Separate Opinion of Judge Eboe-Osuji

1. To all close observers, the actualisation of the victims' interests in the processes of this Court—including in the matter of reparation—remains a difficult ideal. Still, no effort must be spared in the bid to make it work. Such is the consideration that impels me to accept the judgment without dissent, in spite of certain elements in it that stir concern. Yet, those elements need highlighting. It is for that reason that I write separately.

*

2. But, before getting to the main matter, there is a certain issue of nomenclature. I note that the decision of the Trial Chamber is replete with the terminology of 'child soldiers',[1] ostensibly as an axiomatically correct designation for children who had been conscripted or enlisted into armed forces or groups. It is not an ideal terminology. I find much persuasion with the central thesis of Simon O'Connor's essay titled 'Why a child is not a soldier.'[2] He essentially argues that attributing to a child the moniker of 'soldier' does not appreciably illumine the essence of the violation:[3] which is always to place the opprobrium of the crime upon the adults who instrumentalise children into military enterprises in which the children have no say—a most pernicious form of child abuse. Nor is the moniker sensible as a matter of proper legal characterisation. If the law forbids the conscription or enlistment of a child into an armed force or group, it becomes a legal misnomer casually to foist the title of 'soldier' upon him or her by the simplistic process of linguistic usage. O'Connor's re-conceptualisation more appropriately extends the protection of humanitarian law to those highly vulnerable persons.

3. It may indeed be noted that the Statute, by virtue of article 8(2)(b)(xxvi) and (e)(vii), does not use the term 'child soldiers' to describe the relevant prohibition. Notably, those provisions proscribe as a war crime '[c]onscripting and enlisting

---

[1] *E.g.* Impugned Decision, paras 31, 67, 87, 89, 142, 164, 169, 197, 198, 216, 217, 221, 224-229, 236, 238, 241. In the original French version, the term '*enfants soldats*' was used.
[2] Simon O'Connor, 'Why a child is not a soldier' in Chile Eboe-Osuji (ed.) *Protecting humanity: essays in international law and policy in honour of Navanethem Pillay* (2010) (hereinafter: 'O'Connor') 237-273.
[3] O'Connor 263.

children under the age of fifteen years into [...] armed forces or using them to participate actively in hostilities.' When the attraction of catchy monikers runs the risk of refracting ready emotional understanding of odious crimes, it is much better to use statutory designations, though prosaic, that describe the crime more accurately. In the circumstances, 'children [criminally] conscripted or enlisted into armed forces or groups and used to participate actively in hostilities'—which approximates the statutory language and tenor—is a more appropriate terminology than to call them 'child soldiers'.

**

4. Turning now to the substantive matter of this opinion, I concur with my esteemed colleagues that amongst the 'rights' protected in rule 97(3) of the Rules is the right of a convicted person to have reasonable opportunity to know and confront the allegations levelled against him by potential victims.[4] The law protects this right as part of its due processes. But, the right must be made meaningful: notably in the sense that the primary burden rests with the party claiming relief to demonstrate that the allegations are true.

5. At the same time, I recognise the practical challenges arising from the cases brought before this Court. They typically involve crimes that affect a multitude of victims. The resulting volume of evidence capable of supporting victims' claims is often copious. There is no doubt, then, that these situations of mass criminality call for good sense—even flexibility—in the procedures employed to assess the claims. Flexibility has certainly been overarching in this case.

6. I accept that in the particular circumstances of this case, reparation could take the *collective* approach, in hopes of slaking at least the thirst for justice on the part of all of the potential victims:[5] for all too often, justice itself is incapable of making victims whole again. Indeed, where harm was suffered on a collective basis—such as

[4] *See* Today's Judgment of the Appeals Chamber, paras 248, 256. I acknowledge that this finding is made in the judgment only in response to the relatively narrow issue raised under Mr Lubanga's third ground of appeal; that is, whether certain names and other identifying information may be redacted from victims' applications for reparation when transmitted to the convicted person. *See also* *Lubanga* Amended Reparations Order, para 49.
[5] Impugned Decision, paras 192-194, 288.

where a cultural monument was damaged or destroyed during war—the collective approach to reparation would be the most appropriate.[6]

7. However, it is my view that reparation could also be achieved through the *individualised* approach—and that all efforts must be exhausted in that direction before resorting to the *collective* approach—where harm was suffered on an *individualised* basis. In those circumstances, it would be preferable for the Trial Chamber to assess victims' eligibility before it sets the amount of the convicted person's liability for reparation. As a matter of legal practice and precedent, this makes more sense. For, generally speaking, the most compelling evidence concerning the harm that a victim has suffered (for purposes of punitive responsibility) is the evidence submitted by that victim to prove harm (for purposes of reparation). The Trial Chamber would then assess such evidence, thus better enabling it to make proper findings as to the total number of eligible victims. This finding would, in turn, directly underlie the Trial Chamber's determination of the scope and extent of harm and the resulting cost to repair that harm.[7] To reverse the process would amount, in a manner of speaking, to an awkward approach that puts the proverbial cart before the horse.

8. But, more fundamentally, as a matter of law, following the correct approach (where the Trial Chamber's assessment of victims' eligibility takes place before it sets the amount of the convicted person's liability) would preserve the convicted person's internationally recognised due process right[8] to a meaningful opportunity to challenge the reparation claims in a way that would have an impact on the final reparation award. Moreover, such an approach, whereby an order of the Trial Chamber would set out the eligible victims, gives meaning to both the victims' and convicted person's right to seise the Appeals Chamber of an appeal, in an orderly way, under article 82(4) of the Statute in relation to the eligibility assessment.

[6] This does not exclude the possibility that such damage may, in some cases, also give rise to harm suffered on both a collective *and* individual basis.
[7] *See* *Katanga* Judgment on Reparations, para 72.
[8] *See* UN Basic Principles on the Right to Reparation (2005), article 27, stating, '[n]othing in this document is to be construed as derogating from internationally or nationally protected rights of others, in particular the right of an accused person to benefit from applicable standards of due process'.

9. Our judgment today gives an ostensibly 'victim-friendly' reading to the Court's statutory framework. Without more, there may be nothing wrong with that approach, as long as rights of convicted persons are respected, as required by international standards.[9] But, difficulty arises when Trial Chambers are permitted to make reparation awards against convicted persons for the benefit of unidentified persons who have not yet requested, or who may never request, reparation. It thus raises a question whether this approach is truly 'victim-friendly' or only so in appearance. Given that one of the important features of this Court's processes is that victims may express their views and concerns, I favour a system that properly gives meaning to (and promotes) the participation of victims in the judicial assessment of reparation. Victims should be consulted individually for a fuller appraisal of the harm they suffered individually and what would be commensurate reparation for them. The final order should fully acknowledge their victimhood with supportive factual findings. Indeed, one of the primary purposes of reparation under international law is to allow victims' stories to be told and their individual suffering to be recognised in the form of a reparation order.[10] In the face of individual harm, justice should not be based merely on convenient statistical approximations.

10. I commend the Trial Chamber in this case for attempting to repair the full extent of the harm. However, as explained above, one must not lose sight of the fact that the assessment of reparation pursuant to article 75 of the Statute is a judicial process.[11] Factual findings must be based upon solid evidence, particular to those victims to whom a convicted person is held liable to make reparation. In this regard, I question whether the documentary evidence relied upon is sufficient to allow Mr Lubanga to contest the eligibility of individual victims in a meaningful way. Of further concern is that the Trial Chamber did not perform an assessment of the evidence to determine whether any of the 'hundreds and possibly thousands more victims' is a natural

[9] *See* UN Basic Principles on the Right to Reparation (2005), article 27.
[10] *See* *Kaing Guek Eav* Appeal Judgment, para 661, referring to the importance of 'victims' identification and individual recognition in the final judgment'.
[11] I recall that the Appeals Chamber previously determined in this case that it is 'beyond question that a person subject to an order of a court of law must know the precise extent of his or her obligations arising from that court order, particularly in light of the corresponding right to effectively appeal such an order, and that the extent of those obligations must be determined by a court in a judicial process' (*Lubanga* Appeals Judgment on Reparations, para. 237).

person who truly suffered harm as a result of the crimes of which Mr Lubanga was convicted, in accordance with rule 85(a) of the Rules.[12]

11. To conclude this point, there is the concern that confirming the decision to fix Mr Lubanga's liability at US$ 6 600 000 in respect of 'any other victims who may be identified',[13] but who remained unidentified at the time of the order, may improperly detract from due process and set an undesirable precedent as to what may be permitted under the guise of a 'collective' approach to reparation. More generally, I worry that, in confirming the Impugned Decision, today's judgment may readily lend itself to the reading that a decision that collective reparation is more appropriate may permit a Trial Chamber to avoid the usual procedures for proof of individual claims. I urge caution in resorting to such an approach in future cases.

12. In making this point, I recognise that the Trial Chamber, in its discretion, opted to defer the assessment of individual eligibility of the 'hundreds and possibly thousands more victims' to a later stage, and to issue the reparation award against Mr Lubanga before that assessment. However, while trial chambers should have a reasonable margin of appreciation in assessing reparation, it must be emphasised that such margins are also reasonably constrained by the requirements of due process of the law in which defendants also have rights that must be respected. It does distort the idea of the burden of proof, if a convicted person is held liable for reparation in favour of a victim before that victim has proved his or her eligibility. The procedure for the demonstration of eligibility should be the natural and logical antecedent to the reparation award.[14]

13. Of course, there may be many more victims of Mr Lubanga's crimes than those who came forward at the reparation stage. The Trial Chamber correctly noted this fact

---

[12] *See* *Lubanga* Appeals Judgment on Reparations, paras 211-215, finding an error in the use of 'broad formulations' that 'may lead to the inclusion of persons who do not meet the above-mentioned criteria and would be inconsistent with rule 85 (a) of the [Rules]'.

[13] Impugned Decision, p 111.

[14] I recall the Appeals Chamber's pronouncement in this case that, '[i]n the reparation proceedings, the applicant shall provide sufficient proof of the causal link between the crime and the harm suffered' (*Lubanga* Appeal Judgment on Reparations, para 81; *See also* *Lubanga* Amended Reparations Order, paras 22 and 57). This principle was not expressly limited only to individual reparation. Moreover, I note that this is consistent with the approach taken in *Katanga*, where all of the victims who were granted collective reparation provided documents proving their eligibility (Trial Chamber II, 'Order for Reparations pursuant to Article 75 of the Statute', 24 March 2017, ICC-01/04-01/07-3728-tENG, paras 45, 71-73).

in the Impugned Decision.[15] I further recall that a trial chamber is given the mandate to 'determine the scope and extent of any damage, loss and injury'.[16] However, it is not the role of a reparation chamber to guess as to the number of potentially eligible victims.[17] If, in its inquiry, a reparation chamber determines, as it did in this case,[18] that the number of potential victims who did not make requests is not ascertainable, then the litigation in respect of those victims may need to be brought to an end in a reasonable way—as a necessary feature of individual criminal responsibility. But, as explained below, this does not mean that that subsequently identified victims are left without remedy in the manner of reparation.

14. Rather, in situations where a trial chamber considers that there are many potential victims who have not come forward,[19] it may be preferable for the chamber to process the claims of those who have come forward and presented reparation claims. The chamber may then refer the still unidentified victims to the TFV who, through their assistance mandate, may assist victims who will come later. The TFV may use its resources other than those collected from awards for reparation, fines and forfeitures, to fund its mandate to enable victims and their families who have suffered physical, psychological or material harm to receive assistance separately from, and prior to, a conviction by the Court.[20] In successive resolutions, the Assembly of States

---

[15] Impugned Decision, para 238.
[16] Article 75 (1) of the Statute.
[17] *See* Appeals Chamber, *Situation in Uganda*, "Judgment on the appeals of the Defence against the decisions entitled 'Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06' of Pre-Trial Chamber II", 23 February 2009, ICC-02/04-179 (OA) and ICC-02/04-01/05-371 (OA2), para. 36, holding that 'it is an essential tenet of the rule of law that judicial decisions must be based on facts established by evidence. Providing evidence to substantiate an allegation is a hallmark of judicial proceedings; courts do not base their decisions on impulse, intuition and conjecture or on mere sympathy or emotion. Such a course would lead to arbitrariness and would be antithetical to the rule of law. When a Pre-Trial Chamber is considering whether an applicant fulfils the criteria of rule 85 (a) of the Rules of Procedure and Evidence because he or she suffered emotional harm as the result of the loss of a family member, it must require proof of the identity of the family member and of his or her relationship with the applicant. The Chamber must be satisfied that the family member existed and that he or she had the requisite relationship with the applicant'.
[18] Impugned Decision, paras 232-233.
[19] I also note that there are, in this case, other practical considerations justifying reliance on the TFV. Mr Lubanga has been found to be indigent and the TFV has so far elected to complement the reparation award with EUR 3 850 000.
[20] Regulations 47-48, 50(a) of the Regulations of the TFV; TFV, 'Public Redacted Version of ICC-01/04-01/06-2803-Conf-Exp-Trust Fund for Victims' First Report on Reparations', 1 September 2011, ICC-01/04-01/06-2803-Red, para. 121; 'Report to the Assembly of States Parties on the projects and the activities of the Board of Directors of the Trust Fund for Victims for the period 1 July 2017 to 30 June 2018', ICC-ASP/17/14 (2018), p 10.

Parties has called upon governments, international organisations, individuals, corporations and other entities to contribute voluntarily to the TFV for this purpose.[21]

15. In the same vein, and as I have explained on previous occasions, reparation under the Statute need not depend entirely on conviction.[22] It is certainly correct to require a defendant to pay reparation upon conviction. The same was contemplated to a degree under the statutes of the ICTR[23] and the ICTY.[24] But, that is not the same thing as saying that victims are not entitled to reparation under the more elaborate reparation scheme of the Rome Statute, unless there had been a conviction. I note that the TFV has rightly explained that its 'assistance' mandate operates without prejudice to the guilt or innocence of the person subject to investigation or prosecution,[25] and without prejudice to its other mandate to set aside funds for complementing awards for reparation.[26] As a practical matter, not much will turn on the nomenclature of 'reparation' in contrast to 'assistance'. It is more important that efforts are made to repair the demonstrable harm that victims suffered, notwithstanding the successful apprehension and eventual conviction of the right culprit. Where all value for such repair is placed on a stylised idea of 'reparation', as following conviction, one questions whether many victims will really value such an idea of 'reparation' that follows the conviction of an indigent convict, as opposed to substantive 'assistance' such as the TFV is able to give in the circumstances regardless of the question of conviction.

16. It is notable, in this connection, that the TFV has stated in this case that the measures it will take to repair harm will 'necessarily and genuinely need to include broader communities', and that it may repair harm through its assistance mandate that

---

[21] *See* ICC-ASP/3/25, Resolution ICC-ASP/3/Res.7 (10 September 2004); ICC-ASP/6/20, Resolution ICC-ASP/6/Res.3 (14 December 2007). *See also* 'Report to the Assembly of States Parties on the projects and the activities of the Board of Directors of the Trust Fund for Victims for the period 1 July 2017 to 30 June 2018', ICC-ASP/17/14 (2018), p 3.
[22] *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, 'Dissenting Opinion to Decision on the Requests regarding Reparations', 1 July 2016, ICC-01/09-01/11-2038-Anx, paras 12-13.
[23] See ICTR Statute, article 23(3).
[24] See ICTY Statute, article 24(3).
[25] *E.g.* TFV, 'Notification by the Board of Directors in accordance with Regulation 50(a) of the Regulations of the Trust Fund for Victims of its conclusion to undertake further activities in Uganda', 19 December 2018, ICC-02/04-229, para 16.
[26] TFV, 'Public Redacted Version of ICC-01/04-01/06-2803-Conf-Exp-Trust Fund for Victims' First Report on Reparations', 1 September 2011, ICC-01/04-01/06-2803-Red, paras 128-136.

goes beyond the scope of the charges.[27] Indeed, during the nearly nine years that this case has been in litigation under article 75 of the Statute, the TFV has, under its assistance mandate in both the DRC and Uganda, reached *inter alia* survivors of sexual and gender-based violence, children (male and female) who had been conscripted or enlisted in armed groups, disabled persons and amputees, disfigured and tortured persons, and other vulnerable children and young people, including orphans.[28] All of the foregoing practical and legal considerations put in sharp relief the need to emphasise the assistance mandate as the more serviceable option under the Rome Statute to address victims' suffering. This is so, both in respect of situations where proceedings at the Court do not result in a conviction, and also those in which not all victims manage to come forward during the reparation proceedings taking place before a trial chamber.

Done in both English and French, the English version being authoritative.

Judge Chile Eboe-Osuji

Dated this 18th day of July 2019

At The Hague, The Netherlands

[27] TFV, 'Observations of the Trust Fund for Victims on the Appeals Against Trial Chamber I's "Decision Establishing the Principles and Procedures to be Applied to Reparations"', ICC-01/04-01/06-3009, paras 167-172. *See also* *Lubanga* Appeals Judgment on Reparations, referring to the TFV's mandate and stating that '[t]he meaningfulness of reparation programmes with respect to a community may depend on inclusion of all its members, irrespective of their link with the crimes for which Mr Lubanga was found guilty', para 215.
[28] TFV Annual Report, 2017, pp 7, 26-38.