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TRIAL CHAMBER II

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

**IN THE CASE OF
*THE PROSECUTOR v. GERMAIN KATANGA***

Public Document

United Nations Joint Submission on Reparations

Source: The United Nations

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Mr Éric MacDonald

Counsel for the Defence

Mr David Hooper

Legal Representatives of the Victims

Mr Fidel Nsita Luvengika

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Ms Fiona McKay

Other

Mr Pieter de Ban

(Trust Fund for Victims)

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1. The United Nations (UN) respectfully submits on behalf of the following offices and representative of the United Nations its observations in accordance with the Trial Chamber's Order on reparations on the issues addressed in the Registry's Report on applications for reparations in accordance with Trial Chamber II Order of 27 August (Registry Report):
 - i. The United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO);
 - ii. The Office of the United Nations High Commissioner for Human Rights (OHCHR);
 - iii. United Nations Entity for Gender Equality and the Empowerment of Women (UN Women); and
 - iv. The Special Representative of the United Nations Secretary-General on Sexual Violence in Conflict (the Special Representative).
2. On 15 January 2015, the Trial Chamber in its "Scheduling order for interested States or other interested persons to apply for leave to file submissions pursuant to Article 75 of the Statute" (the Trial Chamber's Order) invited representations, from or on behalf of, the convicted persons, victims, and other interested persons or interested States on the issues specifically addressed in the Registry's 'Report on applications for reparations in accordance with Trial Chamber II Order of 27 August'.
3. On 2 February 2015, the Trial Chamber issued its "Order extending the deadline for interested States and other interested persons to apply for leave to file submissions pursuant to Article 75 of the Statute" granting the Registry's request for an extension and setting a new deadline of 13 February 2015.

4. On 13 February 2015, the United Nations filed its Joint Application for leave to submit observations pursuant to Article 75 of the Statute.
5. On 1 April 2015, the Trial Chamber issued its « Ordonnance autorisant le dépôt d'observations en application de l'article 75-3 du Statut », by which it granted the United Nations leave to submit observations pursuant to Article 75 of the Statute. The Trial Chamber invited the United Nations and others to submit their observations not exceeding 50 pages no later than 4pm on 30 April 2015.
6. On 17 April 2015, the United Nations requested an extension of the deadline for filing its observations pursuant to Article 75 of the Rome Statute.
7. On 24 April 2015, the Trial Chamber granted the request for extension and invited the United Nations and others to submit their observations no later than 4 pm on 15 May 2015.

INTRODUCTION AND SUMMARY

8. The United Nations' submission outlines the relevant international norms and standards as well as jurisprudence and lessons learned with regard to forms and modalities of distribution of reparations. It also draws on the United Nations' experience in the Democratic Republic of Congo. Given the seriousness of the harm inflicted on victims in the *Katanga* case, the United Nations submits that comprehensive reparations which include an appropriate combination of material, symbolic, individual and collective reparations as well as priority access to services, should be considered.

9. Ensuring that reparations are adequate and effective also requires a participatory, gender-sensitive and transformative approach, while also anticipating issues of security for and protection of victims. Taking into account that rape and sexual slavery occurred as part of the attack on Bogoro, it is proposed that consideration be given to sexual violence victims being able to either claim reparations directly from Mr. Katanga, or participate in some other form of relief under the Trust Fund for Victim's assistance mandate.

I.

A. Adequate and effective reparations: forms and modalities

10. The right to an effective remedy is enshrined in international human rights law and international humanitarian law as established in various international and regional instruments¹ and elaborated upon in subsequent jurisprudence.² This right was reaffirmed in the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights Law and Serious*

¹ In particular, provisions on a right to a remedy for victims of violations of international human rights law are found in article 8 of the Universal Declaration of Human Rights (hereinafter “UDHR”), article 2 of the International Covenant on Civil and Political Rights (hereinafter “ICCPR”), article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter “CERD”), article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter “CAT”), article 39 of the Convention on the Rights of the Child, articles 8 and 24 of the International Convention for the Protection of All Persons from Enforced Disappearances (hereinafter “CPED”), and article 83 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (hereinafter “ICRMW”). Regional instruments also include relevant provisions, such as article 7 of the African Charter on Human and Peoples’ Rights, article 25 of the American Convention on Human Rights (hereinafter “ACHR”), and article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “ECHR”). The obligation of States to pay compensation in case of violations of international humanitarian law is reflected in article 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV), and article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, which are only applicable to international armed conflict. The ICRC’s publication *Customary International Humanitarian Law* (Cambridge, Cambridge University Press, 2005, p. 537) states that a customary rule exists whereby a State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused, which is indicated as a rule that is applicable to both international and non-international armed conflicts. In addition to these specific provisions and rules concerning reparation, including compensation, the International Law Commission’s draft articles on the responsibility of States for internationally wrongful acts provide in general terms, in article 31 (1), that the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. See General Assembly resolution 56/83 of 12 December 2001, Annex.

² The Human Rights Committee, in its General comment No. 31, stated: “Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.” (Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 16). See Committee against Torture, General comment No. 3 (2012), CAT/C/GC/3. See also Committee on the Elimination of Discrimination against Women, General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations (2013), 1 November 2013, CEDAW/C/GC/30.

Violations of International Humanitarian Law,³ (hereinafter “Basic Principles”) adopted by consensus in UN General Assembly resolution 60/147. According to the Basic Principles, remedies include “adequate, effective and prompt reparation for harm suffered.”⁴ Such reparation is intended “to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law.”⁵ Moreover, reparation should be “proportional to the gravity of the violations and the harm suffered.”⁶

11. Ensuring adequate⁷ and effective⁸ reparation for harm suffered, as required by international⁹ and regional¹⁰ human rights instruments, the Basic Principles,¹¹ and the jurisprudence of human rights bodies, including the Inter-American Court of Human Rights¹² and the African Commission on Human and Peoples’ Rights,¹³ entails an analysis of the most appropriate forms and modalities of reparations for victims.¹⁴ The Appeals Chamber in *Lubanga* held that “a Trial Chamber must identify the most appropriate modalities of reparations, based on the specific circumstances of the case at hand [...]. [I]dentifying the harm caused to direct and indirect victims as a result of

³ General Assembly Resolution 60/147, “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”, 16 December 2005, A/RES/60/147.

⁴ *Ibid.*, principle 11(b).

⁵ *Ibid.*, principle 15.

⁶ *Ibid.*

⁷ P.C.I.J., Case Concerning The *Factory at Chorzów*, Ser. A-No.9, 27 July 1927, p. 21, (stating that “It is a principle of international law, and even a general conception of law, that the breach of an engagement involves an obligation to make reparation in an adequate form.”) See also CAT, Article 14; CPED, Article 24(4).

⁸ UDHR, Article 8. ICCPR, Article 2(3). ECHR, Article 13.

⁹ See e.g. CERD, Article 6. ICRMW, Article 83.

¹⁰ ACHR, Articles 25, 63. See also Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa, Article 25.

¹¹ General Assembly Resolution 60/147, A/RES/60/147, principle 11.

¹² IACtHR, *Case of Velásquez Rodríguez v. Honduras*, Reparations and Costs, Judgment of 21 July 1989, para. 25.

¹³ ACHPR, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication 245/02, para. 213.

¹⁴ See Rome Statute, Article 75. See also Rules of Procedure and Evidence of the International Criminal Court, Rule 97.

the crimes for which a person was convicted [...] is inter-linked with identifying the appropriate modalities of reparations in that specific case.”¹⁵

i. Forms of reparations

12. Article 75(1) of the Rome Statute lists reparations as including, but not limited to, restitution, compensation and rehabilitation. According to the Appeals Chamber in *Lubanga*,¹⁶ other types of reparations, for instance those with symbolic, preventive or transformative value, may also be appropriate.

13. The Basic Principles provide that victims should “as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation”¹⁷ [...] which includes restitution,¹⁸ compensation,¹⁹ rehabilitation,²⁰ satisfaction,²¹ and guarantees of non-recurrence.²²

¹⁵ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against the “Decision establishing the principles and procedure to be applied to reparations” of 7 August 2012, with AMENDED order for reparations, ICC-01/04-01/06 AA2A3), 3 March 2015, (hereinafter “*Lubanga* Reparations Appeals Judgment”), para. 200.

¹⁶ *Lubanga* Reparations Appeals Judgment, Order, para. 34.

¹⁷ General Assembly Resolution 60/147, A/RES/60/147, principles 15 and 18.

¹⁸ *Restitution* should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law and serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property (General Assembly Resolution 60/147, A/RES/60/147, principle 19).

¹⁹ *Compensation* should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as physical or mental harm; lost opportunities, including employment, education and social benefits; material damages and loss of earnings, including loss of earning potential; moral damage; and costs required for legal or expert assistance, medicine and medical services, and psychological services. (See General Assembly Resolution 60/147, principle 20).

²⁰ *Rehabilitation* should include medical and psychological care as well as legal and social services (General Assembly Resolution, A/RES/60/147, principle 21).

²¹ *Satisfaction* should include, where applicable, any or all of the following: effective measures aimed at the cessation of continuing violations; verification of the facts and full and public disclosure of the truth; the search for the whereabouts of the disappeared and for the bodies of those killed; an official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victims; judicial and sanctions against persons liable for the violations; commemorations and tributes to the victims; and inclusion of an accurate account of the violations that occurred in educational material. (See General Assembly Resolution 60/147, A/RES/60/147, principle 22).

14. As such, the United Nations submits that comprehensive²³ programmes which include an appropriate combination of material, symbolic, individual and collective reparations as well as priority access to services, should be considered. Furthermore, reparations should be linked with other measures aimed at redressing past violations, including criminal justice, truth-seeking, and institutional reform.²⁴

ii. Modalities of reparations

15. Ensuring adequate and effective reparation for harm suffered also entails an analysis of the most appropriate modalities of distribution thereof to victims.²⁵

a. Defining the victims

16. Harm can be suffered by victims individually or collectively. “Victims” of gross violations of international human rights law and serious violations of international humanitarian law are defined in the Basic Principles as “persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering,

²² *Guarantees of non-repetition* should include, where applicable, any or all of the following measures, which will also contribute to prevention: ensuring effective civilian control of military and security forces; ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality; strengthening the independence of the judiciary; protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders; providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces; promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises; promoting mechanisms for preventing and monitoring social conflicts and their resolution; reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law. (See General Assembly Resolution 60/147, A/RES/60/147, principle 23).

²³ See Committee against Torture, CAT/C/GC/3, para. 6.

²⁴ See Commission on Human Rights, “Updated Set of principles for the protection and promotion of human rights through action to combat impunity” (E/CN.4/2005/102/Add.1). See also OHCHR Rule-Of-Law Tool for Post-conflict States: Reparations Programmes, p. 33 (available at www.ohchr.org).

²⁵ *Lubanga Reparations Appeals Judgment, Order*, para. 33.

economic loss or substantial impairment of their fundamental rights, through acts or omissions ... Where appropriate ... the term ‘victim’ also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.”²⁶

b. Individual reparations

17. As individual reparations are awarded on the basis of the determination of damage, loss and injury to, or in respect of a specific person, it is important to gather as much empirical knowledge about victims as possible, including their identity and location.²⁷
18. The Appeals Chamber clarified in its *Lubanga* judgment that the term “victim” refers to “direct and indirect victims [resulting from] the crimes for which [the accused] was convicted,” with the proviso that the Trial Chamber may make a finding in the order of reparations pursuant to “other potential scenarios” with examples as to what scenarios would qualify.²⁸

c. Collective reparations

19. The term “collective reparations” has been used to refer to reparations provided to: (a) a group of people who have suffered harm as a result of violations of international human rights law or international humanitarian law; (b) the particular community where a group of people described in (a) resides; or (c) a group of people described in

²⁶ General Assembly Resolution 60/147, A/RES/60/147, principle 8.

²⁷ *Prosecutor v. Thomas Lubanga Dyilo*, International Center for Transitional Justice, Submission on reparations issues, ICC-01/04-01/06, 7 August 2012, paras. 20-21.

²⁸ *Lubanga* Reparations Appeals Judgment, para. 185.

(a) who are connected by cultural and ancestral bonds.²⁹ The Committee against Torture, in its General Comment No. 3, stated that “[c]ulturally sensitive collective reparation measures shall be available for groups with shared identity, such as minority groups, indigenous groups, and others.”³⁰ The Committee further elaborated “that collective measures do not exclude the individual right to redress.”³¹ Collective reparations can help to prevent stigma, given that they do not require the naming of individual victims and the violations they have suffered, but individuals must also directly benefit from reparations so as to not feel excluded, marginalized, or further stigmatized.³²

20. Special care should be given to ensure that collective reparations do not create or entrench problems of inequality, so that they do not benefit men more than women, who traditionally either do not control or have little access to family or community resources, including bank accounts. It is therefore important that adequate consultations take place with victims when crafting collective reparations (see Section I. B. Reparations should be guided by consultations with the victims). Steps should be taken to understand the cultural and social context of victims, the harm suffered and their particular needs, as well as the obstacles they may face after reparations are awarded.³³

²⁹ See International Center for Transitional Justice, *The Rabat Report: Concept and Challenges of Collective Reparations* (2009), p. 10.

³⁰ Committee against Torture, General Comment No. 3 (2012), 13 December 2012, CAT/C/GC/3, para. 32.

³¹ *Ibid.*

³² Guidance Note of the Secretary General: Reparations for Conflict-Related Sexual Violence (hereinafter “Guidance Note”), p. 7 (available at www.unwomen.org).

³³ *Ibid.*, p. 8.

d. Individual and collective reparations reinforce each other

21. Rule 97(1) of the Rules of Procedure and Evidence (hereinafter “RPE”) allows the Court to award reparations on an individual or collective basis, or both, taking into account the scope and extent of any damage, loss, or injury.

22. The United Nations submits that collective reparations are not a substitute for individual reparations, but can complement them, as the two modalities serve different purposes. Individual reparations are important for a victim, in that they can provide not only important compensatory or other relief, but recognition of the harm a victim individually suffered. Collective reparations can then be provided to a class of victims established to exist as the result of mass crimes and address the needs of those victims without the necessity of individual members of that class entering a formal justice process. Thus, collective reparations could be considered as a way for the Court to fill the gap where individual reparations will not completely redress the harm suffered by all the victims of mass crimes or their community. The United Nations submits that in the present case, a combination of different modalities of reparations would be the most appropriate.

B. Reparations should be guided by the consultations with the victims

23. It is important to fully take into account the principles and experiences outlined below, and the views of the victims themselves regarding the specific forms and modalities of reparations, as reflected in the Registry Report.

24. The United Nations submits that analysis of the forms and modalities of reparations should be guided by the needs of victims. This principle is reflected in Article 75 of

the Rome Statute,³⁴ with its requirement that reparations be “appropriate,”³⁵ as well as in General Comment No. 3³⁶ of the Committee against Torture, among others. This includes the need to understand the particular perspective of the victim, including his or her gender, culture, and background, as these factors will influence the victim’s experience of harm.³⁷

25. Outreach and awareness-raising on the right to reparation are essential to ensure that victims are aware of their rights and of the processes dealing with their harm. Outreach should take place in a language and through means that victims, whether literate or not, can understand and relate to in a culturally appropriate way. It is also important that this awareness-raising is conducted in a way that manages victims’ expectations.

26. Furthermore, it is important that efforts be made to make the process accessible for all victims, by adequately identifying the legal, cultural, economic, religious, and other obstacles that victims encounter, as well as their concerns. Professionals interacting with victims must be trained to communicate with them in a manner that is appropriate in their culture and specific circumstances. For instance, men and women should be given the choice to share their experiences with professionals of the sex they feel most comfortable with. Participation and consultation processes should also take into

³⁴ Rome Statute, Article 75(3).

³⁵ Rome Statute, Article 75(2).

³⁶ See Committee against Torture, CAT/C/GC/3, para. 6. See also Nairobi Declaration on Women’s and Girls’ Rights to a Remedy and Reparation, para. 7 (available at www.fidh.org).

³⁷ See *Prosecutor v. Thomas Lubanga Dyilo*, Dr. Clara Sandoval, Consultant’s report on reparations in the Inter-American Human Rights System, “Annex - Confidential *ex parte* only available to the Registry and the Trust Fund for Victims: Consultant’s report on reparations in the Inter-American Human Rights System,” ICC-01/04-01/06-2806-Anx, 19 March 2012 (reclassified as public). See also Heidy Rombouts, Pietro Sardaro and Stef Vandeginste, “The right to reparation for victims of gross and systematic violations of human rights,” in *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*, K. De Feyter and others, eds. (Antwerp, Intersentia, 2006), p. 459.

account specific obstacles women and girls may face, including limitations regarding mobility, taboos or stigma attached to women's engagement in these processes.

27. Participation of child victims needs to be carefully managed, taking into account their age, abilities, intellectual maturity, and evolving capacities, in a manner that does not risk further harm or trauma.

28. Finally, confidentiality at all stages of the reparation process is essential in order to encourage victims to come forward, to have faith in and engage with the process, and to protect them from further harm. In the case of sexual and gender-based crimes, due to the stigma attached to them, confidentiality is particularly crucial to protect the victim from further victimization by her/his own community.

29. It is submitted that by supporting a victim-centered approach in the mapping, design, implementation, monitoring, and evaluation of reparations, the process itself can be empowering and transformative. This can enhance the intended impact and perception of reparations, and ensure ownership of the process.³⁸

C. Reparations should be gender sensitive

30. Ensuring that reparations are adequate and effective requires a full understanding of the gendered nature of the harm suffered,³⁹ for both females and males, and the consequences that result. This understanding should inform considerations of the gender inequalities that may result from the operationalization of reparations, in order to ensure that reparations are equally accessible to all victims, and do not exclude,

³⁸ Guidance Note, pp. 9-11.

³⁹ See also Committee on the Elimination of Discrimination against Women, CEDAW/C/GC/30, para. 79.

marginalize, or penalize women or men. Similarly, the *Nairobi Declaration on Women's and Girls' Rights to a Remedy and Reparation* and the 2010 report by the Special Rapporteur on violence against women, its causes and consequences⁴⁰ advocate gender-sensitive reparations which take into account pre-existing gender relations and power imbalances to ensure a fair assessment of the harm inflicted upon women and men, with equal access to, and benefits from, reparation programmes for both women and men.

31. The United Nations submits that integrating a gender sensitive dimension into the reparations order involves identifying the legal, cultural, social and economic obstacles that prevent women from participating in the design, implementation, monitoring and evaluation of the reparations process; and that the substance of reparations is responsive to the particularities of women's vulnerability and their roles vis-à-vis their communities. Respectfully, it is submitted that the Court should take specific measures that seek to intentionally and strategically address the underlying structural inequalities that prevent women from accessing and benefiting from reparations processes. "Negative stereotypes," especially those relating to conflict-related sexual and gender based violence, can "impact [...] access to justice and reparation by women, who may be reluctant to come forth due to feelings of shame or fear of social ostracism."⁴¹ Specific measures can include measures to compensate for time constraints and mobility, including travel and child care costs, ensuring processes take place in local languages, and, if necessary, the provision of identity documents to

⁴⁰ Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, 23 April 2010, A/HRC/14/22. See also Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, "Principles on Housing and Property Restitution for Refugees and Displaced Persons", 28 June 2005, E/CN.4/Sub.2/2005/17.

⁴¹ Anne Saris and Katherine Lofts, "Reparations Programmes: A Gendered Perspective", in *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity* (Ferstman, *et al.*, eds 2009), pp. 87-88.

facilitate women's participation. Access to adequate psychological support and to health care services is also required to promote free and meaningful participation of survivors in the process and to ensure that it is a beneficial rather than harmful experience.⁴²

32. Furthermore, the United Nations submits that care should be taken to ensure that any form and modality of reparations is delivered in a gender responsive manner, benefitting men and women equally. For instance, the goal of restitution can be problematic for women, including women living in the DRC. Seeking to "return" to a pre-violation situation ignores the structured and endemic forms of gendered violence and discrimination that women are subject to prior, during, as well as post conflict. Reparations should aim to capitalize on their potential to move societies towards greater gender equality.⁴³

D. Reparations should seek to have a transformative potential

33. The UN Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights has emphasized that "the question of reparation should be viewed in the overall context of the promotion and protection of human rights and fundamental freedoms and of preventing and correcting human rights abuses."⁴⁴ The design and implementation of reparations, including the

⁴² Guidance Note, pp. 11-12.

⁴³ Guidance Note, p. 16. Ni Aolain, Fionnuala D. and O'Rourke, Catherine and Swaine, Aisling, Transforming Reparations for Conflict-Related Sexual Violence: Principles and Practice (2 March 2015). Harvard Human Rights Journal, Forthcoming; Minnesota Legal Studies Research Paper No. 15-02. Available at SSRN: <http://ssrn.com/abstract=2572540>, p. 20.

⁴⁴ Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection

appropriate combination of different forms and modalities, should be informed by their transformative potential.⁴⁵

34. The principle of transformative reparations acknowledges that conflict-related violence often results from, and perpetuates, patterns of pre-existing structural subordination and discrimination. These inequalities can also aggravate the consequences of the harm. Rather than re-establishing or reinforcing the existing paradigm that contributed to victimization in the first place, reparations should aim to transform or change the status quo by tangibly improving victims' situations. In the aftermath of international crimes, it is often not appropriate to restore the status quo ante that gave rise to such crimes, in particular because the majority of victims will likely have been powerless and dispossessed at the time the conflict started. In this respect, care must be taken so as to not unintentionally dilute the impact of reparations and so reduce their transformative potential. Reparations have the potential to trigger important changes, even if they alone cannot transform the root-causes, or the general structural conditions that made such violence possible.

35. Transformative reparations are particularly important when addressing the violations suffered by women and girls, who experience conflict-related harms differently from men. In light of the disparate and differentiated impact that violence has on women and on different groups of women, there is a need for specific measures of redress in order to meet their needs and priorities. In the Inter-American Court of Human Rights, this principle is illustrated by the case of *Cotton Field v. Mexico*, where the

of Minorities, "Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report submitted by Mr. Theo van Boven, Special Rapporteur", 2 July 1993, E/CN.4/Sub.2/1993/8, para. 136 (2).

⁴⁵ See Guidance Note, p. 8.

court stated that “bearing in mind the context of structural discrimination [against the female victims in the case]..., 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.”⁴⁶

36. Similarly, the UN Special Rapporteur on violence against women, its causes and consequences has stated that “[s]ince violence perpetrated against individual women generally feeds into patterns of pre-existing and often cross-cutting structural subordination and systemic marginalization, measures of redress need to link individual reparation and structural transformation.”⁴⁷ Furthermore, the Committee on the Elimination of Discrimination against Women, in its General Recommendation No. 30, reiterated that “reparation measures should seek to transform the structural inequalities which led to the violation of women’s rights, respond to women’s specific needs and prevent their re-occurrence.”⁴⁸ For example, in certain settings, women-centered economic compensation, access to productive resources, credit, fistula surgery and other reproductive health services, and land redistribution or restitution may help enhance women’s economic empowerment and autonomy.⁴⁹ The development and implementation of programmes should be guided by their potential to be transformative.

⁴⁶ IACtHR, *Case of González et al. (“Cotton Field”) v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of 16 November 2009, para. 450.

⁴⁷ See Human Rights Council, “Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo”, 23 April 2010, A/HRC/14/22, para. 24.

⁴⁸ Committee on the Elimination of Discrimination against Women, CEDAW/C/GC/30, para. 79.

⁴⁹ Guidance Note, p. 9.

II.

37. It is submitted that reparations in the *Katanga* case be informed by the above analysis of international standards and jurisprudence with regard to the forms and modalities of reparations. Furthermore, reparations should be guided by lessons learned from the United Nations practical experience in the Democratic Republic of Congo and elsewhere, including those of MONUSCO, OHCHR, UN Women, and the Special Representative. It should also take into account the work of the Panel on Remedies and Reparations for Victims of Sexual Violence in the DRC.⁵⁰

A. Reparations for victims in the *Katanga* case should be comprehensive and combine individual and collective, and material and symbolic reparations

38. Given the seriousness of the harm inflicted on victims in Bogoro, the United Nations submits that a combination of different forms of reparations, including material and symbolic, should be considered in the *Katanga* case. The modalities should include both individual and collective reparations. Reparations should be designed to maximize their transformative potential, ensuring that a gender-sensitive and participatory approach is maintained, while also anticipating issues of security. This will include taking into account victims' views and needs in order to provide the means to seek to transform their own lives.

39. Efforts must also be made to ensure that reparations do not create stigma,

⁵⁰ See 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 (hereinafter "Report of the Panel on Remedies") (available at www.ohchr.org).

discrimination, or ostracise victims, and do not further expose victims or put them at risk by identifying them. It is also important that the provision of reparations is combined with the provision of appropriate protective measures. Throughout the process, victims' expectations must be carefully managed as harm can be exacerbated when the process of claiming reparations is restrictive or sets unrealistic expectations for the victims. Furthermore, due consideration should be given to adequate reparations granted by national courts in cases involving convictions for similar crimes, and efforts should be made to ensure that there is not too great a discrepancy between reparations awarded by various bodies.

Individual material benefits should be duly considered

40. According to the Registry Report, victims have indicated their overwhelming preference for receiving individual material benefits, including economic development and financial measures, notably housing and farming/agriculture and support for education, with most wanting this to be provided through financial compensation.⁵¹ Therefore, the United Nations submits that due consideration should be given to the provision of individual compensation, in addition to other forms of reparations. In that regard, the United Nations would argue that individual compensation need not be substantial in order to make a real contribution to the lives of the victims of the attacks on Bogoro.

⁵¹ See *Prosecutor v. Katanga*, Registry Report on Applications for Reparations In Accordance with Trial Chamber II's Order of 27 August 2014, Annex 1, ICC-01/04-01/07, 16 December 2014, (hereinafter "*Katanga* Registry Report"), pages 28, 35 and 45.

41. The form of compensation should be carefully considered to enhance its transformative potential, and issues of security should be anticipated. For instance, the payment of lump-sum compensation should take into account the obstacles that victims, in particular women, may face in accessing and keeping money, given that many of the victims may be illiterate and may not have access to the formal banking sector. This includes the likelihood of money being spent quickly to meet needs of other members of the family, or for reasons not necessarily related to the harm suffered. In order to obviate some of these problems, victims could be encouraged and trained to use community credit unions, known in the DRC as *Mutuelles de Solidarité* (MUSOs).
42. The United Nations submits that compensation in kind should be also considered, including the provision of material kits with tools, equipment, or merchandise of the victim's preferred income-generating activity. Such compensation should be provided directly to victims.
43. The suggested reparation process should aim at bringing a positive transformation to the lives of the victims and their communities. The elaboration and implementation of specific income-producing projects that can promote peaceful coexistence and mutually profitable economic relations between the various groups in conflict should be considered. Moreover, in order to avoid reinforcing pre-existing imbalances and to emphasize the transformative aspects of reparations, the victims should be given opportunities to increase their knowledge of the creation and management of income-generating projects, as well as of banking and savings methods, as indicated in the examples above. These basic economic skills can assist the victims and their families to improve their situations through long-term sustainable activities.

44. When considering specific reparations measures *in lieu* of monetary compensation, it is important to ensure that the social and gender-based implications are carefully considered, and that local leaders and the community as a whole are properly sensitized.

Support for Education for Children and Vocational Training for Youth should be considered

45. According to the Registry Report, victims also indicated that the attack on Bogoro “had an impact on their ability to educate their children. Of those who indicated that the economic development and financial measure was a high priority, 66% expressed the need for educational support for their children.”⁵²

46. It is submitted that further emphasis should be placed on the children of victims, by potentially establishing a Community Youth Centre and schools. Youth victims could either be sent back to school or, if already in school, supported through the payment of school fees and the provision of materials. Schools could also be supported directly to provide free education for victims, with the involvement of the Ministry of Education. Depending on the amount of funding available, schools could also be built or rehabilitated to ensure continuity of educational opportunities.

47. For instance, as part of the Reparations for Victims of Sexual Violence Project in the DRC, one of the NGOs specialized in assistance to children and youth, received a grant and supported 80 girl victims, who received one year school fees, as well as

⁵² See *Ibid*, page 24.

school uniforms and materials. The victims also received psychosocial assistance throughout the year with sessions on HIV/AIDS, human rights, sexual violence and youth issues, and were registered in a health insurance program. As all the victims were either orphans or displaced children, their guardians received monthly food rations for the whole family and a small grant to support income generating activities that might support family needs and the victims' schooling.

48. In order to increase job opportunities, youth could also receive vocational training in order to acquire skills, and a small grant may be made available after such training for an income generating activity. In particular, this may be a possible option in cases in which the direct victims have died or are too old to receive training or to work, and where the children/youth (indirect victims) can be trained and supported in order to take care of the direct victim / family.

Medical, psychological and social measures should be considered

49. According to the Registry Report, besides the overwhelming preference of victims for economic development and financial measures, "the second most requested measure was medical/psychological support."⁵³

50. The United Nations submits that reparations should go beyond pecuniary benefits to individuals and include access to adequate physical and mental health services. Public hospitals and/or NGO-run health centers could be equipped and supported to provide medical assistance and psychological assistance to victims. Rehabilitation is in many

⁵³ See *Ibid.*, page 45.

cases necessary to enable victims to benefit from other forms of reparations.⁵⁴ It entails not simply restoration, of function, but also the acquisition of new skills required in the aftermath of violations. Full rehabilitation requires a holistic approach and may include medical, physical and psychological rehabilitation services, re-integrative and social services, community and family oriented assistance, vocational training and education.⁵⁵ Medical and psychosocial support are one of the most important remedies for victims and a community impacted by conflict-related sexual violence.

51. This might be accomplished by means of the establishment of a “Community House” where victims could learn, undertake apprenticeships, and obtain basic knowledge of small business management, human rights, literacy and civic education. In Bukavu, for instance, the Brazilian funded OHCHR project on Reparations for Victims of Sexual Violence Project⁵⁶ rehabilitated the DRC Red Cross transit house where victims and other vulnerable persons received psychosocial assistance and were trained in various skills such as dyeing, sewing, knitting and basket-making.

52. As part of the project, a group of three NGOs received a grant to support 250 victims suffering from severe trauma after an attack. The first NGO provided psychological assistance to the victims, after which the second NGO (an adviser on financial, economic management and entrepreneurial issues) provided them with training on the

⁵⁴ C. Sandoval, “Rehabilitation as a Form of Reparation under International Law” (London, REDRESS, 2009).

⁵⁵ See Committee against Torture, CAT/C/GC/3, paras. 11 and 13.

⁵⁶ The OHCHR Reparations for Victims of Sexual Violence Project was a 12-month project funded by Brazil which was implemented from August 2012 to September 2013 in South Kivu and Equateur provinces. Five NGO were granted funds to implement the project activities in South Kivu for victims’ economic and social reintegration. The Project also involved three NGO-run Legal Clinics for victims in Equateur province.

creation and management of small businesses and assistance with establishing a business plan for their preferred economic activities. The NGO helped them to establish groups, and also created *MUSOs* to introduce these groups to concrete savings and loans programmes – the groups could then request loans to support and strengthen their activities. After completing the training, the victims were directed to the DRC Red Cross transit house for apprenticeships. The beneficiaries were in a position to take ownership of the production and sale of baskets and clothes. They received economic reintegration kits from the second NGO, which also provided follow up and advice. This example shows the importance of an integrated approach incorporating various forms of reparations and the need to involve local civil society organisations with different areas of expertise and to follow-up and provide advice at each stage of the implementation process.

53. It is proposed that such support also be provided through the already-existing Maisons de la Femme, managed by the National Ministry of Gender, and operating throughout the DRC, where women are empowered to undertake economic and social activities, or via local NGOs or civil society organizations.

Symbolic reparations should be meaningful to victims

54. According to the Registry Report, the victims expressed the least interest in, and in some instances a clear rejection of, symbolic measures such as monuments.⁵⁷ While taking into account the Registry Report, the United Nations submits that reparations

⁵⁷ See *Katanga* Registry Report, p.28.

should be designed to be multifaceted and consider a full range of material and symbolic benefits.

55. With regard to symbolic reparations, it is particularly important that they do not perpetuate existing stereotypes and are gender sensitive. Furthermore, given their semantic and representational function, symbolic reparations should be based on adequate consultations with victims and an understanding of the particular setting in which they are to be provided.⁵⁸ In particular, it is important to understand, from the victims' point of view, what might be considered local symbols of peace and reconciliation, in order to appropriately provide symbolic reparations, and to avoid symbols that might be offensive or might retraumatize the victims. As appropriate, local authorities should be involved in any symbolic reparations such as the organization of ceremonies for peace.

Guarantees of non-recurrence should be considered

56. The unjust use and distribution of access to land has been both the root cause and the consequence of the massive and systematic human rights violations committed against the inhabitants of Bogoro area. As past and current inter-ethnic problems arise from issues relating to land ownership and use in Bogoro and nearby locations, it is proposed that the court consider including within the reparations, ways to mitigate problems such as inadequate documentation or other inequalities that might result in disparate capacities of victims, particularly women, to prove their tenancy or ownership rights to land.

⁵⁸ See OHCHR, Rule of Law Tools for Post-conflict States: Reparations Programmes, p. 23.

B. Reparations for victims of sexual violence

57. In the preceding sections, the United Nations has proposed that the Chamber be guided by a gender-sensitive approach that would result in a comprehensive and transformative reparations Order for all victims in this case. In its Report, the Registry noted:

*“that among the victims participating and/or requesting reparations are some who have suffered from rape and sexual slavery, or have suffered as indirect victims of this crime committed to their relatives. During the consultation, some local community leaders mentioned that in their community ‘some people are still suffering and are not able to move on due to their trauma that still persists or serious injury that left them disabled’ and ‘many vulnerable victims, in particular raped women and indigents, required special care.’”*⁵⁹

58. In its judgment, the Chamber acquitted Mr. Katanga of criminal liability for rape and sexual slavery as crimes against humanity and war crimes under Articles 7(1)(g) and 8(2)(e)(vi) of the Rome Statute. At the same time, the Chamber held that rape and sexual slavery occurred as part of the attack on Bogoro on 24 February 2003 beyond reasonable doubt.⁶⁰ At the sentencing phase, the Chamber determined that the commission of sexual violence was an element to be considered as part of the gravity of the crimes for which Mr. Katanga was convicted.⁶¹ As a result, the question arises

⁵⁹ *Katanga* Registry Report, footnote 110 (emphasis added).

⁶⁰ *Prosecutor v. Katanga*, Judgment, ICC-01/04-01/07, 7 March 2014, paras. 999, 1023 (hereinafter “*Katanga* Judgment”)

⁶¹ *Prosecutor v. Katanga*, Sentencing Decision, ICC-01/04-01/07, 23 May 2014, para 48 (hereinafter “*Katanga* Sentencing”).

whether victims of sexual violence in Bogoro can receive reparations in light of Mr. Katanga's acquittal on charges of rape and sexual slavery.

59. For the reasons set out below, the United Nations respectfully recommends that consideration be given to sexual violence victims being able to either (i) claim reparations directly from Mr. Katanga or (ii) participate in some other form of relief under the Trust Fund for Victim's assistance mandate.

i. Victims of sexual violence crimes are entitled to reparations from Mr. Katanga despite his acquittal because a lesser standard of proof and a different form of liability apply in the reparations phase.

60. As noted in the preceding sections, Article 75 of the Rome Statute provides that the Court is empowered to "determine the scope and extent of any damage, loss and injury to, or in respect of, victims" using principles it freely determines.⁶² Furthermore, RPE Rule 97(1) provides that when the Court considers an individual or collective reparations award, it must "tak[e] into account the scope and extent of *any* damage, loss or injury" suffered by a victim.⁶³ The term "harm" is broadly defined in the jurisprudence by its ordinary meaning to "denote hurt, injury or damage."⁶⁴ This definition of "harm" is materially similar to the definitions found in both Article 75 of the Rome Statute and RPE Rule 97(1). Relying on these provisions, the Appeals Chamber in the *Lubanga* case stated that "[r]eparation is to be awarded based on the harm suffered as a result of the commission of any crime within the jurisdiction of the

⁶² Rome Statute, Article 75 (1).

⁶³ Rules of Procedure and Evidence, Rule 97(1) (emphasis added).

⁶⁴ *Lubanga* Reparations Appeals Judgment, Order, para. 10 (internal quotations omitted).

Court.”⁶⁵ The United Nations submits that an argument can be made for reparations to be granted, if a victim can establish that there is a causal link between the harm that they suffered (e.g. sexual violence) and the crimes for which Mr. Katanga has been convicted (e.g., an attack on a civilian population).

61. The Court’s jurisprudence and the general principles on reparations under international law provide for an analysis that differs from that required for criminal conviction. The jurisprudence confirms that the inquiry, standard of proof and form of liability in a reparations proceeding are of a “fundamentally different nature” from that of a criminal trial.⁶⁶ It is generally considered that under the Rome Statute a “claim of redress is a civil claim heard in [a] criminal jurisdiction.”⁶⁷ Recognizing this distinction and consistent with international practice,⁶⁸ the reparations judgments in the *Lubanga* case established that the standard of proof in the reparations phase is “less exacting” than the one required in the criminal phase.⁶⁹ The *Lubanga* Appeals Chamber confirmed that the appropriate standard is the one customarily used in civil cases for damages, which is “the balance of the probabilities.”⁷⁰ Consequently, an acquittal on the criminal charges of rape and sexual slavery cannot act as a bar *per se* to reparations for the harm arising out of acts of sexual violence. The United Nations

⁶⁵ *Ibid.*, para 79.

⁶⁶ *Lubanga* Reparations Appeals Judgment, Order, para 22.

⁶⁷ Dinah L. Shelton, “Reparations to Victims at the International Criminal Court” in D. Shelton and T. Ingadóttir, *The International Criminal Court Reparations to Victims of Crimes (Article 75 of the Rome Statute) and the Trust Fund (Article 79)*, available at http://www.pict-pecti.org/publications/PICT_articles/REPARATIONS.PDF.

⁶⁸ See, e.g., Howard M. Holtzmann and Edda Kristjánsdóttir, *INTERNATIONAL MASS CLAIM PROCESSES: LEGAL AND PRACTICAL PERSPECTIVES*, Section 5.02 (“Standard of Proof”) (Oxford University Press 2007). See also Guidance Note p. 14.

⁶⁹ *Lubanga* Reparations Appeals Judgment, Order, para 22. See also *Lubanga* Reparations Appeals Judgment, para 81 (“With respect to the standard and burden of proof, the Appeals Chamber considers that the Trial Chamber correctly articulated the principle that reparation proceedings are fundamentally different from proceedings at trial and therefore a less exacting standard should apply”) (internal quotations omitted).

⁷⁰ *Lubanga* Reparations Appeals Judgment, Order, para 65.

respectfully submits that in view of a “less exacting”⁷¹ standard of proof at the reparations phase, relying solely on determinations made by the Chamber at the higher standard of proof required for criminal culpability and sentencing would be contrary to the purpose of lowering that standard when deciding on reparations.

62. Regarding the proper form of liability for a reparations claim, an applicant for reparations must show both cause-in-fact (“but/for” cause) and proximate cause, using “sufficient proof of [a] causal link between the crime and the harm suffered [by the applicant], based on the specific circumstances of the case.”⁷² As noted, during the reparations proceeding, the Chamber conducts an analysis in order to establish the types of harm caused to victims.⁷³ This analysis of harm focuses on the consequences of Mr. Katanga’s crimes, whether those consequences are the result of intention, recklessness or simply negligence, so that the Chamber’s Order of “reparation [can] as far as possible, wipe out *all* the consequences of the illegal act.”⁷⁴ The United Nations is therefore of the view that the relevant inquiry for the purposes of reparations is whether, on a balance of the probabilities, Mr. Katanga’s crimes resulted in (i.e., “were the proximate cause of”) the victim’s harm⁷⁵ (i.e. “injury, loss or damage”) and if so, to what extent.

63. Although the *Lubanga* Appeals Chamber excluded sexual and gender-based violence from being compensable by Mr. Lubanga, it limited its decision to the “particular

⁷¹ *Lubanga* Reparations Appeals Judgment, para 81.

⁷² *Ibid*, paras 81, 129.

⁷³ *Ibid.*, para. 185.

⁷⁴ P.C.I.J., *Case Concerning The Factory at Chorzów*, Ser. A-No.17, 13 September 1928, p. 47 (emphasis added). It is generally accepted that the *Chorzów Factory Case* is applicable in the individual human rights context, see, e.g., Carla Ferstman, *et al.*, *Reparations for Victims of Genocide, War Crimes, and Crimes Against Humanity: Systems in Place and Systems in the Making*, p. 8 (Nijhoff Publishers 2009).

⁷⁵ For the purposes of collective reparations, the question would simply be modified to include multiple victims.

circumstances of [that] case.”⁷⁶ Moreover, the rationale for the Appeals Chamber’s reversal was based on the fact that the Trial Chamber “was required to explain” how the “harm from sexual and gender-based violence resulted from the crimes for which Mr. Lubanga was convicted” and that “[i]t did not do so.”⁷⁷ The Appeals Chamber thus left open the possibility that a well-reasoned reparations Order, which applies the appropriate standard of proof and properly defines a causal link between sexual violence and the crimes for which an individual was convicted, could be acceptable despite an acquittal on the crimes of rape and sexual slavery.

64. Furthermore, the “particular circumstances” of the case against Mr. Katanga are significantly different from those in *Lubanga*. In the instant case, sexual violence crimes have consistently been part of the consideration and analysis of the Court at different phases of the proceeding: charges of rape and sexual slavery were confirmed by the Pre-Trial Chamber against Mr. Katanga;⁷⁸ the Trial Chamber found that rape and sexual slavery occurred beyond reasonable doubt as part of the attack on Bogoro;⁷⁹ rape and sexual slavery were considered as part of the gravity of Mr. Katanga’s crimes at sentencing;⁸⁰ and the Registry noted based on its community assessment that victims of sexual violence are present in Bogoro.⁸¹

65. As a consequence, the United Nations respectfully recommends that the Chamber give consideration to (i) the causal connection between sexual violence crimes and the

⁷⁶ *Lubanga* Reparations Appeals Judgment, para 198.

⁷⁷ *Ibid.*

⁷⁸ *Prosecutor v. Katanga*, Decision on the Confirmation of Charges, ICC-01/04-01/07, 30 September 2008, pp. 211–12.

⁷⁹ *Katanga* Judgment, paras 999, 1023.

⁸⁰ *Katanga* Sentencing, para 48.

⁸¹ *Katanga* Registry Report, footnote 110.

crimes for which Mr. Katanga's has been convicted and (ii) the application of the appropriate and "less exacting" standard of proof in the reparations proceeding.

ii. Where a causal connection between sexual violence crimes and Mr. Katanga's crimes is not established, victims of sexual violence may be compensated using "other resources" of the Trust Fund for Victims.

66. If the Trial Chamber determines that certain victims have not been able to show a causal connection between sexual violence (or other harm) that they suffered and the crimes for which Mr. Katanga was convicted, "[o]ther resources of the Trust Fund may be used for [their] benefit [...]"⁸² under RPE Rule 98(5).

67. The Regulations of the Trust Fund for Victims provide at Regulation 50(a) that the Board of Directors of the Trust Fund may use these "other resources" when they "consider it necessary to provide physical or psychological rehabilitation or material support for the benefit of victims and their families."⁸³ Known as the Trust Fund for Victims' assistance mandate, the *Lubanga* Appeals Chamber stated that it was "appropriate" for the Board of Directors of the Trust Fund to consider providing some level of relief to victims of sexual and gender-based violence in that case despite its holding regarding receiving reparations directly from Mr. Lubanga.⁸⁴

68. In the present case, the Registry has already recommended that "[u]nder rule 98(5) of the RPE the TFV may use other resources for the benefit of victims and their families,

⁸² Rules of Procedure and Evidence, Rule 98(5).

⁸³ Regulations of the Trust Fund for Victims, Regulation 50(a)(i).

⁸⁴ *Lubanga* Reparations Appeals Judgment, para. 199.

with no requirement for them to be linked to the case specifically [...].”⁸⁵ It also noted the collective harm the community of Bogoro may have suffered and stated that such “an award [...] would also allow the wider affected community to benefit.”⁸⁶ Acknowledging the suffering of sexual violence victims in this way is especially important as this type of violence often subjects victims to devastating stigma, which may even prevent victims of sexual violence from coming forward to the Court at all.⁸⁷

69. The United Nations respectfully submits that the Chamber recommend that the Board of Directors of the Trust Fund for Victims consider the provision of reparations for victims of sexual violence through the use of its assistance mandate in its future implementation plan for this case. Such a recommendation would allow the Chamber to ensure that victims of sexual violence are considered in the Trust Fund’s implementation plan. At the same time, the United Nations recommends that every effort be made in order to ensure that such a recommendation by the Chamber neither prejudices nor precludes victims from making or sustaining individual claims against Mr. Katanga for reparations for harm that resulted from the commission of the crimes for which he was convicted.

C. Considerations relating to the administration of reparations

70. Based on MONUSCO’s experience with previous reparations schemes in the DRC, it is important to consider whether reparations should be distributed directly to the

⁸⁵ *Katanga* Registry Report, para 94(f).

⁸⁶ *Ibid.*

⁸⁷ Guidance Note, p. 5.

victims, or via NGOs or state institutions. While it may be preferable to provide certain types of reparations directly to the victims, for collective and other reparations to be effective, it is also important to involve local NGOs, particularly those with experience in providing services, training or other forms of assistance to victims.

71. The Registry Report indicates that victims “expressed mistrust of local administration and [collective] project implementation in general.”⁸⁸ However, it is submitted that to the extent possible, it would be important to involve local authorities in the operationalization of reparations. This may also help to address the perception by some victims that authorities are unresponsive towards their plight and needs, in particular those of women victims. Involving state institutions can also better contribute to the sustainability of state capacity to assist victims. It is also essential to involve the state in order to ensure that measures are taken to guarantee the non-repetition of violations and to ensure that necessary reforms to institutions, laws and practices are put into effect.

72. As perpetrators may still be present in the community or be aware of the support / assistance to victims, this may create security concerns for the victims. The United Nations submits that it is also therefore essential for the court to ensure that the implementation of reparations does not further expose victims or put them at risk. Reparations should therefore be combined with appropriate protective measures.

⁸⁸ See *Katanga*, Registry Report, page 35.

Linkages between Reparations and Development Cooperation

73. Many countries recovering from conflict, including the DRC, experience the twin challenges of mass poverty and mass violations for which redress is due. It is submitted that delivering on sustainable and transformative reparations for victims in such circumstances requires new approaches. While the right to reparation and the right to development are distinct and separate, coordinating programming and strategies with development actors can assist in better realizing both rights.⁸⁹ For instance, donors supporting health, income-generating, or land-redistribution initiatives could work with the Trust Fund to develop appropriate modalities of reparations that can be included in the Trust Fund's draft implementation plan. In designing its implementation plan, the Court should encourage the Trust Fund to consult and coordinate with UN actors and development partners to fulfil the Court's reparations order with sustainable and transformative impact for victims.

D. Reparations should be a part of broader efforts to combat impunity in DRC

74. Reparations should be complementary to other ongoing efforts to combat impunity in the DRC in order to ensure justice for victims. Furthermore, the Katanga judgment may have a dissuasive effect on activities of armed groups in Ituri and in other parts of the DRC. The restoration of lasting peace and security in all parts of the country is imperative, as is the restoration of dignity and human rights for victims.⁹⁰ In

⁸⁹ Guidance Note, pp. 9-10

⁹⁰ See also Report of the Panel on Remedies, page 53.

particular, it is to be noted that, compared to the number of gross human rights violations committed by armed groups in eastern DRC, there are relatively few domestic convictions of (and thus reparations awards for) members of armed groups, particularly high-level commanders.⁹¹ There has been an increased focus by MONUSCO Joint Human Rights Office (hereinafter “JHRO”) and other actors working in the area of transitional justice/fight against impunity to encourage and promote investigations, prosecutions and trials of members of armed groups, particularly high-level commanders.⁹² Insofar as the *Katanga* case involves a high-level commander of an armed group, the conviction and reparations award in this context may have a powerful dissuasive effect on other leaders of armed groups, and may serve as a precedent for the award and execution of reparations awards for perpetrators from armed groups. To further these objectives, the conviction and reparations award should therefore be publicized, particularly in the East of the country, to the extent possible without exposing the victims/putting them at any further risk.

75. It is submitted that the provision of reparations in the *Katanga* case may also positively impact on efforts to ensure that reparations granted in domestic judgments are actually provided to victims by the State.⁹³ However, it should be made clear that

⁹¹ Although there are some positive developments – the recent conviction and sentencing of FDLR commander Kizima Lenine Sabin to life imprisonment for crimes against humanity in December 2014, and recent arrest of Justin Banaloki (aka Cobra Matata), the leader of the FRPI in January 2015, charged with, inter alia, war crimes, crimes against humanity and child recruitment.

⁹² MONUSCO JHRO is currently planning an evaluation workshop with the DRC military justice authorities on the investigation and prosecution of armed groups which will be held later in the year in Bukavu. The International Centre for Transitional Justice has also noted the lack of prosecution of high-ranking members of armed groups, and is working with the military justice authorities on developing a prosecution strategy which addresses this.

⁹³ To date, there has only been one case (Songo Mboyo) where a reparations award has actually been paid by the State, although reparations have been awarded in many other cases.

the order for reparations in the *Katanga* case is against the convicted person, and thus flows from the liability of the perpetrator,⁹⁴ and that reparations are to be paid by the Trust Fund for Victims only because Mr. Katanga is indigent (and he is under the obligation to repay the Trust Fund if any funds become available).⁹⁵ This is important in order to prevent the perception, among perpetrators of gross human rights violations in the DRC, that other entities, rather than the perpetrators themselves, are primarily responsible for compensating victims, which might erode the dissuasive effect of reparations.

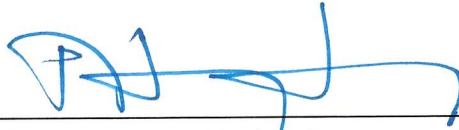
76. The ICC Trust Fund for Victims and the administration of the reparations in the *Katanga* case may also inform how domestic administrative reparations might function, including a reparations fund for victims of sexual violence and child recruitment to be created under the auspices of the Personal Representative of the Head of State on Sexual Violence and Child Recruitment.⁹⁶

The United Nations remains at the disposal of the Court to provide it with any further information and to present its views to the court if called to do so.

⁹⁴ See *Lubanga* Reparations Appeals Judgment, paras. 64-76,

⁹⁵ See *Ibid.*, paras. 103-104.

⁹⁶ Such efforts could assist with commitments made by the Government regarding reparations, for example, within the Joint Communiqué between the Government of the DRC and the United Nations on the Fight Against Sexual Violence in Conflict (2013), p. 2.



Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs
and United Nations Legal Counsel
on behalf of

the High Commissioner for Human Rights;
the Special Representative of the Secretary-General on Sexual Violence in Conflict;
the Executive Director of UN Women; and
the Under-Secretary-General for Peacekeeping Operations.

Dated this 14th day of May 2015

At New York, United States of America