



Original: English

No.: ICC-01/04-01/07

Date: 13 May 2015

TRIAL CHAMBER II

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

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF**

THE PROSECUTOR v. GERMAIN KATANGA

Public

Observations on Reparations Procedure

Source: The Trust Fund for Victims

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr Eric MacDonald

Counsel for the Defence

Mr David Hooper
Mr Andreas O'Shea

Legal Representatives of Victims

Mr Fidel Nsita Luvengika

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Ms Fiona McKay

Trust Fund for Victims

Mr Pieter de Baan, Executive Director,
Secretariat

The **Trust Fund for Victims** (“Fund” or “Trust Fund”) welcomes the invitation of Trial Chamber II (“Trial Chamber” or “Chamber”) to submit observations with regard to reparations in the case of *The Prosecutor v. Germain Katanga*, pursuant to article 75 of the Rome Statute (the “Statute” or “RS”) and rules 97 and 98 of the Rules of Procedure and Evidence (“RPE”).

I. PROCEDURAL BACKGROUND

1. On 7 March 2014, Trial Chamber II, in its majority, issued its Judgment in the case *The Prosecutor v. Germain Katanga* pursuant to article 74 of the Statute.¹
2. On 9 April 2014, the Prosecutor and the Defence gave notices of their appeals against the Judgment.²
3. On 23 May 2014, the Chamber, in its majority, rendered its Sentencing Decision pursuant to article 76 of the Statute and sentenced Mr Katanga to 12 years imprisonment.³
4. On 25 May 2014, the Prosecutor and the Defence discontinued their respective appeals and informed that they did not intend to appeal the

¹ ‘Jugement rendu en application de l’article 74 du Statut’, 7 March 2014, ICC-01/04-01/07-3436 and Dissenting Opinion of Judge Christine Van Den Wyngaert, ICC-01/04-01/07-3436-AnxI.

² ‘Prosecution’s Appeal against Trial Chamber II’s ‘Jugement rendu en application de l’article 74 du Statut’, 9 April 2014, ICC-01/04-01/07-3462; ‘Defence Notice of Appeal against the decision of conviction ‘Jugement rendu en application de l’article 74 du Statut’ rendered by Trial Chamber II (7 March 2014)’, 9 April 2014, ICC- 01 /04-01/07-3459.

³ ‘Décision relative à la peine (article 76 du Statut)’, 23 May 2014, ICC-01/04-01/07-3484 and Dissenting Opinion of Judge Christine Van Den Wyngaert, ICC-01/04-01/07-3484-AnxI.

Sentencing Decision.⁴

5. On 21 August 2014, the Legal Representative of the victims ("LRV") requested for a timetable for the submission of observations regarding the principles and procedures to reparations in this case.⁵
6. On 27 August 2014, the Chamber issued an order instructing the Registry to contact the victims who had applied for participation/reparation in order to receive additional and updated information regarding the harm suffered and reparation measures sought and to file a report thereon.⁶
7. On 15 December 2014, the Registry filed the Report on applications for reparations.⁷
8. On 8 January 2015, the LRV filed observations on the Registry's report.⁸
9. On 21 January 2015, the Chamber invited interested States and others to apply for leave to submit observation on reparations pursuant to article 75 of the Statute.⁹
10. On 1 April 2015, the Chamber granted leave to Redress Trust; Queen's

⁴Defence Notice of Discontinuance of Appeal against the 'Judgement rendu en application de l'article 74 du Statut' rendered by Trial Chamber II on 7 April 2014', 25 June 2014, ICC-01/04-01/07-3497 and annex; Prosecutor, 'Notice of Discontinuance of the Prosecution's Appeal against the Article 74 Judgment of Conviction of Trial Chamber II date 7 March 2014 in relation to Germain Katanga', 25 June 2014, ICC - 01/04-01/07-3498.

⁵'Requête sollicitant la fixation d'un calendrier en vue de permettre aux victimes de soumettre leurs observations sur les réparations (Articles 68, 75 et 76 du Statut)', 21 August 2014, ICC-01/04-01/07-3507.

⁶'Order instructing the Registry to report on applications of reparations, 27 August 2014', ICC-01/04-01/07-3508.

⁷'Registry's Report on Applications for Reparations in accordance with Trial Chamber II's Order of 27 August 2014, 15 December 2014', ICC-01/04-01/07-3512 with three Annexes.

⁸'Observations des victimes sur les réparations (Article 68(3) et 75 du Statut; Règles 89 à 93 et 97 du Règlement de procédure et de preuve)', 8 January 2015, ICC-01/04-01/07-3514-Conf. The public redacted version was notified on 27 January 2015, ICC-01/04-01/07-3514-Red.

⁹'Scheduling order for interested States or other interested persons to apply for leave to file submissions pursuant to Article 75 of the Statute', 21 January 2015, ICC-01/04-01/07-3516.

University Belfast's Human Rights Centre and the University of Ulster's Transitional Justice Institute; an NGO whose name was redacted and the United Nations, to file submissions on various aspects of reparation proceedings.¹⁰

11. On 1 April 2015, the Chamber enjoined on the parties and participants to file observation on the reparation procedure. The Chamber specified that the submissions should focus on reparation principles, the extent of harm, damage or loss suffered and appropriate modalities of reparations.¹¹
12. On 24 April 2015, upon request of the Trust Fund for Victims, the Trial Chamber extended the deadline for the submission of the observations until 15 May 2015.¹²
13. On 8 May 2015, the Trial Chamber issued its decision on the request of the LRV¹³ for clarification regarding the implementation of Rule 94 of the RPE ("Rule 94 Decision") and the steps to be taken. The Chamber set the date on 1 October 2015 for victims to apply for reparation.¹⁴

II. OUTLINE

14. Firstly, the Trust Fund for Victims ("Trust Fund" or "TFV") will refer to

¹⁰ 'Ordonnance autorisant le dépôt d'observations en application de l'article 75-3 du Statut', 1 April 2015, ICC-01/04-01/07-3533-Red.

¹¹ 'Ordonnance enjoignant les parties et les participants à déposer des observations pour la procédure en réparation', 1 April 2015, ICC-01/04-01/07-3532.

¹² 'Décision relative à la requête du Fonds au profit des victimes aux fins de prorogation du délai fixé pour le dépôt d'observations dans le cadre de la procédure en réparation', 24 April 2015, ICC-01/04-01/07-354.

¹³ 'Demande de clarification concernant la mise en œuvre de la Règle 94 du Règlement de procédure et de preuve, 12 May 2015', notified 13 March 2015, ICC-01/04-01/07-3527.

¹⁴ 'Décision sur la demande de clarification concernant la mise en œuvre de la Règle 94 du Règlement de procédure et de preuves et étapes ultérieures de la procédure', 8 May 2015, ICC-01/04-01/07-3546.

the principles established in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, as they relate to the case of *The Prosecutor v. Germain Katanga*. Suggestions are also submitted on where amendments and additional provisions can be considered.

15. Secondly, the submission will present observations on the five minimum elements of the reparation order established in the Judgment of the Appeals Chamber in the case of *The Prosecutor v. Thomas Lubanga Dyilo*.
16. Thirdly, the Trust Fund will elaborate on the reparations procedures in general, as well as on steps of the reparation proceedings in the case of *The Prosecutor v. Germain Katanga* before Trial Chamber II.
17. Finally, the filing will address the particular topics as listed in paragraph 14 of the Order.

III. REPARATION PRINCIPLES

18. On 3 March 2015, the Appeals Chamber issued the Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 April 2012 with amended order for reparations (Annex A) (“Amended Order”) and public annexes 1 and 2 (“Reparation Judgment”).¹⁵
19. The Trust Fund appreciates the thoughtful and comprehensive collection of core principles of reparations as determined by the Appeals Chamber in the case against Mr Lubanga. The Trust Fund submits that most of these principles should be adopted in the case against Mr Katanga with

¹⁵ ‘Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 April 2012 with amended order for reparations (Annex A) and public annexes 1 and 2’, 3 March 2015, ICC-01/04-01/06-3129 and ICC-01/04-01/06-3129-AnxA, -ANX1 and -ANX2.

some exceptions, which will be addressed further below. In the following section, the Trust Fund comments on each of the principles and suggests amendments as appropriate.

Beneficiaries of reparations

20. The Appeals Chamber rightly determined the beneficiaries of reparations in accordance with rule 85 (a) and (b) of the RPE as direct, indirect victims, and legal entities.
21. As regards the Appeals Chamber's recognition of the possible cultural variation of the concept of 'family' and of the need to regard the applicable social and familial structures, the Trust Fund observes that the concept of 'family' may be considered to extend beyond the spouse and children of a victim.¹⁶
22. Notwithstanding the rights of victims under national and international law, the Appeals Chamber indicated that the Court is able to take into account any awards or benefits received by victims from other bodies.

¹⁶ A similar consideration was upheld by the Extraordinary Chambers in the Courts of Cambodia ("ECCC"), Case against Kaing Guek Eav, 'Judgment', E188, 26 July 2010, para. 643: "Although the immediate family members of a victim fall 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. In this regard, the Chamber accepts the view of expert CHHIM Sotheara regarding the nature of familial relationships within Cambodian culture and has therefore evaluated the claims of extended family members who have sought to demonstrate a particular bond with immediate victims of S-21 and S-24." The ECCC's Supreme Court Chamber adopted the Cambodian concept of an extended family in Case against Kaing Guek Eav, 'Appeals Judgment', F28, 3 February 2012, para. 562: "As held above, the Trial Chamber was correct to articulate the requirement of special bonds of affection or dependence between a direct victim and the claimed indirect victim. This Chamber has further held that close family members may be presumed to have had such bonds. As to what constitutes a close family is context dependent. In the Cambodian context large families live together and form ties connecting immediate and non-immediate family members."

This is to “guarantee that reparations are not applied unfairly or in a discriminatory manner”¹⁷.

23. While the Trust Fund 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, the Trust Fund submits that such consideration requires great caution and needs indeed to be appreciated as not prejudicing the victims’ established right to reparations. Already received benefits should be only taken into account in as far as the reparation award is comparable with them.
24. The Trust Fund agrees with the principle of prioritisation of certain victims who are in a particularly vulnerable situation, as well as with the encouragement of the Court to adopt affirmative action measures.

Harm

25. The Trust Fund agrees with the Appeals Chamber’s denotation of harm and the requirement of harm to be personal and not necessarily direct. For legal entities the harm should be ‘direct’ pursuant to rule 85 (b) of the RPE.

Causation

26. The Trust Fund agrees with the general determination of causation and suggests adding the requirement of “proximate cause”, which is a general term already limiting the extent of harm as a result suffered from the crime. Nevertheless, the “proximate cause” condition still allows being determined in consideration of the facts of a specific case.

¹⁷ ICC-01/04-01/06-3129-AnxA, para. 9.

Dignity, non-discrimination and non-stigmatisation

27. The Trust Fund endorses this important principle and welcomes the clarification that all victims may benefit from reparations regardless of whether they participated in the trial.

The Trust Fund subscribes to the need to address any underlying injustices in the implementation of reparations, avoiding replicating discriminatory practices or structures that predated the commission of the crimes.

28. The Fund notes that a gender-inclusive approach “ensuring that principles and procedures are accessible to *all* victims in their implementation” [emphasis added] is a laudable as well as challenging principle. This is even more so when a reparation order is rendered many years after the crimes were committed and when victims may be widely scattered. The available time and resources may limit possibilities of reaching out to *all* victims in this specific case.
29. Thus, the Trust Fund proposes the use of “aiming at” instead of “ensuring” in paragraph 18 of the Amended Order.

The liability of the convicted person

30. The Trust Fund agrees with the principle holding the convicted person liable for reparations regardless whether he or she has the necessary financial capacity to fulfil the reparation order at the time when the reparation order is issued.
31. The Trust Fund submits that the principle that reparations need to be proportionate to the degree of participation in the commission of the crimes may induce the interpretation that the mode of liability is a

determining factor in establishing liability, which may not be in the interest of the victims of the convicted crimes.

32. The Trust Fund invites the Chamber to determine whether and to what extent such an interpretation of this principle finds a basis in international or national legal frameworks concerning individual civil liability. Proportionality based on mode of criminal liability may be deemed to be in contrast with the general legal concept of civil liability for the harm caused by jointly committed acts. Each of the wrongdoers/defendants is liable for the full amount of reparation. The accessory is jointly and severally liable with the primary wrongdoer.¹⁸
33. Mr Katanga was convicted as an accessory pursuant to article 25 (3) (d) of the Statute. The majority of the Trial Chamber was persuaded beyond reasonable doubt that Mr Katanga significantly contributed to the commission of the crime of a group, acting with a common purpose. His contribution was intentional and he knew the common plan to which he contributed.
34. Despite discussions about the civil liability of an accessory and the

¹⁸ Paul S Davies, *Accessory liability*, Hart Publishing, Oxford (2015), at pp. 216-217. For example in Germany, there is a clear article in the civil code that perpetrators and accessories, aider and abettor are jointly responsible towards the victims. (§ 830 Bürgerliches Gesetzbuch-BGB). If the claimant sues only one of the debtors, they may compensate proportionally among themselves according to their level of liability.(§ 840 BGB) It is important to note that each of the perpetrators is liable for the full amount towards the victim/claimant, regardless of his/her level of participation/causation. The same principle of several and joint liability applies in other European countries, in New Zealand, in 46 States of the United States, in Australia, Canada and many other countries. Where some countries are moving away from joint and several liability to a proportionate liability, this does not apply for defendants acting in concert, on cases of negligence, limited to the building industry or not for personal harm. See the good overview in the report of the Law Commission of New Zealand. Liability of multiple Defendants, June 2014 at <http://r132.publications.lawcom.govt.nz/uploads/NZLC-R132-Liability-of-Multiple-Defendants.pdf>. China adopted a similar provision in article 8 of the liability tort act; see *Zeitschrift für Europarecht, internationals Privatrecht und Rechtsvergleichung*, October 2010, Issue 5, at p. 221 at <http://www.jura.uni-freiburg.de/institute/asien/forschung/zeitschrift-fuer-europarecht-int.-privatrecht-rechtsvergleichung>.

question whether his/her contribution should be proportionate to his/her involvement, it is undisputed that (i) the causal link between the principal and the accessory, (ii) the accessory's knowledge of the common plan of the principal(s), (iii) the intention to significantly contribute to the commission of the crimes and thus, causing harm through this contribution, justifies holding the accessory jointly and severally liable together with the principal wrongdoer.¹⁹

35. Therefore, different levels of participation in and contributions to the commission of the crimes do not compel a proportional (civil) liability for the accessory *towards the victim(s)*. Whether and to which extent the harm caused and thus the civil liability may be divided proportionally among all wrongdoers, the principal and the accessory, is a separate question, which should not amount to a principle of reparation disfavours the rights and interests of victims at their expense.
36. Therefore, the Trust Fund suggests not adopting this principle.

Standard and burden of proof

37. The Trust Fund fully endorses this principle, which adequately responds to the nature of reparation proceedings and the difficulties that victims may face in gathering and presenting evidence that substantiates the causal link between the harm they have suffered and the convicted crimes.

Child victims

38. This principle is referenced in paragraphs 26 and 28 to provisions concerning child soldiers. Mr Katanga was acquitted of the charge of

¹⁹ Joachim Dietrich, *The Liability of accessories under statute, in equity, and in criminal law: some common problems and (perhaps) common solutions*, Melbourne University Law review, Vol.34 (2010), (106-139), at p. 117.

using child soldiers to participate actively in hostilities. Therefore, in this case, former child soldiers are not eligible for reparations and thus do not need to be addressed in the reparation order.

Accessibility and consultation with victims

39. The Trust Fund welcomes that consultation with victims and their families is a principle of reparations and suggests for the case against Mr Katanga that further consultation with victims concerning their harm and an assessment of the extent of their injury(ies) and their “views and proposals regarding the appropriate modalities of reparations and programmes”²⁰ should be considered an essential step towards the design and implementation of appropriate reparation awards.
40. The Chamber may consider holding reparation hearings in-situ in order to make the reparation proceedings more accessible and visible for victims. Victims could testify and appear in such hearings and recount the specific harm that they suffered from the crimes until the present. The Trial Chamber may also hear expert advice on the consequences of such harm and how they may be addressed. Such a hearing can enable the Chamber to get a better picture of the harm suffered resulting from the attack and the range of modalities of reparations and priorities sought.

Modalities of reparations

41. The Trust Fund fully agrees with the modalities of reparation as listed by the Appeals Chamber in the case against Mr Lubanga and encourages this Chamber to consider and apply similar modalities.
42. In the case against Mr Katanga, paragraph 43 of the Appeals Chamber’s

²⁰ Amended Order, para. 79.

Amended Order should be amended with regard to the purpose of the publication of the Conviction Decision in so far as it refers to child soldiers who are not victims in the case against Mr Katanga.

Proportional and adequate reparations

43. The Trust Fund endorses this principle of proportional and adequate reparations to victims, which should also apply to the particulars of the conviction against Mr Katanga.

Principle 11, 12 and 13

44. These principles are self-evident and in their entirety endorsed by the Trust Fund. In particular, 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.

IV. OBSERVATIONS ON THE FIVE MINIMUM ELEMENTS OF A REPARATION ORDER AS ESTABLISHED BY THE APPEALS CHAMBER IN THE CASE AGAINST MR LUBANGA

First element:

The order for reparations must be made against the convicted person

45. The Trust Fund fully agrees with the Appeals Chamber's determination that an order for reparations must be made against the convicted person. The Trust Fund held the same position in various prior filings on

reparations.²¹

Second element:

*The order for reparations must establish and inform
the convicted person of his or her liability*

46. The second element results from the first and the Trust Fund agrees that a reparations order must establish and inform the convicted person of his or her liability.
47. With regard to the proportional liability the Trust Fund refers to its submission above and incorporates it by reference.²²
48. The Trust Fund notes that the information about the reparation awards as determined in the reparation order serves also as information to victims and enables them to appeal it, according to article 82 (4) of the Statute, if they wish to do so.

Third element

*The order for reparations must specify the type of reparations,
either individual, collective, or both*

49. The Trust Fund agrees that the Trial Chamber must specify the type of reparations, either individual, collective, or both.
50. Many victims left Bogoro after the attack and did not return. An

²¹ 'Trust Fund's First Report on Reparations', ICC-01/04-01/06-2803-Conf-Exp, 1 September 2011, with public redacted version, registered on 23 March 2012, ICC-01/04-01/06-2803-Red, 1 September 2011, para. 112.

'Observations on Reparations to the Scheduling Order of 14 March 2012', ICC-01/04-01/06-2872, 25 April 2012, paras. 12-16.

'Observations of the Trust Fund for Victims on the appeals against Trial Chamber I's "Decision establishing the principles and procedures to be applied for reparations', ICC-01/04-01/06-3009, 8 April 2013, paras. 103-111.

²² See *infra* paras. 30-36.

unknown number of victims even left the country, some fleeing as far as South Africa.²³ This may pose challenges for outreach and also for the accessibility of eventual reparations awards. The Trial Chamber should take into account the ambition that eventually all eligible victims, regardless of their location of residence, should have access to awards.

51. A narrow determination of types of reparation could possibly limit the modalities. The Trial Chamber should furthermore consult, through the Trust Fund and the Registry, on all modalities with all eligible victims who come forward for reparations.
52. Therefore, the Trust Fund invites the Trial Chamber to be broad in its indication of appropriate types of reparation, in order to maintain all possible modalities for final consideration.

Fourth element:

The order for reparation must define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted, as well as identify the appropriate modalities of reparations based on the circumstance of the case

(a) Harm

53. The Trust Fund agrees with the fourth element as key for a reparation order and acknowledges that the Appeals Chamber in determining the harm in the case of The Prosecutor v. Thomas Lubanga Dyilo could only take into consideration the Trial Chamber's prior findings.²⁴
54. The Trust Fund notes the Appeals Chamber's ruling that "*identifying*" and defining harm must be done by a Trial Chamber in the reparations

²³ T-344-Red-ENG, page 11, lines 11 and 17-18.

²⁴ Appeals Judgment, ICC-01/04-01/06-3129, paras. 185-186 and 238.

order, while the determination of “*assessing the extent*” of that harm for purposes of determining the nature and/or size of reparation awards may be done by the Trust Fund.

55. The Appeals Chamber provided two possible options for a Trial Chamber: (1) The Trial Chamber defines harm *and* determines – with or without experts - the scope and extent of any damage, loss and injury or, (2) it “defines the harm and sets the criteria, that are to be applied by the Trust Fund for purposes of assessing the extent of the harm, either on a collective or individual basis, depending on the order for reparations”²⁵.
56. Pursuant to the second option, subsequent to the Trial Chamber’s reparations order the Trust Fund would establish the nature and size of the reparation awards and propose these for review and approval by the Trial Chamber. This option is at variance with the Appeals Chambers’ ensemble of the five elements of a reparations order, according to which, *inter alia*, the extent of harm is already known and contributes to the determination of the precise scope of liability. Therefore, according to the Trust Fund, the Appeals Chambers’ treatment of type and extent of harm as a constituent element of liability in a reparations order cannot be simply adopted. The related procedural implications and options are discussed in more detail in Section V of this submission.

(b) Modalities of reparation

57. The Trust Fund agrees with the Appeals Chamber’s ruling that the modalities of reparations need to be established by the Trial Chamber.

²⁵ Appeals Judgment, ICC-01/04-01/06-3129, para. 183.

Fifth element:

The order for reparations must identify the victims eligible to benefit from reparations or set out the criteria of eligibility

58. The eligibility and number of victims are critical elements to assess the precise scope of liability. Also for the purposes of consultation with victims, their eligibility must be (eventually) determined in order to establish the link between the convicted crimes and the harm suffered and the scope and extent of reparations awards.
59. As the title of the Appeals Chamber's fifth element suggests, a Trial Chamber's reparation order may only set the criteria for eligibility. As observed above in relation to the fourth element of harm, this would be at variance with the Appeals Chambers' ensemble of the five elements of a reparations order, according to which, *inter alia*, the beneficiaries of reparations (direct and indirect victims) are known and this knowledge is required for the determination of the precise scope of liability. The related procedural implications and options are discussed in more detail in Section V of this submission.

V. PROCEDURES OF THE REPARATION PROCEEDINGS IN GENERAL AND BEFORE TRIAL CHAMBER II IN THE CASE AGAINST MR KATANGA

60. Under this section, the Trust Fund addresses procedural issues to be resolved in relation to the ensemble of the five elements of a reparations decision, as identified by the Appeal Chamber in its Judgment, taking into consideration their occasional inconsistencies as noted above, as well as the relevant Regulations of the Trust Fund.
61. Procedural options to be considered by the Trial Chamber should be responsive to both the objectives of a reparations order and to the Trust Fund's Regulations, while being mindful of the rights and interests of

victims and the convicted person(s).

62. In the case against Mr Lubanga, the Appeals Chamber provided guidance on the reparations proceedings and the minimum content of a Trial Chamber's reparation order, which *inter alia* has to determine the precise scope of liability of the convicted person.²⁶ The determination of precise liability assumes that certain actions and processes have been completed prior to the order.
63. Establishing the precise liability of a convicted person can only be feasible if *all eligible* victim beneficiaries that can be reached within a certain period of time, have been identified, screened for eligibility and consulted regarding their injuries and their preference for modalities of reparations, in order to determine the award(s). The Trust Fund submits that this may often not be viable to be achieved prior to the issuance of a reparations order, given the role of the Trust Fund, as part of the development of a draft implementation plan, to conduct victim mapping, identification and outreach in consultation and in cooperation with the Registry and the Legal Representatives. This is an important process to organize and implement with limited resources and time allocated, and taking into consideration the scope of victimisation resulting from Rome Statute crimes. Therefore, the number, location, and eligibility of victims (both direct and indirect) may be difficult to determine prior to the issuance of a reparations order.
64. This situation is reflected in the Trust Fund Regulations in Part III/Chapter III, concerning individual reparations when fines and forfeitures are deposited at the Trust Fund, and in Chapter IV, collective awards when the voluntary contributions of the Trust Fund are used to

²⁶ 'Appeals Judgment', ICC-01/04-01/06-3129, paras. 237-243.

complement the Court order, which leave scope for the Trust Fund to identify victim beneficiaries *following* a reparations order by the Court.

65. While victims' screening for collective reparations is not explicitly addressed in the relevant part of the Trust Fund Regulations, Part III / Chapter IV, the Trust Fund respectfully submits that it is not excluded either. It follows from a logical and practical, although not legal approach, and is not an unlikely situation to arise in circumstances that make collective awards more appropriate.

Procedure according to the Appeals Chamber's Judgment

66. The Appeals Chamber indicated 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."²⁷ The convicted person must know the extent of his/her obligations in order to appeal such an order effectively. In addition, victims have the possibility to appeal the reparation order. In order to determine the precise scope of liability, the Trial Chamber would need to be provided with relevant information. In the case against Mr Lubanga, the Appeal Chamber noted that the Trial Chamber had only made limited enquiries in this regard.²⁸
67. The Trust Fund submits that 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

²⁷ Ibid., at para 237.

²⁸ Ibid., at para 238.

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.

68. In order to determine the precise liability of the convicted person, the Trial Chamber needs to envisage and determine what kind of programme(s)/modalities will remedy the victims. In this course, it is necessary to determine the final number of eligible victims, the types and extent of harm and the concrete modalities and programmes of reparations awards.

69. The Trial Chamber's order is a reparations order, appealable pursuant to article 82 (4) of the Statute. Based on the Appeals Chamber's Decision, the Trust Fund's role would be limited to the implementation of the reparations order. However, the Trust Fund Regulations referencing the "draft implementation plan" suggest a more substantive role for the Trust Fund.

Procedure as envisaged in the RPE and the RTFV

70. The legal basis for the reparations proceedings and in particular the role of the Trust Fund therein can be found in Rule 98 of the RPE. The Trust Fund addressed this topic in detail in its previous filings.²⁹

71. Rule 98 (2) of the RPE applies only to individual reparations and in case when an award is deposited with the Trust Fund.

²⁹'Trust Fund's First Report on Reparations', ICC-01/04-01/06-2803-Conf-Exp, 1 September 2011, with public redacted version, registered on 23 March 2012, ICC-01/04-01/06-2803-Red, 1 September 2011, paras. 256-275 (with regard to Rule 98 (1) – (3)) and 283-288 (with regard to Rule 98 (4)).

72. Rule 98(3) of the RPE reads as follows:

“The Court may order that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate.”

73. The Regulations of the Trust Fund for Victims envisage that the Trust Fund “shall prepare a draft implementation plan” in the case when (i) the order [of the Trial Chamber] is issued against the convicted person and (ii) that the award is to be made through the Trust Fund.³⁰

74. The legal framework is silent what exactly will be the content of the draft implementation plan. Regulation 55 describes as follows:

*“Subject to the order of the Court, the Trust Fund shall take into account the following factors **in determining the nature and/or size of awards**, inter alia: the nature of the crimes, the particular injuries of the victims and the nature of evidence to support such injuries, as well as the size and location of the beneficiary group” (emphasis added)*

75. Regulation 69 states with regard to the scenario of Rule 98 (3):

*“...the draft implementation plan **shall set out the precise nature of the collective award(s), where not already specified by the Court, as well as the methods for its/their implementation.**” (emphasis added)*

76. The RTFV are silent on what the “precise nature of the collective award(s)” and “the determination of the nature and/or size of the awards” exactly encompasses. Pursuant to Regulation 70 of the RTFV, the Board of Directors may consult with victims and experts on these matters.

77. However, Regulations 55, 59-65, and 69-70 of the RTFV clearly indicate that the Trust Fund drafts the implementation plan *after* the Court issued

³⁰ See Regulations 50 (b), 54 and 69 of the RTFV.

its reparation order and that this undertaking is subject to the order. The Regulations' section on the implementation of collective awards pursuant to Rule 98 (3) does not explicitly mention the determination of eligible victims and the type and scope of harm. One might infer that the determination of (i) the eligible victims, (ii) the type and (iii) scope of harm for the purpose of collective awards may have been made by the Trial Chamber. Yet it is more likely that the Trust Fund's role to specify the "nature of the collective awards", if the Court did not specify the nature, and to "develop methods for its/their implementation", as described in Trust Fund Regulation 69, would incorporate the establishment of the scope of harm and the determination of the nature of the award.

78. According to the Appeals Chamber's Judgment on reparations in the case against Mr Lubanga, the identification of the types of harm to direct and indirect victims must be done by the Trial Chamber.³¹ As to the extent of harm, the Appeals Chamber is of the view that the Trial Chamber has two options: to either itself "determine the scope, extent of any damage, loss and injury to, or in respect of victims, in the order for reparations"; or "[...] to set the criteria that are to be applied by the Trust Fund for the purposes of assessing the extent of the harms [...]"³².

General Discussion

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

³¹ Appeals Chamber's Judgment, ICC-01/04-01/06-3129, para 181.

³² Ibid, para 183.

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.

80. To achieve this, the Trust Fund submits that the Trial Chamber may issue the reparations order in two parts, becoming appealable in its entirety upon the issuance of the second part.
81. The first part of a reparation order against the convicted person may define the types of harm caused to direct and indirect victims and set the criteria that are to be applied by the Trust Fund for purposes of assessing the extent of harm and the criteria for the eligibility of victims in the draft implementation plan to be approved by the Trial Chamber.³³ Prior to issuing the first part of the order, the Trial Chamber may invite observations on these specific issues from the Defence, Legal Representatives of Victims, and other interested persons or interested States pursuant to Article 75 (3) of the Statute, and seek to call expert evidence pursuant to Rule 97 of the Rules of Procedure and Evidence.
82. As regards the identification and eligibility of victim beneficiaries of the reparations awards, the Trial Chamber may also determine, in the first part of the reparation order, the relevant criteria for both or either individual and collective awards. As foreseen as an eventuality in RTFV 59 on individual awards, which may well be held to be equally pertinent for collective awards, the identity of all eligible victims may not be known in the draft implementation plan. This would again constrain the ability of a Trial Chamber, at the time of reviewing the Trust Fund's

³³ The Trust Fund notes that the Trial Chamber's approval of the implementation plan is not an appealable decision.

draft implementation plan, to determine the convicted person's precise scope of liability.

83. The Trust Fund respectfully submits to the Trial Chamber to consider, in this circumstance, that the second part of the order on reparations be issued once the Trust Fund has completed and reported on the identification and screening of eligible victims, assessed the extent of their injury, and determined their association with one or more of the modalities of reparations, and the calculation of the resulting cost. This supplementary implementation plan will be indispensable to the Trial Chamber's ability to establish the precise scope of liability – and in doing so to ensure the rights of parties to review and appeal.
84. In order to avoid two appeals, namely against the first and the second part of the reparations order, the Trust Fund submits that 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 Trust Fund submits that this is consistent with the Appeals Chamber's statement that "the Trial Chamber's determination of the amount of Mr Lubanga's liability for the awards of reparations constitutes a part of the order for reparations within the meaning of article 75 (2) of the Statute and is therefore appealable, pursuant to article 82 (4)."

Procedural options in the case against Mr Katanga

85. The Trust Fund recalls that the following issues need to be determined in a reparation order:

(1) criteria to be used in the screening of victims as well as the number and identity (on a confidential basis) of qualifying eligible victims;

(2) 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;

(3) types and modalities of reparations that remedy the harm and the types/nature size of the programmes/measures that are to be designed, the period of implementation as well as measures to promote the sustainability of awards. The determination should result from consultation with and an injury assessment of eligible victims.

86. The Trust Fund respectfully suggests the following process to be adopted by the Trial Chamber for reparations in the case against Mr Katanga, mindful of the need to maintain the balance between the guarantees of an accurate and just process for both the victims and Mr Katanga.

87. The Trust Fund suggests splitting the reparation order into two parts, which are only in their entirety appealable.

88. Before issuing the first part of the reparation order, the Trial Chamber invites observations of the Defence, the Legal Representative of Victims, the Trust Fund, and the Registry on the following issues:

- Criteria and methodology to be applied in the screening process of victim eligibility for reparations. ;
- Process and criteria for assessment of the extent of harm;
- Sequence and timeline of the reparation proceedings;
- Methodology and purpose of consultation;
- Reparation hearings and their content;

The Trial Chamber may also consider engaging experts for any of the above under rule 97 of the RPE.

89. In its invitation for observations, the Trial Chamber may encourage the invitees to submit practical and realistic observations, keeping in mind to achieve a timely outcome and to arrive at a reasonable use of resources in proportion to the eventual awards.
90. Based on these submissions, the Trial Chamber issues the first part of the reparation order, in which it establishes the principles of reparations in the case against Mr Katanga by taking into account the already submitted observations of parties, participants and others. In addition to the principles on reparations, the Chamber decides in this first, non—appealable part of the reparation order on:
 - Eligibility criteria for victims
 - Type of harm and criteria for assessment of harm by the Trust Fund
 - Type of reparations and modalities of reparations to be considered, allowing for adjustments resulting from consultations with victims
91. Furthermore, the Chamber may order that outreach be conducted to inform communities and potentially eligible victims. This should be based on available knowledge about where the victims of the attack against Bogoro village may (likely) reside. The Trust Fund submits that the decision concerning the most appropriate type(s) of reparations should be based on the results of consultation with all reached and eligible victims about the extent of their injury and their views and proposals on “modalities and programmes of reparations”³⁴.
92. The Victims Participation and Reparation Section (“VPRS”) interviewed

³⁴ Amended Order, at para. 79.

304³⁵ 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.

93. The Trust Fund takes note of the Trial Chamber's Rule 94 Decision by which the Chamber set a date for the submission of reparation applications on 1 October 2015. The Chamber may consider, in line with the Trust Fund's present submission, to issue the *first part* of the reparation order prior to any final consideration of victims' applications, thus allowing the Registry in cooperation with the Trust Fund to complete effective and appropriate consultations on the basis of preapproved criteria, processes and methodologies.
94. In the first part of the reparation order, the Trial Chamber may invite the Trust Fund to submit a draft implementation plan, which should address, *in as far as feasible*, the following issues, based on consultations with victims, communities, and experts:
 - The determination of the number of direct and indirect eligible victims in this case;
 - The extent of their harm;
 - Modalities of reparations that are appropriate in this case;
 - The nature and estimated size of the awards and the possible programmes and projects that address the extent of harm;

- First estimate of costs, budget, and timeline.
95. The Trial Chamber may invite the parties and participants to comment on this draft implementation plan and issue its approval or amendments, if applicable. Where the draft implementation plan is not able to indicate the total number of eligible victims and, consequently, the size and cost of awards, the Chamber may decide to review, propose amendments (if applicable) and approve the draft implementation along with an instruction to the Trust Fund to incorporate in a supplementary implementation plan the required information on the total number of victim beneficiaries, the size, nature and costs of the proposed awards, as well as a decision of the Trust Fund's Board of Directors pursuant to Regulation 56 of the RTFV.
96. Subsequently, the Trial Chamber may issue the second part of the reparations order in which it determines the precise liability of Mr Katanga. The first and second parts together would constitute the reparation order appealable under article 82 (4) of the Statute.

Eligibility of already participating victims in this case

97. 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. The devised screening process should take into account that the incident at stake is one attack on a single day against the village of Bogoro, which at the relevant time of the attack

had an estimated 800 inhabitants³⁶, of which a sizeable portion has participated in the trial. While the screening process may be different for victims who have already applied and for newly identified victims, the application of eligibility criteria should be consistent for all victims.

*Determination of the eligibility of individuals
newly requesting reparations*

98. Should the Trial Chamber decide to set criteria for the eligibility of victims in the first part of the reparations order, it may then consider to decide on a final deadline until when unknown victims may come forward, based on information provided by the Trust Fund in the draft implementation plan.
99. Following 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. Interviews conducted with potentially eligible victims could seek to establish the types of harm suffered, the assessment of the extent of their injury and their preferences for modalities and programmes of reparations. The outcomes of his process will be documented by the Trust Fund in the draft implementation plan, if feasible, or alternatively in the supplementary implementation plan.

³⁶ ICC-01/04-01/07-3436, para. 730.

VI. OBSERVATIONS ON TOPICS RAISED IN THE AMENDED ORDER FOR REPARATIONS AGAINST MR LUBANGA AND THEIR RELEVANCE IN THE CASE AGAINST MR KATANGA

Preliminary Remarks

100. The following observations are made in relation to the specific topics identified by Trial Chamber II, in its Order of April 1, 2015. In the preceding parts of this submission, the Trust Fund endeavoured to address the procedural implications of a number of these topics, demonstrating the importance of adopting an iterative approach towards the design and implementation of reparations awards in ensuring that – next to the actions and interactions of the Court, the Trust Fund, and parties – the voice of victims, their families and where relevant their communities is heard and accounted for.

(i) Victims and groups of victims eligible to benefit from reparation

101. Mr Katanga was found guilty, as an accessory to murder, attacking the civilian population, destruction of property and pillaging, committed on 24 February 2003 during the attack on the village of Bogoro in Ituri. The attack was directed against the base of the *Union des patriotes congolais* (UPC) but also against the Hema population in the village in order to eliminate the group. Also members of other ethnicities were attacked. The attackers interrogated villagers to determine their ethnicity. Several survived by pretending that they were not Hema.³⁷ The Trial Chamber found that at the very least 60 persons known by name were killed.³⁸ At the time of the attack, Bogoro village had an estimated 800 inhabitants.³⁹

³⁷ 'Jugement rendu en application de l'article 74 du Statut', 7 March 2014, ICC-01/04-01/07-3436, para. 989

³⁸ ICC-01/04-01/07-3436, paras 835-841. The prosecutor and the Legal Representatives of the Victims stated that 150 persons were killed, while the Defence asserted that 142 persons were killed.

³⁹ ICC-01/04-01/07-3436, para. 730.

102. The Trust Fund submits that *direct* victims in this case are (i) the civilian inhabitants of Bogoro village who did not participate in the hostilities⁴⁰ and who were present on 24 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. As *indirect* victims, family members of direct victims are eligible for reparations.
103. According to the Bogoro village chief who testified in the Sentencing Hearing, the victims of the attack who never returned to Bogoro have scattered and fled, some as far as South Africa.⁴¹
104. Out of the 304 interviewed individuals only 20 % still live in Bogoro village.⁴² Thus, many people now living in the village were not victims of the 2003 attacks and are reported not to originate from Ituri. Alleged perpetrators of the attack are reported to now live alongside victims in Bogoro village.⁴³

(ii) Screening, identification, and consultation of victims

105. The Trust Fund agrees with the consideration of the Appeals Chambers that, 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.
106. The Trust Fund holds that the screening of victims eligible for reparations in this case must be done for the (i) victim participants and, (ii) for individuals who may yet come forward seeking reparations.

⁴⁰ ICC-01/04-01/07-3436, para. 729. The Trial Chamber could not exclude that also members of the self-defence groups, dressed in civilian clothes, may have participated in the hostilities. They would not be eligible for reparations because they are considered to be combatants.

⁴¹ T-344-Red-ENG, page 11, lines 11 and 17-18.

⁴² Registry's Report, para. 33.

⁴³ Reparations in the Democratic Republic of Congo, A Report by the Sanela Diana Jenkins Human Rights Project at UCLA March 2012, at www.uclaforum.com/sdj at p. 6.

The following steps are proposed for consideration by the Chamber:

- (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. The Trust Fund notes that the incident at stake is one attack on a single day against the village of Bogoro, which had at the relevant time an estimated 800 inhabitants. Therefore, in this instance and given the circumstances, it is very likely that the victim participants who were authorized on a *prima facie* basis qualify as victims of the case and thus for reparations. The Trust Fund observes that the VPRS conducted group meetings with 223 victims and individual meetings with all 304 victim participants. The Trust Fund notes that the questionnaire inquired whether the victim confirms the facts in the application form. It is very likely that they know each other and remember who was living in the village on 24 February 2003 and became victim of the convicted crimes.
- (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 establish that the individuals are civilians and did not participate as combatants in the hostilities.

107. The Trial Chamber may invite the parties/participants to submit their observations on the victims' screening criteria and procedure, to inform the *first part* of the reparations order and subsequently the draft implementation plan. The screening process would eventually result in the identification and verification of victim beneficiaries for purposes of reparations awards. This information is an important prerequisite for the determination of the nature and size of the award and thus the precise scope of liability of Mr Katanga.
108. In the case against Mr Katanga, for the first time victims who were authorized to participate in the proceedings were consulted on the modalities of reparations sought.⁴⁴
109. The purpose of consultation was to (i) gather information and (ii) act upon the collected information accordingly. The outcomes of the consultation of a sizeable portion of potentially eligible direct and indirect victims in this case are a highly relevant source of information for the Trust Fund to make observations on the applicability of the elements of the Appeals Chamber's Judgement and Amended Order in the case against Mr Lubanga, in particular regard of the reparations in the case against Mr Katanga.
110. The Trust Fund recalls its prior observations on the process of consultation with victims and communities, as submitted in the reparations phase of the case against Mr Lubanga.⁴⁵

⁴⁴ 'Registry's Report on Applications for Reparations in accordance with Trial Chamber II's Order of 27 August 2014', 15 December 2014, ICC-01/04-01/07-3512 with three Annexes. Annex 1 is the report summarizing the methodology and results of the consultation; Annex 2 contains fact sheets for each individual victim and Annex 3 shows the questionnaire.

⁴⁵ 'Trust Fund's First Report on Reparations', ICC-01/04-01/06-2803-Conf-Exp, 1 September 2011, with public redacted version, registered on 23 March 2012, ICC-01/04-01/06-2803-Red, 1 September 2011, paras. 276-279.

111. The Trust Fund notes that consultation should include those communities where the victims currently reside. Consultation and a participatory process are recommended. The Trust Fund suggests the following content of such a participatory communication approach:

Inform the public and affected communities about the reparation order and keep victims informed as they take part in the consultation process;

Educate the public, affected communities and victims about the details of the provisions of the reparation order, the role of the Trust Fund and Court, and information related to the reparations process;

Solicit information from the public to augment other sources of information;

Consult with the public, affected communities and victims to learn what they know and how they feel about the consultation and implementation process;

Involve the public, affected communities and victims in planning to develop programme goals, strategies and visions for the future;

Obtain responses from the public, affected communities and victims about the impact of the reparation order and the implementation process;

Provide comments on how public, affected communities and victims respond to issues or the impact of the reparation order and the implementation process; and

Involve members of the public, affected communities and victims directly in decision-making through participation in on-going consultations.

112. The Trust Fund observes that this consultation process is of inherent reparative value already constitutes a holistic process where victims and communities are involved. Further, such a process will create an environment where the communities understand and contribute to the process, which will lead to its acceptance.

(iii) Harm

113. The Trust Fund notes that the definition of type of harm in the case against Mr Lubanga is based on the limited information that was available to the Appeals Chamber.⁴⁶
114. The types of harm as defined in the Amended Order in the case against Mr Lubanga may serve as a reference in the case against Mr Katanga, as long as specific harm articulated in the reparations order pertains to Mr Katanga's criminal actions.
115. In the case against Mr Katanga, the Trial Chamber may consider in the first part of the reparation order the definition of the type of harm: (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,

⁴⁶ 'Appeals Judgment', ICC-01/04-01/06-3129, para. 186.

engaged for that purpose; (iii) evidence contained in reparation requests, submitted pursuant to Rule 94 of the RPE.⁴⁷

116. The harm articulated by the Chambers must stem from the crimes for which Mr Katanga was convicted. The Trust Fund submits that the different types of harm that may be suffered by victims should be regarded in a holistic way as they represent the multidimensional nature of their impact on the lives and prospects of victims to regain their dignity and rebuild their lives.
117. The Trial Chamber may set out or adopt the criteria in the first part of the reparation order based on expert advice, if applicable.
118. The Trust Fund is of the view that the extent of harm may be best articulated in the second part of the reparations order following the screening and assessment of all eligible victims. This information is necessary to determine the precise scope of liability.
119. 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. Such an assessment is even more complicated in a situation where many if not all victims of this case lived in a war torn area where they might have experienced similar events on different occasions. Victims that have experienced such events may suffer from post-traumatic stress disorder (PTSD), depression, dissociative disorders and a range of other traumas induced by the violence that they endured. The Trust Fund is of the opinion that such an assessment prior to the

⁴⁷ Ibid., para. 185.

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.

120. Material harm due to destruction and loss of property should be considered as consequential injuries to victims seeking reparations in the case against Mr Katanga as pillage and destruction of property are part of the conviction.
121. With regard to material loss and damage, experts who would be invited by the Trial Chamber might shed light on the value of the lost property. This is a lengthy, intense and expensive assessment, which would include field visits, which may not be deemed to be proportional to the purpose and the outcome of a reparations order and could better be undertaken during the implementation of an order, if applicable. This is even more the case when the Trust Fund financially complements reparation awards, which according to regulation 56 of the RTFV regards collective reparations awards, not individual awards.
122. In regard of compensation, international and national courts have acknowledged that in certain cases a precise damage assessment or proof is impossible, and even where it is possible, it might be inappropriate.⁴⁸ Dwertmann observes that “a general tendency towards standardized or lump awards can be assessed, which are based on tables or guidelines in cases of typical categories of harm, instead of individual

⁴⁸ Eva Dwertmann, *The Reparation System of the International Criminal Court*, Martinus Nijhoff Publishers, (Leiden-Boston) (2010), at p. 172.

assessment of damage. This is particularly true of pecuniary harm and instances where harm has been caused to a number of persons”⁴⁹.

123. In case that the Trial Chamber finds that a more specific assessment of the extent of harm would assist in its determination of the extent of harm and thus, the precise scope of liability in the reparation order, then the Chamber may consider getting only an assessment of material harm and loss, which is easier to measure. Nevertheless, also for material harm an expensive and lengthy expert examination would be necessary.
124. To conclude, the Trust Fund is of the view that a further specification and assessment of harm at this stage, i.e., prior to the issuance of a reparations order, is not advisable as it may not contribute to a just and holistic reparation scheme.

iv) Standard of causation

125. The Trust Fund fully agrees with the set standard of causation.

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

126. The Trust Fund welcomes an order for reparation that is directed against the convicted person and holds Mr Katanga liable for the harm that he caused through the commission of the convicted crimes.
127. According to Regulation 56 of the RTFV, as confirmed by the Appeals Chamber, the Board of Directors of the Trust Fund may decide whether to complement resources collected through awards for reparations and advise the Chamber at what level it may complement an award for reparations should the Court determine Mr Katanga to be indigent for purposes of reparations.

⁴⁹ Ibid., at pp. 172 and 173.

128. The continuous and life-long monitoring by the Court of the financial situation of Mr Katanga, with the assistance of States Parties, is an important step towards materialising his financial liability for reparations to the victims of the convicted crimes.
129. With regard to indirect victims, the Trust Fund stresses that the local cultural customs should guide the decision on the understanding of family concept, which may be larger than the narrow parent/child relationship. An important factor to consider should be the financial or other strong bonds between persons living in a family structure and carrying together the burden to support the (broader) family.
130. In the case against Mr Katanga, the Trial Chamber may 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.
131. The Board of Directors of the Trust Fund may also consider to develop measures under the assistance mandate in regard of those communities where direct and indirect victims now live, in order to address and mitigate possible tensions that may result from the reparations order or to address matters related to the root causes of the conflict.
132. The Trust Fund submits that the Trial Chamber in the case against Mr Katanga may consider the proposal of the Trust Fund to divide the reparation order in two parts, to be appealable in its entirety when the second part is rendered.

(vi) *Types and modalities of reparations*

133. Types and modalities of reparation in the case against Mr Katanga must address the harm resulting from the convicted crimes, which include murder, attacking the civilian population, destruction of property and pillaging on 24 February 2003 in and around the village of Bogoro. As noted above, the multidimensional nature of the harm suffered by victims should find expression in modalities of reparations that constitute a comprehensive and integrated response to the harm suffered by direct and indirect victims.
134. The Trust Fund notes that the types and modalities of reparations should be based on the assessment of the extent of harm experienced by victims, as expressed or exhibited during consultations and or evaluations. Likewise, it should be based on the consultation with victims regarding their views and proposals of appropriate reparation awards.
135. The modalities of satisfaction and guarantees of non-repetition include, but are not limited to, such individual and collective elements as revelation of the truth, public acknowledgment of the facts and acceptance of responsibility, search for the disappeared and identification of remains, the restoration of the dignity of victims through commemoration and other means, activities aimed at remembrance and education and at preventing the recurrence of similar crimes.⁵⁰

⁵⁰ Article 19 Submission of the Global Campaign for Free Expression before the Inter-American Court of Human Rights in the Case of Luis Gonzálo 'Richard' Vélez Restrepo v. Colombia, Case No. 12.658, para. 62. See at <http://www.article19.org/data/files/medialibrary/3084/Article-19-Amicus-Velez-Restrepo.pdf>.

136. Most of these measures did not receive much attention by the interviewed victims.⁵¹ However, preventing the recurrence of similar crimes was expressed to be a concern of the interviewed victims. The ongoing lack of security was also given as an important reason why victims have not returned to Bogoro. The Trial Chamber may consider addressing the requests for specific measures, such as peace initiatives, settling of land conflicts, finding solutions to the land delimitation between communities and obtaining agreement on territorial boundaries.⁵²
137. The Trial Chamber may determine reparations which address the psychological harm from the attack for direct victims, the harm with regard to the murder of relatives and thus for indirect victims, and the harm that results from the loss and destruction of property for both direct and indirect victims.
138. Should the Trial Chamber adopt the proposal of the Trust Fund to split the reparation order in two parts, the Trust Fund notes that the modalities of reparations should be based on an assessment of the extent of harm experienced by victims. Considering the importance of accessibility to reparations, the Trust Fund would need to consider and propose to the Trial Chamber options to include those victims who live far from the area.
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,

⁵¹ Registry's Report, ICC-01/04-01/07-3512-Anx1, paras. 54-55.

⁵² Ibid., at footnote 124.

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.

140. The Amended Order against Mr Lubanga contains a provision that he may “contribute to this process by way of a voluntary apology to individual victims or group of victims, on a public or confidential basis”⁵³.

141. Mr Katanga has apologized to the victims at the time of the discontinuance of the appeal against the article 74 Judgment. The Trust Fund draws the attention of the Trial Chamber to the strong reactions to the apology of Mr Katanga by applicants interviewed by the VPRS. They did not consider his apology to be genuine and found it inconsiderate.⁵⁴ To protect the psychological well-being of the victims, the VPRS did not probe further as to their opinions regarding the apology. Therefore, the Trust Fund submits that apologies by Mr Katanga should be carefully weighed by the Trial Chamber as to whether it may be considered at all as a form of reparations and satisfaction to victims.

142. In the second part of the reparations order, the Trial Chamber may be able to fully address the types and modalities of reparations awards, based on the results of the complete consultation of eligible victims, on the type and extent of their injuries, as well as their views and proposals on modalities and programmes of reparations, and the results of consultations with their communities.

⁵³ Amended Order, ICC-01/04-01/06-3129-AnxA, para. 67 (viii).

⁵⁴ Registry’s report, ICC-01/04-01/07-3512-Anx1, para. 28.

(vii) Objectives of reparations

143. The Trust Fund submits that the objectives of reparation in the case against Mr Katanga encompass the following:

- Relieve the suffering from the committed and convicted crimes;
- Afford justice to the victims by alleviating the consequences of the wrongful acts;
- Deter future violations;
- Assist in promoting reconciliation between the conflicting parties;
- Include communities into the reparation process.⁵⁵

144. The Trust Fund observes that in the case of Mr Katanga the objective of assisting in the promotion of reconciliation needs more consideration and should be addressed in further consultation with victims and their respective communities in order to determine what benefits reconciliation may provide in this specific case and in the present situation.

(viii) Transmission of requests for reparations to the Trust Fund

145. The Trust Fund submits that existing requests for reparations in the case against Mr Katanga, subject to the consent of the victims concerned, should be transferred to the Trust Fund.

⁵⁵ Derived from the Amended Order in the case against Mr Lubanga, ICC-01/04-01/06-3129-AnxA, paras. 71-72, and adjusted for reparations in the case against Mr Katanga.

(ix) Draft implementation plan

146. The Trust Fund respectfully refers to its observations and suggestions in the present submission in regard of the draft implementation plan, in conjunction to options that may be considered by the Trial Chamber in regard of the reparations order.⁵⁶

FOR THE FOREGOING REASONS

The Board of Directors respectfully submits its observations and informs the Chamber of its willingness and availability to appear on any specific issue addressed in this filing and/or on any other issue the Chamber deems necessary.



Pieter W.I. de Baan

Executive Director of the Secretariat of the Trust Fund for Victims,
on behalf of the Board of Directors of the Trust Fund for Victims

Dated this 13 May 2015

At The Hague, The Netherlands

⁵⁶ See *infra*, inter alia, paras. 80-82; 94-96; 98-99, 107, 138 and 142.