the equivalent in Congolese francs of sums between USD

⁹¹ See Inganya (M.E.), ASF, “*La réparation des crimes internationaux en droit congolais. Analyse des pratiques indemnitaires des juridictions militaires au regard du Statut de Rome de la Cour pénale internationale*”, Brussels, December 2014, *inter alia*, pp. 77 *et seq.* The document is accessible at: http://www.asf.be/wp-content/uploads/2015/09/ASF_RDC_R--parationCrimesInternat_201509.pdf

⁹² *Idem*, in particular the tables on pp. 82 and 83.

⁹³ See FIDH, *op. cit.*, footnote 51 above, pp. 25-28. See also, ICTJ, Briefing, *Judgment Denied, The Failure to Fulfill Court-Ordered Reparations for Victims of Serious Crimes in the Democratic Republic of the Congo*, May 2012. The document is accessible at: <https://www.ictj.org/sites/default/files/ICTJ-Briefing-DRC-Reparations-2012-ENG.pdf> It should be noted, however, that no payment had been made at the time of the reports (2013).

⁹⁴ See ASF, “*Recueil de jurisprudence congolaise en matière de crimes internationaux*”, Édition critique, Brussels, December 2013, pp. 100-125. The document is accessible at: http://www.asf.be/wp-content/uploads/2013/12/ASF_RDC_JurisprudenceCrimesInternat_201312.pdf

2,500 and USD 30 000 to each victim of rape (10), between USD 1,750 and USD 15 000 to each victim of torture (15), USD 50 000 to one murder victim, USD 5,000 to one victim of attacks against protected property and USD 800 to each of the 107 victims of pillaging.⁹⁵

74. Lastly, the Principal Counsel is concerned about the approach adopted by the TFV with respect to determining the supplementary amount that the Board of Directors decided to award for reparations in the instant case. Without community on the amount proposed, the Principal Counsel considers that the Chamber could play a role in determining it.⁹⁶ It is the view of the Principal Counsel that, the independence of the TFV notwithstanding, the Trial Chamber maintains discretion to determine these supplementary amounts.

2. The role of the Presidency at the stage of enforcing reparation orders and forfeiture orders

75. The Principal Counsel submits that, under regulations 113, 116 and 117 of the Regulations of the Court, the Presidency has the duty both to monitor the financial situation of the convicted person⁹⁷ and to supervise the implementation of reparations. The regulations seem to apply in the same manner to both the judicial supervision required for forfeiture orders and the judicial supervision of reparation orders.

76. According to regulation 113(1)(b) of the Regulations of the Court, an enforcement unit shall be established within the Presidency to enforce the said decisions. Regarding *forfeiture orders* and *reparation orders*, regulation 116(1) of the Regulations of the Court stipulates that the Presidency shall make the

⁹⁵ *Ibid.*, p. 229.

⁹⁶ In this respect the Principal Counsel also refers to the Prosecution's submissions. See Prosecution's Observations, footnote 4, above, para. 5.

⁹⁷ See Draft, footnote 2, above, paras. 103-104 and 109.

arrangements necessary in order to receive property and the proceeds of the sale of real property or any other property and to ensure the transfer of money to the Trust Fund. Regulation 117 of the Regulations of the Court sets forth ongoing monitoring of the financial situation of the sentenced person by the Presidency, even following completion of a sentence of imprisonment. This ongoing monitoring mechanism is intended for the enforcement of forfeiture orders and reparation orders alike.

77. The Principal Counsel therefore submits that, in the future, should the Trial Chamber order the forfeiture or freezing of any property or assets belonging to Mr Lubanga which may have been identified and traced in the interim, the Presidency would ensure the necessary follow-up. Further, the Presidency would also have to monitor any change in the financial situation of the sentenced person.

78. Similarly, when the TFV enters the period of implementation proper of the planned reparations developed on the basis of the Order of 3 March 2015, the Principal Counsel notes that it will be incumbent on the Presidency to supervise enforcement of the Order. In that respect, the Principal Counsel submits that the activities developed by the TFV will be subjected to judicial “monitoring” to ensure that reparations implemented for victim beneficiaries are consistent with the Order for reparations in the instant case. The Principal Counsel therefore welcomes the TFV’s proposal to submit regular reports to the Chamber and the parties – a term which in this context includes victims’ lawyers – so as to update all stakeholders on reparations.⁹⁸ These reports will no doubt assist the Presidency in executing its monitoring mandate and should therefore be transmitted to it as well, unless the Chamber decides that the Presidency will directly conduct the entire monitoring process and,

⁹⁸ See Draft, footnote 2, above, paras. 37 *et seq.*

consequently, orders the reports to be transmitted directly to it and to nobody else.

79. Further, the Principal Counsel notes the importance of the Presidency's role in judicial supervision of the implementation of reparations. In fact, in the event where difficulties arise with local implementation partners or with victims, it is vital for the Court to provide judicial follow-up to ensure that reparations respect the principles identified in the instant case.

3. Required flexibility at the stage of checking the eligibility of victims⁹⁹

80. The Principal Counsel submits that a large number of victims who will come forward to benefit from reparations have neither identification nor the means – financial, logistical or even administrative – of obtaining identification. Consequently, she considers that the verification process which the TFV will carry out must necessarily be flexible with respect to the type of requisite supporting documentation, in order not to act against the very essence of the reparations procedure.

81. The Principal Counsel also wishes to draw the attention of the Chamber to the fact that, whereas some of her clients benefit from the Court's protection programme, some of the victims who ought to benefit from reparations are now dispersed within the DRC and further afield.¹⁰⁰ In addition, the Chamber acknowledges that beneficiaries of reparation orders may be both direct and indirect victims of the crimes of which Mr Lubanga was found guilty. Reparations implemented by the TFV must therefore cover all victim

⁹⁹ The Principal Counsel also refers to the observations in this respect contained in the Registry Report of 30 October 2015 attached to the TFV's Draft. See the "Confidential redacted version of Annex I to Filing on Reparations and Draft Implementation Plan", footnote 16 above, pp. 5-6, 8-10 and, *inter alia*, footnotes 245-259.

¹⁰⁰ See the "Observations on issues concerning reparations", footnote 22, above, para. 13. See also, Observations of LIPADHOJ, footnote 5, above, para. 9.

beneficiaries. Hence, the collective reparations that are planned for Ituri exclusively could exclude victims who have left the DRC, unless an “individual” approach to trace them is adopted. However, the successful inclusion and integration of such victims, not in Ituri at present, could facilitate their return to their families and communities if they desire. Consequently, the Principal Counsel does not share the TFV’s conclusion that such victims will not benefit from reparations because of its limited resources.¹⁰¹ She suggests the setting up of coordination with legal representatives of victims so as to include as many prospective victim beneficiaries as possible.

82. Moreover, the Principal Counsel insists on the individual dimension which reparations may be given in the collective projects implemented. Without challenging the Chamber’s decision regarding collective reparations, and in order to take into account the fact that internationally recognised human rights are usually exercised on an individual basis, the Principal Counsel expresses the need for the TFV to ensure that the type of project implemented sufficiently recognises each individual’s value, as well as his or her place as a person enjoying rights within his or her society.¹⁰²

83. Regarding the eligibility of victims for reparations, the Principal Counsel reiterates the arguments set out in the observations dated 18 April 2012. Considering the nature of the crimes of which Mr Lubanga was found guilty, and setting aside the specific harm that each prospective victim beneficiary suffered, the Principal Counsel submits that, additionally, they all suffered harm relating to their life plan:¹⁰³

¹⁰¹ See Draft, footnote 2 above, paras. 26-27.

¹⁰² See the “Observations on issues concerning reparations”, footnote 22 above, para. 17. See also, International Center for Transitional Justice (ICTJ, Lisa Magarrell), *Reparations in Theory and Practice*, p. 3. The document is accessible at: <http://ictj.org/publication/reparations-theory-and-practice> See also, the “Public Redacted Version of ICC-01/04-01/06-2803-Conf-Exp-Trust Fund for Victims’ First Report on Reparations”, footnote 61, above, para. 18.

¹⁰³ See the “Observations on issues concerning reparations”, footnote 22, above, para. 60.

which deals with the full self-actualisation of the person concerned and takes account of her calling in life, her particular circumstances, her potentialities, and her ambitions, thus permitting her to set for herself, in a reasonable manner, specific goals, and to attain those goals. [...] acts that violate right seriously obstruct and impair the accomplishment of an anticipated and expected result and thereby substantially alter the individual's development. In other words, the damage to the "life plan", understood as an expectation that is both reasonable and attainable in practice, implies the loss or severe diminution, in a manner that is irreparable or reparable only with great difficulty, of a person's prospects of self-development.¹⁰⁴

C. Observations concerning the role of victims' lawyers in implementing the Draft plan

84. The Principal Counsel emphasises, lastly, the need to involve the OPCV and the other legal representatives of victims in the methodology for initiating the reparations procedure. In this respect, the Principal Counsel notes that the other lawyers of victim beneficiaries in the instant case also seem to be in favour of being involved in the reparation process proper, in order to assist or represent their clients effectively.¹⁰⁵

85. The Principal Counsel considers that the victims could be assisted by their lawyers, *inter alia* during meetings organised by the TFV with communities to present the projects. Hence the need for the TFV, at the request of the victims to put them in contact with their lawyers (in the instant case, the OPCV); to set up a special representation mechanism taking account of the specific categories of prospective victims; to determine the most appropriate procedure to ensure that each of the victims can give valid, informed consent to the reparations proposed; and to identify the appropriate form of reparations

¹⁰⁴ See IACHR *Loayza-Tamayo v. Peru*, Reparations and Costs, Judgment of November 27, 1998, Series C No. 42, paras. 147 and 150. The Judgment is accessible at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_42_ing.pdf

¹⁰⁵ See the "Observations on the sentence and reparations by Victims a/0001/06, a/0003/06, a/0007/06, a/00049/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0523/08, a/0610/08, a/0611/08, a/0053/09, a/0249/09, a/0292/09, a/0398/09, and a/1622/10", footnote 44, above, para. 50.

on a case-by-case basis in the light of the types of loss suffered by their clients and the needs they expressed.

86. For example, at the Extraordinary Chambers, rules 23 *quinqüies* 3(b) and 80 *bis* of the Internal Rules state that the Trial Chamber may order legal representatives of civil parties to provide further specification of the substance of the awards they intend to request in the reparations procedures. The legal representatives therefore have the duty of specifying both the substance and the mode of implementation of each award.¹⁰⁶ Although it does not necessarily take that form, the Principal Counsel nonetheless highlights the important role conferred upon to victims' lawyers in the reparations procedures before the Court. Each victim beneficiary must be able to count on the assistance, explanations and oversight of his or her lawyer during this important procedure.

87. Whereas – like the TFV – the Principal Counsel recognises that, at this stage in the procedure, it is not possible to produce a comprehensive list of victim beneficiaries for reparations, it is nonetheless important that, once identified, they should have access to legal assistance from their respective lawyers.

88. The Principal Counsel emphasises, in addition, the critical role that each victim's lawyer will play in ensuring that there is an individual component in the collective reparations that will be implemented. In this respect, whereas, on the basis of available resources and the needs identified, the Chamber opted for collective reparations in the instant case, the individual character which they can and must exhibit is unavoidable. The presence and the assistance of the legal

¹⁰⁶ See ECCC, Internal Rules [Rev. 9], 16 January 2015, rules 23 *quinqüies* 3(b) and 80 *bis*. The document is accessible at: https://www.eccc.gov.kh/sites/default/files/legal-documents/Internal_Rules_Rev_9_Eng.pdf See also, De Brouwer (A.-M) and Heikkilä (M.), "Victims issues: Participation, Protection, Reparation, and Assistance", in Sluiter (G.), Friman (H.), Linton (S.), Vasiliev (S.) and Zappala (S.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, First Edition, 19 May 2013, p. 1364.

representative at each stage of the implementation of reparations will ensure follow-up of the individual component.

89. Another important aspect worth emphasising is the need to organise and coordinate explanations which will be given in Ituri about reparations, either to set the stage for the implementation of reparations or as a first step in the implementation procedure. Like the TFV,¹⁰⁷ the Principal Counsel insists on the need to plan ahead for the period during which reparations will be implemented and how this will affect communities composed not only of the victims of the crimes committed by Mr Lubanga but also of the victims of the crimes for which Mr Ntaganda is being tried. The Principal Counsel therefore suggests the need for clear identification as soon as possible of those involved in the communication about reparations and, once they have been identified, the need to set up formal or informal coordination for them to reach common ground on the priorities and objectives of the information to be provided by each of them in carrying out their mandate. Such coordination will enable the Court to ensure that the best interests of the victims are taken into account and protected, irrespective of whether they are victims in *Lubanga* or *Ntaganda*.

90. The Principal Counsel notes, moreover, that, as a result of the poverty prevalent in Ituri, special emphasis must be laid on the message and the explanations provided during the implementation of reparations. Failing this, an outbreak of tension is likely within the communities and in areas where victims of both cases live alongside each other. In fact, the misunderstanding which this may provoke could generate new tension which, in addition to having a very negative impact on the affected communities and lasting peace, may compromise the implementation of reparations themselves. It may be expected that discontented communities will put pressure on the organisations responsible for the implementation of reparations. In fact, if the organisations

¹⁰⁷ See Filing, footnote 2 above, para. 11. See also, Draft, footnote 2 above, paras. 20-22.

are local bodies – which makes them more sensitive to peer pressure – it is possible that reparations may not be implemented.

CONSEQUENTLY, the Principal Counsel respectfully requests Trial Chamber II to take into consideration the above observations in the reparations procedure in the instant case.

[signed]

Paolina Massida

Principal Counsel

Dated this 1 February 2016

At The Hague, the Netherlands