



Original: **English**

No.: **ICC-01/04-01/06**

Date: **10 May 2012**

TRIAL CHAMBER I

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

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

PUBLIC

Observations of the Women's Initiatives for Gender Justice on Reparations

Source: The Women's Initiatives for Gender Justice

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

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I. Introduction

1. The Women's Initiatives for Gender Justice ("the Women's Initiatives") respectfully submits its observations on reparations in response to the Trial Chamber's "Decision granting leave to make representations in the reparations proceedings" of 20 April 2012.
2. For details about the Women's Initiatives and its interest in the case, please see the request for leave to participate in the reparations proceedings submitted on 28 March 2012.¹

II. Relevant procedural background

3. On 14 March 2012, Trial Chamber I issued a "Judgment pursuant to Article 74 of the Statute" ("Judgment") convicting Thomas Lubanga Dyilo ("Mr Lubanga") of the war crimes of conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities within the meaning of Articles 8(2)(e)(vii) and 25(3)(a) of the Statute from early September 2002 to 13 August 2003.² Judge Odio Benito issued a Separate and Dissenting Opinion. Judge Fulford appended a Separate Opinion.
4. On 14 March 2012, the Trial Chamber issued a "Scheduling order concerning timetable for sentencing and reparations" inviting other individuals or interested parties to apply in writing by 28 March 2012 for leave to participate in the proceedings should they wish to file observations.³

¹ Women's Initiatives for Gender Justice, *Women's Initiatives for Gender Justice request for leave to participate in reparations proceedings*, ICC-01/04-01/06-2853, 28 March 2012, paras 37-41.

² Trial Chamber I, *Judgment pursuant to Article 74 of the Statute*, ICC-01/04-01/06-2842, 14 March 2012 (hereinafter 'Judgment').

³ Trial Chamber I, *Scheduling order concerning timetable for sentencing and reparations*, ICC-01/04-01/06-2844, 14 March 2012, para 10 (hereinafter 'Scheduling Order').

5. In response to this invitation, the Women's Initiatives submitted a request for leave to participate in the reparations proceedings on 28 March 2012,⁴ which was granted by the Trial Chamber on 20 April 2012.⁵

6. In the decision granting leave, the Trial Chamber granted the Women's Initiatives leave to make written observations in accordance with paragraph 8 of the Scheduling Order. The Scheduling Order invited submissions on the following issues:
 - i. whether reparations should be awarded on a collective or an individual basis (see Rule 97(1) of the Rules);
 - ii. depending on whether there should be individual or collective reparations (or both), to whom are they to be directed; how harm is to be assessed; and the criteria to be applied to the awards;
 - iii. whether it is possible or appropriate to make a reparations order against the convicted person pursuant to Article 75(2) of the Statute;
 - iv. whether it would be appropriate to make an order for an award for reparations through the Trust Fund for Victims pursuant to Article 75(2) of the Statute; and
 - v. whether the parties or participants seek to call expert evidence pursuant to Rule 97 of the Rules.⁶

7. The Women's Initiatives hereby submits its observations on questions (i), (ii), (iii) and (iv), above.

⁴ Women's Initiatives for Gender Justice, *Women's Initiatives for Gender Justice request for leave to participate in reparations proceedings*, ICC-01/04-01/06-2853, 28 March 2012 (hereinafter 'Request for leave').

⁵ Trial Chamber I, *Decision granting leave to make representations in the reparations proceedings*, ICC-01/04-01/06-2870, 20 April 2012 (hereinafter 'Decision granting leave').

⁶ Scheduling Order, para 8.

III. Observations

8. The Women's Initiatives prefaces its observations by noting that the Rome Statute includes unique provisions among international courts and tribunals, requiring it to provide gender-inclusive justice. The Rome Statute not only includes gender-based crimes within the jurisdiction of the Court as war crimes, crimes against humanity and acts of genocide,⁷ but also contains specific provisions requiring the Court to apply and interpret law consistent with internationally recognised human rights and without any adverse distinction founded on grounds such as gender.⁸ The Rome Statute, Rules of Procedure and Evidence, and Regulations of the Court also provide specific provisions for women victims/survivors of gender-based crimes.⁹ We further note that gender discrimination is deeply rooted in most social and cultural contexts, including those giving rise to these reparations proceedings. In addition, women and girls experience conflict differently from men and boys,¹⁰ and often bear a disproportionate burden in situations of armed conflict. For these reasons we submit that it is necessary for the Trial Chamber to include specific gender-responsive methodologies in the process of consulting with victim/survivor communities as well as in the development of

⁷ See Rome Statute Article 6; Article 7(g); Article 8(2)(b)(xxii); Article 8(2)(e)(vi); and the corresponding articles of the Elements of Crimes (EoC).

⁸ Article 21(3) provides that the Court shall apply and interpret law consistent with internationally recognised human rights and without any adverse distinction founded on grounds such as gender as defined in Article 7(3) of the statute, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth, or other status.

⁹ Rule 86 of the Rules of Procedure and Evidence provides that "a Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with article 68, in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence". See also Article 68(1) and (2), Rules 16-17, 70-72, 88(1) and (5) of the Rules of Procedure and Evidence, and Regulation 34(2) of the Regulations of the Office of the Prosecutor. Pursuant to Article 54(1)(b), the Prosecutor is under the obligation to "[t]ake appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court... and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children". The Rome Statute also underscores the need for specific expertise and training on gender-based violence, including in the appointment of experts. See for instance Rome Statute Articles 36(8)(b), 42(9), and 43(6), Rule 17(2)(a)(iv) of the Rules of Procedure and Evidence, and Regulations 6 and 12 of the Regulations of the Office of the Prosecutor.

¹⁰ See also Trust Fund for Victims, *Observations on Reparations in Response to the Scheduling Order of 14 March 2012*, ICC-01/04-01/06-2872, 25 April 2012, para 74 (hereinafter 'Trust Fund observations on reparations').

reparative programmes. The Rome Statute further provides that the Court's establishment of principles on reparations, as well as any reparations orders or awards, should not prejudice the rights of victims under national and international law,¹¹ which would include principles applicable to victims of sexual violence. Ultimately, reparation strategies and initiatives themselves must effectively recognise and integrate gender issues in order for the particular needs of girls and women to be addressed and satisfied.

A. Whether reparations should be awarded on a collective or individual basis; and to whom reparations (individual and collective) are to be addressed

9. Rule 97(1) of the Rules of Procedure and Evidence allows the Court to award reparations on an individualised or collective basis, or both, taking into account the scope and extent of any damage, loss or injury.
10. The Women's Initiatives submits that in this case, the Court should order both collective and individual reparations, with an emphasis on collective reparations. In addition, the modalities of collective reparations should have individualised components and allow for the taking into account of individual considerations, for the reasons outlined below.

I. Collective reparations

11. The term collective reparations is used here to refer to both reparations for a specific group of people (for instance victims/survivors of gender-based crimes, former child soldiers, and former girl soldiers), as well as to a community (i.e. a village, region, or ethnic group), and in contrast to individual reparations, which are conceived of and awarded on the basis of the determination of harm to an individual. As also noted by other parties and

¹¹Article 75(6).

participants in this case, there is no single legal definition of collective reparations in international law;¹² and although substantial precedents exist for ordering collective reparations in a judicial context,¹³ the term is used to refer to multiple scenarios and configurations.¹⁴

12. The Trust Fund has provided a useful observation in distinguishing between collective reparations that are “inherently collective and exclusive” (such as specialised health services for a targeted group of victims), and collective reparations that are “community-oriented and not exclusive” (such as schools that benefit the entire community).¹⁵ We submit that both approaches would be appropriate in this case, and that certain harms, particularly those arising from gender-based crimes, require reparations with an “exclusive” element in order to meet the needs of individual victims/survivors within a collective context. However, we also emphasise the need for “non-exclusive” collective reparations, which, along with “exclusive” collective reparations, are important to effectuate the transformative function of reparations, particularly in respect of addressing ingrained gender discrimination within a community or society.

13. We support the Trust Fund’s suggestion that a “community-based approach” to collective reparations could be adopted, to redress the harm caused to the social fabric at the community level.¹⁶ However, we consider the “community-based approach” to be a mechanism for delivering reparations

¹² Trust Fund observations on reparations, para 173.

¹³ See for instance the following cases in which the Inter-American Court of Human Rights (IACtHR) awarded collective reparations in addition to individual reparations: IACtHR, *Aloeboeoe v. Suriname*, reparations, 10 September 1993; IACtHR, *Massacre of Plan de Sánchez v. Guatemala*, reparations, 19 November 2004; IACtHR, *Saramaka v. Suriname*, admissibility, merits, reparations and costs, 28 November 2007; IACtHR, *Rosendo Cantú and others v. Mexico*, Admissibility, merits and reparations, 16 November 2009; IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, judgement on the merits and reparations, 17 June 2005; IACtHR, *Cotton Field v. Mexico*, Admissibility, merits and reparations, 16 November 2009. The principles established in these cases can guide the Chamber pursuant to Article 21 of the Rome Statute.

¹⁴ Trust Fund observations on reparations, paras 154-174; Office of Public Counsel for Victims, *Observations on issues concerning reparations*, ICC-01/04-01/06-2863, 18 April 2012, paras 94, 96-97 (hereinafter ‘OPCV observations on reparations’).

¹⁵ Trust Fund observations on reparations, para 174.

¹⁶ Trust Fund observations on reparations, paras 153-171.

programmes, rather than a description of who direct beneficiaries of such programmes could be. In addition, we note that even in the design of reparations awards aimed at benefitting the community as a whole, the needs of specific groups of victims, in particular women and girls, must explicitly be taken into account, and care must be taken to avoid replicating discriminatory practices given the differences between and within the communities. We also note that in addition to the challenges of taking into account differences in the roles and situations of communities in the region, delineating such broad categories may have the unintended effect of diluting the impact of limited reparations. In this regard, we agree with the Trust Fund that the decisive factor in designing “appropriate” reparations¹⁷ should be victims’ best interests, taking into account general principles, including consideration of gender dimensions in both substance and process, and the need for reparations to provide a measure of reconciliation and transformation.¹⁸ We would emphasise the importance of an approach to reparations which fundamentally seeks to transform communal and gender relations through the development and implementation of programmes designed to achieve this goal.

14. In the *Lubanga* case, collective reparations are appropriate given that the harm suffered had multiple dimensions, and thus had an impact not only upon individuals, but also at the level of family, village, community, society, and ethnic group. This is true for former child soldiers, their families, communities, and ethnic groups, and is likewise true for the victims of crimes committed by the UPC.¹⁹ Examples of such harm include: rejection and stigmatisation of victims; a lack of young people with a minimum level of

¹⁷ As the Trust Fund noted, Rule 97 and 98(3) both contain the term “appropriate” as a requirement based on which the Chamber decides upon the type and modalities of the reparations order.

¹⁸ Trust Fund observations on reparations, para 178.

¹⁹ See also Trust Fund observations on reparations, para 154.

education, which affects the socio-economic prospects of a community; substance abuse, and gender-based violence.²⁰

15. In particular, collective reparations will be an important component of reparations programmes seeking to address the harms caused by sexual violence, which is a defining characteristic of the conflict in eastern Democratic Republic of Congo (DRC), and an integral component of each of the crimes for which Mr Lubanga was convicted.²¹

16. In the *Lubanga* case, the Court heard from the parties,²² participants,²³ and witnesses²⁴ about rape and sexual violence in the context of the UPC's enlistment, conscription and use of child soldiers. As the Women's Initiatives has stated, rape is an effective weapon of war because it relies on pre-existing norms, standards and belief-systems regarding gender inequality to create a breakdown within the community; to fracture individual and family networks; to splinter social and cultural connections; and to assert dominance, commonly ethnic dominance, through the use of acts already legitimised as the means of expressing such dominance, that is, through sexualised violence,

²⁰ Trust Fund observations on reparations, para 154.

²¹ Request for leave, paras 16-26; see also Judge Odio Benito, *Separate and Dissenting Opinion of Judge Odio Benito*, ICC-01/04-01/06-2842, 14 March 2012, para 21 (hereinafter 'Separate and Dissenting Opinion of Judge Odio Benito').

²² The Prosecution described the gendered aspects of the charges in its opening statements in January 2009 (ICC-01/04-01/06-T-107-ENG) and closing statements in August 2011 (ICC-01/04-01/06-T-356-ENG).

²³ The Legal Representatives of Victims detailed the specific abuse of girl soldiers in their opening statements in January 2009 (ICC-01/04-01/06-T-107-ENG) and closing statements in August 2011 (ICC-01/04-01/06-T-356-ENG). In addition, in a Joint Application filed on 22 May 2009, the Legal Representatives of Victims also sought to change the legal characterisation of facts to include inhuman and cruel treatment and sexual slavery to the existing characterisation (Legal Representatives of Victims, *Joint Application of the Legal Representatives of Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court*, ICC-01/04-01/06-1891, 22 May 2009).

²⁴ The following Prosecution witnesses testified about sexual violence committed against girl soldiers by the UPC: Witness 38 (ICC-01/04-01/06-T-114-ENG), Witness 299 (ICC-01/04-01/06-T-122-ENG), Witness 298 (ICC-01/04-01/06-T-123-ENG), Witness 213 (ICC-01/04-01/06-T-133-ENG), Witness 8 (ICC-01/04-01/06-T-138-ENG), Witness 11 (ICC-01/04-01/06-T-138-ENG), Witness 10 (ICC-01/04-01/06-T-144-ENG), Witness 7 (ICC-01/04-01/06-T-148-ENG), Witness 294 (ICC-01/04-01/06-T-151-ENG), Witness 17 (ICC-01/04-01/06-T-154-ENG), Witness 55 (ICC-01/04-01/06-T-178-Red-ENG), Witness 16 (ICC-01/04-01/06-T-191-Red2-ENG), Witness 89 (ICC-01/04-01/06-T-196-ENG), Witness 31 (ICC-01/04-01/06-T-202-ENG) and Witness 46 (ICC-01/04-01/06-T-207-ENG).

most commonly rape, predominantly against women.²⁵ Likewise, rape was used in this context, to sever ties between the child soldiers and their families and communities, and to assert dominance over the boys and girls in the context of the armed group.

17. One of the aims of reparations is to be transformative, in particular in addressing sexual violence and the conditions that existed prior to the conflict that may have contributed to these crimes and that may prevent the full rehabilitation and restoration of the rights of victims/survivors of sexual violence. Collective reparations can contribute to the transformative function of reparations by addressing existing gender inequalities within communities, advancing gender equality through the types of programmes funded and the type of support provided to victims' communities.²⁶ Ordering reparations in the *Cotton Field* case, the Inter-American Court of Human Rights stated that, bearing in mind the context of structural discrimination in which women had been sexually abused and murdered, "re-establishment of the same structural context of violence and discrimination is not acceptable".²⁷ We submit that any collective reparations ordered by the Chamber should be designed with this transformative function in mind, and be aimed to both rehabilitate

²⁵ Brigid Inder, 'Sexual Violence and the International Criminal Court', 2005, Cordaid Debate, on file with the Women's Initiatives. Women's Initiatives for Gender Justice, 'Presentation to the Board of the Trust Fund for Victims', 22 November 2007, on file with the Women's Initiatives. See also UN Security Council Resolution 1820, noting that "civilians account for the vast majority of those adversely affected by armed conflict; that women and girls are particularly targeted by the use of sexual violence, including as a tactic of war to humiliate, dominate, instil fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group and that sexual violence perpetrated in this manner may in some instances persist after the cessation of hostilities", S/RES/1820 (2008).

²⁶ Women's Initiatives for Gender Justice, 'Presentation to the Board of the Trust Fund for Victims', 6 November 2006, 22 November 2007, 3 June 2009, 21 March 2011, 20 March 2012, on file with the Women's Initiatives. See also Trust Fund observations on reparations, para 77, stating that: "the transformative quality of reparations [should] be explicitly addressed in the Court's principles with a view to eliminating the pre-existing inequalities that have led to or encouraged the violence".

²⁷ In the case *Cotton Field v. Mexico*, the IACtHR held that that "the concept of "integral reparation" (*restitutio in integrum*) entails the re-establishment of the previous situation and the elimination of the effects produced by the violation, as well as the payment of compensation for the damage caused. However, bearing in mind the context of structural discrimination in which the facts of this case occurred, which was acknowledged by the State [...], 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, re-establishment of the same structural context of violence and discrimination is not acceptable." See IACtHR, *Cotton Field v. Mexico*, Admissibility, merits and reparations, 16 November 2009, para 450.

individual victims/survivors of gender-based crimes and to contribute to the transition of society into a community based on non-violence and non-discrimination for all of its members.

18. Equally, reparation awards should support prevention strategies, particularly for the prevention of violence against children and women. By integrating these considerations into the design of the reparation awards, the Court will be able to respond to the violence that occurred and assist in preventing the repetition of gender-based violence in the ongoing context in the DRC. Again, collective reparations particularly at the community level, as well as directed towards specific groups, are important in this regard. Specific groups may include women and girls at risk, victims/survivors of sexual violence, and former child soldiers, and may also include training and capacity building directed towards the public, police, military, and community leaders.²⁸

19. Collective reparations may also directly and indirectly serve to address the shame and stigmatisation experienced by victims/survivors of gender-based crimes; directly in providing public education to the community about gender-based crimes and the needs and rights of victims/survivors, and indirectly by allowing victims/survivors to benefit from reparations programmes without being identified or having their experiences become public. In this regard, the Women's Initiatives agrees with the Trust Fund's observations that:

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

²⁸ In the *Cotton Field* case, the IACtHR, as part of its reparations order, ordered the Mexican State to design appropriate training programmes on gender discrimination and gender-based crimes for both public officials, as well as for the general public. Notably, the IACtHR held that "training with a gender perspective involves not only learning about laws and regulations, but also developing the capacity to recognize the discrimination that women suffer in their daily life. In particular, the training should enable all officials to recognize the effect Training of public officials and the general public on gender issues." IACtHR, *Cotton Field v. Mexico*, Admissibility, merits and reparations, 16 November 2009, paras 455, 540-543.

vulnerable groups of victims, including women and girls in the context of the crimes in the present case.²⁹

20. Collective reparations will allow the Court to reach unidentified victims, including women and girls. Given that a limited number of victims (129)³⁰ have been accepted to participate in the trial proceedings relative to the number of individuals and communities affected by the crimes and the conflict, and that as of 28 March 2012, the Registry had received only 85 individual applications for reparations,³¹ it is important that reparations be designed with the potential to reach unidentified victims, in particular women and girls. The most recent public statistics on the gender breakdown of participating victims in the *Lubanga* case indicate that approximately 26% of participating victims are female,³² demonstrating that the Court has thus far had a limited ability to reach women and girl victims/survivors through its formal application processes.³³

21. In this regard, it is also worth noting that failure to incorporate a gender perspective in devising the reparations strategy would have a discriminatory impact on women and girl victims, in violation of international human rights standards and the Chamber's obligations under Article 21(3) of the Statute. Failure to consider women's and girls' distinct needs and concerns at the

²⁹ Trust Fund observations on reparations, para 167.

³⁰ While a total of 129 victims had been granted participatory status at the time of the Judgment, we note that a number of these victims had their status revoked by the Trial Chamber in the trial Judgment.

³¹ Registry, *First Transmission to the Trial Chamber of applications for reparations*, ICC-01/04-01/06-2852, 28 March 2012.

³² Trial Chamber I noted that of the 129 victims, 34 are female and 95 are male victims. Trial Chamber I, *Summary of the "Judgement pursuant to Article 74 of the Statute*, ICC-01/04-01/06-2843, 14 March 2012, para 15 (hereinafter 'Summary of Trial Judgment'). For an analysis of the gender breakdown of victim participants in all cases and Situations, including the *Lubanga* case, see Women's Initiatives for Gender Justice, *Gender Report Card on the International Criminal Court 2011*, p 272-291.

³³ The last available public statistics about the Court's outreach activities indicates that of the Court's general Outreach Programmes in 2011 only 9% of its activities were directed exclusively to women in the Central African Republic (CAR), the DRC, Sudan and Uganda. No gender breakdown is currently available for the Court's activities in Kenya. Out of the four Situations for which figures on attendance by women are available, activities in the CAR have the strongest participation of women (44%). In the DRC, 35% of attendees are women. In relation to the Darfur Situation, 17% of attendees were women. In Uganda, 7% of attendees at outreach activities were women. See Women's Initiatives for Gender Justice, *Gender Report Card on the International Criminal Court 2011*, p 34.

reparations phase of proceedings would further compound the disparate impact upon them resulting from the Prosecution's selective charging strategy. Furthermore, in addition to the general obligation under Article 21(3) to ensure that the law is applied and interpreted in a non-discriminatory way, the Chamber is also specifically obliged under Article 75(6) to ensure that its interpretation of the relevant statutory provisions on reparations does not provide for a lower standard of victims' rights than that already recognised by national or international human rights law.

22. As discussed below, limiting reparations to individuals whose application for victim participation status and reparations have been accepted would likely have an unintended exclusionary effect on women and girls who may be reluctant to come forward due to fears of stigmatisation or other obstacles preventing their access to services and justice generally. Collective reparations, especially those specifically addressing women's needs, may be necessary to ensure their accessibility to female victims.

23. During the reparations phase of proceedings, the Court may undertake the identification of other victims, for example by publicising reparations proceedings through radio or other means. In any attempt to identify other victims who may qualify for reparations, particular attention must be given to circumstances that may prevent victims/survivors from coming forward, in particular women and girls, and strategies designed to ensure equal access to the proceedings should be employed. Any further calls for applications should also be mindful of raising expectations or overwhelming the programme, and should include security measures to ensure minimal exposure and security risk to victims/survivors. Should further identification of victims for the purposes of reparations be undertaken, the Women's Initiatives would recommend coordinating with the Trust Fund for Victims and making use of their expertise in this area.

24. In respect of the specific modalities of collective reparations, we note at the outset that victims/survivors should be consulted and participate in the design of reparations programmes,³⁴ whether collective or individual. Such consultations should be conducted by a person or body with expertise on reparations for gender-based crimes. As noted by the Trust Fund, the reparations process in itself can be restorative if it allows victims/survivors to be involved in all stages of the process.³⁵ We provide further submissions on conducting gender-sensitive consultations in section A.III, below.

25. Specifically, modalities of collective reparations could include: rehabilitation programmes providing medical and psychosocial support to victims/survivors, specifically victims/survivors of gender-based crimes; support for rape crisis and health centres providing medical and psychosocial support for women to assist in their recovery from sexual violence, including sexual and reproductive health services and treatment of STDs and HIV/AIDS infections; social rehabilitation and demobilisation programmes for former child soldiers; the establishment of medical and psychosocial services and medical centres with specific expertise in addressing childhood trauma and working with child soldiers; community-wide anti-violence programmes; human rights and legal education programmes informing women of their rights to live free from violence; and community education programmes that are also directed towards men and encourage and embrace male community leaders in supporting these initiatives.³⁶

³⁴ See also Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation (2007), para 2(B).

³⁵ Trust Fund observations on reparations, para 98. See also Trust Fund for Victims, *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, 1 September 2011, paras 186, 273-282.

³⁶ Women's Initiatives for Gender Justice, 'Presentation to the Board of the Trust Fund for Victims', 21 April 2004, 6 November 2006, 22 November 2007, 21 March 2011, 20 March 2012, on file with the Women's Initiatives for Gender Justice. See also Office of the Prosecutor, *Prosecution's Submissions on the principles and procedures to be applied in reparations*, ICC-01/04-01/06-2867, 18 April 2012, paras 14-15, 19-20 (hereinafter 'Prosecution submissions'); Trust Fund observations on reparations, paras 169-172; OPCV observations on reparations, paras 14-18.

26. When considering cultural and customary norms in reparations awards, care should be taken not to continue or reflect structural inequalities that perpetuate women's unequal status within the family and community.

II. Individual reparations

27. In respect of individual reparations, while we believe that the Court should emphasise collective reparations, based on the reasons outlined above, we also acknowledge the value of combining individual and collective reparations or, at a minimum, ensuring that there is consideration of individual needs in the context of collective reparations.

28. Providing for individualised components within collective reparations is important for a number of reasons. The Court acknowledges individuals in the victim participation process and through applications for reparations. Individuals who have participated in the justice process have done so at risk to themselves and their families, and have functioned in the judicial process as representatives for larger communities of victims/survivors. Certain modalities of reparations that may be particularly appropriate for former girl soldiers are necessarily individualised, such as providing mediation to assist returning former girl soldiers with reintegration into their families, as well as assistance with obtaining documentation of identity and demobilisation that may be necessary in order to access other services. Furthermore, acknowledgement of the individual and differentiated experiences of victims/survivors is key to restoring their rights that have been violated or eroded in the conflict, and for their personal healing and well-being.

29. We also note that, in particular, the needs of vulnerable people and victims/survivors may not be met through collective reparations strategies,

and therefore an effort must be made to address these individual needs in certain cases. In this regard, their vulnerability should be assessed now, and not at the time of the crimes.

30. However, individual reparations have limitations. Individual reparations, including the costs of identifying and verifying victims, may consume more resources and consequently reach fewer victims/survivors, with in turn a smaller impact of the overall reparations programme or award.³⁷ Individual reparations will not reach unidentified victims, which may have a disparate impact on girls and women. Furthermore, there is the potential for stigmatisation of individuals by virtue of being identified as having received a reparations benefit. The potential for further stigmatisation may in particular prevent victims/survivors of sexual violence from coming forward to claim awards. Individual reparations may also undermine community healing and cohesion. They may be seen as a "reward" to child soldiers or other combatants by victims/survivors and communities, encouraging future enlistment, perpetuating stigma and preventing reconciliation, as also noted by other filings in this case.³⁸

³⁷ See also Trust Fund observations on reparations, paras 134-135.

³⁸ In this regard, the Legal Representatives of Victims observed that while the Hema community suffered by having its youth recruited by the militia group, a large portion of this community also supported those recruiting child soldiers and even collaborated with the militia. Consequently, they indicated that reparations to benefit the Hema community "does not make sense", and could be perceived by other communities as unjust. Collective reparations in the form of initiatives to reintegrate child soldiers would, however, be favoured, as they would not create resentment as unjust, nor would they encourage future enlistment of child soldiers by viewing reparations as a 'reward' for having been recruited. See Legal Representatives of Victims, *Observations sur la fixation de la peine et les réparations de la part des victimes* 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, et a/1622/10, ICC-01/04-01/06-2864, paras 15-17. We note that the Trust Fund has identified two major risks of an individual approach, namely that this would not be compatible with the 'do no/less harm' principle and that such individual awards would be counterproductive to a reconciliation process. The Trust Fund thus recommended the Chamber to take a community-based approach to collective reparations, which "may mitigate the risks of stigmatisation and re-traumatisation at the level of victims, and of jealousy, tension and resurgence in violence at the level of communities". See Trust Fund observations on reparations, paras 137, 145-151, 172.

III. Consultations with victims

31. We recommend that the Chamber undertake further consultations with victims/survivors and experts, incorporating a gender perspective, to determine to whom and how reparations should be directed. Women and girls suffered from both the same and different crimes as men and boys. Yet, the impact of even the same crime can differ widely between girls and boys, and men and women, given existing gender inequalities in the region. For example, for the same crime of rape, both boys and girls may suffer similar forms of stigmatisation, STDs and physical and psychosocial trauma, while girls may also be faced with unwanted pregnancies, unsafe or forced abortions, resulting in long-term medical complications and sometimes death. They may also be considered unmarriageable as a result of the rape, rejected by their families and communities, and face the long-term physical and economic requirements of motherhood.³⁹ Furthermore, women and girls face distinct obstacles in their access to justice, information and public life. Therefore, consultations should be devised to address these existing limitations.

32. It remains essential that the Court consult with victims/survivors to ensure that women and girls are effectively included in the process of designing and identifying appropriate reparations, including victims/survivors of acts of gender-based violence. In this regard, any reparations experts engaged by the Court should have the necessary expertise and experience in gender analysis and in the area of sexual and gender-based violence. Women and girls often have different views concerning the type and modalities of reparations that are meaningful to them. Particular attention must be paid to the modalities of

³⁹ Separate and Dissenting Opinion of Judge Odio Benito, para 20, noting the “gender-specific potential consequences of unwanted pregnancies for girls that often lead to maternal or infant’s deaths, disease, HIV, psychological traumatisation and social isolation”.

the consultation process and to the substantive input provided on the form of reparations most needed by women and girls, in order to ensure that the reparations order does not have the unintended effect of replicating ongoing gender discrimination.

33. For example, the participation of victims/survivors of, and experts on, sexual violence in conflict in the reparations proceedings would enable a fuller understanding of the harm suffered, the specific consequences of that harm and the best means of providing redress. For example, any reparations programme providing medical services to victims/survivors of sexual violence should involve a careful analysis of the potential barriers for women and girls in accessing these services. Despite the high rate of sexual violence in the DRC, several reports indicate a low rate of access to medical and psychosocial support services.⁴⁰ According to the results of the Women's Initiatives' 2006 documentation programme on gender-based violence in Ituri, only 27% of those interviewees who experienced rape, predominantly women, reported receiving medical treatment.⁴¹ Consultation may reveal and identify obstacles and therefore suggest approaches for reparations programmes to be able to contribute to overcoming such barriers and improving accessibility for women

⁴⁰ "I have no joy, no peace of mind": Medical, Psychosocial and Socio-Economic Consequences of Sexual Violence in Eastern DRC', *Medicins Sans Frontieres*, 2004, available at http://www.doctorswithoutborders.org/publications/reports/2004/sexualviolence_2004.pdf, last visited on 9 May 2012; *Report of the Special Rapporteur on violence against women, its causes and consequences*, A/HRC/7/6/Add.4, 28 February 2008, paras 55-60; *Rapport préliminaire de la mission d'enquête du Bureau Conjoint des Nations Unies aux Droits de l'Homme sur les viols massifs et autres violations des droits de l'homme commis par une coalition de groupes armés sur l'axe Kibua-Mpofi, en territoire de Walikale, province du Nord-Kivu, du 30 juillet au 2 août 2010*, 24 September 2010; 'DR Congo: UN report details suffering of rape victims, recommends reparations', *UN News Centre*, 3 March 2011, available at <http://www.un.org/apps/news/story.asp?NewsID=37672&Cr=&Cr1>, last visited on 9 May 2012; *Report of the Panel on Remedies and Reparations for Victims of Sexual Violence in the Democratic Republic of Congo to the High Commissioner for Human Rights*, March 2011, available at http://www.ohchr.org/Documents/Countries/ZR/DRC_Reparations_Report_en.pdf, last visited on 9 May 2012.

⁴¹ Information from Women's Initiatives documentation missions in eastern DRC in May and July 2006. These documentation missions and their results are described more fully in Brigid Inder, 'Partners for Gender Justice', in *Sexual Violence as an International Crime: Interdisciplinary Approaches*, Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens, Larissa van den Herik (Eds), (Intersentia, forthcoming September 2012). The Women's Initiatives carried out two further documentation missions in eastern DRC in March and June 2007. The combined results of the 2006 and 2007 documentation missions indicates that 34.9% of interviewees who experienced rape had received medical treatment. Women's Initiatives for Gender Justice, 'Presentation to the Board of the Trust Fund for Victims', 22 November 2007, on file with the Women's Initiatives.

and girls victims/survivors of sexual violence. For example, one of the major barriers for women in eastern DRC in accessing medical treatment and hospital services is the lack of the existence of such facilities. While the ICC's reparations programme could not be expected to address such a fundamental limitation, it could support programmes and initiatives which expand existing health services, assist with mobile medical units to reach rural and remote communities, and train local medical personnel in diagnosing and treating injuries which result from rape and other forms of sexual or gender-based violence. Reparations initiatives could also support the establishment of transit houses for women travelling long distances to access medical or other services, providing them with a safe place to rest and recover before and after medical treatment. The transit houses may also provide a base for other reparative programmes such as counselling, community healing projects, livelihood support initiatives and anti-violence programmes for men and boys in the community.⁴² Consultations should also be used to identify the priorities of victims/survivors, who may express a strong preference for reparations in the form of economic support and opportunities over support for existing, or creation of new, medical services.

34. When designing the consultation process to determine to whom reparations should be directed, and to incorporate a gender perspective in all of the consultation process during the reparations process, a number of factors should be considered. Fundamentally, women and girls must be integrated

⁴² In September 2011, the Women's Initiatives initiated a support project together with one of our partners in eastern DRC, with the establishment of a transit house to directly assist women victims/survivors in rural and remote areas within the Fizi region of South Kivu. This transit house provides victims/survivors with a place to rest while travelling for surgery and other medical treatment as a result of sexual and gender-based violence attacks by militia groups and/or the Congolese national army, and assists victims/survivors to travel to the nearest medical service. The urgent need for such facilities has been demonstrated by the overwhelming response the project has received: in a four-month period 214 victims/survivors were identified and provided with counselling and assistance; 142 victims/survivors stayed at the transit house; and 204 received medical treatment. Other activities have also taken place around the transit house, including the distribution of 1,200 female and male condoms, voluntary screening for HIV/AIDS, the organisation of community counselling through the production of narrative theatre, and individual counselling. See Women's Initiatives for Gender Justice, 'Interview with Ms Emérite Mongelwa Tabisha, Coordinator of AFD, South Kivu,' *Women's Voices e-letter*, April 2012, available at <http://www.iccwomen.org/WI-WomVoices4-12-FULL/WomVoices4-12.html#2>.

into the consultation process, and have agency and a voice in the process. For example, consultations should further seek the views of women and girls regarding types of reparations that will be meaningful for them, and consider the preferences of victims/survivors concerning which reparations model they wish to pursue. They should also assess any gaps between the official understanding and formal definitions of reparations and women's expectations of what constitutes reparations, what women's priorities for reparations are, and how these differ from those of men or the community as a whole.

35. Consultations should further assess whether women have decision-making power in their families and communities, whether women are legally permitted or culturally able to keep and/or own any material form of reparations which may be provided, and will have full access to other forms of reparations, including to the full array of possible programmes, projects and services that may be offered. In this regard, compensation should not be granted to families and communities on women's behalf, to be disposed of by male members of the family or community. We submit these considerations to the Chamber as a non-exhaustive list of factors to be taken into account for the consultation process.

B. How harm is to be assessed

36. All harm, including but not limited to, physical and psychological harm, emotional suffering, economic loss or impairment suffered as a result of the crimes for which Mr Lubanga has been convicted, should be included in the reparations order. The types of harm suffered include: physical and psychosocial harm arising from abduction/forced conscription and being forced to fight; rape and other forms of sexual violence; sexual slavery; ostracisation from families and within communities; loss of family life,

childhood, education, and other opportunities; and unwanted pregnancies, STDs, and PTSD, as well as other health and reproductive health complications.⁴³ The Chamber should recognise the full breath of harm suffered in its reparations order.

37. As the Women's Initiatives submitted in its request for leave to participate, any harm which can be reasonably assessed to be a direct consequence of the crimes for which the accused has been convicted can legitimately be considered for inclusion in a reparations order.⁴⁴ The violence committed against women and girls, and therefore the harm suffered, is extensive, multi-faceted, systemic and gendered. Rape was an integral component of the conscription process for girl soldiers and sexual violence constituted an integral component to the crimes for which Mr Lubanga has been convicted. As such, reparations should not be limited to a narrow assessment of the harms attached to the charges, but should be inclusive of the breadth of harm suffered as a result of these crimes.

38. Evidence of rape and other forms of sexual violence featured extensively throughout the trial proceedings, including in Prosecution opening and closing statements, and witness testimony.⁴⁵ The Chamber heard directly from former child soldiers and other witnesses about the multiple tasks performed by girl soldiers, including being forced to fight, working as bodyguards, preparing food, providing sexual services, and to serving as 'wives' to the

⁴³ See also OPCV observations on reparations, paras 36-37, 45-56; Registrar, *Second Report of the Registry on Reparations*, ICC-01/04-01/06-2806, 1 September 2011, para 20 (hereinafter 'Second Registry Report on Reparations'); Prosecution submissions on reparations, para 23.

⁴⁴ Request for leave, para 16.

⁴⁵ The following Prosecution witnesses testified about sexual violence committed against girl soldiers by the UPC: Witness 38 (ICC-01/04-01/06-T-114-ENG), Witness 299 (ICC-01/04-01/06-T-122-ENG), Witness 298 (ICC-01/04-01/06-T-123-ENG), Witness 213 (ICC-01/04-01/06-T-133-ENG), Witness 8 (ICC-01/04-01/06-T-138-ENG), Witness 11 (ICC-01/04-01/06-T-138-ENG), Witness 10 (ICC-01/04-01/06-T-144-ENG), Witness 7 (ICC-01/04-01/06-T-148-ENG), Witness 294 (ICC-01/04-01/06-T-151-ENG), Witness 17 (ICC-01/04-01/06-T-154-ENG), Witness 55 (ICC-01/04-01/06-T-178-Red-ENG), Witness 16 (ICC-01/04-01/06-T-191-Red2-ENG), Witness 89 (ICC-01/04-01/06-T-196-ENG), Witness 31 (ICC-01/04-01/06-T-202-ENG) and Witness 46 (ICC-01/04-01/06-T-207-ENG). The Prosecution also described the gendered aspects of the charges in its opening statements in January 2009 (ICC-01/04-01/06-T-107-ENG) and closing statements in August 2011 (ICC-01/04-01/06-T-356-ENG).

commanders.⁴⁶ These witnesses described physical and psychological harm, including: being whipped or beaten with sticks;⁴⁷ harm as a result of having been raped, including stigmatisation and having contracted STDs;⁴⁸ girls were thrown out of the armed group when they became pregnant;⁴⁹ difficulties reintegrating in society;⁵⁰ harm resulting from forced abortions, sometimes leading to death;⁵¹ injuries suffered from being forced to fight in battles;⁵² loss of education;⁵³ and continuing psychological harm.⁵⁴ Special Representative for Children and Armed Conflict Radhika Coomaraswamy, appearing before the Court as an expert witness in January 2010, testified that girls recruited in armed conflict play multiple roles, including combat, scouting and portering, as well sexual slavery and forced marriage.⁵⁵ In her opening statement, one Legal Representative representing former girl soldiers also spoke about the harms suffered by girl soldiers, which includes having been “denied the right to a childhood, to be schooled, a right to safety, a right to be protected, a right

⁴⁶ Witness 38 (ICC-01/04-01/06-T-114-ENG, p 22 lines 16-19, p 82 lines 1-3), Witness 299 (ICC-01/04-01/06-T-122-ENG, p 26 lines 23-25), Witness 7 (ICC-01/04-01/06-T-148-ENG, p 49 lines 14-22), Witness 16, Witness 89 (ICC-01/04-01/06-T-196-ENG, p 7 lines 23-24; p 8 lines 2-3, 6-16), Witness 31 (ICC-01/04-01/06-T-202-ENG, p 10 lines 12-25, p 11 lines 1-3), Witness 46 (ICC-01/04-01/06-T-207-ENG). The Trial Chamber also noted that 30 victim participants (18 female and 12 male) referred to acts of sexual violence in their victim applications, either because they suffered sexual violence or witnessed sexual violence. See Summary of Trial Judgment, footnote 54.

⁴⁷ ICC-01/04-01/06-T-144-ENG, p 30 lines 18-21; ICC-01/04-01/06-T-186-ENG, p 7 lines 16-25, p 8 lines 1-19.

⁴⁸ ICC-01/04-01/06-T-202-ENG, p 10 lines 12-25, p 11 lines 1-3.

⁴⁹ ICC-01/04-01/06-T-196-ENG, p 10 lines 3-7.

⁵⁰ ICC-01/04-01/06-T-202-ENG, p 11 lines 9-18.

⁵¹ Witness 7 testified that “the decision to have an abortion was made by the commanders”. He added that “there weren’t any facilities at the camp where they could have abortions. They did things themselves. They took medicine, traditional medicine to have an abortion. They had abortions alone.” He described witnessing a young girl who “tried to have an abortion and then got problems and died of these”. ICC-01/04-01/06-T-150-ENG, p 35-36. Kristine Peduto, a former Child Protection Adviser for MONUC, testified that many young girls got pregnant as a result of the sexual violence committed against them. She told the Court that many girls had voluntary or involuntary abortions as a result of which they were in acute need of medical care. Many young girls were undernourished as a result of not having received adequate care during pregnancy. ICC-01/04-01/06-T-207-ENG, p 30 lines 14-25; p 31 lines 1-18; p 36 lines 13-20.

⁵² ICC-01/04-01/06-T-145-ENG, p 28 lines 18-25.

⁵³ ICC-01/04-01/06-T-145-ENG, p 29 lines 15-25.

⁵⁴ Witness 10 said: “My life is destroyed. My life is completely destroyed. I don’t know after this phase where I’ll go. My life is completely destroyed.” ICC-01/04-01/06-T-145-ENG, p 29 lines 12-14.

⁵⁵ Ms Coomaraswamy noted the multiple forms of sexual exploitation suffered by these girls: “first they suffer rape. This happens to girls on a regular basis. Then they suffer forced marriage. They are often given as bush wives. [...] there would be sexual harassment also.” ICC-01/04-01/06-T-223-ENG, p 30 line 25, p 31 lines 1-9.

to physical integrity, a right to reproductive health and sexual autonomy”.⁵⁶

These harms are also documented in reports on child soldiers in DRC.⁵⁷

I. Definition of harm

39. We note that the only guidance on the concept of ‘harm’ offered by the Statute or Rules of Procedure and Evidence is found in Rule 85(a), which states that victims are to be defined as “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court”. Rule 85 does not provide any further definition of the concept of ‘harm’ itself, or specify what causal relationship is required between the harm suffered and the crime committed.

⁵⁶ ICC-01/04-01/06-T-107-ENG, p 54 lines 13-16. This Legal Representative added that “rape began as soon as they were abducted and continued throughout their stay with the UPC. In fact, often the abuses were greatest in the initial stages of their abduction and in the training camps where they were trained to become militia soldiers. Many of these girls, victims of rape, suffer from psychological trauma. Many girls have been tortured, abused or imprisoned for refusing the sexual advances of their superiors which they then underwent against their will.” ICC-01/04-01/06-T-107-ENG, p 53 lines 14-21.

⁵⁷ See for example: ‘Democratic Republic of Congo: Children at War’, *Amnesty International*, September 2003, available at <http://www.amnesty.org/en/library/asset/AFR62/034/2003/en/123f1fc9-d699-11dd-ab95-a13b602c0642/afr620342003en.pdf>, last visited on 5 May 2012, p 1-49, describing that the vulnerability of girls in the DRC armed conflict is at the source of their recruitment by armed groups and this vulnerability continues even after leaving these groups. ‘Children at War: Creating hope for their future’, Field Report, *Amnesty International*, October 2006, available at <http://www.amnesty.org/en/library/asset/AFR62/017/2006/en/c51c4605-d3f7-11dd-8743-d305bea2b2c7/afr620172006en.pdf>, last visited on 5 May 2012, p 35-40, describing the harms suffered, including being beaten for refusing to undress, abdominal pains, pregnancy and the stigmatisation in their communities suffered by girls as a result of having been raped. Beth Verhey, ‘Reaching the Girls: Study on Girls Associated with Armed Forces and Groups in the Democratic Republic of the Congo’, *Save the Children UK and the NGO Group: CARE, IESH and IRC*, November 2004, available at http://www.crin.org/docs/Reaching_the_girls.pdf, last visited on 5 May 2012, p 10-15, reporting that girls serve multiple roles in armed groups, including as ‘wives’, being ‘taken’ or ‘allocated’ as the sexual partner of a particular member of the armed group, serve as escorts, fight in active conflict and participate in the various food, water and other support tasks. This report also describes that as a result of having suffered sexual violence, girls fear ‘to have lost their value’ and have contracted STDs (p 15). ‘Child Soldiers Global Report 2008’, *Coalition to Stop the Use of Child Soldiers*, available at http://www.childsoldiersglobalreport.org/files/country_pdfs/Congo,%20Democratic%20Republic%20of.pdf, last visited on 9 May 2012, also describing that girl soldiers were raped and that many had children, and suffered serious and permanent injuries as a result of rape. ‘Forgotten Casualties of War – Girls in armed conflict’, *Save the Children*, 2005, available at http://www.peacewomen.org/assets/file/Resources/NGO/HR_ForgottenGirls_SC_2005.pdf, last visited on 9 May 2012, reporting that in addition to the physical and psychological harm suffered as a result of being raped, many girls who did not officially participate in demobilisation programmes, but instead fled the armed groups, do not have official papers.

40. Harm has, of course, been defined by this Chamber and other Chambers of this Court, but on a limited basis as it relates to the procedures for recognition of victim participants at the pre-trial and trial phase of proceedings.⁵⁸ The Women's Initiatives notes that, even within the context of the victim participation process, different legal criteria for assessing harm have been proposed and applied at different phases of proceedings. In order to participate at the pre-trial or trial phases of proceedings against a specific defendant, victims must show a link between the harm they suffered and the charges which have been confirmed against the accused or included in an arrest warrant or summons to appear.⁵⁹ In order to participate at the Situation phase of proceedings, by contrast, the Court only required a victim to show that they had suffered harm as a result of the commission of a crime which could potentially fall within the Court's jurisdiction.⁶⁰

⁵⁸ See for example Appeals Chamber, *Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007*, ICC-01/04-556, 19 December 2008; Appeals Chamber, *Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 3 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 6 December 2007*, ICC-02/05-177, 2 February 2009; Appeals Chamber, *Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008*, ICC-01/04-01/06-1432, 11 July 2008; Pre-Trial Chamber I, *Public Redacted Version of the "Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case"*, ICC-01/04-01/07-579, 10 June 2008; Pre-Trial Chamber III, *Fourth Decision on Victims' Participation*, ICC-01/05-01/08-320, 12 December 2008.

⁵⁹ See for example Appeals Chamber, *Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008*, ICC-01/04-01/06-1432, 11 July 2008; Pre-Trial Chamber I, *Public Redacted Version of the "Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case"*, ICC-01/04-01/07-579, 10 June 2008; Pre-Trial Chamber III, *Fourth Decision on Victims' Participation*, ICC-01/05-01/08-320, 12 December 2008.

⁶⁰ See for example Pre-Trial Chamber I, *Decision on the Applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6*, ICC-01/04-101-tEN-Corr, 17 January 2006, para 94: "The Chamber therefore considers it necessary to establish that there are grounds to believe that the harm suffered is the result of the commission of crimes falling within the jurisdiction of the Court. However, the Chamber considers that it is not necessary to determine in any great detail at this stage the precise nature of the causal link and the identity of the person(s) responsible for the crimes." See also Pre-Trial Chamber I, *Corrigendum to the "Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of the Congo by a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 to a/0110/06, a/0188/06, a/0128/06 to a/162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06, a/0227/06 to a/0230/06, a/0234/06 to a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to /0239/06 and a/0241/06 to a/0250/06"*, ICC-01/04-423-Corr-tENG, 31 January 2008: "[A]t this stage of the proceedings, it is sufficient... to consider whether the applicants seeking to be granted the status of victims authorized to participate in the proceedings at the investigation stage of the relevant situation have established that there are grounds to believe that the harm they suffered is the result of a crime within the jurisdiction of the Court, and that the crime was committed within the temporal, geographical and, as the case may be, personal parameters of the said situation."

41. Given the absence of an authoritative definition of harm in either the relevant legal instruments of the Court or in its prior jurisprudence, we submit that the Chamber should interpret the concept of ‘harm’ for the purposes of the reparations phase of proceedings. Any such interpretation must take into account the object and purpose of the provision in question, as read and understood in the context of the Statute as a whole.⁶¹ This is supported by previous jurisprudence from Pre-Trial Chamber I, which has noted that:

The term “harm” is not defined either in the Statute or in the Rules. In the absence of a definition, the Chamber must interpret the term on a case-by-case basis in the light of article 21(3) of the Statute, according to which “[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights”.⁶²

42. The Women’s Initiatives submits that, in addition to Article 21(3), the Chamber must also take into account the provisions of Article 75(6), which states that “[n]othing in this article shall be interpreted as prejudicing the rights of victims under national or international law”. Given that reparations have been held to form an integral part of the right to an effective remedy for victims under international human rights law,⁶³ the Women’s Initiatives would submit that any interpretation of harm that sought to unnecessarily restrict the number or category of victims who could take part in the Court’s reparations scheme would undermine the object and purpose of the relevant provisions of the Statute.

43. The Women’s Initiatives would therefore argue that the Chamber should take a purposive approach to interpreting the concept of ‘harm’ at the reparations

⁶¹ Article 31(1) of the Vienna Convention on the Law of Treaties provides for literal, purposive and contextual interpretation: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

⁶² Pre-Trial Chamber I, *Decision on the Applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6*, ICC-01/04-101-tEN-Corr, 17 January 2006, para 81.

⁶³ The UN Human Rights Committee have stated that “[w]ithout reparation to individuals whose [rights under the International Covenant on Civil and Political Rights] have been violated, the obligation to provide an effective remedy... is not discharged”. See Human Rights Committee, General Comment 31 (26 May 2004), UN Doc CCPR/C/21/Rev.1/Add.13, para 16.

phase of proceedings, and should interpret the term broadly in order to ensure the effectiveness of both the reparations process and the extent to which both victims/survivors and affected communities are able to access that process.

44. This approach is supported by the submissions from the Trust Fund for Victims, the Registry and the Office of the Prosecutor. The Office of the Prosecutor has specifically proposed that the concept of 'harm' should be broadened from that applied to victim participants at the pre-trial and trial phase of proceedings:

[F]or the reparations stage, the Office favours a wider approach to allow participation of victims and representations from or on behalf of victims and other interested persons who suffered harm as a result of crimes other than those included in the charges selected for prosecution. Any other approach would be overly restrictive and unfair, since the Prosecution must necessarily limit the incidents selected in its investigation and prosecution. Accordingly, the Office will support reparations applications, as appropriate, by a broader range of individuals and entities than those who are linked to the charges for which the accused is ultimately convicted. Modalities will need to be further developed consistent with the generally broad scheme of reparations envisioned in the Statute.⁶⁴

45. The Court's jurisprudence limits victim participation in criminal proceedings against a specific defendant to those individuals who have suffered harm as a result of the crimes for which that accused is charged.⁶⁵ However, at the reparations phase of proceedings, it would be needlessly restrictive to continue to limit the category of eligible victims only to those who have met the criteria for victim participation in this case and would ultimately

⁶⁴ Office of the Prosecutor, Policy Paper on Victim's Participation, April 2010, ICC-OTP/RC/ST/V/M.1, p 7. The Prosecution has therefore proposed a particularly expansive definition of harm for the purposes of the reparations process: "The Prosecution submits that all victims of the attacks perpetrated by the UPC, the group led by Mr Lubanga, in particular the targeted members of the Lendu communities, could apply as victims in the reparations phase. It will be enough to permit their participation in this phase if they demonstrate the harm suffered and that it was as a result of the activities of the UPC." See Prosecution submissions on reparations, para 2(a).

⁶⁵ See para 40, above.

undermine the effectiveness and the object and purpose of the reparations process.

46. The Women's Initiatives proposes that the Chamber should broadly define how the concept of harm is to be addressed in the context of establishing principles relating to reparations under Article 75(1). In doing so, the Chamber will need to address two distinct elements: (i) the legal categories of harm which will be recognised by the Court; and (ii) the causal relationship between the crimes and the harm.⁶⁶ We note the position of the Office of the Prosecutor in respect of the causal relationship between the crimes and the harm, and submit that the causal relationship may be taken into account on a limited basis, specifically in situations where the convicted person is financing a portion of the reparations award.⁶⁷ Any standard of proof established by the Chamber relevant to establishing both harm and causation should take into account the difficulties in obtaining documentary and other evidence which may be encountered by individuals or groups in trying to access the Court's procedures.⁶⁸

47. Once the general principles relating to the definition of 'harm' for the purposes of reparations have been established by the Chamber, the Women's Initiatives recommends, should an application process be utilised, that any specific assessment of whether the harm suffered by an applicant for reparations satisfies the necessary criteria be made by an appropriate panel of experts appointed by the Chamber and overseen by the Trust Fund for Victims,

⁶⁶ See Cormac McCarthy, *Reparations and Victim Support in the International Criminal Court* (Cambridge University Press, 2012) p 94-129.

⁶⁷ In this regard, the Prosecution submitted: "The limited charges brought in this criminal proceeding therefore should not prejudice the right of others to seek individual or collective restitution, through a reparations arrangement not to be paid by the convicted person for harm resulting from crimes committed directly or indirectly by him but in respect of which he has not been charged." See Prosecution submissions on reparations, para 2(a).

⁶⁸ See for example Liesbeth Zegveld, 'National Practice on Assessment of Harm for Reparations Claims', paper delivered at conference entitled 'Reparations Before the International Criminal Court: Issues and Challenges', The Hague, May 2011, summary available at http://www.iccnw.org/documents/REDRESS_reparations_before_the_ICC_summary_report.pdf.

according to the criteria outlined below.⁶⁹ This panel is conceived as being distinct from the Trust Fund's *ad hoc* multi-disciplinary expert advisory committee on reparations, which is intended to assist the Trust Fund in the design of its overall reparations programme.⁷⁰

C. Criteria to be applied to the awards

48. Rule 97 provides that, in the assessment of reparations, the Court “may appoint appropriate experts to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations”.⁷¹ Regulation 70 of the Trust Fund further provides that the Trust Fund’s Board of Directors may consult any competent expert or expert organisation on the nature of the collective award(s) and the methods for its/their implementation.⁷² We note that the Statute and regulations provide for appointment of experts at two distinct but complementary levels, one being the appointment of experts by the Chamber to assist them in respect of reparations proceedings, and two, the appointment of an expert panel to assist the Trust Fund with consultations with victims/survivors, assessment of harm and causation, design of the awards, and implementation of reparations orders in this case.

49. We further submit that such expert(s), once appointed, should be fully independent. Within the Court, the Trust Fund for Victims, as an independent body with expertise in these issues, could be considered among the

⁶⁹ Rule 97(2), Rome Statute, Rules of Procedure and Evidence. See also Trust Fund observations on reparations, para 204; Registry, *Registrar’s observations on reparations issues*, ICC-01/04-01/06-2865, 18 April 2012, para 28 (hereinafter ‘Registrar’s observations on reparations’).

⁷⁰ In its March 2011 Annual Meeting, the Board of the Trust Fund decided to establish the *ad hoc* Expert Advisory Committee on Reparations. The Women’s Initiatives has been advocating for the establishment of this Committee since 2004.

⁷¹ Rule 97(2), Rome Statute, Rules of Procedure and Evidence.

⁷² Regulation 70, Regulations of the Trust Fund for Victims

appropriate experts to assist the Chamber under Rule 97(2). Although gender expertise will need to be prioritised within any expert or team of experts appointed, as outlined below, we direct the following comments specifically to the experts who may assist the Trust Fund. The Women's Initiatives submits that such experts may be appointed by the Chamber under Rule 97(2), and could be overseen by the Trust Fund. The team of experts should include specific expertise in gender-based violence and working with victims/survivors, children, and other vulnerable groups, as well as specific expertise on reparations for victims/survivors of gender-based crimes and girl soldiers, in addition to expertise on the impact of sexual violence on boy soldiers (for instance, those forced to rape as part of enlistment/conscription or forced to find girls for commanders). The mandate or terms of reference of the expert or team of experts, to be determined by the Chamber, should specify the need for such expertise.

50. We submit that an expert or team of experts could also be appointed to determine the criteria to be applied to the awards. Should an application process be utilised, as noted in other submissions, this expert or team of experts should take into account the number and classes of claimants and the availability of funds in proposing criteria.⁷³ The expert or team of experts should include similar expertise as described above, including expertise in gender-based violence and working with victims/survivors, children, and other vulnerable groups, as well as specific expertise on reparations for victims/survivors of gender-based crimes and girl soldiers, in addition to expertise on the impact of sexual violence on boy soldiers. As noted above, the

⁷³ The Registry noted that the Court could appoint a team of experts to carry out a scoping assessment of potentially eligible beneficiaries and an impact assessment of the modalities of reparations, and underscored that this team of experts should include specialists on gender-based violence. Registrar's observations on reparations, paras 20, 28. The Prosecution also submitted that the Chamber should appoint appropriate experts pursuant to Rule 97(2). See Prosecution submissions on reparations, paras 22, 25. While the LRV's have submitted that they should propose experts on behalf of the participating victims, we would submit that a broader process would be appropriate to take into account the representations of all parties and participants. Legal Representatives of Victims, *Observations du groupe de victimes VO2 concernant la fixation de la peine et des réparations*, ICC-01/04-01/06-2869, 18 April 2012, para 44.

mandate or terms of reference of the expert or team of experts, to be determined by the Chamber, should specify the need for such expertise.

51. The assessment and criteria should be based on the principle of non-discrimination. In addition, the process should address structural, administrative and procedural obstacles that may hinder beneficiaries' access to reparations. This is particularly relevant for women and girls as they may face particular gender-specific obstacles including, but not limited to: societal norms that women cannot be awarded certain forms of reparations such as land; customary rules that women can only be represented by male members of the family; and the non-recognition of women as heads of households.

52. In carrying out its assessment, the expert(s) should consult with victims/survivors, specifically with former girl soldiers and their families and communities. In undertaking consultations, care should be taken to create conditions that enable women to speak about their experiences, taking into account the tendency to under-report certain crimes, for instance because of stigmatisation, and security issues. The modalities of the expert consultations with victims/survivors and communities should consider the same questions and be similar to the modalities set out in section A.III above.

53. The expert assessment should be submitted to the Chamber for further consideration and formal adoption.

D. Whether it is possible or appropriate to make a reparations order against the convicted person pursuant to Article 75(2) of the Statute

54. Although Mr Lubanga has been assessed as indigent, he or representatives acting on his behalf may still be ordered to provide symbolic reparations to victims/survivors harmed by the crimes for which he was convicted, in

addition to any other reparations ordered by the Court and administered through the Trust Fund for Victims, as discussed below. Symbolic reparations would be appropriate because they would be ordered directly against the convicted person. Furthermore, while Mr Lubanga has been assessed as indigent for the purposes of legal aid, should he possess assets in the form of cattle, livestock or other material products, these should be considered by the Court in determining his personal contribution to reparations.⁷⁴ The direct involvement of the convicted person in providing reparations to victims/survivors would provide a powerful public recognition of wrongdoing, acknowledgement of responsibility as well as recognition of the harm and suffering of those affected.

55. While the Judgement and conviction itself can be considered a form of symbolic reparations,⁷⁵ the Court should order other types of symbolic measures, such as an acknowledgement that harm was done, an act of atonement, or reconciliation measures involving Mr Lubanga or his representatives. Symbolic measures may take the form of, for example, a public acknowledgement of responsibility during a public ceremony broadcasted by local and national radio and television involving the victims/survivors, or a public apology.⁷⁶

⁷⁴ In this regard, we note the Prosecution observation that the Court can order different satisfaction measures, including a public acknowledgement of the truth, a public or private apology by Mr Lubanga, or an order to Mr Lubanga to pay a symbolic nominal sum to each identified victims to symbolically recognise their loss. Prosecution submission on reparations, paras 11-13.

⁷⁵ In this regard, see IACtHR, *Garibaldi v. Brazil*, Preliminary Objections, Merits, Reparations and Costs, 23 September 2009, para 157; IACtHR, *Kawas Fernández v. Honduras*, Merits, Reparations and Costs, 3 April 2009, para 199; IACtHR, *Escher et al. v. Brazil*, Preliminary Objections, Merits, Reparations and Costs, July 6, 2009, para 239; IACtHR, *Juan Humberto Sánchez v. Honduras*, Merits, Reparations and Costs, 7 June 2003; IACtHR, *Cotton Field v. Mexico*, Admissibility, merits and reparations, 16 November 2009, para 450; IACtHR, *Moiwana Community v. Suriname*, preliminary objections, merits, reparations and costs, 15 June 2005; IACtHR, *Radilla-Pacheco v. Mexico*, preliminary objections, merits, reparations and costs, 23 November 2009. See also Registry, *Second Report of the Registry on Reparations*, ICC-01/04-01/06-2806, 1 September 2011, para 81 (hereinafter ‘Second Registry Report on Reparations’); Prosecution submissions on reparations, para 13. While the symbolic measures ordered by the IACtHR were ordered against the State, similar measures can be ordered against the convicted person or representatives thereof.

⁷⁶ IACtHR, *Cotton Field v. Mexico*, Admissibility, merits and reparations, 16 November 2009, paras 468-472, 454.

56. To ensure that the symbolic measures ordered by the Court provide an adequate form of reparation to the victims/survivors, the views of victims/survivors and their communities should be sought. This consultation process must be particularly sensitive to the needs and expectations of victims, including victims of gender-based crimes, and should include measures to ensure equal access to the consultation process. As noted earlier, these consultations should be based on methodologies that enable access and meaningful participation for women and girls⁷⁷ and also ensure a feedback process to those who participate in the consultations.

E. Whether it would be appropriate to make an order for an award for reparations through the Trust Fund for Victims pursuant to Article 75(2) of the Statute

57. The Trust Fund is an appropriate body to implement a reparations order, as an independent body of the Court with specific expertise in reparations, and given its experience to date implementing its general assistance mandate in eastern DRC. Such a role was envisioned in the Rome Statute in Article 75(2), which provides that the Court may order that the reparations award be made through the Trust Fund. Furthermore, pursuant to Rule 98(3) of the Rules of Procedure and Evidence “the Court may order that an award for reparations against a convicted person be made through the Trust Fund where the number of victims and the scope, forms and modalities of reparations makes a collective award more appropriate”.

58. Pursuant to Rule 98(5), the Trust Fund’s “other resources” may be used for the benefit of victims. As provided for under Regulation 56 of the Regulations of the Trust Fund, “the Board of Directors shall determine whether to complement resources collected through awards for reparations with ‘other resources of the Trust Fund’”. In this regard, acknowledging its

⁷⁷ See above, section A.III.

responsibilities under the Rome Statute concerning reparations, the Trust Fund submitted that its Board of Directors at its Ninth Annual Meeting in March 2012 increased its reserve to complement reparation awards to 1.2 million Euros.⁷⁸ This reserve is designated to complement all reparation awards that may result from reparations orders in all cases before the Court.

59. Should it be ordered to implement a reparations order, the Trust Fund, and equally any other implementing body, should work to contribute to advancing gender equality through the types of programmes funded and the type of support provided to victim communities. Following consultations with individual victims/survivors and communities, as outlined above, the implementing body should prepare an implementation plan, which should be submitted to the Chamber for approval. We note that the Trust Fund regulations explicitly provide for such approval process.⁷⁹ As described above, these consultations must create conditions that enable women and girls, as well as other vulnerable groups such as children or the elderly, to participate and contribute equally to the design of the implementation plan. Specific issues that should be addressed include:

- How will women participate/ how are women participating?
- If country-based intermediaries are used to implement collective reparations: what requirements should be established to ensure the intermediary operates in ways fully inclusive of women, and includes where appropriate local women's organisations and actors?
- What are the modalities for project delivery and how inclusive are these mechanisms of gender issues?
- What is the involvement of women in the decision-making processes within the set-up of a specific reparations programme?⁸⁰

⁷⁸ Trust Fund observations on reparations, para 244.

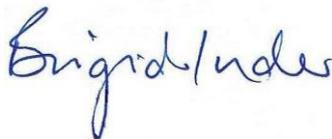
⁷⁹ Regulations 57 and 58, Regulations of the Trust Fund for Victims.

⁸⁰ These considerations have been raised by the Women's Initiatives in its presentations to the Board of the Trust Fund for Victims, including 21 April 2004, 22 November 2005, 3 June 2009, 20 March 2012, on file with the Women's Initiatives.

60. To this end we note that the Trust Fund has taken a specific focus on gender-based crimes in implementing its general assistance mandate in the DRC, Uganda, and the Central African Republic.⁸¹ For these reasons, we submit that the Trust Fund is an appropriate body to implement reparations in this instance.

IV. Conclusion

61. The Women's Initiatives respectfully submits the foregoing observations and informs the Chamber of its willingness to further assist the Chamber with any of the issues addressed above and/or any other issues that may arise in the context of the reparations proceedings.



Brigid Inder, Executive Director
on behalf of
Women's Initiatives for Gender Justice

Dated this 10 May 2012

At The Hague, the Netherlands

⁸¹ Out of the total contributions received by the Trust Fund, 43.5% were earmarked or sexual and gender-based violence projects in 2009 and 37% in 2010. As of 31 July 2011, the Trust Fund has nine sexual and gender-based violence ("SGBV") projects – eight in the DRC and one in Uganda – that are supported by earmarked funding. The estimated number of beneficiaries reached by earmarked SGBV projects in 2011 is 32,499 (28,143 in northern Uganda and 4,356 in DRC). See Women's Initiatives for Gender Justice, *Gender Report Card on the International Criminal Court 2011*, p 27-28. In addition, on 6 May 2011, the Trust Fund invited Expressions of Interest to support rehabilitation of victim survivors of sexual and gender-based violence in the Central African Republic (CAR) "because it has identified a pressing priority need for assistance to victim survivors of such crimes in the context of the situation in CAR". See 'ICC's Trust Fund for Victims Launches Expression of Interest Supporting Victim Survivors of Sexual and Gender-Based Violence in the Central African Republic', 6 May 2011, *Trust Fund for Victims Press Release*, available at <http://www.icc-cpi.int/NR/exeres/D300E6CF-A627-433F-881D-7467B527EA78.htm>, last visited on 7 May 2012.