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TRIAL CHAMBER II

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

***SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO
IN THE CASE OF
THE PROSECUTOR v. GERMAIN KATANGA***

Public

**Defence Consolidated Response to the Parties, Participants and Other Interested
Persons' Observations on Reparation**

Source: Defence for Mr Germain Katanga

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

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INTRODUCTION

1. Pursuant to the Trial Chamber's *Ordonnance enjoignant les parties et les participants à déposer des observations pour la procédure en réparation*¹ and its *Ordonnance autorisant le dépôt d'observations en application de l'article 75-3 du Statut* of 1st April 2015,² the following parties, participants and other interested persons submitted their observations on reparation : the Legal Representative of Victims,³ the Registry,⁴ the Trust Fund for Victims (the "TFV"),⁵ the Prosecution,⁶ the United Nations (the "UN"),⁷ the Queen's University Belfast's Human Rights Centre and University of Ulster's Transitional Justice Institute (the "Universities").⁸ the *Ligue pour la Paix, les Droits de l'Homme et la Justice* (the « LIPADHOJ »),⁹ and the Redress Trust.¹⁰
2. The defence for Mr Katanga ("the defence") hereby submits its consolidated response to these observations in a single document, given that the various submissions deal with the same issues.
3. The defence is grateful to the various contributors to this discussion, and in particular to the observations made on behalf of the Redress Trust and by Dr Luke Moffett on behalf of the Queen's and Belfast Universities.
4. In respect of many of the issues raised in the submissions, and which the Trial Chamber has provided the defence with the opportunity to respond to in this filing, the defence has already declared its viewpoint in its Observations on reparations

¹ ICC-01/04-01/07-3532, 1 April 2014.

² ICC-01/04-01/07-3533-Red, 1 A April 2014.

³ ICC-01/04-01/07-3555, Observations des victimes sur les principes et la procédure en réparation, 15 May 2015.

⁴ ICC-01/04-01/07-3553, Registry's Observations pursuant to Order ICC-01/04-01/07-3532, 15 May 2015.

⁵ ICC-01/04-01/07-3548, Observations on Reparations Procedure, 15 May 2015.

⁶ ICC-01/04-01/07-3544, Prosecution's Observations on the Procedure for Reparations, 15 May 2015.

⁷ ICC-01/04-01/07-3550, Prosecution's Observations on the Procedure for Reparations, 15 May 2015.

⁸ ICC-01/04-01/07-3551, Queen's University Belfast's Human Rights Centre (HRC) and University of Ulster's Transitional Justice Institute (TJI) Submission on Reparations Issues pursuant to Article 75 of the Statute, 15 May 2015.

⁹ ICC-01/04-01/07-3552-Conf, Observations de la Ligue pour la Paix, les Droits de l'Homme et la Justice (LIPADHOJ) présentées en vertu de l'article 75-3 du Statut, 15 May 2015.

¹⁰ ICC-01/04-01/07-3554, Redress Trust observations pursuant to Article 75 of the Statute, 15 May 2015.

notified on 15 May 2015 (the “Defence Observations”)¹¹ and does not seek to repeat itself here. The defence refers to that filing to that extent. In addressing any further or specific issues, the defence will follow the same order as it did in those earlier observations.

5. The defence in its original filing acknowledged that the principles annunciated by the Trial Chamber in *Lubanga*, as extensively amended by the Appeals Chamber in its judgment of 3rd March 2015¹² (the “*Lubanga* Judgment”), reflected in the amended order annexed to that judgment¹³ (the “*Lubanga* Order”), are generally applicable to the present case. Those principles “should be general concepts that, while formulated in light of the circumstances of a specific case, can nonetheless be applied, adapted, expanded upon, or added to by future Trial Chambers.”¹⁴

DISCUSSION

6. The relevant legal provisions are set out in articles 75 and 79 of the Rome Statute; Rules 85 and 98 of the Rules of Procedure and Evidence; the Regulations of the Trust Fund for Victims are also of relevance, most notably Regulations 42-50.¹⁵

1. Victims and groups of victims eligible for reparations

7. The defence refers to its submissions in its original filing, at paragraphs 14 to 21 where, in summary, the defence acknowledges that only persons who have suffered harm as a result of the crimes for which Mr. Katanga has been convicted can qualify as direct or indirect victims.

- ***Direct victims***

8. The TFV submits “that direct victims in this case are (i) the civilian inhabitants of Bogoro village who did not participate in the hostilities and who were present on 24

¹¹ ICC-01/04-01/07-3549, Defence Observations on Reparations, 15 May 2015.

¹² ICC-01/04-01/06-3129, Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012, 3 March 2015.

¹³ ICC-01/04-01/06-3129-AnxA, Order for Reparations, 3 March 2015.

¹⁴ *Lubanga* Order, para. 5.

¹⁵ Adopted at the 4th plenary meeting on 3 December 2005, by consensus, Resolution ICC-ASP/4/Res.3 – Regulations of the Trust Fund for Victims.

February 2003 and survived the attack, (ii) those that had left the village because of rumours that the village would be attacked and (iii) any legal entity harmed by the attack”.¹⁶ The defence objects to inclusion of the second of those elements, the ‘rumour’ element, as being insufficiently proximate and specific. It should also be noted that many inhabitants left Bogoro well before the attack and their displacement cannot be the product of crimes committed by Mr Katanga. Bogoro was a UPC armed camp, a legitimate military target, from which aggressive and punitive actions were launched against its Ngiti and Lendu neighbours over several months, as well as being a significant strategic target for government backed forces. An attack was therefore on the cards irrespective of the particular attack in respect of which Mr Katanga was convicted of contributing. Mr Katanga cannot be held liable to anyone who left the village because of rumours brought about by the military situation in Ituri.

- *Indirect victims*

9. The defence reiterates that indirect victims who may be granted reparations from Mr. Katanga are: (i) family members of direct victims; (ii) other persons who suffered personal harm as a result of these offences. By ‘family members of direct victims’ the defence submits that they should qualify as indirect victims only when sufficiently close, as in parent/child, or otherwise demonstrated to be dependent. In line with the jurisprudence on victim participation, other persons who suffered personal harm as a result of the crimes for which Mr. Katanga has been convicted should be limited to their “dependents”.¹⁷
10. The defence notes that the prosecution submits that “[i]n determining whether a person is a “family” member of a victim, the Court should have regard to the social and familial structures applicable in Ituri, bearing in mind that the concept of “family” may have many cultural variations”.¹⁸ The TFV also submits that “with regard to indirect victims, [...] the local cultural customs should guide the decision on the understanding of family concept, which may be larger than the narrow parent/child relationship”¹⁹ and refers to a method of evaluation adopted by the ECCC, in the Case against Kaing Guek Eav: “Although the immediate family members of a victim fall

¹⁶ ICC-01/04-01/07-3548, para. 102.

¹⁷ Defence Observations, para. 20.

¹⁸ ICC-01/04-01/07-3544, para. 6.

¹⁹ ICC-01/04-01/07-3548, para. 129.

within the scope of Internal Rule 23(2) (b), direct harm may be more difficult to substantiate in relation to more attenuated familial relationships. The Chamber nevertheless considers that harm alleged by members of a victim's extended family may, in exceptional circumstances, amount to a direct and demonstrable consequence of the crime where the applicants are able to prove both the alleged kinship and the existence of circumstances giving rise to special bonds of affection or dependence on the deceased.”²⁰

11. The defence maintains, in light of submissions suggesting that a broad view may be taken of what constitutes family, given the context of African society, that the description ‘close family members’ will meet that consideration and invites the Trial Chamber to adopt a similar approach as the one defined by the ECCC.
12. The defence supports the Legal Representative of Victims’ submission according to which the Trial Chamber, for its reparation order against Mr Katanga, should not enlarge the notion of victim to communities other than the one of Bogoro, the TFV being competent to assist the other communities pursuant to its general assistance mandate.²¹
13. The defence agrees with the Legal Representative of Victims’ submissions²² that the Trial Chamber should distinguish clearly, in its future order, the reparations ordered against Mr Katanga and the reparations that it could recommend to the TFV for the other categories of victims.

- ***Prioritisation of certain categories of victims***

14. The defence approves the principle of prioritisation of certain victims who are in a particularly vulnerable situation, supported by the TFV²³ and the Universities.²⁴ The Redress Trust observes that the recourse to prioritisation may be justified because :

85. Prioritisation between eligible beneficiaries or forms of reparation may be necessary when the liability for reparation is greater than the available resources at any given time. Also, prioritisation is sometimes used as a method to efficiently and expeditiously disburse reparation.²⁵

²⁰ ICC-01/04-01/07-3548, fn 16, referring to Judgment’, E188, 26 July 2010, para. 643.

²¹ ICC-01/04-01/07-3555, paras 42-44.

²² ICC-01/04-01/07-3555, para. 29.

²³ ICC-01/04-01/07-3548, para. 24.

²⁴ ICC-01/04-01/07-3551, para. 12.

²⁵ ICC-01/04-01/07-3554, para. 85.

15. The defence submits that it may be justified in the present case in respect of some categories of vulnerable victims such as old people, children still at school (scholarships), injured people (healthcare), *etc.* This would also be helpful if the available funds fall below the amount established by the Trial Chamber as necessary to repair the harm caused by the crimes.²⁶

16. The Redress Trust notes that “Often, particular categories of vulnerable persons are prioritised on the basis of the type of vulnerability or the degree of neediness”²⁷ and the Universities further detail the potential categories of victims to prioritise and the “interim” award which could be granted to them to remedy their vulnerability:

“12. We would like to draw the Court’s attention to the need to prioritise the implementation of reparations to the elderly and other victims with demonstrably urgent need. Elderly people do not have the luxury to wait on protracted reparation proceedings, and thus require prioritisation so that they can avail of reparations as soon as possible. [...] In Sierra Leone the payment of interim reparations of \$100 USD as well as health and educational support to those most vulnerable victims helped to minimise the temporal lag of reparation orders.

54. [...] To focus on those most vulnerable the Court could prioritise based on harm suffered, i.e. next of kin of those murdered, and victims who were seriously injured and suffered sexual violence as part of the attack on the civilian population in Bogoro. This category of victims are generally prioritised over those who lost property or their homes. [...] The Court may need to prioritise resources to address those with the most acute needs.

55. The findings of the Kenyan Truth, Justice and Reconciliation Commission may be helpful in such circumstances [...] the Commission recommended that reparations be organised with victims of gross violations of human rights placed into the following categories: (1) violations of the right to life; (2) violations to the right to personal integrity, including sexual or gender based violence. The Commission then prioritised victims in categories 1 and 2 as those most vulnerable as Priority A, including those in category 3 who had died as a result of displacement. Victims in the Priority A group would be eligible for monetary compensation through a ten year annual pension, as well as medical and psychological vouchers to fund rehabilitation.”²⁸

17. Therefore the Trial Chamber may consider, in light of the categories of harm it will identify and of the funds available, the necessity to prioritise certain categories of victims.

- ***Eligibility of already participating victims in this case***

²⁶ ICC-01/04-01/07-3554, para. 84.

²⁷ ICC-01/04-01/07-3554, para. 85.

²⁸ ICC-01/04-01/07-3551, paras. 12, 54.

18. The Legal Representative of Victims submits that since 350 applicants were granted the status of victims, they should *de facto* be admitted to participate in the reparation proceedings without further examination of their situation.²⁹
19. The defence submits that while they should continue to be represented by their present counsel in the reparation proceedings, this does not mean that each of them will necessarily obtain reparation. As the TFV observes: “*The victims in this case who were authorized to participate in the proceedings received their status as victims on a prima facie basis. In order to determine eligibility for reparations related to the crimes for which Mr Katanga was convicted, all prospective and participating victims will need to be screened.*”³⁰ In order to grant reparations, the Trial Chamber will need to assess the credibility of the claims of each applicant (i.e. whether they in fact lost a family member, property, livestock etc.) given that Chambers do not engage in a substantive assessment of the credibility, or reliability, of a victim’s application before the commencement of the trial but “*merely ensure that there are, prima facie, credible grounds for suggesting that the applicant has suffered harm as a result of a crime committed within the jurisdiction of the Court*”.³¹

2. Identification of Victims

20. Regarding the identification of the victims, the defence reiterates that the Trial Chamber should adopt the same procedure as was employed to assess the applications to participate in the case.³² The defence supports the TFV’s observations according to which “in the absence of acceptable documentation on the identity of a victim, the statements of two credible witnesses may replace identification documentation to ascertain the identity of a victim”.³³

²⁹ ICC-04/07-01/07-3555, para. 37.

³⁰ ICC-01/04-01/07-3548, para. 97. See also para. 92: “The Victims Participation and Reparation Section (“VPRS”) interviewed 304 individual victims, which is a sizeable sample of the anticipated number of potentially eligible direct victims in the case. The Trust Fund observes that this process did not include a screening of eligibility or an assessment of injury. Therefore, the information obtained from participants should be taken to be of indicative value in regard of possible modalities of reparations awards.”

³¹ Defence Observations on Reparations, para 42.

³² See ICC-01/04-01/07-933-tENG, Decision on the treatment of applications for participation, 09 July 2009, paras. 30, 31, 37, 38.

³³ ICC-01/04-01/07-3548, para. 105.

3. The harm

21. As previously submitted in the Defence Observations (paragraphs 24 - 29), in the present case, the harm should be linked to:

- “Any physical injuries and psychological traumas sustained by civilians due to their being present at Bogoro during the attack on the civilian population of 24th February 2003, resulting from that attack – e.g. exposure to an environment of violence and fear, depression or other psychological trauma;
- Any material damage caused by the attack on the civilian population at Bogoro – e.g. interruption and loss of schooling, loss of income due to sustained injuries, or the closure of offices;
- The destruction of property at Bogoro;
- The pillaging of property at Bogoro.”³⁴

22. The TFV submits that the Trial Chamber takes into account the following material to define the type of harm (in the first part of the TFV’s suggested two parts order): “(i) evidence presented during the trial under Regulation 56 of the Regulations of the Court, for the purpose of reparations and which was not relied upon for factual findings relevant to the conviction and sentencing of the accused; (ii) evidence received at a reparation hearing, in written submissions from parties and participants, or from experts engaged for that purpose; (iii) evidence contained in reparation requests, submitted pursuant to Rule 94 of the RPE.”³⁵ The defence maintains that while this material may be relevant to identify the types of damage that occurred in the *Katanga* case, it may not suffice to prove the harm of each victim individually.

23. The Legal Representative of Victims states that several deaths among the victims represented (27) were the consequence of lack of appropriate care consequent on the misery provoked by the crimes for which Mr Katanga was convicted; he regrets that this indirect harm cannot be repaired.³⁶ The actual cause of death is insufficiently clear. The defence acknowledges that such remote, indirect consequence of crime is not an issue for the Trial Chamber in its reparation order against Mr Katanga but a matter more relevant to the assistance mandate of the TFV.

³⁴ Defence Observations, para. 29.

³⁵ ICC-01/04-01/07-3548, 3548, para. 115.

³⁶ ICC-01/04-01/07-3555, paras. 71, 108.

24. The defence respectfully disagrees with the prosecution³⁷ and Legal Representative of Victims³⁸ submissions according to which the Trial Chamber may take into account in this case, as harm to indirect victims, the "loss, injury or damage suffered by an intervening person who attempted to prevent a direct victim from being further harmed as a result of a relevant crime." This circumstance does not feature in the *Katanga* case.³⁹

- ***Psychological harm***

25. The defence takes notes of the following TFV observations:

“With regard to psychological harm, the Trust Fund notes that after more than 12 years, it will be difficult, if not impossible to distinguish the mental trauma that is precisely related to the attack on 24 February 2003 without individual, extensive, and intensive anamneses by mental health specialists.... The Trust Fund is of the opinion that such an assessment prior to the issuance of the first part of a reparations order is not proportional to the purpose of the determination of the extent of harm, which informs on the nature and size of the award. It will be sufficient when psychological harm is identified through the simple statement of the victim on a *prima facie* basis.”⁴⁰

26. The defence submits that while, indeed, it may difficult, ‘if not impossible’, to identify and prove the psychological harm of victims in relation to the Bogoro attack, a simple statement of the victim is insufficient to demonstrate this type of harm, or any other harm.

- ***Material loss and damages***

27. The TFV submits that “with regard to material loss and damage, experts [...] might shed light on the value of the lost property. This is a lengthy, intense and expensive assessment, which [...] could better be undertaken during the implementation of an order.”⁴¹ The defence is not in favour of the suggestion to appoint experts, as developed *infra* (at paragraphs 172) and submits that in deciding whether or not to appoint a team of experts, the Trial Chamber may take into account the costs incurred by such appointments in comparison with the financial awards which could be attributed to the victims found eligible for reparation.

³⁷ ICC-01/04-01/07-3544, para. 15.

³⁸ ICC-01/04-01/07-3555, para. para 33.

³⁹ Defence Observations, para. 16.

⁴⁰ ICC-01/04-01/07-3548, para. 119.

⁴¹ ICC-01/04-01/07-3548, para. 121.

28. The Legal Representative of Victims, on the basis of his experience in the and consultation with victims, may be in a position to suggest a figure for the types of harm claimed by the applicants he represents (the cost of a roof or house, a cow, a chicken, etc). The defence believe that it should be possible for the parties to come to some agreement on figures without the need to employ ‘experts’ in areas that appear to be relatively straight-forward.

- ***Cattle***

29. The Legal Representative of Victims defines several types of harm, stresses the importance of the cattle for the Hema, and submits that none of the victims was able to recover their previous standard of living. The defence cannot comment on the fact that not all the victims have been able to recover their standard of living, in light of the absence of evidence produced to support this assertion. However, careful scrutiny of claims concerning loss of cattle is necessary, particularly given that there was evidence, from a Hema witness,⁴² that most of the cattle was sent away long before the Bogoro attack to avoid their being stolen. Also, as a number of prosecution witnesses testified, cattle rustling and theft of crops and property was a feature of life in the area for a substantial period of time,⁴³ doubtless due to the background of hardship and starvation.

- ***Direct harm caused by crimes not attributable to Mr. Katanga***

30. The defence has submitted its view in respect of the beneficiaries of reparations,⁴⁴ limiting the beneficiaries, so far as a reparations order against Mr Katanga is concerned, to victims of the crimes with which he has been convicted. The principle point of departure between that view, which reflects existing ICC jurisprudence, and that of a number of the submissions is that the latter wish the reparation order against Mr Katanga to extend to victims of the sexual crimes⁴⁵ and/or to child soldiers.⁴⁶ With

⁴² D2-176, a Hema soldier, stated that local cattle owners had moved their cattle far away from the possibility of rustling: D2-176-T-255-p.48 (FRA-p.48); D2-176-T-256-pp.41-42, 48 (FRA-p.36-37; 41).

⁴³ P-233-T-88-pp.6, 10 (FRA-pp.7-9). See also P-250-T-101-p.8 (When the witness was in Zumbe, the UPDF attacked the groupement of Bedu-Ezekere “a lot” and pillaged everything) (FRA-p.8).

⁴⁴ at paragraph 21 of its Observations.

⁴⁵ United Nations Joint Submission on Reparations, ICC-01/04-01/07-3550, 15 May 2015:

“9. 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.

this the defence strongly disagrees. It would mean abandoning the current jurisprudence of the ICC and making Mr Katanga liable for crimes of which he was acquitted.

(i) Victims of Sexual Violence

31. Most of the observers suggest that victims of sexual violence should benefit from support. The defence previously submitted that, while Mr. Katanga cannot be held liable in respect of harm resulting from sexual violence, this fact “should not be viewed as precluding such victims from being able to benefit from assistance activities that the Trust Fund may undertake”.⁴⁷ It reiterates these observations and would support submitting a request to the Board of Directors of the Trust Fund for them to consider “in the exercise of its mandate under regulation 50(a) of the Regulations of the Trust Fund, the possibility of including members of affected communities in the assistance programmes operating in the situation area in the DRC, where such persons do not meet the above-mentioned eligibility criterion”.⁴⁸
32. However, the defence objects to the UN’s recommendation that sexual violence be given consideration as a reparations claim directly against Mr. Katanga.⁴⁹
33. This issue has already been determined by the Appeals Chamber in the *Lubanga* case. The reasoning of the Appeals Chamber was very clear: “sexual and gender-based violence” could not “be defined as harm resulting from the crimes for which Mr Lubanga was convicted”.⁵⁰ The Appeals Chamber does not refer to different standards of proof to be applied at different stages of the proceedings and, accordingly, Mr Lubanga could not be held liable for these crimes either at the conviction or reparation level. Crimes for which accused are acquitted cannot be thrown back at them at a later stage through the backdoor of reparations. To do so would be unfair on

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.”

⁴⁶ *Observations de la Ligue pour la Paix, les Droits de l’Homme et la Justice (LIPADHOJ) présentées en vertu de l’article 75-3 du Statut*, ICC-01/04-01/07-3552-Conf.

« 18. Nous insistons sur le fait qu’il serait injuste de ne pas considérer la situation des victimes des crimes reconnus au procès mais pour lesquels M. Katanga n’a pas été condamné, spécialement les enfants soldats, tant en ce qui concerne une réparation de types collectif qu’individuel. »

⁴⁷ ICC-01/04-01/07-3555, para. 76.

⁴⁸ Ibid, para. 32, citing the Lubanga Order, para. 55.

⁴⁹ ICC-01/04-01/07-3550, paras. 9, 59.

⁵⁰ ICC-01/04-01/06-3129, 3 March 2015, para. 196.

the convicted person and violate Rule 97(3) of the Rules of Procedure and Evidence pursuant to which the Court has an obligation to “respect the rights of victims and the convicted person”.⁵¹

34. There is no sufficient distinction to be made between the *Lubanga* case and the present to justify the imposition of a different principle for the latter. Mr. Katanga has not been convicted for sexual and gender-based violence. There are no “particular circumstances” rendering Mr. Katanga’s case so significantly different from Lubanga’s that the UN’s proposed, radical departure from the Appeals Chamber’s clear reasoning⁵² would be justified.

35. The UN, in arguing “particular circumstances”, refers to sexual violence crimes having “*consistently been part of the consideration and analysis of the Court at different phases of the proceedings: charges of rape and sexual slavery were confirmed by the Pre-Trial Chamber against Mr. Katanga; the Trial Chamber found that rape and sexual slavery occurred beyond reasonable doubt as part of the attack on Bogoro; rape and sexual slavery were considered as part of the gravity of Mr. Katanga’s crimes at sentencing; and the Registry noted based on its community assessment that victims of sexual violence are present in Bogoro.*”⁵³

36. Whilst none of this is in dispute, it does not justify a departure from the Appeals Chamber’s clear ruling. The position is not altered by the fact that he had initially been charged with them or that such crimes occurred in the course of the attack. He is acquitted of all sexual violence charges. His acquittal reflects the general principle of individual responsibility that underlies criminal law, as explained by the Appeals Chamber at the International Criminal Tribunal for the Former Yugoslavia, that:

“[...] a person cannot be held responsible for an act unless something he himself has done or failed to do justifies holding him responsible. So, for instance, individuals are not held responsible – either for the conviction or sentencing, for the unforeseeable acts of others involved in carrying out a plan.”⁵⁴

⁵¹ See also ICC-01/04-01/06-3129, 3 March 2015, para. 183.

⁵² ICC-01/04-01/07-3550, para. 64.

⁵³ Ibid, para. 64.

⁵⁴ Deronjić Judgement on Sentencing Appeal, para. 124.

37. In similar fashion, in acquitting Mr. Katanga for sexual violence despite its finding that such violence occurred in the course of the Bogoro attack, Trial Chamber II held:⁵⁵

“For the Chamber, it is paramount that the accused’s contribution be connected to the commission of the crime and not solely to the activities of the group in a general sense. Indeed, a significant contribution, analysed in relation to each crime, must be proven beyond reasonable doubt. By significant contribution, the Chamber wishes to lay stress on a contribution which may influence the commission of the crime. Conduct inconsequential and immaterial to the commission of the crime cannot, therefore, be considered sufficient and constitute a contribution within the meaning of article 25(3)(d) of the Statute.”

38. The Appeals Chamber noted that sexual and gender-based violence had not been considered as an aggravating factor in Lubanga’s case.⁵⁶ Nor has it been considered an aggravating factor in Mr. Katanga’s case, even if it was considered as part of the background to the gravity of the crimes committed in the attack, as opposed to committed by Mr Katanga. The Chamber dealt with the issue of gravity, which is a condition for admissibility of any case before the Court pursuant to article 17(1)(d) of the Rome Statute, at the sentencing level to distinguish factors that had already been considered as part of gravity from factors that may aggravate the sentence.⁵⁷

39. Accordingly, the commission of sexual crimes at Bogoro by persons other than Mr. Katanga had no impact on Mr. Katanga’s sentence. Nor did the Prosecutor or Legal Representative make submissions that their commission should be considered as an aggravating factor.⁵⁸ The Chamber would not have allowed them to be in any event. At the sentencing hearing, the Presiding Judge warned the Legal Representative of Victims that any questions asked of witnesses or observations made must fall within the scope of a sentencing hearing with due regard for Article 68 and Rule 145.⁵⁹ The Presiding Judge expressly drew attention to the fact that “in relation to sexual offences, Mr Katanga was acquitted of the counts of rape and sexual slavery, and in actual fact this relates only to attacks on the civilian population”.⁶⁰ At a later stage in the questioning, the Presiding Judge intervened again, stating “I was very clear when I

⁵⁵ ICC-01/04-01/07-3436, para. 1632.

⁵⁶ ICC-01/04-01/06-3129, 3 March 2015, para. 197.

⁵⁷ ICC-01/04-01/07-3484, para. 35.

⁵⁸ ICC-01/04-01/07-3457-Conf, Observations du représentant légal relatives à la fixation de la peine, 7 April 2014, paras 41-47 ; ICC-01/04-01/07-3455, Prosecution's Sentence Request, paras 33-41.

⁵⁹ ICC-01/04-01/07-T-344-Red-ENG WT, 5 May 2014, page 14, lines 6-12.

⁶⁰ Ibid, page 14, lines 14-16.

stated that Germain Katanga was not found guilty of rape and sexual violence. ... Now, given that your question would be revisiting [determinations already made at the trial level] it might be wiser for you to move on to another set of questions”.⁶¹

40. In light of the clear position taken by the Katanga Trial Chamber and the Lubanga Appeals Chamber, the argument “*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*»⁶² is firmly closed, a view expressed by the TFV.⁶³

41. The suggestion to apply a lower standard in the context of reparations is not practical or tenable.⁶⁴ This is not a civil but a criminal court, and the Trial Chamber makes the findings of fact. There may be a lower standard of proof for persons to demonstrate that they are qualifying victims for reparations, but the Chamber cannot revisit the factual determinations underlying the conviction. The Court can only award reparation claims in the event of a conviction. No such power exists under the Rome Statute in the event of an acquittal. This is clear from article 75(2), allowing the Court to “make an order directly against a convicted person”; and article 75(4), according to which the Court may seek measures under article 93 to give effect to a reparation order “after a person is convicted of a crime within the jurisdiction of the Court”. No similar arrangements can be put in place when a person has been acquitted. Accordingly, the Court cannot impose a different standard of proof at the reparation level. A conviction, which is necessary to trigger reparation proceedings, can be entered only if the allegations are proven ‘beyond a reasonable doubt’. Without such a conviction, the right to reparations before the Court falls away.

42. Accordingly, the United Nation’s comparison with domestic jurisdictions where a different standard of proof applies with regard to civil damages claims is not helpful. Such a procedure does not exist under the Rome Statute. And even if it did, and a different standard of proof could be applied in the reparation proceedings, it would

⁶¹ Ibid, page 21, lines 1-10.

⁶² ICC-01/04-01/07-3550, para. 63.

⁶³ ICC-01/04-01/07-3554, para. 130.

⁶⁴ ICC-01/04-01/07-3550, para. 61.

still have to be shown that Mr. Katanga was at fault for the harm caused. This is, for instance, the standard, which is applied in France in civil action when the person considered being responsible for the civil party's harm has been acquitted. In the case of an acquittal, the civil party "may apply for compensation for the damage caused by the fault of the accused in so far as it derives from the matters of which he was accused".⁶⁵ This fault must be the direct cause of the personal harm suffered by the civil party.⁶⁶ Even on this lower standard, Mr. Katanga cannot be held liable for the acts of sexual violence committed by others without his knowledge. Indeed, he committed no fault which caused the sexual violence. He was not even in the close proximity of the crime scene, nor did he do anything to encourage it.

43. In this particular case, there is also a practical reason not to support the UN's proposition of re-evaluating the facts on the basis of a lower standard. The newly constituted Chamber has not been part of the fact-finding process, which was a complicated task, based on evidence presented over the course of several years, and determined on the standard of proof beyond reasonable doubt. The new Chamber was not present during the cross-examination of witnesses and is in no proper position to make any independent credibility assessments of the evidence. The judgment provides

⁶⁵ French Code of Criminal Procedure, Section III Decisions as to the Civil Action, Article 372: « The civil party, in the case of an acquittal and of exemption from penalty, may apply for compensation for the damage caused by the fault of the accused in so far as it derives from the matters of which he was accused. ».

See also : Crim. 26 févr. 1969: http://www.dalloz-avocats.fr/documentation/Document?id=CASS_LIEUVIDE_1969-02-26_6891352&ctxt=0_ciR0MzE9Mzcywqd4JHNmPWR6LWNvZGVzwqdyJGVvPSJDT0RFUy9DUFIQIg%3d%3d&FromId=CODES_CPRPBull.crim.n°97;D.1969.325●11mars
1987: http://www.dalloz-avocats.fr/documentation/Document?id=CASS_LIEUVIDE_1987-03-11_8394993&ctxt=0_ciR0MzE9Mzcywqd4JHNmPWR6LWNvZGVzwqdyJGVvPSJDT0RFUy9DUFIQIg%3d%3d&FromId=CODES_CPRPBull.crim.n°121;Crim.11janv.1984:
http://www.dalloz-avocats.fr/documentation/Document?id=CASS_LIEUVIDE_1984-01-11_8391968&ctxt=0_ciR0MzE9Mzcywqd4JHNmPWR6LWNvZGVzwqdyJGVvPSJDT0RFUy9DUFIQIg%3d%3d&FromId=CODES_CPRPBull.crim.n°17●7oct.1987:
http://www.dalloz-avocats.fr/documentation/Document?id=CASS_LIEUVIDE_1987-10-07_8780526&ctxt=0_ciR0MzE9Mzcywqd4JHNmPWR6LWNvZGVzwqdyJGVvPSJDT0RFUy9DUFIQIg%3d%3d&FromId=CODES_CPRPBull.crim.n°341●20oct.1993:
[http://www.dalloz-avocats.fr/documentation/Document?id=CASS_LIEUVIDE_1993-10-20_9380338&ctxt=0_ciR0MzE9Mzcywqd4JHNmPWR6LWNvZGVzwqdyJGVvPSJDT0RFUy9DUFIQIg%3d%3d&FromId=CODES_CPRPBull.crim.n°298;](http://www.dalloz-avocats.fr/documentation/Document?id=CASS_LIEUVIDE_1993-10-20_9380338&ctxt=0_ciR0MzE9Mzcywqd4JHNmPWR6LWNvZGVzwqdyJGVvPSJDT0RFUy9DUFIQIg%3d%3d&FromId=CODES_CPRPBull.crim.n°298;Crim.20oct.1993:)
Crim. 20 oct. 1993: http://www.dalloz-avocats.fr/documentation/Document?id=CASS_LIEUVIDE_1993-10-20_9380338&ctxt=0_ciR0MzE9Mzcywqd4JHNmPWR6LWNvZGVzwqdyJGVvPSJDT0RFUy9DUFIQIg%3d%3d&FromId=CODES_CPRPBull.crim.n°298.

⁶⁶ French Code of Criminal Procedure, Preliminary Title Public Prosecution and Civil Action, Article 2: « Civil action aimed at the réparation of the damage suffered because of a felony, a misdemeanour or a petty offence is open to all those who have personally suffered damage directly caused by the offence. »

little guidance as to whether liability for the crimes could hypothetically be imposed on Mr. Katanga if a lower standard were to be applied. It would be unfair on Mr. Katanga if, what is in effect, a new Chamber were to be allowed to re-evaluate the evidence already presented and on which the findings were established, on the basis of a different standard of proof. Nor could further hearings be a fair or practicable manner of addressing the problem.

44. As for the Prosecution's assertion that acts of rape committed during the attack were encompassed by Mr. Katanga's conviction under article 8(2)(e)(i) and that, therefore, "victims of these acts of rape are entitled to reparations for such harm as direct victims of the war crime of attacking civilians",⁶⁷ this is erroneous. The Chamber made it clear that, since it had not been established beyond reasonable doubt that Mr. Katanga was present at Bogoro on 24 February 2013,⁶⁸ his criminal liability was limited to certain crimes committed by the group of combatants and commanders of the Walendu-Bindi *collectivité* in respect of which he was found to have made a significant contribution. Crucially, the Chamber found that the sexual crimes (rape and sexual slavery) were not envisaged in the plan to which Mr. Katanga contributed.⁶⁹ These occurred in the aftermath of the attack and were not envisaged by Mr. Katanga, whose contribution was made at a far geographical distance from the crime scene, nor were they foreseeable by him. The Chamber's finding that sexual violence crimes were subsequently committed in the course of the attack has no legal bearing on Mr. Katanga's liability. The Chamber did not find him liable for rape or sexual slavery.

45. To the extent the judgment might be perceived as unclear as to whether Mr. Katanga was held liable for these crimes as part of the attack on a civilian population, or whether his liability is limited to the crimes for which he has been charged separately, the newly composed Trial Chamber is ill equipped to step into the shoes of the fact finder and determine that Mr. Katanga is liable for rape to the extent it is part of the attack on a civilian population. The benefit of the doubt, as usual, goes to the defendant.

⁶⁷ ICC-01/04-01/07-3544, para. 13.

⁶⁸ ICC-01/04-01/07-3484, para. 61.

⁶⁹ Ibid, para. 64.

46. If the Chamber were to adopt the Prosecutor's suggestion, the Defence submits that the order should be limited to the finding relied upon by the Prosecution, which is at paragraph 876 of the article 74 judgment, which reads:

"876. Lastly, although the UPC combatants had retreated, the Lendu and Ngiti combatants continued to pursue the population of Bogoro who were still hiding in the bush, killed some of them and sexually assaulted two women."⁷⁰

47. Therefore, the maximum liability in reparations which can be imputed on Mr. Katanga is limited to the harm suffered by these two women and not all victims of sexual violence in Bogoro, given his acquittal both for rape and sexual slavery. The fact that the Chamber has not made any other express findings of sexual violence (rape or sexual slavery) and that these took place surreptitiously suggests they were not widespread, nor intended or known by Mr. Katanga. Sexual slavery has not been found to be part of the attack against civilians,⁷¹ and is therefore an even more distant proposition for liability. In the defence submission Mr Katanga cannot be held liable for any of the acts of sexual violence at the reparation stage.

48. The Legal Representative's suggestion that victims of sexual crimes should be included in the reparation programs ordered, even if the costs are not imposed on Mr. Katanga,⁷² is without legal basis. It is also inconsistent with the further proposal in respect of the child soldiers, namely that they should be rewarded, not as a reparation order, but pursuant to the TFV assistance mandate.⁷³ Why would one group for whose suffering Mr. Katanga has been acquitted be part of the reparation order and not another group for whose suffering Mr. Katanga has equally been acquitted? There may be a plausible reason but it is not explained in the observations.

49. It must be clear for which crimes Mr. Katanga is liable and for which he is not. Therefore, the sexual violence crimes should be dealt with by the TFV pursuant to its assistance mandate by virtue of Regulation 50(a) of the Regulations of the TFV. The

⁷⁰ ICC-01/04-01/07-3436, para. 865 (footnotes omitted). The 2 women being referred to are P-132 and P-249.

⁷¹ ICC-01/04-01/07-3436, para. 876 ; ICC-01/04-01/07-3484, para. 48.

⁷² ICC-01/04-01/07-3555, para. 47.

⁷³ Ibid.

TFV itself has recognised the possibility for the Trial Chamber to “invite the Board of Directors of the Trust Fund to consider making use of its assistance mandate to respond to harm resulting from crimes of sexual violence inflicted on inhabitants of Bogoro during the attack and from the use of child soldiers among the attackers, since Mr Katanga was acquitted of these crimes ».⁷⁴

50. The defence notes the TFV submissions, relying on Regulation 56 of the RTFV, that the “other resources” of the Trust Fund are not meant to be used to complement individual reparations awards, such as financial compensation.⁷⁵

51. The defence, as developed *supra*, strongly disagrees with this narrow interpretation of Regulation 56 of the RTFV. If the TFV is able to provide collective reparations only, as its interpretation appears to suggest, victims of sexual violence may not be able to benefit from individual reparations but only from collective reparation awards. This would have undesirable effects. Victims of sexual violence each have their own needs and require individual rather than collective support. They do not necessarily have the same level of trauma and may need very different types of support. Psychological support offered to victims of sexual violence is by nature individual. Accordingly, the defence requests that the Chamber not accept this invitation but rather adopts a wider definition of Regulation 56.

(ii) Child Soldiers

52. The defence supports the submission by the TFV that “former child soldiers are not eligible for reparations and thus do not need to be addressed in the reparation order” because “Mr Katanga was acquitted of the charge of using child soldiers to participate actively in hostilities”.⁷⁶

53. The child soldiers do not meet the criteria to be eligible for reparations, being unable to demonstrate that they suffered direct or indirect harm as a result of conduct for which Mr. Katanga has been convicted - one of the five “minimum and essential elements” which the Appeals Chamber identified as being critical to any order for

⁷⁴ ICC-01/04-01/07-3554, para. 130.

⁷⁵ ICC-01/04-01/07-3554, para. 139.

⁷⁶ ICC-01/04-01/07-3548, paras. 38, 42.

reparations.⁷⁷ LIPADHOJ's reliance on Article 75(1) and 75(2) in support of its request for both individual and collective reparations for child soldiers⁷⁸ is wrong in law.

54. The finding that child soldiers were part of the militia and participated in the Bogoro attack and the crimes committed⁷⁹ had no impact on Mr. Katanga's sentence. The Chamber found that, whilst it "*cannot rule out the possibility that Ngiti commanders of Walendu-Bindi collectivité used children under the age of 15 years in the hostilities connected to the battle of Bogoro, it cannot find that Germain Katanga committed the crime of using child soldiers under article 8(2)(e)(vii) and, consequently, cannot find him responsible under article 25(3)(a) of the Statute*".⁸⁰

55. The Trial Chamber may invite the TFV to use its assistance mandate and other resources to support former child soldiers who participated in the Bogoro attack on the basis of Rule 98(5) and Regulations 42, 47, 48 (and eventually 50(a)) of the Regulations of the Trust Fund for Victims. This has been suggested by the Legal Representative for Victims. He however did not argue that the former child soldiers were eligible for reparations.⁸¹

56. In deciding whether to use its other resources to assist former child soldiers who participated in the Bogoro attack, the TFV may wish to pay regard to the following considerations.

57. If the Court grants the requests for the TFV to use its other resources for the purpose of assisting former child soldiers who fought at Bogoro, care will need to be employed in assessing the credibility of applicants. The child soldiers who testified in the trial turned out to be significantly older than they had claimed⁸² and not one of them was considered credible by the Chamber. The testimonies of P-250, P-279 and P-280 have all been rejected in their entirety.⁸³ Only P-28 was relied upon in part,

⁷⁷ ICC-01/04-01/06-3129, 3 March 2015, para. 1.

⁷⁸ ICC-01/04-01/07-3552-Conf, para. 18.

⁷⁹ ICC-01/04-01/07-3436-tENG, para. 1086.

⁸⁰ ICC-01/04-01/07-3436-tENG, para. 1088.

⁸¹ ICC-01/04-01/07-3555, para. 49.

⁸² Ibid, paras. 126-128 (P-28); 244-261 (P-250); 262-263 (P-279) 294 (P-280).

⁸³ Ibid, paras. 114-137 (P-28); 230-261 (P-250); 262-292 (P-279); 280- 293-319 (P-280).

where corroborated, but he was considered not young enough to qualify as a child soldier.⁸⁴ No child soldier who participated at Bogoro has been identified to date. The Legal Representative for the child soldiers did not call any as witness in the trial. A transit centre for the demobilisation of child soldiers was established in Aveba at the end of 2004, when Mr. Katanga was the President of the FRPI. The Chamber accepted that many of the children who participated were never in the militia, but participated in the demobilisation process for benefits, such as money and clothing.⁸⁵ If it so happens that the TFV manages to identify a former child soldier who fought at Bogoro, something which the Court has failed to do thus far, then of course such a former child soldier should be offered help and assistance.

58. Due account should be taken of the programs that were put in place to aid former child soldiers through demobilisation and re-integration.

59. It may be more useful for the TFV to assist children who are in the militia today, if there are any, and provide them with an incentive to leave the bush and re-integrate into society. The TFV could set up demobilisation and reintegration programs as have been established previously, including options such as a professional training or reintegration into a school program.

60. LIPADHOJ seeks authority for counsel for child soldiers to participate in the reparation proceedings.⁸⁶ In light of Mr. Katanga's acquittal for the crime of using children contrary to article 8(2)(b)(xxvi), the Chamber decided: "*La Chambre tient à relever que la position qu'elle a prise sur la charge d'utilisation d'enfants soldats ne permet plus au Représentant légal de ce groupe de victimes de participer désormais à la procédure.*"⁸⁷ Renewed participation would conflict directly with the Trial Chamber's order.

4. Standard of causation

⁸⁴ Ibid, paras. 126-128, 144-147, 1079.

⁸⁵ Ibid, paras. 1054-1056.

⁸⁶ ICC-01/04-01/07-3552-Conf, Observations de la Ligue pour la Paix, les Droits de l'Homme et la Justice (LIPADHOJ) présentées en vertu de l'article 75-3 du Statut, 15 May 2015, para. 22.

⁸⁷ ICC-01/04-01/07-3437, *Ordonnance portant calendrier de la procédure relative à la fixation de la peine (article 76 du Statut)*, 7 March 2014, para. 4.

61. The defence notes that all the parties appear to agree with the standard of causation - but/for⁸⁸ - as defined by the *Lubanga* Appeals Chamber. The defence supports these submissions.

5. Standard and burden of proof to be met by applicants

62. The defence reiterates its previous Defence Observations,⁸⁹ agreeing with the prosecution's submission that "Victims seeking reparations bear the burden of showing the necessary harm."⁹⁰

Screening process

63. Contrary to the Legal Representative of Victims submissions,⁹¹ the defence reiterates⁹² that the standard of proof applied by Chambers to grant victims admission to participate in the proceedings is insufficient at the reparation stage of the proceedings. Chambers "merely ensure that there are, *prima facie*, credible grounds for suggesting that the applicant has suffered harm as a result of a crime.' The Appeals Chamber has said that the applicant should provide 'sufficient' proof of the causal link between the crime and the harm suffered, based on the specific circumstances of the case. Given the very specific nature of the event – one attack on one day – the production of sufficient and credible evidence should not be beyond the reach of any victim and is an important safeguard for the person against whom an order is made.
64. The particular context of the DRC, a place of great poverty and consequent temptation to make false or exaggerated claims, is referred to in our earlier observations at paragraph 44. The observations of Redress (their paragraph 63) that 'mass claim processes have reported relatively few attempts at fraud' relates to different contexts to that in the DRC. The defence has previously drawn the Chamber's attention to the problems of false claims and fraud and submits it constitutes a real, rather than theoretical problem.

⁸⁸ ICC-01/04-01/07-3555, para. 76 ; ICC-01/04-01/07-3553, para. 9.

⁸⁹ Defence Observations, paras 40-49.

⁹⁰ ICC-01/04-01/07-3544, para. 11.

⁹¹ ICC-01/04-01/07-3555, para. 78.

⁹² Defence Observations, paras 40-49.

65. Therefore, the defence invites the Trial Chamber to define a screening process for the applicants. Like the TFV, the defence submits that this screening process should be applied to both prospective and participating victims and for both individual and collective reparation.⁹³ The Registry similarly observes that in light of the Appeals Chamber's clarification according to which in case of reparations granted to a community, only members of that community meeting the relevant criteria are eligible, a verification process may be required to verify that the members of this community satisfy the criteria of rule 85.⁹⁴

66. In response to the TFV suggestion that "[f]ollowing a mapping of potentially eligible victims, they should be informed during outreach activities about the eligibility criteria and about ways to come forward and undergo screening as per the criteria set by the Chamber,"⁹⁵ the defence submits that this approach may incite potential victims to lie to fulfil the criteria to obtain reparation, a concern raised by the Redress Trust.⁹⁶ If adopted, this approach should be implemented with caution, keeping in mind the risk of false testimony/evidence. The defence supports the Redress Trust submissions according to which "mechanisms can and should be put in place to mitigate such risks."⁹⁷

67. The defence notes that the TFV suggests the following method of screening of the victims:

"(a) As a first step for the group of already participating victims, the Trial Chamber may invite VPRS to provide their experience from the consultation with victims and their conclusions in order to assist in the eligibility determination of participating victims. [...]

(b) Individuals, who may come forward seeking reparations following an outreach campaign of the Court, may give a statement relating to their harm suffered from the convicted crimes. The identity of a direct victim may be confirmed through the statement of two other credible witnesses. An indirect victim may demonstrate the family link/kinship through civil status documents, any other evidence or statements of two credible witnesses.

(c) Important in this case is the distinction between civilians and combatants. Only the former are eligible for reparations. Inquiries need to be undertaken, in order to

⁹³ ICC-01/04-01/07- 3548, para 65, 97, 106.

⁹⁴ ICC-01/04-01/07- 3553, para. 3.

⁹⁵ ICC-01/04-01/07- 3548, 3548, para. 99.

⁹⁶ ICC-01/04-01/07-3554, para. 63: « The use of outreach can create fear that a large number of irrelevant, non-qualifying or fraudulent claims will be received. [...] »

⁹⁷ ICC-01/04-01/07-3554, para. 63.

establish that the individuals are civilians and did not participate as combatants in the hostilities.”⁹⁸

68. As suggested by the TFV,⁹⁹ the Trial Chamber should invite the parties/participants to submit their observations on the victims’ screening criteria and procedure in order to preserve the rights of the convicted person and of the victims. The Registry has not submitted observations on the design of this process but has already indicated that it stands ready to assist the Trial Chamber and the TFV in the matter.¹⁰⁰ The defence submits the following observations on the TFV suggested screening process.
69. It is respectfully submitted that while some further conclusions from the VPRS and/or the statements of the victims may assist the Trial Chamber to assess the reliability of the claims of the victims, this is not sufficient in itself. The VPRS has helped the victims to complete their application forms, by collecting identifying documents from them etc. While the defence does not put in question the integrity of its staff, it would be difficult to consider this unit as being neutral. In addition, the claim of an applicant cannot rely solely on his/her own words, otherwise the defence would be prevented from challenging the claims.
70. Given that numerous applicants were admitted to participate in the proceedings at the trial stage, i.e. from 2008,¹⁰¹ more than six years ago, the defence regrets that a systematic process of collection of evidence by these victims was not put in place as soon as their applications were filed before a Chamber or granted by a Chamber. So far, the defence has only had disclosed the identity cards, death certificates and application forms of the victims, which is insufficient to substantiate their reparation claims – except regarding the death of a family member. In addition, all this material was disclosed to the defence in a heavily redacted format, rendering it difficult for the defence to make any assessment of the reliability of the victims and their claims.

⁹⁸ ICC-01/04-01/047-3548, paras 105-106.

⁹⁹ ICC-01/04-01/047-3548, para. 107.

¹⁰⁰ ICC-01/04-01/07- 3553, para. 3.

¹⁰¹ See, for instance, ICC-ICC- 01/04-01/07-212-Conf, *Transmission à la défense des demandes de participation a/0327/07 à a/0337/07 et a/0001/08 expurgées*, 20 February 2008.

71. The defence reiterates its request to be disclosed the unredacted version of this material.¹⁰² Without such disclosure, eventual submissions by the defence on each reparation claim will be meaningless.
72. No witness statements, health certificates, medical bills, photographs or other relevant material were produced by victims in support of the alleged harm. Such evidence could have been provided at the time of the initial victim applications, especially since nearly all the applicants completed their forms with the assistance of an intermediary or NGO. Yet, many years on, and only now does it appear that thought is being applied to the obvious problem of producing such relevant material. This will lead to even further delay of the proceedings as such evidence is necessary to protect the interests of Mr Katanga.
73. As stressed by the Appeals Chamber, the reparation order will be issued against the convicted person only so it is only fair that he be able to challenge the claims of the victims. If the individual claims of each victim cannot be substantiated, then individual reparation cannot be awarded. As noted by the Universities, “Victims’ eligibility for ICC reparations is therefore dependent ‘on whether the crimes they suffered from are charged and successfully prosecuted, as well as being able to sufficiently evidence their harm.’ Therefore, only a very limited number of (individual) victims will generally be capable to demand and receive reparations from the court, and often only years or even decades after the crimes were committed.”¹⁰³
74. While a long time has elapsed since the Bogoro attack and the submission of the victims applications, this is not the fault of the convicted person and any difficulty to gather evidence now to support the victims’ claims¹⁰⁴ should not justify the application of a standard of evidence so low that it would prevent any meaningful challenge by the defence.
75. The Trial Chamber may be minded to authorise the applicants to supplement their applications in order to produce a sufficient level of proof, but in doing so the defence

¹⁰² ICC-01/04-01/07-3557-Red, Defence Request for the Disclosure of Unredacted or Less Redacted Victim Applications, 22 May 2015.

¹⁰³ ICC-01/04-01/07-3551, para. 60.

¹⁰⁴ The Legal Representative of Victims argues that the disclosure of evidence by the victims is “almost impossible. » ICC-01/04-01/07-3555, para. 79.

is concerned that time be strictly limited. Alternatively, properly supported applications for reparations should be made the subject of discretionary consideration by the TFV rather than form part of an order against Mr Katanga.

76. Given that only civilians are eligible for reparations in the present case, the defence fully endorses the TFV recommendation that, “inquiries need to be undertaken, in order to establish that the individuals are civilians and did not participate as combatants in the hostilities”.¹⁰⁵ This is particularly relevant given the circumstances of the case where most of the UPC combatants – and there were upwards of 300 – were themselves residents of Bogoro.

6. Scope of Mr Katanga’s liability for reparations

77. The defence reiterates that “[a]ny reparations ordered must be proportionate to the harm caused as well as the level of responsibility of the convicted person, and his or her participation in the commission of the crimes for which he or she was found guilty.”¹⁰⁶

78. In greater detail, the Appeals Chamber noted that “the scope of a convicted person’s liability for reparations may differ depending on, for example, the mode of individual criminal responsibility established with respect to that person and on the specific elements of that responsibility. Accordingly, the Appeals Chamber finds it necessary to be guided by a principle not previously articulated by the Trial Chamber, namely that: A convicted person’s liability for reparations must be proportionate to the harm caused and, inter alia, his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case.”¹⁰⁷

79. In light of these established principles, the defence disagrees with the Legal Representative submissions¹⁰⁸ that “[l]e mode de responsabilité de G. Katanga est indifférent quant à sa culpabilité et l’étendue de sa responsabilité »¹⁰⁹ - an assertion

¹⁰⁵ ICC-01/04-01/047-3548, paras 105-106.

¹⁰⁶ *Lubanga* Order, para. 21 cited in Defence Submissions, para. 60.

¹⁰⁷ *Lubanga* Judgement, para. 118; Defence observations, para. 66.

¹⁰⁸ As a correction note that the Trial Chamber did not say, as the LRV states, that Katanga was a ‘key player’ but that he had a “significant” role.

¹⁰⁹ ICC-01/04-01/07-3555, para. 90.

in conflict with the Appeals Chamber's ruling and made without reference to argument or law.

80. The prosecution maintains that "*the convicted person's liability for reparations should not only be proportionate to the harm caused by their crimes, but also to the nature of their participation in the crimes for which they were convicted*",¹¹⁰ and that "[g]iven the unique characteristics of the crimes within the jurisdiction of this Court (and the potential for an individual to cause even greater harm and suffering by inspiring, assisting, or directing the crimes of others), the Trial Chamber should refrain from a priori reasoning as to the relative gravity of the different modes of liability under articles 25 and 28 of the Statute. Instead, it should look at the facts of the case to ascertain the true nature of their participation in the crimes for which they were convicted."¹¹¹ While the defence agrees with the first part of the prosecution submissions, it again submits that Mr Katanga's "moral culpability is greatly reduced" in light of the mode of liability and the facts and circumstances of the case.¹¹²

Joint and several liability

81. The defence disagrees with the TFV submission¹¹³ that proportionality based on the degree of participation in the commission of the crimes "*may not be in the interest of the victims of the convicted crime*"¹¹⁴ and "*may be deemed to be in contrast with the general legal concept of civil liability for the harm caused by jointly committed acts*".¹¹⁵ The defence refers to its original submissions at paragraph 70.
82. The TFV refers to the standard of liability sometimes applied in domestic tort cases pursuant to which the accessory "*is jointly and severally liable with the primary wrongdoer*".¹¹⁶ However, this standard is increasingly controversial and its application has become less frequent.¹¹⁷ Several other standards, of which

¹¹⁰ ICC-01/04-01/07-3544, para. 20.

¹¹¹ Ibid, para. 21.

¹¹² Defence Observations, paras 67-71.

¹¹³ ICC-01/04-01/07-3548, para. 32.

¹¹⁴ ICC-01/04-01/07-3548, para. 31.

¹¹⁵ ICC-01/04-01/07-3548, para. 32.

¹¹⁶ ICC-01/04-01/07-3548, para. 32.

¹¹⁷ See e.g. Pennsylvania which recently amended its applicable standard to « fair share » standard. See, amongst others, Drinker Biddle & Reath LLP, Pennsylvania's Fair Share Act : will Pennsylvania join the majority of states and adopt proportionate share liability among joint tortfeasors? 13 June 2011, at: <http://www.lexology.com/library/detail.aspx?g=84ba543f-c0d8-4805-9e37-d01390cc373a>. See also

proportionate share liability is most common, are equally being applied in tort cases.¹¹⁸ The proportionate share liability test is the equivalent of the proportionality test as formulated by the ICC Appeals Chamber. Accordingly, if the Chamber were to adopt this, or any other standard which departs from the applicable proportionality test, substantial legal debate about the application of this standard, rather than a simple reference thereto, would be warranted.

83. Joint and several liability basically means that anyone acting in a concerted manner “is independently liable for the full extent of the injuries stemming from the tortuous act”,¹¹⁹ even if the wrongdoer who is being sued made a very minor contribution. The person who is being sued (often the one with the deepest pockets) may subsequently seek contribution from the other wrong-doers.¹²⁰ It is applied in several jurisdictions in the United States, but not without certain limitations. For instance, in Ohio, any person can be held liable for the total sum of damages only if his or her actual share in liability amounts to more than 50%.¹²¹

84. The standard has been criticised. For instance, the American Tort Reform Association (“ATRA”) states:¹²²

The rule of joint and several liability is neither fair, nor rational, because it fails to equitably distribute liability. The rule allows a defendant only minimally liable for a given harm to be forced to pay the entire judgment, where the co-defendants are unable to pay their share.

Instead of joint and several liability, the ATRA supports a rule of proportionate liability, which is the standard adopted by the ICC Appeals Chamber.

Andrew C. Cook, Tort Reform Update : Recently Enacted Legislative Reforms and State Court Challenges, State Courts White Paper, 10 January 2013, at: <http://www.fed-soc.org/publications/detail/tort-reform-update-recently-enacted-legislative-reforms-and-state-court-challenges>

¹¹⁸ Ibid.

¹¹⁹ Joint and Several Liability, Legal Information Institute, Cornell University Law School, at : https://www.law.cornell.edu/wex/joint_and_several_liability.

¹²⁰ Ibid. *See also* Matthiesen, Wickert & Lehrer, S.C., Joint and Several Liability and Contribution Laws in all 50 States, at <http://www.mwl-law.com/wp-content/uploads/2013/03/contribution-actions-in-all-50-states.pdf>.

¹²¹ R.C. 2307.11(A)(1) and (2), at: https://en.wikipedia.org/wiki/Joint_and_several_liability#cite_note-5

¹²² <http://www.atra.org/issues/joint-and-several-liability-rule-reform>.

85. The defence shares these concerns, in particular when applied to international criminal cases. Indeed, it would be unfair if one individual, who played a relatively minor role in the commission of crimes, could be held liable for the guilt of all others who may never be brought to justice. This is particularly unfair in respect of charges before international tribunals, as they tend to be very wide in scope involving many criminal acts for which a variety of players may be responsible. That shared responsibility should not be imposed on a single individual.

86. This is particularly nonsensical when the convicted person is indigent. The awards a convicted person should pay should be proportional to his or her means. The defence reiterates that the reparation procedure must be seen to be realistic. Who is prosecuted is essentially a decision of the Prosecutor.¹²³ The defence has previously submitted that individuals with far greater responsibility for the attack on Bogoro have not been prosecuted - nor is there any reasonable perspective that they will be prosecuted.

87. Accordingly, the application of this standard to international criminal cases is not tenable, not least because Mr. Katanga would never be able to seek compensation from any of the other wrong-doers who have thus far not been identified. Also, in the absence of any prosecutions of any of the other wrong-doers, it is impossible to quantify the percentage of Mr. Katanga's over liability in respect of the crimes committed at Bogoro. These limitations would similarly arise in other international criminal cases.

88. The application of a several and joint liability standard further defeats the principle of proportionality and is inconsistent with the Appeals Chamber's decision in Lubanga. The TFCV does not justify why the liability of Mr Katanga should be assessed in a different manner from Mr Lubanga; the facts of the case do not justify such an amendment of the criteria to define the scope of the convicted person's liability for reparations. The proposed standard not only violates the principle of proportionality, which the Appeals Chamber determined should be applied to liability for reparations,¹²⁴ its application would also seriously prejudice the rights of the convicted person, avoidance of which is one of the principles the TFCV itself refers to

¹²³ See further Defence Observations paras. 57-74, 77.

¹²⁴ Lubanga order, para. 21.

as “*self-evident and in their entirety endorsed by the Trust Fund*”.¹²⁵ The TFV specifically states that the principle that “*nothing in these principles will prejudice the rights of the convicted person*” should apply in the case against Mr Katanga. This is also in line with the Court’s obligation under Rule 97(3) of the Rules of Procedure and Evidence to “*respect the rights of victims and the convicted person*”.¹²⁶ Accordingly, the defence requests that the proposition be rejected.

89. As also noted by the TFV, the Appeals Chamber has determined that “*the imposition of liability on a convicted person, including the precise scope of that liability, should be done by the Trial Chamber in the order for reparations.*”¹²⁷ This is to safeguard the right of the convicted person and victims to appeal, which lies only against the Trial Chamber’s determinations, and not those of the Trust Fund.¹²⁸ The convicted person must also have knowledge of the extent of his/her obligations to have an effective right of appeal.¹²⁹

90. In addition, the Appeals Chamber held that, if the Trust Fund were to define the scope of liability, “*there is a real risk that the different mandates of the Trust Fund, namely its assistance mandate, which is not linked to or limited by the parameters of a conviction in a specific case before the Court, and its role in implementing court orders for reparations may be blurred in a manner prejudicial to the rights of the convicted person*”.¹³⁰

91. To avoid such ‘blurring’ the defence submits that the most practical solution for the Chamber is to issue an order with very clear delineation, effectively two orders – one order on reparations against Mr. Katanga pursuant to Article 75(2) of the Statute and a second order (not against Mr. Katanga) containing only recommendations as to the use of the other resources of the TFV pursuant to Rule 98(5) of the Rules in relation to sexual violence crimes, crimes against other ethnic groups, most notably the Ngiti community and possibly child soldiers.

¹²⁵ ICC-01/04-01/07-3548, para. 44.

¹²⁶ See also ICC-01/04-01/06-3129, 3 March 2015, para. 183.

¹²⁷ ICC-01/04-01/07-3548, para. 66 footnote 27. *Lubanga* judgement, para. 237 – extent must be defined by the Chamber.

¹²⁸ ICC-01/04-01/07-3548, para. 66, footnote 27.

¹²⁹ ICC-01/04-01/07-3548, para. 66, footnote 27; ICC-01/04-01/06-3129, 3 March 2015, para. 181.

¹³⁰ ICC-01/04-01/06-3129, 3 March 2015, para. 182.

7. Modalities and forms of reparations

92. As a preliminary point, the defence takes note of the statement of the Legal Representative of Victims according to which the victims are aware that full reparation (réparation intégrale) will be difficult.¹³¹

- *Benefits previously provided*

93. The Redress Trust submits that “*one of the factors taken into account by an international court when determining whether to afford individual reparation is whether such measures may duplicate domestic measures already underway, for those same victims.*”¹³² The TFV also “*generally agrees with the idea to consider other received benefits in order to avoid duplication and unfairness and / or to facilitate the eventual prioritisation of awards or (groups of) victim beneficiaries.*”¹³³ The defence reiterates its submission that any measures should not duplicate the work of State or NGO’s in the area done for the benefit of the inhabitants and victims of Bogoro. Several reparation measures have been implemented there,¹³⁴ and all such measures should be identified.

94. On several occasions, the defence invited the TFV to indicate any missions and projects that it may have carried out in Ituri generally, and in the Walendu-Bindi area, such as Gety and Aveba, in particular, but has not received any response.¹³⁵

95. The Trial Chamber may therefore consider asking the Registry, the Legal Representative of Victims, the TFV, and/or the DRC authorities, to identify what work has been done, or is in hand, in Bogoro and elsewhere in the area, before it issues its order on reparations. These are matters that could and should have been determined over the past several years. In particular, the Trial Chamber may seek to identify the awards already granted to:

- each victim individually (provision of housing, roofing, goods, etc., when, by whom,

¹³¹ ICC-01/04-01/07-3555, para. 27.

¹³² ICC-01/04-01/07-3554, para. 29.

¹³³ ICC-01/04-01/07-3548, para. 23.

¹³⁴ Defence Observations, para. 83.

¹³⁵ See the annex to the Defence Request Relating to the Trust Fund for Victims, ICC-01/04-01/07-3536-Anx.

amount of money granted, material gifted, etc.);

- "the community" of Bogoro (e.g. reconstruction of the Bogoro Institute, the central market, schools, etc.)

- ***Form of reparations***

96. As to the form reparations may take, the defence refers to that part of its original submissions headed 'Modalities and forms of reparations' – paragraphs 75 et seq.

A preference for individual awards

97. The defence submits that the Trial Chamber should favour individual reparations, being the wish of the majority of victims who have been consulted and the one most appropriate in the circumstances of the case. Individual reparations are appropriate, subject to their being made in respect of persons who have truly suffered harm as a result of the crimes and where that harm is proved to a satisfactory degree.

98. In addition, the Trial Chamber may encourage the TFV to use its other funds, pursuant to Rule 98(5) RPE and Regulation 50(a) of the Regulations of the TFV, to put in place collective forms of reparations.

99. The Chamber should '[...] invite the Trust Fund to exercise its discretion, under Regulation 50 of the Regulations of the Trust Fund, to provide assistance not only to victims of crimes found by Trial Chamber II to have occurred in the course of the Bogoro attack, but for which Mr. Katanga was not convicted, but also to consider extending its resources to assist the neighboring Ngiti, Lendu and Bira communities. These communities suffered greatly as a result of the war in Ituri [...]' ¹³⁶

Funding

100. An essential, and logically determinative, element for the making of reparations is the amount of money available to meet them. Various submissions recommend a span of reparations, both individual and communal, without referring to how they will be paid or how much they will cost. There is no reasonable prospect of Mr Katanga being in a position to pay reparations.

¹³⁶ See paragraph 89 et seq. of the Defence Observations.

101. The Universities submission that “[...] given that Mr Katanga was commander of the FRPI militia, which collectively committed the massacre in Bogoro with other armed groups, the DRC government may be able to trace and seize assets of former FRPI members to be provided to the Trust Fund”¹³⁷ does not reflect the realities of the situation. The FRPI was, and its remnants remain, a rag-tag militia operating in a country positioned at the penultimate rank of the rankings of the Human Development Index – 186th of 187 countries. There is no money.
102. Plainly, whichever form reparations take, the money to meet them will have to come from the Trust Fund, at its discretion – subject to the approval by the Chamber of the TFV draft implementation plan.
103. The TFV states: “The absence of a reference in RTFV 56 to Rule 98(2) of the RPE, concerning individual reparations awards, indicates that the “other resources” of the Trust Fund are not meant to be used to complement individual reparations awards, such as financial compensation.”¹³⁸ If this means that the TRV considers it has no mandate to meet individual awards, then the defence must strongly disagree. It would render the making of individual awards meaningless and bring the ICC into disrepute. The defence requests that the Trial Chamber dismiss the TFV proposed interpretation of Regulation 56 of the RTFV.
104. More precisely, the TFV observations relating to Regulation 56 are only one interpretation of this regulation, that the defence invites the TC to dismiss on the grounds that it is too narrow and contradicts the object and purpose of the ICC reparations scheme as defined by the Rome Statute, the RPE, and the ICC case law, pursuant to Article 21 of the Statute. In terms of hierarchy, both the Rome Statute and the RPE take precedent over the TFV Regulations. The latter must therefore be interpreted in a manner consistent with the text, object and purpose of the Rome

¹³⁷ ICC-01/07-01/04-3551, para. 75.

¹³⁸ ICC-01/04-01/07-3551, para. 139:

(v) Scope of Mr Katanga’s liability for reparations

“139. The Trial Chamber is invited to take into account that the Trust Fund’s Regulation 56, which refers to Rule 98(3) and 98 (4) of the RPE, indicates that the TFV may financially complement collective reparations awards. The absence of a reference in RTFV 56 to Rule 98(2) of the RPE, concerning individual reparations awards, indicates that the “other resources” of the Trust Fund are not meant to be used to complement individual reparations awards, such as financial compensation.”

Statute and RPE.

105. The Assembly of States Parties, in a Resolution of 20 December 2011, has indicated that it was "[m]indful that reparations to the victims of the most serious international crimes are critical components of the Rome Statute and that it is therefore essential that the relevant provisions of the Rome Statute are efficiently and effectively implemented."¹³⁹

106. Article 75 (1) of the Statute confers to the Trial Chamber itself the power to determine the "*principles relating to reparations to, or in respect of, victims*" and article 75 (2) does not impose any limit on the type of reparations that can be implemented through the TFV:

"2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79."¹⁴⁰

107. Similarly, Regulation 48 of the RTFV simply states that "[o]ther resources of the Trust Fund shall be used to benefit victims of crimes as defined in rule 85 of the Rules of Procedure and Evidence, and, where natural persons are concerned, their families, who have suffered physical, psychological and/or material harm as a result of these crimes", without limiting the use of these other funds to communities of victims, which would be the beneficiaries of collective reparations.¹⁴¹

108. Similarly, the first sentence of Regulation 56 of the RTFV is very general and does not impose any limit on the use of the TFV's "other funds" for reparations:

"56. The Board of Directors shall determine whether to complement the resources collected through awards for reparations with "other resources of the Trust Fund" and shall advise the Court accordingly. "

109. Therefore, the second sentence of Regulation 56, quoted by the TFV, relates only to a potential use of these "other funds", for collective reparations under rule 98, sub-rule 3, and for reparation awarded to an international or national organisation

¹³⁹ Resolution ICC-ASP/10/Res.3 adopted at the 7th plenary meeting, on 20 December 2011, by consensus (emphasis added).

¹⁴⁰ Emphasis added.

¹⁴¹ Emphasis added. See the definition of collective reparations by the Redress Trust, at ICC-01/04-01/07-3554, para. 13.

under rule 98, sub-rule 4:

"Without prejudice to its activities under paragraph 50, sub-paragraph (a), the Board of Directors shall make all reasonable endeavours to manage the Fund taking into consideration the need to provide adequate resources to complement payments for awards under rule 98, sub-rules 3 and 4 of the Rules of Procedure and Evidence and taking particular account of ongoing legal proceedings that may give rise to such awards."

110. It is submitted that this wording only *invites* the TFV to focus its efforts on collective reparations, the drafters of the RTFV having deciding, at a late stage of the drafting history of the RTFV,¹⁴² to stress a particular "need to provide adequate resources to complement payments for awards under rule 98, sub-rule 3 and 4", but it does not prevent the use of the "other funds" of the TFV for individual reparations.

111. Indeed, Regulation 57 of the RTFV immediately clarifies that the TFV draft implementation plan of a reparation order is submitted to the approval of the Court:

"57. The Trust Fund shall submit to the relevant Chamber, via the Registrar, the draft implementation plan for approval and shall consult the relevant Chamber, as appropriate, on any questions that arise in connection with the implementation of the award."¹⁴³

112. Therefore, if the TFV were to suggest a draft implementation plan based only on collective reparations, while the Chamber had ordered mainly individual reparations, the draft implementation plan could be amended by the Chamber to reflect its decision. Otherwise, this means that the Trial Chamber's order would be meaningless and (almost) never executed, in light of the indigence of most of the accused and the suggested lack of support of the TFV for individual reparations.

113. As noted by one commentator:

"Any schemes administered by the Trust Fund pursuant to a reparations awards made by the Court under Article 75(2) amount to 'reparations' within the meaning of Article 75 and are therefore ultimately to be controlled by the Court in accordance with the reparations principles it develops pursuant to Article 75(1)."¹⁴⁴

¹⁴² The draft of the RTFV, annexed to 'The Report of the Bureau on the draft Regulations of the Trust Fund for Victims' of 21 November 2005, only contains the first sentence of the current Regulation 56, in its article 60. See ICC-ASP/4/29, p. 13.

¹⁴³ Emphasis added.

¹⁴⁴ Reparations and Victim Support in the International Criminal Court, Conor McCarthy, April 2012, Cambridge University Press, p. 87 (emphasis added)
@ https://books.google.nl/books?id=jTYgAwAAQBAJ&pg=PA86&lpg=PA86&dq=tfv+regulations+drafting+history&source=bl&ots=eSQ7R8Tfc3&sig=_tRntE5_1J3uZ0EB5qfSdnK0Hs4&hl=nl&sa=X&ved=0CCEQ6AEwAGoVChMImpGe_vuRxxgIVSxgsCh0mQACE#v=onepage&q=tfv%20regulations%20drafting%20history&f=false.

The author further observes that:

"the distinction between reparations [pursuant to Article 75] and victim support [pursuant to Rule 98(5)] has important implications for the way in which the Trust Fund discharges its mandate in respect of the latter. With regard to reparations, the form and extent of an award is subject to judicial determination as part of the criminal trial, whereas, even though victim support is provided in respect of harm caused by a crime, it is provided via an administrative procedure outside the confines of the judicial process and regardless of whether a court has attributed responsibility for the crime of which the recipient is a victim. In addition, decisions as to the form and extent of victim support are made by the Trust Fund on the basis of a more managerial methodology and one characterised by a much greater degree of discretion than decisions regarding reparations, which must be made on the basis of the principles established by the Court pursuant to Article 75(1).¹⁴⁵

114. In consequence, if the interpretation of the TFV were to be adopted, this would have an adverse effect:

- on the participation of victims before the ICC; knowing that most of the accused are indigent and that the TFV would not grant them individual reparations, while this is the overwhelming will of the victims, the victims will be less inclined to participate in the ICC proceedings;
- on the collection of funds by the TFV, since several donors may be reluctant to fund an entity which brings only collective reparation and would never be able to implement an ICC order granting individual reparations.

115. The TFV interpretation strikes at one of the main aims of the ICC reparation scheme, *ie* to deliver meaningful reparation. The ICC has already recognized that "*every effort must be made to ensure that reparations are meaningful to victims*"¹⁴⁶ and the TFV itself acknowledges that:

"Delivering meaningful reparations will be fundamental for the ICC's credibility in the eyes of victim communities and the public at-large. Reparations principles address philosophical and practical challenges stemming from the judicial nature of the reparations before the Court – and the Trust Fund for Victims will have a key role to play in working with victims and the ICC to implement the Court's reparations orders. The TFV's reparations mandate is linked to a case at the ICC. Resources are collected through fines or forfeiture and awards for reparations are complemented with "other resources of the Trust Fund" if the Board of Directors so determines. Reparations to or in respect of victims can take many different forms, including restitution, compensation and rehabilitation. This mandate leaves room for the ICC to identify the most appropriate forms of reparation in light of the context of the case and the rights and wishes of the victims and their communities."¹⁴⁷

¹⁴⁵ *Ibid*, pp. 92-93 (emphasis added).

¹⁴⁶ ICC, Report of the Bureau on the impact of the Rome Statute system on victims and affected communities, ICC-ASP/9/25, Appendix III, 22 November 2010, para. 19.

¹⁴⁷ TFV Strategic Plan 2014-2107 Approved by the TFV Board of Directors, The Hague, August 2014, p. 18 (emphasis added), at:

116. The defence has requested the TFV to provide a figure to the Chamber and the parties as to the sum generally available but the Trust Fund has not been forthcoming. The defence renews its request¹⁴⁸ that the Chamber request the TFV to supply it with a realistic figure of the monies available to meet any reparations order. This request is also supported by the Legal Representative of Victims' submissions according to which the TFV should be heard on the funds available¹⁴⁹ and by the prosecution submissions that "the Trial Chamber should only take into account the feasibility of compensation on the basis of "the availability of funds" in the sense of considering what concrete measures may practicably be ordered".¹⁵⁰ As noted by the *Lubanga* Order:

"37. Compensation should be considered when i) the economic harm is sufficiently quantifiable; ii) an award of this kind would be appropriate and proportionate (bearing in mind the gravity of the crime and the circumstances of the case); and iii) in view of the availability of funds, this result is feasible."¹⁵¹

117. The United Nations Joint Submission 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."¹⁵² It does not define what is meant by 'substantial' but the implication is that things can be done cheaply in DRC, and so they can, but the defence submits that the ICC should provide full and appropriate levels of reparation if it is to fulfill its mandate towards victims and satisfy their expectations, raised over the years. Reparations should not be illusory, nor done 'on the cheap'.

118. The Universities' submissions observe that out of the total amount available to the fund, a proportion will be required to administer and deliver reparations to victims. The defence requests the Chamber to inquire of the TFV how much that is

http://www.trustfundforvictims.org/sites/default/files/media_library/documents/pdf/TFV_Strategic_Plan_2014_2017_approved.pdf.

¹⁴⁸ ICC-01/04-01/07-3536, Defence Request Relating to the Trust Fund for Victims, 17 April 2015; Defence observations, para. 103.

¹⁴⁹ ICC-01/04-01/07-3555, para. 119.

¹⁵⁰ ICC-01/04-01/07-3544, para. 24.

¹⁵¹ ICC-01/04-01/06-3129-AnxA, para. 37 (emphasis added).

¹⁵² ICC-01/04-01/07-3550, para. 40.

likely to be. There is a danger that the limited amounts available will be rapidly depleted by an excess of administration, particularly in respect of communal schemes.

119. The defence notes the suggestions in the United Nations Joint Submission, many of which require significant funding. The defence requests the Chamber, Registry or TFV to invite the United Nations to contribute to the reparations and other supportive activities, both financially and through UN personnel in Ituri and MONUSCO. These comprise the only effective transport and general infrastructure in the region. They have been present and active in the area since 2002. They are well placed to assist and any such assistance will be fully in keeping with the UN peace-keeping mandate.

Individual awards

120. “Over 99% of the victims consider that economic development and financial measures would be the most appropriate form of reparations”.¹⁵³ In contrast, the victims tend to be “unanimously negative” in respect of collective awards and schemes.¹⁵⁴

121. The Registry report (paragraph 55), referring to this preference for economic development and financial measures, states that the top five preferences are: support for farming, agricultural, livestock and other professional activities, support for housing, support for financial compensation, support for education, and, less of a high priority as a measure, medical, psychological and social measures.

122. The Registry report states that “many victims expressed concerns over the administration and long-term implementation of certain programs such as education or medical support (often citing their own past experiences) and considered individual compensation as a way to ensure that the intended beneficiaries actually receive the intended award”.¹⁵⁵

123. The Universities submissions, based on their particular knowledge of reparation schemes, suggest that “the Court consider awarding victims in the Katanga

¹⁵³ ICC-01/04-01/07-3512-Anx1-Red2, Report on applications for reparations in accordance with Trial Chamber II’s Order of 27 August, (the “Registry Report”), para. 43.

¹⁵⁴ Registry Report, paras 57 et seq.

¹⁵⁵ Registry Report, para. 50.

case individual compensation awards.”¹⁵⁶ Among its suggestions are educational scholarships for direct victims’ heirs.

124. The Universities submission contains a rare reference to the sums available to the Trust Fund, stating that “the Trust Fund has €4.8 million in reserve funds for reparations, and likely at least €1.2 million for the Katanga case.”¹⁵⁷ If that is correct, then the Trial Chamber will, according to the Universities’ submissions, be capable of providing: “If there are roughly 500 eligible victims in the Katanga case this would average at €2,400 per individual.”¹⁵⁸

125. While this is feasible, and not an insignificant amount in the DRC given the level of poverty, it is still an amount that falls below levels of compensation found in other awards. For example, in Kenya, in comparable circumstances, the award for rebuilding housing destroyed in the Post Election Violence of 2008 was \$20,000. And while, in terms of those killed or seriously injured, ‘a symbolic amount of €1000 may provide recognition of their suffering and provide some form of short-term monetary support’,”¹⁵⁹ such sum is still far below that paid in, for example, the *Sawhoyamaxa* case, referred to by the Redress Trust, concerning the Enxet people in Paraguay, where the IACHR awarded \$20,000 per death.¹⁶⁰ Given the declared importance of reparations at the ICC, the amount of reparation should not be token.

126. In respect to individual reparation, the defence submits that payments should, as a general rule, be paid directly to the victims. This is appropriate for one off payments – such as for loss and bereavement, home, crop and husbandry reparations. There should not be any element of patronizing the victim by ‘managing’ the reward. The victims are best placed to make appropriate choices as to how they manage their awards.

127. The defence agrees with the suggestion, made in several of the submissions,

¹⁵⁶ ICC-01/04-01/07-3551, para. 29.

¹⁵⁷ ICC-01/04-01/07-3551, para. 30.

¹⁵⁸ Ibid.

¹⁵⁹ ICC-01/04-01/07-3551, para. 33.

¹⁶⁰ ICC-01/04-01/07-3554, para. 29, referring to the Case of the Sawhoyamaxa Indigenous Community v Paraguay, Sawhoyamaxa Indigenous Community of the Enxet-Lengua people v Paraguay, Merits, reparations and costs, IACHR Series C No 146, IHRL 1530 (IACHR 2006), 29th March 2006, Inter-American Court of Human Rights.

that should a victim be concerned that his or her receipt of reparations could cause him/her to attract the envy of their community, staggered payments could be made that will help disguise their receipt. A similar procedure could be made in respect of continuing payments necessary in respect of long term education and medical expenses. It will also put less pressure on the TFV as it will be able to husband its funds over several years.

128. Use could be made of MPESA accounts rather than bank accounts.¹⁶¹

Collective reparations

129. The examples provided in the various filings,¹⁶² of individual and collective or community based reparations¹⁶³ concern significantly different circumstances to the present case. Aside from the particular facts of those cases, and their identification of a ‘community’ appropriate to be subject to collective awards, the findings and awards in the examples provided by the Redress Trust and the Universities, were made against States. No example is given of reparations against an individual. This has implications for the costing and management of such schemes.

130. It is to be noted that the examples provided, of collective or community based reparations,¹⁶⁴ concern cases where the courts have identified a strong and homogenous community whose rights have been affected. It would appear that the majority of victims in the present case no longer live as an identifiable, homogenous community. Only 20% of the 304 victims interviewed remain living in Bogoro.¹⁶⁵ In the defence submission this strongly militates against collective or community based reparations and favours, in the particular circumstances, individual awards.

131. The defence notes that the Registry reports that victims, while overwhelmingly favouring individual awards, expressed cynicism and mistrust of community or collective based schemes.

¹⁶¹ ICC-01/04-01/07-3554, para. 72.

¹⁶² See ICC-01/04-01/07-3551 and ICC-01/04-01/07-3554.

¹⁶³ See, for example, the examples provided in the Redress Trust submissions, ICC-01/04-01/07-3554, at paras 19 et seq.

¹⁶⁴ See, for example, the examples provided in the Redress Trust submissions, ICC-01/04-01/07-3554, at paras 19 et seq.

¹⁶⁵ ICC-01/04-01/07-3548, para. 104.

132. The United Nations' submissions include a suggestion (paragraph 45) of establishing Community Youth Centre and schools, but makes no mention of how it can be funded and supported in the future. Others refer to health centres and the like. In respect of major schemes, such as the building of schools and health centres, due allowance has to be made for the continued upkeep, management and resourcing of such institutions. In cases where they have been ordered, it has been done so in the context of State reparations – in effect an extension or re-focusing of State functions. In any event, so far as the defence is aware, these are provided for in Bogoro, and rebuilding schemes have taken place. Duplication of such efforts is to be avoided. Bogoro is also only 20 kilometres from Bunia, the capital of Ituri, with its more developed infrastructure and to which the inhabitants have access, as do many of those who fled to Bunia as a result of the instability of the Bogoro area. This is in contrast to Walendu Bindi where many Ngiti have little or no access to facilities.

8. Objectives of reparations and reconciliation

133. In response to the Legal Representative of Victims' comment according to which the victims have indicated that if reparations are granted to the "victims in general", their persecutors could become beneficiaries, which would contravene the objective of reparation,¹⁶⁶ the defence wishes to recall that reparation is also about reconciliation. Indeed, the defence supports the TFV's affirmation according to which "the objective of assisting in the promotion of reconciliation needs more consideration and should be addressed in further consultation with victims."¹⁶⁷

134. As the Registry submitted, "the impact of any measure of reparation on intra- and intercommunity relations, and the wider conflict, must be carefully assessed, and steps taken to avoid, or at least to mitigate, potentially harmful effects."¹⁶⁸ Similarly the Universities' observe: "Although we support victims' claims for individual reparations, we are acutely aware that such payment of compensation to only the victims in the Katanga case and not other victims in Ituri or eastern DRC has the

¹⁶⁶ ICC-01/04-01/07-3555, para. 30.

¹⁶⁷ ICC-01/04-01/07-3548, para. 144.

¹⁶⁸ Registry Report, para. 82.

potential to cause resentment.”¹⁶⁹ The defence supports the prosecution submissions according to which "Reparations should be awarded in a way that avoids creating tensions and divisions within the relevant communities" and "In designing any award of reparations, the Trial Chamber should seek to reconcile victims with their families and affected communities, where necessary."¹⁷⁰

135. Unsurprisingly, given the nature of the case, “[t]he vast majority of the victims falling within the scope of the case belong to the Hema ethnic community”.¹⁷¹ The defence, and others, have pointed out the difficulties that will arise, in particular the envy and jealousy it will generate among the community and the sense of injustice that will be felt by the Lendu/Ngiti communities who have themselves suffered. In respect of the latter, the defence again emphasis that in the course of the conflict in Ituri, the Lendu/Ngiti were among those who suffered the worst depredations, including at the hands of the Hema, who are the prospective beneficiaries of this reparations procedure. The Ngiti are left with many widows, orphans and handicapped, while the civic fabric is largely destroyed. The significance of this imbalance cannot be ignored. The area remains impoverished and neglected and the two communities live in close proximity. The Ngiti and Lendu live only five kilometres from Bogoro.

136. The defence exhorts the Chamber to have in mind that it is really dealing with two communities and that, while providing appropriate reparation to the Hema victims of the attack, it must not lose sight of the fact that both sides suffered. They continue to live as neighbours just a few kilometres apart, and today Ngiti also inhabit Bogoro.

137. As part of its extended assistance mandate pursuant to Rule 98(5), the TFV should be asked to consider, in the case of Walendu Bindi, an investment in infrastructure in the area. This will benefit the Ngiti, who are an identifiable and homogenous community. It would help demonstrate a recognition of the depredations inflicted on that community and help reconciliation between the Hema and Ngiti. The

¹⁶⁹ ICC-01/04-01/07-3551, para. 74.

¹⁷⁰ ICC-01/04-01/07-3544, para. 22.

¹⁷¹ Registry Report, para. 33.

defence proposes, for example, that the health centres at Bavi, Aveba and Alongba could be rebuilt and equipped. They have been the subject of repeated attacks over the past years, with widespread pillage.

138. There is need to provide support to the women of the area, some of whom have been the subject of widespread rape and sexual violence, and no such facilities presently exist.

139. Villages such as Songolo, which was the subject of attack by Hema militia in 2003 with significant loss, should also be the subject of support. The same is true of the Lendu communities in the *Montagnes Bleues* who suffered repeated attacks from the UPC based in Bogoro. To be seen to favour the Hema, and not to make any effective contribution to their neighbours who suffered these Hema attacks, will only fuel resentment and prevent reconciliation.

140. Schools in Walendu Bindi have been badly affected by the wars. The defence understands from its own sources that all the schools - 85 Primary Schools and 45 Secondary schools - have been destroyed or pillaged and badly need reconstruction and support. The cost is understood to be in the region of over \$1,000,000.

141. The Trust Fund should be prevailed upon to exercise its discretion to extend resources, in a clear and meaningful manner, to the Ngiti population. While that is a matter for the Trust Fund, should the TFV fail clearly and effectively to make allowance for doing so in its plan, then the Chamber should reject the plan.

Other forms of reparations

142. **Symbolic** - While a monument may appear to be appropriate, and indeed the Universities' suggest €10,000 be provided to erect one,¹⁷² it is to be noted from the Registry report that not much weight is attached by victims to reparations that involve monuments and commemorations, or of identification of bodies and disinterment. The Registry report, paragraph 55, identifies those modes of reparation the least favoured by victims, and in some cases a 'clear rejection' of them, – namely "[...] commemorations and tribute to victims, establishing and publishing the truth" and

¹⁷² ICC-01/04-01/07-3551, para. 40.

“explaining and publicizing/disseminating/translating trial process, tracing missing/deceased persons, monuments, reconstruction of shared facilities and monuments.”

143. Despite this a number of the submissions advance such reparations. The defence submits that, if they are accorded little value by the community, then they should not be given effect, particularly if they reduce the amount of money available for those reparations the victims have indicated a strong preference.

144. In fact, a monument of sorts was erected in Bogoro, but is now neglected to the extent that just the stub of the cross remains. There appears to have been no effort to maintain it, which may indicate a lack of enthusiasm for such monuments amongst the community. If there is to be a monument one would have thought a lesser sum could be dedicated, and that consideration should be given to how best to manage its conservation.

145. The Universities suggest that exhumation and examination of grave sites “could also be important for measures of satisfaction ordered by the ICC in identifying and returning the bodies of victims”¹⁷³ Exhumation and re-interment is, again, not given any emphasis by the victims. A search for and exhumation of bodies was conducted by the Scientific Section of the ICC Prosecution in March 2009 and its result was disclosed by the prosecution but not admitted as evidence in the case. The forensic experts were able to find about fifteen bodies but unable to identify any.¹⁷⁴ When the defence first visited the area in 2008, there were a few human remains visible in the fields, but whether they were the product of the attack, or other events, could not be determined. One witness informed the defence that the remains were those of Ngiti that had been left unburied. In any event, after thirteen years not much will remain. It is understood that the Red Cross, in 2010, helped gather a few remains and placed them in a communal grave - the site of the memorial referred to above.

Providing an inter-community forum

146. Since the events of 2002/2003, little appears to have been done to bring the two communities together. There appears to be little social intercourse between them,

¹⁷³ ICC-01/04-01/07-3551, para. 75.

¹⁷⁴ DRC-OTP-1049-0002.

aside from the Ngiti bringing their produce to market. There does not appear to be any forum for such intercourse to take place. The defence submits that a first step to reconciliation is to create the circumstances in which the two communities can be brought together. The Elders and Sages are best placed to make such arrangements and the defence submits that the TFV could provide financial support to enable them to do so.

147. A further opportunity, suggested to the defence by a Ngiti resident, is the setting up of a local radio station, or a radio service, to serve the Ngiti, who have no vernacular radio. This is particularly relevant to an area cut off from the rest of the DRC with no media of its own, print or otherwise, and could play a significant role in all manner of matters – from giving advice and help, educating and most significantly, helping bring the communities together.

Apology

148. The defence takes note of the various comments that have been made concerning the benefits of apology and the reaction of victims, or of some victims, to the statements made by Mr Katanga attached to his notice of discontinuance of appeal, which, it is to be noted was a very formal document and which read, in relevant part, *“J'accepte les conclusions rendues à mon encontre dans ce Jugement et j'exprime mes sincères regrets à tous ceux qui ont souffert en raison de ma conduite, y compris les victimes de Bogoro.”*¹⁷⁵

149. The defence does not know what any particular victim, or victims, has been told, or the manner in which he or she was told of that apology. The defence can only say that the statements made to the Chamber by Mr Katanga have not been contrived or composed by his lawyers but have come from him. For our part we have been struck by their honesty and heartfelt nature. The apologies are also more extensive than in any other trial in which members of the defence have participated, whether domestic or international cases. At the end of the trial, Mr Katanga said; *“Today, my thoughts go out to all the victims of the conflicts in Ituri in general and particularly*

¹⁷⁵ ICC-01/04-01/07-3497-AnxA, Annex to *Defence Notice of Discontinuance of Appeal against the ‘Jugement rendu en application de l’article 74 du Statut’ rendered by Trial Chamber II on 7 April 2014*, 25 June 2014.

the conflict in Bogoro. My thoughts go out to all those who have lost loved ones, who have lost their property and their wealth. For all those whose pride and dignity have suffered, I extend to them my compassion in regard to all the suffering that they have suffered because of the foolishness and wickedness of human nature. ... I also want to extend my thoughts to the child soldiers and victims who are the corner-stone of this trial. As the interests of victims are upheld, justice also takes root. I want to thank them for their participation in this trial."¹⁷⁶ And similarly, at the sentencing hearing he said *"In conclusion, I wish to say that I shall now never forget the victims of this war. I know the pain that is endured by those who lost family members and friends. I offer them my compassion from the bottom of my heart."*¹⁷⁷ All these statements were said in the context of a contested trial and it is difficult to know what more he could have said in those circumstances than he did.

150. An apology cannot come from the lawyers. Nor can it be imposed on an accused, or be seen as contrived to win some benefit. If it is to be of any value, it must come from the heart. It is not something that should be seen as capable of being the subject of a court order. In any event, Mr Katanga is very willing to address this issue further, as indicated below, and to do so in a manner which, it is hoped, will be satisfactory to the victims. However, this cannot be the product of some agreed script and, in the defence submission, it must be left entirely to him.

151. In recent months some members of the defence team have contributed to a documentary and, in the course of its making, it became apparent that an opportunity arose whereby Mr Katanga might be in a position to speak, through film, to a particular victim who had been met by the documentary maker. The prospect then arose that Mr Katanga could in fact extend that exercise to more victims. That project is in hand and discussions are continuing with the Registry, that has agreed in principle, and awaits only the judicial consent that the Registry feels it should first obtain.

152. Mr Katanga remains a respected son of his community and he has stated his willingness to assist in any manner thought helpful to the bringing of peace to

¹⁷⁶ ICC-01/04-01/07-T-340-ENG CT WT 23-05-2012, pp. 48-49.

¹⁷⁷ ICC-01/04-01/07-T-345-CONF-ENG ET 06-05-2014, p. 48.

Walendu Bindi and to reconciliation between the two communities. He has suggested that some visit by the Elders of his community to Bogoro, also involving his family or those close to him, could be made in order to stress the desire of the Ngiti to live in peace with their neighbours.

153. Efforts are also being made to meet with representatives of the DRC as to Mr Katanga's future.

154. The Chamber should be aware that the authorities of the DRC have waged several campaigns against Walendu Bindi over the past ten years and even up to last week and, in doing so, caused considerable harm to the civilian population, including rape and killings, mass displacement of the people, damage to the remaining infrastructure and even further loss of confidence by the Ngiti in the *bona fides* of the State. There is understandable cynicism among the Ngiti as to the intentions of its Government which is widely regarded among them as having contributed little to the area other than war. Mr Katanga is willing to play a peaceful and positive role in helping the Ngiti put the past behind them.

9. The TFV suggested procedure

155. In its observations on reparations, the TFV recalls¹⁷⁸ the five minimum elements established by the *Lubanga* Appeals Chamber Judgment¹⁷⁹ to be contained in a reparation order against a convicted person:

- 1) Be made against a convicted person;
- 2) Establish and inform the convicted person of his liability;
- 3) Specify the type of reparation, individual, collective or both – (the TFV stresses that the Trial Chamber should take into account the fact that several victims have left the country but should still have access to awards -para. 50);
- 4) Define the harm and identify the modalities of reparations; in particular, the Trial Chamber could define the extent of damage or set criteria to be applied by the TFV to assess the extent of the harm;
- 5) Identify the victim eligible for reparation or set out the criteria of eligibility.

156. The TFV highlights the existence of an apparent contradiction between the 2nd

¹⁷⁸ ICC-01/04-01/07-3548, paras 45-59.

¹⁷⁹ *Lubanga* Judgment, para. 1.

element on one hand and the 4th and 5th elements on the other.¹⁸⁰ the Appeals Chamber, while considering that the reparation order must inform the convicted person as to his liability (2°), nevertheless authorises the Trial Chamber simply to set criteria to determine the extent of the harm (4°) and to identify the victims eligible (5°), which implies that the assessment of the harm and the identification of victims would be done by the TFV only once the Trial Chamber has issued its reparation order. This means that the reparation order will be unable to define the exact scope of the liability of the convicted person, pending the determination, by the TFV, of the identity of the victims eligible and of the extent of their harm, in violation of the convicted person and the victims' rights:

"79. Should a Trial Chamber's reparation order only set criteria for the assessment of harm or the eligibility of victims, this will impede the determination of the exact scope of liability of a convicted person in the same order for reparations. This situation is at odds with the rights and interests of both the convicted person and the victims to be informed about the scope of liability and the scope of the award(s) respectively – and to appeal this decision. Therefore, the Trust Fund respectfully submits to the Trial Chamber to consider options to issue an appealable decision on liability at a later stage."¹⁸¹

157. The defence submits that this is an important point to be taken into account in when establishing the procedure to be applied to determine the scope of Mr Katanga's liability. The defence agrees with the TFV submissions that:

"67. [...] the precise scope of the liability is determined by

- * the number and identity (on a confidential basis) of qualifying eligible victims;
- * the types and extent of harm, loss, and damage which was caused by Mr Katanga through the commission of the crimes for which he is convicted;
- * the modalities of reparations that remedy the harm and the types/nature/size of the programmes/measures that are to be designed and the time needed to be sustainable measures. They should result from consultation with eligible victims;
- * the amount that is needed to finance the identified and determined reparation measures."¹⁸²

158. To remedy this issue, the TFV suggests (paragraph 80 onwards) a concrete procedure, according to which the Trial Chamber would issue its reparation order in two parts:

¹⁸⁰ ICC-01/04-01/07-3548, paras 54-56, 58-59.

¹⁸¹ ICC-01/04-01/07-3548, para. 79.

¹⁸² ICC-01/04-01/07-3548, para. 67.

- in the first part of its order, the Chamber would define the criteria necessary to assess the harm, to identify the victims eligible for reparation, and to apply collective or individual reparations;
- then the TFV would issue a draft implementation plan in accordance with these criteria, suggesting an estimate of the costs necessary to remedy the harm identified;
- this implementation plan would be amended or approved by the Chamber;
- the Chamber would then issue the second part of its order, where it would define the exact scope of the convicted person's liability;
- between each step of the proceedings, the parties and participants would be consulted.

159. The defence welcomes this suggestion since it already noted, in its Defence observations, that ‘the procedure now to take place is unclear to the defence, particularly in respect of the procedure to be adopted to ensure that ‘the precise scope’ of Mr Katanga’s liability is to be assessed.’¹⁸³ The defence submits that the procedure suggested by the TFV, appears realistic and respectful of the rights of both the victims and the convicted person. It will ensure that the reparation claims are genuine and reasonable and allow the Trial Chamber to clarify the scope of Mr Katanga’s liability. The only matter of concern is the time that such a procedure may take, though that is not a criticism of the suggested procedure but of the failure to address these matters earlier. Therefore the defence invites the Trial Chamber to adopt this procedure, subject to the following observations.

160. The defence respectfully disagrees with the TFV submissions according to which “84. *In order to avoid two appeals, namely against the first and the second part of the reparations order, [...] the combined first and second parts of the order for reparations should be deemed to be the complete order and only then appealable, when the second part is notified.*” The defence submits that the Legal Representative of Victims and the defence should be able to appeal each part of the reparations order as soon as they are issued, given the impact of the first part of the order on the second part of the order and the definition of the scope of the convicted person’s liability.

161. To allow the parties to appeal the first part of the order immediately would be in the

¹⁸³ Defence Observations, para. 62.

interest of the expeditiousness of the trial. If the parties were able to appeal only the complete order, and if the Appeals Chamber were to reverse the first part of the reparation order, this would mean that the whole process may have to re-start from the beginning. As stressed by the Legal Representative of Victims, several applicants have already died during the proceedings, so this is a matter that should be dealt with as quickly as possible, and any means to accelerate the proceedings or to avoid undue delay should be favored.

162. The Trial Chamber should define from the outset a clear timeframe for the entire reparation procedure, in order to preserve the right of the convicted person to be tried without undue delay.

163. As suggested by the TFV,¹⁸⁴ the Trial Chamber should invite the parties and participants to comment:

- on the issues to be determined in the first part of the order, prior to its issuance;
- on the draft implementation plan of the TFV, before it is approved/amended by the Chamber;
- on the issues to be determined in the second part of the order, prior to its issuance.

The defence submits that to preserve the fairness of the proceedings, it is important that they be given the opportunities to express their views and concerns on these different issues and steps of the proceedings.

164. In this regard, the Universities noted:

“61. It remains important for victims to be able to participate before the ICC in the development of reparations in the *Katanga* case, rather than such implementation being delivered alone by the Trust Fund. This is based on the more transparent and accessible participatory rights available to victims through the Court, including the right of appeal, which are absent from the TFV. As argued by victim legal representatives in the *Lubanga* case, delegating the design and delivery solely to the Trust Fund undermined victims’ rights and agency in shaping meaningful reparations.”¹⁸⁵

It is necessary that the Trial Chamber remains in charge of the proceedings and that its eventual delegations of power be as limited and detailed as possible and never detrimental to the rights of the convicted person or the victims.

¹⁸⁴ ICC-01/04-01/07-3548, paras 81, 95.

¹⁸⁵ ICC-01/04-01/07-3551, para. 61.

165. The defence submits that the second part of the reparation order should identify the victims who will receive an individual award by their specific number in order that their right to appeal be meaningful.

166. The TFV suggests that the Chamber may consider holding reparation hearings.¹⁸⁶ The defence submits that they should be held only if the written submissions of the parties and participants are deemed insufficient for the Chamber to issue a decision.

8. The appointment of a team of experts

167. The Legal Representative of Victims asks the Trial Chamber to appoint a team of experts, pursuant to Rule 97-2 of the Rules, to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations. He defines the eventual mandate of these experts, including the amount which should be paid by the convicted person.¹⁸⁷ He adds that there could be a hearing on a report of these experts.¹⁸⁸

168. The defence notes that usually, in national jurisdictions that cater for victim applications, whether as part of a criminal process or as a distinct civil claim, the victims themselves define their harm, provide evidence in support of this harm, and submit the type of reparation wanted, and in particular the amount of money wanted. These elements are then contested, or not, by the defence, and assessed by the Chamber, with or without the assistance of an expert, if deemed necessary by the Chamber.

169. The defence notes that the claims of the victims represented by the Legal Representative are still not clearly defined. The Registry has provided a useful report on the harm suffered by each victim and the type of reparation sought,¹⁸⁹ however it does not provide sufficient details as to the harm alleged by each victim and the extent of reparation sought. For instance, it specifies that a victim lost relatives, but not how

¹⁸⁶ ICC-01/04-01/07-3548, para. 40.

¹⁸⁷ ICC-01/04-01/07-3555, para. 118.

¹⁸⁸ Ibid, para. 119.

¹⁸⁹ ICC-01/04-01/07-3512-Conf-Anx2-Corr-Red.

many nor their link with the victims. Also, some victims ask for financial compensation but do not provide a figure. Nor do the Legal Representative's Observations on reparation contain a figure. Consequently, the defence does not know the exact claims of the victims. It is probable that each victim is capable of putting a value on the items lost or damaged. The defence submits that it is incumbent upon the Legal Representative of Victims, in consultation with each victim, to define their claim, including particularising the amount of damages.

170. If an issue appears difficult to determine, such as, for instance, the financial award to claim, or to be allocated, in respect of the death of a relative, then it should be capable of resolution through discussion and observation. Similarly, the detailed observations of the TFV, the UN, the Universities, and of the Redress Trust appear sufficient to determine the types and modalities of reparations to be granted in the *Katanga* case.

171. In the present case, the defence submits that there is no proven need to call experts. The Legal Representative does not indicate who would be the experts to be called and what would be their added value in comparison with the experience of the bodies quoted above.

172. For these reasons, the defence submits that the appointment of experts does not appear necessary at this stage of the proceedings. On the contrary, it will probably further delay the proceedings and be costly. The defence submits that the limited amount of money available for the reparations in the *Katanga* case should be allocated in priority to the victims rather than to some experts. The defence maintains that the reparations procedure suggested by the TFV, mentioned *supra*, will be sufficient to assist the Trial Chamber to rule on the various issues raised by the Legal Representative of Victims without the assistance of experts.

9. States and other stakeholders

• *Involvement of the DRC*

173. The defence repeats its earlier submission that “the Chamber, Registry and/or the Trust Fund, should consult with the DRC authorities to identify, for example, whether

the State has taken any reparation measures in Bogoro and/or whether it wishes to take part in any reconciliation and/or rehabilitation process which may be put in place by the Trust Fund. The Court may also wish to consult with the human rights associations active in the region.”¹⁹⁰

174. The Victims’ representative makes a similar observation, maintaining that the DRC should be associated in the reparation proceedings and assist in finding a solution to the land conflict.¹⁹¹ He observes that the DRC could bring a financial contribution to the TFV.¹⁹² The Universities make a very similar proposal: “[...] reparations ordered by the ICC should be complemented by a national reparation process by the DRC government, which itself could also make a donation to the Trust Fund [...]”.¹⁹³ The defence supports those proposals. Again, they should also benefit the Ngiti.

175. It is also important, as submitted previously, that the DRC bear its due weight of responsibility to the victims and the area more generally. The State has done little in the area, and particularly in Walendu Bindi, the Ngiti homeland.

- ***Involvement of other States***

176. As suggested by the Universities, the Trial Chamber may consider it appropriate “to request that the Assembly of State Parties call upon donors to provide funds to any specific funding programme the Trust Fund develops for assistance to victims outside the crimes convicted in the Katanga case, to complement the work the TFV has already supported in Ituri. To sufficiently remedy victims’ suffering in the Katanga case and to provide redress for a wider group of conflict-affected communities, complementary state-led reparations schemes will be necessary.”¹⁹⁴

10. Rights of the defence

¹⁹⁰ Defence Observations, para. 105.

¹⁹¹ ICC-01/04-01/07-3555, paras 126-127.

¹⁹² ICC-01/04-01/07-3514, Observations des victimes sur les réparations, 28 January 2015 :

“49. Le représentant légal estime très important que la Cour associe la République Démocratique du Congo au processus des réparations dans la présente affaire. Il estime notamment que la République Démocratique du Congo devrait être impliquée dans la recherche des solutions sur les questions liées à la sécurité locale en ce compris sur le conflit de répartition des terres entre les communautés qui gangrène la région depuis des décennies. Le représentant légal est également d’avis qu’une intervention financière, via une contribution spécifique au Fonds, pourrait être sollicitée de la part de la République Démocratique du Congo dans le cadre du processus des réparations des victimes.”

¹⁹³ ICC-01/04-01/07-3551, para. 75.

¹⁹⁴ ICC-01/04-01/07-3551, para. 71.

177. The defence endorses the following observations from the TFV:

“44. [...] the Trust Fund agrees that (i) nothing in these principles will prejudice the rights of the convicted person; (ii) States Parties have the obligation to cooperate in the enforcement process and (iii) the need to publicise these principles and reparation proceedings. They should also apply in the case against Mr Katanga.”¹⁹⁵

178. The defence reiterates the necessity to preserve the rights of the convicted person, in particular his right to an expeditious trial. The defence stresses that the Trial Chamber should set a detailed timeframe and notify it to the parties and participants in order “*to provide justice as speedily as possible, to provide certainty and to minimise administrative costs.*”¹⁹⁶

CONCLUSION

179. The defence respectfully requests that the Trial Chamber give due consideration to the above observations on the principles to be adopted in determining the proper reparation modalities and awards.

Respectfully submitted,



David Hooper Q.C.

Dated this 16 June 2015,

London. W.C.1

¹⁹⁵ ICC-01/04-01/07-3548, para. 44.

¹⁹⁶ ICC-01/04-01/07-3554, para. 77.