

**Presentation to Trial Chamber II**  
**Observations of the Women's Initiatives for Gender Justice**  
11 October 2016

*Check against delivery.*

Honourable Judges, Counsel for the Defence, Victims Legal Representatives and the Trust Fund for Victims, my name is Brigid Inder and I am the Executive Director of the Women's Initiatives for Gender Justice.

I would like to begin by thanking The Chamber for the invitation extended to the Women's Initiatives to present our observations on reparations in the case against Thomas Lubanga.

We are honoured to participate in this historic Hearing, the first on reparations before the ICC. We are cognizant of this moment and its importance.

We congratulate The Chamber for your foresight in deciding to invite observations at this stage of proceedings and to further complement this opportunity with a Public Hearing. Your leadership on these issues provides very positive indications of the value you place on ensuring access to the justice process for victimized communities and for those who may not have had the opportunity to previously provide their views to Chambers. We note, in this respect, the relatively high number of submissions presented to the Trial Chamber, including the significant number of observations provided by local NGOs in eastern DRC, whose views in this process are of particular significance. The response by the local community is an indication of how highly they value this opportunity, their critical role as partners in the reparative process, and the dire and urgent needs of victims of the crimes of enlistment, conscription and use of children to participate actively in hostilities, for which Mr Lubanga has been convicted.

As noted in our recent observations,<sup>1</sup> the Women's Initiatives has monitored all of the filings and decisions in this case from the moment of Mr Lubanga's arrest and transfer to the ICC in March 2006. We have previously sought leave on two occasions in this case, initially in the pre-trial proceedings,<sup>2</sup> and secondly, at an earlier stage of the reparations process when we were granted leave to address the Trial Chamber on the harm caused to female child soldiers of the UPC/FPLC and the gender aspects of reparations in this case.<sup>3</sup>

The suggestions, therefore, included in our current submission draw on this experience, as well as our work in eastern DRC since 2006 and in particular: our work with victims/survivors of conflict-related sexual and gender-based crimes; our documentation programme including interviews with victims/survivors of the conflict in Ituri inclusive of the 2002-2003 period most relevant to this case; our community-based advocacy programmes for gender justice; and our programmes providing almost 1000 victims of sexual violence annually with support and access to medical and psychosocial services, of whom 85% require and receive reparative surgeries for rape-related injuries. Former child soldiers, predominantly females, are integrated within these programmes.

There are numerous aspects of the context which have already been considered in the filings and decisions on reparations and in our observations we highlighted five additional contextual factors that we wish to recap and expand upon today. These focus on the specificity of the context and the convicted person at this point in the proceedings, on the cusp of reparations.

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<sup>1</sup> ICC-01/04-01/06-3240-Anx14.

<sup>2</sup> ICC-01/04-01/06-403.

<sup>3</sup> ICC-01/04-01/06-2876.

These factors are:

- Mr Lubanga is currently completing his sentence within the DRC and his return to the country has been highly disturbing for victims of his crimes and presents an additional element with respect to actual or perceived security risks in Ituri and other locations to which victims of his crimes have relocated.<sup>4</sup>
- Mr Lubanga will be released at the latest by 2019 which will coincide with the implementation phase of the reparative programmes. Victims have already expressed serious security and safety concerns regarding his release and their potential participation in reparations programmes linked to his conviction.
- The presence of Mr Lubanga in the country, combined with years of armed conflict in Ituri and in several of the near or neighbouring provinces in eastern DRC, creates a vortex of actual or perceived threats to security both at individual and communal levels.
- Mr Lubanga continues to enjoy support from the Hema community and the UPC remains an active political force within Ituri, including within the areas in which the reparations programmes will likely be implemented. The UPC exerts considerable influence amongst the Hema population and we note that in recent weeks, the UPC has been more visible with marches and public displays asserting its presence within Bunia.<sup>5</sup>

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<sup>4</sup> On 19 December 2015, Mr Lubanga was transferred to a prison facility in the DRC to serve his sentence of imprisonment. See ICC-CPI-20151219-PR1181

<sup>5</sup> Reports from Congolese organisations. Notes on file with the Women's Initiatives for Gender Justice.

- The limited safety the Government of the Democratic Republic of the Congo (DRC) has been and is able to afford its citizens in Ituri and other eastern provinces further underscores the vulnerability of the population at large, including in areas within which the reparations programmes will likely be implemented.<sup>6</sup>

We believe these conditions are pivotal indicators to be considered within the reparations process and provide a sound basis for victims to have reason to feel concerned and fearful with respect to accessing the reparative programmes. It is clear that victims believe there is a strong likelihood of retaliations and threats.

It is bearing in mind this specific set of factors with respect to victims' safety and security and the Appeals Chamber Order for Reparations,<sup>7</sup> that the Women's Initiatives proposes that Mr Lubanga's financial responsibility should not be attached to reparative responses which require individual eligibility and harm assessment processes.

We appreciate that this Hearing is not intended to address the eligibility mechanism, assessments of harm or the basis for determining Mr Lubanga's financial responsibility. But as these issues are intrinsically related to victims safety, their confidence in the reparations process and willingness to participate in the reparative modalities and programmes we later propose in this presentation, and as outlined in our observations, we believe it is relevant to touch upon these issues in the context of describing

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<sup>6</sup> See eg. 'World Report 2015: Democratic Republic of Congo', Human Rights Watch, available at <https://www.hrw.org/world-report/2015/country-chapters/democratic-republic-congo>; 'Human Rights Priority Country update report: January to June 2016', Foreign and Commonwealth Office, 21 July 2016, available at <https://www.gov.uk/government/publications/democratic-republic-of-the-congo-drc-human-rights-priority-country/human-rights-priority-country-update-report-january-to-june-2016>.

<sup>7</sup> ICC-01/04-01/06-3129-AnxA.

appropriate reparative responses for victims in this case and in support of achieving the goal of the reparations process, which is to restore and repair victims. This can hardly be achieved if victims fear reprisals and are reluctant to participate in the reparative programmes.

The Women's Initiatives and our partners in eastern DRC believe safety to be the most important component of any and all reparations programmes. We are of the view that the high volume of security concerns expressed by victims and local organisations with respect to the reparations programmes are compelling, and in preparing our observations and this presentation, the overwhelming message from our partners was the issue of safety.

To briefly summarise, we propose that reparations programmes which require individual eligibility and harm assessments, should not be included within Mr Lubanga's financial responsibility with respect to reparations. Programmes requiring individualised assessments would mostly fall within the modalities described in the Appeals Chamber Reparations Order as restitution, compensation and rehabilitation.<sup>8</sup> They are also largely the kinds of programmes outlined within the Trust Fund for Victims Draft Implementation Plan.<sup>9</sup> Detaching Mr Lubanga's financial responsibility from these forms of reparations does not alter his liability for the harms caused to victims of his crimes. Rather, directly in response to the safety and security concerns of victims, it focuses his financial responsibility away from requiring access to individual eligibility assessment forms, a source of considerable concern for victims, and towards areas which do not require individual assessments, namely, symbolic, preventative and transformative reparations.

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<sup>8</sup> ICC-01/04-01/06-3129-AnxA, para 67.

<sup>9</sup> ICC-01/04-01/06-3177-AnxA, paras 65-172

Under the current requirement for assessing eligibility and harm for victims to access reparative programmes, Mr Lubanga will have the opportunity to review the individual assessments and applications. Even if heavily redacted, this possibility is highly concerning for victims and many have already indicated that they fear reprisals.<sup>10</sup>

By detaching the rehabilitation, restitution and compensation forms of reparations from Mr Lubanga's financial responsibility, the individual harm and eligibility assessments of victims would not need to be transmitted to the Defence, and Mr Lubanga would not need to be consulted or even informed about the screening or eligibility process, the harm assessments, the number of beneficiaries, the locations of programmes or how much these programmes cost. Being able to reassure victims that Mr Lubanga would not receive or have access to any of this information would likely generate greater confidence in and engagement with the reparative programmes, reduce fears of reprisals and assist the reparations programme to achieve its goal of restoring and repairing the harm done to victims. As mentioned earlier, this will hardly be achieved if victims are reluctant or decline to engage with the programmes for fear of further violence from the person found to be responsible for the original crimes, or his supporters who helped to create the enabling environment within which the crimes in this case occurred.

Elaborating on the security concerns, we note the large number of redactions in all of the observations submitted by Congolese NGOs and other submissions including our own, primarily due to safety and security concerns. We withdrew our initial request to bring a partner here to The Hague to speak at this Public Hearing precisely for security

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<sup>10</sup> ICC-01/04-01/06-3208, eg paras 41, 67-69. Supported by anecdotal reports from local organisations. Notes on file with the Women's Initiatives for Gender Justice.

reasons, for even in this secure environment, exposure to the Defence and by association to the convicted person, was considered by the individual to be too high a risk. If the safety issues are this concerning for a Hearing in the Hague, one can easily imagine the level of vulnerability victims and communities feel within Ituri knowing Mr Lubanga, even if he serves his full sentence, will be released within the DRC during the reparations phase and that the UPC is active and continues to be an influential political force amongst the Hema community in areas in which reparations programmes are likely to be implemented.

We have been informed that individuals believed by the local population to be loyal to Mr Lubanga have been approaching NGOs and victims in and around Bunia specifically asking them about the ICC and this Hearing. These approaches have been perceived as a threat and as a way of sending the message that human rights organisations supporting, or even simply following, ICC proceedings are being watched and monitored by those loyal to Mr Lubanga.

Even if the alternative eligibility and harm assessment process, as proposed by the Trust Fund for Victims, is adopted by the Trial Chamber, in which Mr Lubanga would have the opportunity to review the screening process rather than the individual victims assessments,<sup>11</sup> communicating to victims that Mr Lubanga would be involved in aspects of the screening process, even if in a limited role, would still create concern and distrust towards the reparations programme. In addition, we have doubts that such a review by Mr Lubanga would be conducted with the best interests of the victims in mind, given he has yet to acknowledge the crimes for which he has been convicted or offered an apology to victims.

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<sup>11</sup> ICC-01/04-01/06-3208, para 127.

We propose that the Trust Fund provides the resources for the restitution, rehabilitation and compensation programmes, along with a contribution from the DRC Government. We believe that it would be appropriate and in keeping with international standards, for the Trial Chamber to consider assigning a role and an amount to the DRC Government to contribute to the restitution, rehabilitation and compensation of its citizens harmed by the crimes for which Mr Lubanga was convicted, recognising the failure of the State to protect its population from these violent crimes, and the lack of responsiveness to date by the Government to establish a reparations programme in the DRC, an obligation noted in the Basic Principles on the Right to a Remedy and Reparation for Victims of Gross Human Rights Violations.<sup>12</sup>

We believe that there is scope within the Amended Order for selecting the forms of reparations, within the parameters set by the Appeals Chamber, to which Mr Lubanga's financial responsibility is to be calculated and quantified. This approach appears to be supported by the Appeals Chamber Order and in addition we note the importance given by the Appeals Chamber to implementing appropriate measures to ensure the safety, physical and psychological well-being of victims.<sup>13</sup> Within the Amended Order, there are several references to safety-related issues for victims suggesting that this is recognised as a critical concern. In our view given the timeframe and context within which reparations will be implemented, we propose that victims safety is the issue upon which the design, implementation and determination of Mr Lubanga's financial responsibility turns.

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<sup>12</sup> United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Human Rights Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147, 21 March 2016, paras 15-16.

<sup>13</sup> ICC-01/04-01/06-3129-AnxA, para 15.

The release of Mr Lubanga within the DRC during the implementation phase of reparations, the presence of the UPC in areas in which the reparative programmes are likely to be implemented, along with the demonstrable limitations of the DRC Government to protect its citizens in the east including within Ituri, creates an environment in which victims have a sound basis to fear threats, violence and reprisals. We do not believe that adhering to expectations that Mr Lubanga's financial liability should be applied to all forms of reparations, as principled as this may be, outweighs the safety of victims, their confidence in the reparations process and the potential benefits of the reparative programmes.

With respect to the rehabilitation, restitution and compensation forms of reparations we find the programmes outlined within the Trust Fund's Draft Implementation Plan to be well designed and responsive to the kinds of priorities and issues the Women's Initiatives and our partners have noted in our work with former child soldiers. Our partners are insistent on these forms of reparations which assist the individual lives of victims and the need for the reparative programmes to have an impact at this level. Ultimately, we propose that restitution, rehabilitation and compensation programmes should be designed bearing in mind the victims as they were at the time the crimes occurred (as children) as well as the victims as they are now (as young adults).

We also wish to highlight that access to learning and education is a high priority for both former child soldiers as well as for their children - children conceived as a result of their enlistment and conscription by the FPLC. Given the lapse of time since the crime period of 2002-2003, the children born to female former child soldiers are of school age and some are young teenagers. These children are experiencing stigma, discrimination and marginalisation by the community and their peers, compounded by the stigma and discrimination also experienced by their mothers. We also note and agree with the

sound practitioner-related proposals included within Annex 9,<sup>14</sup> those of Child Soldiers International,<sup>15</sup> as well as proposals by COOPI,<sup>16</sup> and several of the proposals included within the observations submitted by MONUSCO.<sup>17</sup> Unfortunately, the observations from the local NGOs were heavily redacted and it was not always possible to see the specific proposals.

### **Symbolic, preventative and transformative reparations**

In light of the very specific security issues in this case we propose that Mr Lubanga's financial responsibility should be attached solely to symbolic, preventative and transformative reparations. It is on these programmes I would now like to focus.

Symbolic, preventative and transformative reparations do not require individualised needs assessment or a screening process to determine individual eligibility as such programmes are not oriented towards addressing the specific harm caused to individual victims. Rather, they address the harm to direct and indirect victims at the community and societal level. Symbolic, preventative and transformative reparations are intrinsically collective and communal in nature and as such they can be effective responses to the widespread and large-scale nature of the crimes for which Mr Lubanga was convicted.<sup>18</sup> These kinds of reparations focus on the harm done to the relationship between direct victims and their families and communities.<sup>19</sup> They are communal responses to collective harm.

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<sup>14</sup> ICC-01/04-01/06-3240-Anx9.

<sup>15</sup> ICC-01/04-01/06-3240-Anx10.

<sup>16</sup> ICC-01/04-01/06-3234.

<sup>17</sup> ICC-01/04-01/06-3240-Anx15.

<sup>18</sup> ICC-01/04-01/06-3129, para 153

<sup>19</sup> ICC-01/04-01/06-3129-AnxA, para 46.

Importantly, these programmes can be designed to address the *ongoing* harm experienced by victims including discrimination, stigma, community-rejection and marginalization. The consultations conducted by the Trust Fund for Victims in May and June 2015 revealed that issues of stigma, shame and discrimination feature prominently in the lives of former child soldiers.<sup>20</sup> Our own work with young women formerly associated with militia groups in the DRC and Uganda confirms the powerful and debilitating effects of stigma, marginalization and discrimination experienced by returnees. They often feel powerless to address these issues. The experience of familial, tribal or community rejection exacerbates their sense of shame adding to anxiety, depression and hopelessness. Many of those we work with share a similar narrative of experiencing disillusionment at some point following their return from the militia, consider the possibility of going back to life in the bush, and have contemplated suicide directly as a result of the rejection they experience by their families and the community including its leaders.

There is little doubt that the marginalisation of former child soldiers is a significant obstacle to their recovery and to accessing services and programmes which may support their reintegration. These issues are compounded for female former child soldiers especially if they return from the militia with children. The loss of virginity and evidence of sexual activity outside of marriage, regardless of the non-consensual nature of the acts, adds to the social and cultural stigma experienced by females with long-term consequences.<sup>21</sup> According to local partners, female former child soldiers are considered by their families to be ‘an affliction’.

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<sup>20</sup> ICC-01/04-01/06-3177-Red, para 93-94. See also paras 51-75.

<sup>21</sup> ICC-01/04-01/06-3177-Red, paras 66-67, 93-94.

Symbolic, preventative and transformative reparations embody great potential to foster community-based reconciliation with former child soldiers, reduce the obstacles created by stigma and marginalisation to accessing reintegration networks, and complement the reparative responses which address the individual needs of individual victims.

These forms of reparations are highly visible to the community at large and can be designed to address the underlying attitudes, cultural beliefs and practices which enabled the enlistment, conscription and use of children and which fuelled the narrative of ethnic conflict justifying the formation of the FPLC militia, without which the crimes committed against children in this case would not have occurred.

In keeping with the Order, the Trust Fund should provide Mr Lubanga with the opportunity to review the specific programmes designed as symbolic, preventative and transformative reparations.<sup>22</sup> This could include the detailed plans of the design, the cost, the collective benefits of these programmes, the proposed number and locations of the memorial sites, the proposed dates of commemoration days, the purpose of community-based reconciliation campaigns and the length of time they will run, amongst other aspects, as determined by the Trial Chamber.

In our observations we provided examples of the kinds of programmes which could be implemented within symbolic, preventative and transformative reparations.

1. Symbolic Reparations: could include memorials in locations meaningful to the community both within Ituri and outside in locations where victims have relocated; commemoration days; an apology from Mr Lubanga and/or the UPC; an apology from the DRC Government for its failure to protect the children of

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<sup>22</sup> ICC-01/04-01/06-3129-AnxA, para 66.

Ituri- the apology should be both in written form and accompanied by public ceremonies;<sup>23</sup> the creation of 'peace paths' in locations meaningful for the community; and the establishment of learning and training centres which may ultimately be sites in which the rehabilitation and restitution programmes are conducted. In addition, symbolic reparations should include culturally responsive initiatives that restore and strengthen the reunification of individuals with their communities. We note that other observations also indicated the importance of cultural activities including within the submissions provided by MONUSCO and Ligue pour la Paix, les Droits de l'Homme et la Justice (LIPADHOJ). An example we would like to offer, comes from northern Uganda where young women formerly associated with the LRA are using traditional music and dance to reconnect and reconcile with their clans. Many returnees are rejected by their families and clans for being the cause of violence and suffering to the community. Many are blamed and ostracised as LRA combatants or are seen as LRA supporters, although they themselves are victims. The young women are considered a source of shame for their families especially if they returned with children, which most of them did. To foster reconciliation and to remind their clan that they are don't belong to the LRA but rather they are a part of this clan, clan members are their parents, elders, childhood friends – they perform traditional dances to signify clan affiliation. This strategy is helping to reduce barriers, remove stigma, foster reconciliation and address the discrimination experienced by returnees. The use of culturally responsive forms of symbolic reparations allows victims to reclaim their cultural identity and to

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<sup>23</sup> Dyan Mazurana and Kristopher Carlson, *'Reparations as a Means for Recognizing and Addressing Harm'*, in *The Gender of Reparations*, ed Ruth Rubio-Marin, 2009, p 209.

prove that communal affiliations can triumph over breaches of trust and violence and can heal individual and collective harm.

2. Preventative Reparations programmes could include: antiviolence education promoting the rights of children and non-violent forms of communication and parenting. The focus on good parenting is an issue which has been raised with us by many female former child soldiers. They are concerned by the violence and anger they express towards their children and they are aware that they do not have the skills or parental responses they see their peers demonstrating. Other preventative programmes could include peace building campaigns highlighting non-violent approaches to resolving disputes; and education campaigns informing cultural, traditional, civic and religious leaders of the Convention on the Rights of the Child including its optional protocol on the involvement of children in armed conflict.<sup>24</sup> One of the issues the Women's Initiatives outlined in our earlier filing on reparations in this case, is the principle of non-repetition and the prevention of the future commission of acts of violence against children including girls. The outrage expressed in response to reports of the scale and brutality of violence committed against children in armed conflict is right and clear. But the pervasive and pre-existing forms of violence against children including girls whether committed by militias, family members, strangers or neighbours laid the ground work for the latter large scale forms of violence of enlistment, conscription and use. Preventative reparation responses should therefore promote the non-repetition of all forms of violence against children in line with the Convention on the Rights of the Child. They should also contribute

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<sup>24</sup> Original Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, A/RES/54/263, May 2000, entry into force, 12 February, 2002.

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

to the non-repetition of violence against those who were already enlisted and conscripted, meaning the ongoing violence and discrimination for which former child soldiers are targeted. Community-based education campaigns can be designed to respond to the violence which has already occurred as well as prevent and interrupt the cycle of ongoing violence whether committed by or against former child soldiers.

3. Transformative reparations programmes could include: community-based reconciliation dialogues addressing the social marginalisation and discrimination of former child soldiers including the additional stigma experienced by young women who returned from the FPLC with children. These reparative programmes acknowledge victims as members of their communities and recognize that successful reintegration cannot occur without the respect and acceptance of victims collectively, by the community and its leaders. Other transformative programmes include peace building campaigns promoting tolerance, human rights and equality (addressing, *inter alia*, age, gender, ethnicity) and we support the proposal by Ligue pour la Paix, les Droits de l'Homme et la Justice (LIPADHOJ) for both intra and intercommunity peace projects. Other preventative programmes include community-wide campaigns on the rights of children and the rights of the girl child addressing the pre-existing inequalities which led to or facilitated the violence for which children in this case were targeted. Many victims report contemplating vengeance and without support they would be easy to re-recruit into militias. They feel that people now minimize them because they no longer have a gun. This feeling of loss of power associated with terrorizing the community remains dominant and it is a potent mix when combined with loss of status with their

peers, the marginalization and discrimination they experience from the community and their families, alongside their own personal trauma. Peer dialogues and community dialogues have the potential to inform and restore well-being, re-establish relationships of mutual trust, transform behaviours and provide alternative models to violence.

We propose that the Trust Fund for Victims advance its resources in order to enable the implementation of these forms of reparations which, in compliance with the Appeals Chamber Order, the Trust Fund can later claim from Mr Lubanga.<sup>25</sup>

### **Implementation Period**

The Trust Fund has indicated that its Draft Implementation Plan is for three years.<sup>26</sup> Given the start-up time required even once the programmes have been designed, partners selected, agreements approved and funds provided, we believe the reparations implementation period should be five years with a mid-programme assessment in the third year allowing for adjustments if needed and inclusive of a transition plan for the staggered withdrawal and gradual reduction of resources by the Trust Fund during the fourth and fifth years of programmatic operations.

### **Funds**

The last issue we would like to address is the amount of funding set aside by the Trust Fund for reparations in this case. According to the Draft Implementation Plan, the Board of the Trust Fund has decided to complement €1 million for collective reparations in the Lubanga case.<sup>27</sup> This is €1 million in total to be dispersed over three years. Such

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<sup>25</sup> ICC-01/04-01/06-3129-AnxA, para 62.

<sup>26</sup> ICC-01/04-01/06-3129-AnxA, para 173.

<sup>27</sup> ICC-01/04-01/06-3129-AnxA, para 174.

an amount is manifestly insufficient. We do note that the TFV Board has stated that this amount is merely an indication at this stage and is not yet a final figure.<sup>28</sup> We hope in reviewing the figure, that the Trust Fund significantly increases the amount put aside for reparations in this case, that it sets itself a fundraising goal with respect to reparations and greatly enhances its efforts in this area. It would be truly regrettable if the Trust Fund was found to not have the resources necessary to implement its own plan.<sup>29</sup>

In closing, practical, legal and conceptual issues such as harm assessment, establishing criteria to assess eligibility, determining the financial responsibility of Mr Lubanga, the form and scale of the reparative responses are in the process of being harmonised by the Trial Chamber into a framework which is legally sound, sufficiently transparent and able to be operationalised. It is a tall order, but that is the challenge within the Court's mandate and it is certainly not less than the victims and survivors of the crimes of enlistment, conscription and use deserve.

The confidence of victims in the reparations process including their confidence in being able to safely access reparative programmes is essential for the success of reparations and may ultimately be the benchmark by which affected communities assess the value of international justice.

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<sup>28</sup> ICC-01/04-01/06-3177-AnxA, para 175

<sup>29</sup> ICC-01/04-01/06-3129-AnxA, para 78. See also, ICC-01/04-01/06-3177-AnxA, para 175.