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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 Observations on Reparations

Source: Defence for Mr Germain Katanga

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INTRODUCTION

1. The defence for Mr. Germain Katanga (“defence”) hereby submits its observations on reparations.
2. The defence acknowledges that the principles annunciated by the Trial Chamber in *Lubanga*, as extensively amended by the Appeals Chamber in its judgement of 3rd March 2015¹ (the “*Lubanga* Judgement”), reflected in the amended order annexed to that judgement², (the “*Lubanga* Order”) are generally applicable to the present case.

PROCEDURAL BACKGROUND

3. On 7 March 2015, Trial Chamber II issued its ‘*Jugement rendu en application de l’article 74 du Statut*’ (the “Article 74 Judgment”),³ according to which, by majority, it found Germain Katanga guilty, within the meaning of article 25(3)(d) of the Statute, as an accessory to the crimes committed in Bogoro on 24 February 2003 of:
 - Murder as a crime against humanity under article 7(1)(a) of the Statute;
 - Murder as a war crime under article 8(2)(c)(i) of the Statute;
 - Attack against a civilian population as such or against individual civilians not taking direct part in hostilities, as a war crime under article 8(2)(e)(i) of the Statute;
 - Destroying the enemy’s property as a war crime under article 8(2)(e)(xii) of the Statute; and
 - Pillage as a war crime under article 8(2)(e)(v) of the Statute.
4. The Trial Chamber acquitted Mr Katanga of:
 - Rape and sexual slavery as crimes against humanity under article 7(1)(g) of the Statute;
 - Rape and sexual slavery as war crimes under article 8(2)(e)(vi) of the Statute;
 and

¹ 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.

² ICC-01/04-01/06-3129-AnxA, Order for Reparations, 3 March 2015.

³ ICC-01/04-01/07-3436.

- Using children under the age of 15 years to participate actively in hostilities as a war crime under article 8(2)(e)(vii) of the Statute.⁴
5. On 23 May 2014, Trial Chamber II issued its '*Décision relative à la peine (article 76 du Statut)*' (the "Sentencing Decision"), according to which, by majority, it condemned Mr Katanga to a sentence of 12 years of imprisonment.⁵
 6. On 16 December 2014, the Registry filed its 'Report on Applications for Reparations' (the "Registry Report").⁶
 7. On 27 January 2015, the Legal Representative of Victims submitted his '*Observations des victimes sur les réparations*'.⁷
 8. On 1st April 2015, Trial Chamber II invited the defence, the Legal Representative of Victims, the Registry, the Trust Fund for Victims (the "TSF") and the Prosecutor to submit observations, (a) on the applicability of the principles, established by the Appeals Chamber in the context of the *Prosecutor v. Lubanga Dyilo*,⁸ to the facts of the present case and possible adaptations and additions necessary in the light of the circumstances of the case; and (b) the extent of damage, loss or injury ('*L'ampleur du dommage, de la perte ou du préjudice*') to victims or their dependents ('*aux victimes ou à leurs ayants droit*'), as well as the appropriate types and modalities of reparation.
 9. The Trial Chamber seeks views on nine particular areas:⁹
 - i. Victims and groups of victims eligible to benefit from reparations
 - ii. Identification of victims
 - iii. Harm
 - iv. Standard of causation
 - v. Scope of Mr Katanga's liability for reparations
 - vi. Modalities and forms of reparations
 - vii. The objectives of reparations

⁴ Article 74 Judgment, pp. 709-710.

⁵ ICC-01/04-01/07-3484, paras 147, 170.

⁶ ICC-01/04-01/07-3512, Registry Report on Applications for Reparations in accordance with Trial Chamber II's Order of 27 August 2014.

⁷ ICC-01/04-01/07-3514, *Observations des victimes sur les réparations (Articles 68(3) et 75 du Statut ; Règles 89 à 93 et 97 du Règlement de procédure et de preuve)*.

⁸ ICC-01/04-01/07-3532, Ordonnance enjoignant les parties et les participants à déposer des observations pour la procédure en réparation, para. 14, p. 7.

⁹ Ibid para 14

- viii. Transmission of requests for reparations to the Trust Fund
- ix. The draft implementation plan

DISCUSSION

10. 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; and the Regulations of the Trust Fund for Victims are also of relevance, most notably Regulations 42-50.¹⁰
11. The defence acknowledges that the general principles on reparations defined by the Appeals Chamber in the course of the *Lubanga* proceedings, —“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.”¹¹
12. The Appeals Chamber identified five “minimum and essential elements” that must be included in an order for reparations and “vital to its proper implementation.” They are:
 - 1) it must be directed against the convicted person;
 - 2) it must establish and inform the convicted person of his or her liability with respect to the reparations awarded in the order;
 - 3) it must specify, and provide reasons for, the type of reparations ordered, either collective, individual or both, pursuant to rules 97 (1) and 98 of the Rules of Procedure and Evidence;
 - 4) it 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 modalities of reparations that the Trial Chamber considers appropriate based on the circumstances of the specific case before it; and
 - 5) it must identify the victims eligible to benefit from the awards for reparations or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted.
13. The numbering, 1-5, of the five elements is not significant and was determined solely by the order in which submissions were made in that case. The Trial Chamber may address the elements in any order it wishes.¹²

¹⁰ 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.

¹¹ *Lubanga* Order, para. 5.

¹² *Lubanga* Judgement, para 33.

1. Victims and groups of victims eligible for reparations

14. Rule 85(a) of the Rules of Procedure and Evidence defines ‘victims’ as “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court” and applies to both direct and indirect victims.¹³ By Rule 85(b) victims include organisations or institutions “that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.” Paragraphs 6 to 9 of the *Lubanga* Order, as amended, set out the general principles to be employed in defining the beneficiaries of reparations, and in paragraphs 54 to 56 of the Order, apply those principles to the *Lubanga* case. Several institutions in Bogoro have applied to participate in the proceedings.¹⁴ The defence notes that some rebuilding of schools in the area has taken place over the past ten years, work that it understands was financed by NGO’s. The defence submits that such past benefits must be taken into account when assessing awards.

15. 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 are persons who are victimized directly as a result of the crimes for which the convicted person has been held criminally responsible. They are eligible to receive reparations. Their definition is uncontroversial.

¹³ ICC-01/04-01/07-1491-Red-tENG, Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims, 23 September 2009:, paras. 49-56.

¹⁴ A/0071/08 applied to participate in the proceeding in 2008 (ICC-01/04-01/07-518-Conf-Exp-Anx36) and the PTC authorized its participation as moral person (Decision ICC-01/04-01/07-578-Conf and its public redacted version ICC-01/04-01/07-579, paras 139-141; see also 3512-Conf-Anx2-Corr-Red, p. 17).

A/0072/08 also applied to participate in the proceeding in 2008, referring to the destruction of administrative buildings of the *groupement* in Bogoro (ICC-01/04-01/07-518-Conf-Exp-Anx37) but the PTC denied its request because “it has not provided evidence establishing *prima facie* that such buildings were dedicated to religion, education, art or science or charitable purposes, historical monuments, hospitals or other places or objects for humanitarian purposes” (Decision ICC-01/04-01/07-578-Conf and its public redacted version ICC-01/04-01/07-579, paras 139-141).

Two other moral persons (a/0268/09 and a/0533/08) applied to participate in the proceedings in 2009 (ICC-01/04-01/07-1209-Conf-Exp-Anx5 and ICC-01/04-01/07-1571) but their request were denied by the TC (Decisions ICC-01/04-01/07-1669 and ICC-01/04-01/07-1737, paras 19, 20, 23).

16. In respect to ‘indirect victims’ the defence submits that the definition of ‘indirect victims’ set out in the ‘Principles’ section of the *Lubanga* Order at paragraph 6, requires adjustment in the context of the *Katanga* case. Two categories mentioned there, namely; “anyone who attempted to prevent the commission of one or more of the crimes under consideration”, and “individuals who suffered harm when helping or intervening on behalf of direct victims”¹⁵ have not featured in the *Katanga* case.
17. Consequently, the defence submits that the indirect victims who may be granted reparations from Mr. Katanga are:
- i. family members of direct victims;
 - ii. other persons who suffered personal harm¹⁶ as a result of these offences.
18. In light of the general principle that the reparation order “must identify the victims eligible to benefit from the awards for reparations or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted”¹⁷ - the defence submits these two sub-categories of indirect victims should be further defined.
19. It has been held that “[i]ndirect victims must establish that, as a result of their relationship with the direct victim, the loss, injury, or damage suffered by the latter gives rise to harm to them. It follows that the harm suffered by indirect victims must arise out of the harm suffered by direct victims, brought about by the commission of the crimes charged.”¹⁸ Furthermore, it has been established that “close personal relationships, such as those between parents and children, are a precondition of participation by indirect victims.”¹⁹ The harm suffered by these indirect victims “may include the psychological suffering experienced as a result of the sudden loss of a family member or the material deprivation that accompanies the loss of his or her contributions.”²⁰

¹⁵ *Lubanga* Order, para. 6, ii and iii.

¹⁶ Harm, as defined in paragraph 10 of the *Lubanga* Order “...denotes “hurt, injury and damage”. The harm does not necessarily need to have been direct, but it must have been personal to the victim. Harm may be material, physical and psychological.”

¹⁷ ICC-01/04-01/06-3129, 3 March 2015, para. 1.

¹⁸ TCI, *Pros. v. TLD*, Redacted version of “Decision on ‘indirect victims’”, ICC-01/04-01/06-1813, 8 April 2009, para. 49.

¹⁹ *Ibid*, para. 50.

²⁰ *Ibid* para. 50.

20. Accordingly, the defence submits that ‘family members of direct victims’ can qualify as indirect victims only if they are ‘close family members’. 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 ».²¹

21. The beneficiaries of reparations in this case should be limited to the victims of the following crimes, provided they can show harm:

- ‘murder’: the beneficiaries of reparation should be the close family members (parents and children) of the persons killed in the attack.
- ‘attack against a civilian population as such or against individual civilians not taking direct part in hostilities’: the beneficiaries of reparation should be the civilians who were present at Bogoro when it was attacked on 24 February 2003 provided they can demonstrate direct harm suffered in the attack. It is to be noted that the primary target of the attack was the large number of UPC combatants based in Bogoro, a substantial number of whom were themselves residents of Bogoro. Care should be taken to ensure that neither these combatants, nor their relatives, if claiming as indirect victims, are beneficiaries.
- ‘destroying the enemy’s property’ and ‘pillaging’: the beneficiaries of reparation should be the direct victims of these crimes, i.e. the victims whose property was destroyed or pillaged on the 24 February 2003; indeed, the Trial Chamber ruled that “it is seized only of acts committed during the events of 24 February 2003 in Bogoro and therefore it will not consider acts of destruction that allegedly took place in the days following the attack.”²²

²¹ PTCI, *Pros. v. TLD*, Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-172-tENG, 29 June 2006, at pages 7-8 (defining indirect victims as ‘close family or dependents’.). *See also Pros. v. TLD*, Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo, ICC-01/04-01/06-228-tENG, 28 July 2006.

²² Article 74 Judgment, para. 916.

2. Identification of Victims

22. Regarding the identification of the victims, the defence submits that the Trial Chamber should adopt the same procedure as the one employed to assess the application to participate in the case.²³

23. This same identification procedure has been accepted in the *Lubanga* reparation procedure and consists of the following:²⁴

‘Victims may use official or unofficial identification documents, or any other means of demonstrating their identities. In the absence of acceptable documentation, a statement signed by two credible witnesses establishing the identity of the applicant and describing the relationship between the victim and any individual acting on his or her behalf is acceptable.’

²³ See ICC-01/04-01/07-933-t-ENG, Decision on the treatment of applications for participation, 09 July 2009 (footnotes omitted):

F. Documents accepted by the Chamber in order to establish the identity of Applicants [...]

“30. The Chamber shares this viewpoint and hence authorises the submission of the following documents:

i) national identity card, passport, birth certificate, death certificate, marriage certificate, family registration booklet, will, driving licence, card from a humanitarian agency;

ii) voting card, student identity card, pupil identity card, letter from local authority, camp registration card, documents pertaining to medical treatment, employee identity card, baptism card;

iii) certificate/attestation of loss of documents (loss of official documents), school documents, church membership card, association or political party membership card, documents issued in rehabilitation centres for children associated with armed groups, certificates of nationality, pension booklet; or

iv) a statement signed by two credible witnesses, within the meaning understood by Trial Chamber I, 28 attesting to the identity of the applicant or the relationship between the victim and the person acting on his or her behalf, providing that there is consistency between the statement and the application. The statement should be accompanied by proof of identity of the two witnesses.

31. As regards the credibility of witnesses called upon to sign statements, the Chamber indicates that it will take into consideration, non-cumulatively, factors such as the nature and length of the relationship of those witnesses with the applicant, or their standing in the community.”

See also ICC-01/04-01/07-1491-Red-t-ENG, Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims, 23 September 2009:

“37. In line with the position adopted by the Appeals Chamber, the Chamber considers that, when an applicant alleges that he or she has suffered mental harm following the loss of a member of his or her family, the identity of that family member and the relationship between him or her and the applicant must be established. In this regard, the Chamber will rely on the death certificate or evidence of family relationship produced to it, but also on any other document or information which allows it at this stage to satisfy itself that the statements in the applications for participation are true.

38. Thus the Chamber is of the view that it is not possible to ignore the difficulties encountered by applicants living in Ituri in providing documents proving the death of a family member or their family relationship with that person. It therefore considers that the submission of a certificate signed by two credible witnesses is sufficient, at this stage in the proceedings, to establish the death of a person or that individual’s family relationship with the applicant. In this regard, it recalls that, in order to assess the credibility of witnesses who signed these declarations, it “will take into consideration, non-cumulatively, factors such as the nature and length of the relationship of those “witnesses with the applicant, or their standing in the community.””

²⁴ *Lubanga* Order, para. 57.

3. *The harm*

24. The Court recognises the right to reparations of direct and indirect victims of ‘harm’. According to the *Lubanga* Order, the concept of ‘harm’ denotes “hurt, injury and damage”; the harm does not necessarily need to have been direct, but it must have been personal to the victim, and it may be material, physical and psychological.²⁵
25. The Appeals Chamber critically distinguished the identification of “the harms to direct and indirect victims caused by the crimes for which the person was convicted” and the assessment of “the extent of that harm for purposes of determining the nature and/or size of reparation awards”.²⁶
26. The Appeals Chamber held that the harm should be clearly identified by the Trial Chamber in order that both victims and convicted persons are informed of this critical aspect and thereby placed in a position to appeal an order for reparations pursuant to article 82(4) of the Statute.²⁷ The Chamber’s order should also set out criteria that the Trust Fund should apply in determining the extent of these harms and the nature and size of reparation awards.²⁸ In this respect, the Appeals Chamber emphasised the principle, as codified in rule 97 (3) of the Rules of Procedure and Evidence, that, in awarding reparations, “the Court shall respect the rights of victims and the convicted person”, which includes the right to meaningfully challenge an order for reparations pursuant to article 82 (4) of the Statute.
27. An additional reason for it to be the Trial Chamber, and not the Trust Fund, to define the harms is that otherwise “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.”²⁹ Indeed, as acknowledged by the Trust Fund

²⁵ *Lubanga* Order, para. 5.

²⁶ ICC-01/04-01/06-3129, 3 March 2015, para. 181.

²⁷ *Ibid*, para. 181.

²⁸ *Ibid*, para. 183.

²⁹ *Ibid*, para. 182.

itself,³⁰ the scope of reparations of harms for which the convicted person may be held liable must be limited to the extent of his conviction.³¹

28. The harm of direct victims must be personal and derive from the crimes for which Mr. Katanga was convicted. Reparations for murder can only be awarded to indirect victims. As for the remainder of the crimes, the direct victims, as identified above, should be entitled to reparation of any material, physical or psychological harm they suffered as a result of these crimes.

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.

Direct harm caused by crimes not attributable to Mr. Katanga

30. The United Nations submissions are likely to include a request that the Trust Fund be invited to include victims of sexual violence in their assistance programmes.³² A similar request was made and approved in the *Lubanga* reparations procedure. In that case, the Appeals Chamber made it very clear that “sexual and gender-based violence” could not “be defined as harm resulting from the crimes for which Mr Lubanga was convicted”.³³ Nor had it been considered as an aggravating factor of these crimes, as “nothing suggests that Mr Lubanga ordered or encouraged sexual violence, that he was aware of it or that it could otherwise be attributed to him in a

³⁰ Ibid, para. 182.

³¹ Ibid, para. 184.

³² ICC-01/04-01/07-3523, para. 28.

³³ ICC-01/04-01/06-3129, 3 March 2015, para. 196.

way that reflects his culpability”.³⁴ The Appeals Chamber held that Mr Lubanga could not “be held liable for reparations in respect of such harm”.³⁵

31. This is no different to Mr Katanga’s situation, where the link with sexual violence “in the context of the charges” has similarly not been established “beyond reasonable doubt”.³⁶ Mr Katanga was acquitted of such crimes because they could not be characterized as occurring in the ordinary course of the implementation of the common purpose of the group of Ngiti militia, to which Mr. Katanga made a significant contribution.³⁷ While Mr. Katanga can not be held liable in respect of harm resulting from sexual violence, the defence agrees with the observations made by the United Nations,³⁸ and by the Appeals Chamber in the *Lubanga* proceedings, that such a finding “should not be viewed as precluding such victims from being able to benefit from assistance activities that the Trust Fund may undertake”.³⁹

32. The defence submits that in this case:⁴⁰

‘It is appropriate for the Board of Directors of the Trust Fund 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’.

33. The Trial Chamber may also consider “that it is appropriate for the draft implementation plan to include a referral process to other competent NGOs in the affected areas that offer services to victims of sexual and gender-based violence”.⁴¹

Indirect harm

34. As observed by the Trial Chamber in *Lubanga*, “whereas Rule 85(b) of the Rules provides that legal persons must have “sustained direct harm”, Rule 85(a) of the Rules

³⁴ Ibid, para. 197.

³⁵ Ibid, para. 198.

³⁶ Ibid, para. 197.

³⁷ Compare with *ibid.*, para. 199.

³⁸ ICC-01/04-01/07-3523, para. 28.

³⁹ ICC-01/04-01/06-3129, 3 March 2015, para. 199.

⁴⁰ Lubanga Order, para. 55.

⁴¹ ICC-01/04-01/06-3129, 3 March 2015, para. 199.

does not include that stipulation for natural persons, and applying a purposive interpretation, it follows that people can be the direct or indirect victims of a crime within the jurisdiction of the Court.”⁴²

35. In *Katanga*, Trial Chamber II defined harm of indirect victims as follows:⁴³

51. The Chamber recalls the position of the Appeals Chamber, whereby “the notion of victim necessarily implies the existence of personal harm but does not necessarily imply the existence of direct harm.” Consequently, the relatives of the deceased person, as indirect victims, may claim to have suffered harm as a result of the harm suffered by the deceased as the direct victim, and may thus submit an application for participation on the sole ground of the mental and/or material harm they themselves have suffered.

56. The Chamber accordingly holds that a relative of a deceased person can only submit an application for participation in his or her own name, by invoking any mental and/or material harm suffered personally as a result of the death of said person.

36. The defence accepts this definition and submits that close family members of persons who died during the Bogoro attack, to the extent Mr. Katanga is liable, should be eligible for reparations, with respect to:

- i. Psychological suffering experienced as a result of the loss of a family member;
- ii. Material deprivation that accompanies the loss of the family members’ contributions.

37. The Trial Chamber found that the Ngiti combatants of the Walendu-Bindi collectivity whose crimes have been attributed to Mr. Katanga, were responsible (either on their own or jointly with the Lendu attackers) for killing civilians.⁴⁴ The Chamber established, giving the accused the benefit of the doubt that of those killed, only 30 had been proved to have been killed by Ngiti combatants. As the other deaths can not be attributed to Mr. Katanga, he should not be subject to an order for reparations in respect of them. The Trust Fund may be invited to consider extending its assistance program to them. The reparation order should, however, make it clear that Mr. Katanga is not liable to pay reparations to any direct or indirect victims of crimes not attributable to him.

⁴² ICC-01/04-01/06-1119, Decision on victim's participation, 18 January 2008, para. 91.

⁴³ ICC-01/04-01/07-1491-Red-tENG, Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims, 23 September 2009 (footnotes omitted).

⁴⁴ Sentencing Decision, para. 47 ; Article 74 Judgment, para. 869.

4. Standard of causation

38. Reparation is to be awarded based on the harm suffered as a result of the commission of the crimes for which Mr Katanga was convicted.
39. The defence submits that the standard of causation between the crimes and resulting harms for the purpose of reparations should be the standard, defined in the *Lubanga* order, requiring a “but/for” relationship between the crimes for which Mr. Katanga was convicted and resulting harms, and that these crimes were the “proximate cause” of the harms for which reparations are sought.⁴⁵

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

40. In the *Lubanga* Order, at paragraph 22, it is stated that: “Given the fundamentally different nature of reparations proceedings, a standard less exacting than that for trial, where the prosecution must establish the relevant facts to the standard of “beyond a reasonable doubt”, should apply. In determining the appropriate standard of proof in reparation proceedings, various factors specific to the case should be considered, including the difficulty victims may face in obtaining evidence in support of their claim due to the destruction or unavailability of evidence.” The defence agrees that, as stated by the Appeals Chamber, the applicant shall provide ‘sufficient’ proof of the causal link between the crime and the harm suffered, based on the specific circumstances of the case.
41. In the present case, which concerns only one attack, on one day, against one village, the defence submits that it is not an onerous burden for victims to produce sufficient and credible evidence in support of their claims. Failing that, the Trust Fund may consider supporting them through other funds, but it would be unfair for Mr Katanga to be held liable to compensate a reparation award which is not adequately substantiated by credible evidence.

⁴⁵ Lubanga Order, para. 59.

42. This is all the more so, given that in practice Chambers do not engage in a substantive assessment of the credibility, or reliability, of a victim's application before the commencement of the trial. Rather, Chambers "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 ».⁴⁶ This is a low threshold, in particular because the Chamber is provided with only the limited information contained in a victim's application form. At this later stage, the Trial Chamber should examine the reparation claims with care to ensure that the convicted person does not pay for false or exaggerated claims.
43. The Chamber must be alert to the difficulties that arise because of the poverty of persons in Eastern Congo who are amongst the poorest of the poor, with limited opportunities for betterment. The unemployment rate is high and those fortunate to have paid work, and they are few, rarely receive a salary higher than \$30 per month.⁴⁷ In addition, many have suffered economic and health difficulties brought about by the collapse of the State in the latter years of Mobutu and the wars inflicted on the region since 1994, during which an estimated five million people have died, the majority through malnutrition and disease.⁴⁸
44. In such circumstances, it should be no surprise that sometimes individuals may present false or exaggerated claims. By way of example, two victims admitted to participate in the *Katanga* case and to testify as witnesses, were not called as witnesses, because of their unreliability. They were withdrawn from the list of victims at the request of the Legal Representative of Victims.⁴⁹ Economic hardship has led

⁴⁶ Decision on victim's participation ICC-01/04-01/06-1119, 18 January 2008, para. 99. See also *Pros. V. Abu Garda*, Decision on the Applications for Participation at the pre-Trial Stage of the Case, ICC-02/05-02/09, 25 September 2009, para. 14.

⁴⁷ In its closing brief, the defence noted for instance that in North Kivu the family income of poorer households in 2003 was approximately 140 USD a year: ICC-01/04-01/07-3266-Conf-Corr2, para. 507, with reference to P-267-T-173-pp.9-10 (FRA-pp.9-10). The World Bank mentions an income per person of 220 dollars in 2012, indicating that it is one of the lowest in the world (<http://www.banquemondiale.org/fr/country/drc/overview#1>).

⁴⁸ See ICC-01/04-01/07-3266, Defence Closing Brief, para. 549.

⁴⁹ See ICC-01/04-01/07-2668-Red2, *Complément d'informations relatif au retrait de la victime a/0381/09 de la liste des témoins du représentant légal*, 1^{er} février 2011 ; ICC-01/04-01/07-2669, *Notification du retrait de la victime a/0381/09 de la liste des témoins du représentant légal*, 31 January 2011 ; ICC-01/04-01/07-2674, *Décision relative à la Notification du retrait de la victime a/0381/09 de la liste des témoins du représentant légal*. See also ICC-01/04-01/07-2695-Red, *Notification du retrait de la victime a/0363/09 de la liste des témoins du représentant légal*, 10 February 2011, and ICC-

witnesses to make false allegations during the trial.⁵⁰ As a result, in the Article 74 Judgment, the Trial Chamber considered that several witnesses were unreliable.⁵¹ While these witnesses were put to the test of cross-examination, most victims will not be put to any test at all. Their word alone should be insufficient and should be adequately corroborated. If the Chamber were to accept the assertions of the claimants at face value, without requiring adequate supporting documentation or other evidence, the burden would effectively fall on the defence to disprove such allegations.

45. This is in line with the Appeals Chamber's observation in *Kony et al* that:⁵²

[I]t is an essential tenet of the rule of law that judicial decisions must be based on facts established by evidence. Providing evidence to substantiate an allegation is a hallmark of judicial proceedings; courts do not base their decisions on impulse, intuition and conjecture or on mere sympathy or emotion. Such a course would lead to arbitrariness and would be antithetical to the rule of law.

46. Accordingly, the Appeals Chamber determined that a claim of emotional harm following the loss of a family member, proof of the identity of the family member as well as his or her relationship with the claimant is required.⁵³ In this particular case, the Appeals Chamber was not satisfied that the factual and evidential basis was sufficient to reach even a *prima facie* finding that a number of victim applicants had suffered such harm as the result of the loss of a family member.⁵⁴

47. The dissent was equally strong in stating that "[i]t is a cardinal rule of pleading that the facts relied upon in support of a claim must be explicitly identified; proof is confined to a verification of those facts through the adduction of evidence. The more

01/04-01/07-2699-Red, *Décision relative à la Notification du retrait de la victime a/0363/09 de la liste des témoins du représentant légal*, 26 February 2011.

⁵⁰ ICC-01/04- 01/07-3266-Corr2-Red, Second Corrigendum to the Defence Closing Brief, paras. 487-488, 492, 509–10.

⁵¹ See, inter alia, Article 74 Judgement, paras 144 (P-28), 177-179 (P-219), 318-319 (P-280), 291-292 (P-279).

⁵² ICC-02/04-179, Judgment on the appeals of the Defence against the decisions entitled "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06" of Pre-Trial Chamber II, 23 February 2009, para. 36.

⁵³ Ibid. See also ICC-01/05-01/08-320, *Quatrième décision relative à la participation des victimes*, 12 December 2008, para. 72 ; ICC-01/04-01/06-172, Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo, 29 June 2006, at pages 7-8; ICC-01/04-01/06-228, Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo, 28 July 2006.

⁵⁴ *Supra* note 74.

authentic the evidence, the more readily will the court acknowledge the existence of the facts relied upon. If this is not possible because such evidence is either unavailable or impossible to secure, other evidence may be adduced, depending on the persuasiveness of which the court may accept the facts as proven or not. »⁵⁵

48. Part of the harm may have been caused by earlier attacks on Bogoro,⁵⁶ one of which was significant, resulting in a high number of casualties.⁵⁷ The area has also suffered from subsequent events, as war and conflict in Ituri has continued up until today. It is believed that further and substantial degradation of buildings –for example at Diguna – took place well after the Bogoro attack. For example, the DRC Army is understood to have removed large amounts of roofing and other material for its own use. In light of these circumstances, it may be difficult to determine the material, physical and psychological damages resulting from the February 2003 attack.

49. In light of these principles, a request for individual reparations in the case of Katanga should be dismissed when:

- no causal link has been established between the alleged harm and the crimes for which Mr Katanga was convicted;
- it is incomplete,⁵⁸ and in particular:

⁵⁵ ICC-02/04-179, Dissenting Opinion of Judge Pikis, Judgment on the appeals of the on the appeals of the Defence against the decisions entitled "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06" of Pre-Trial Chamber II, 23 February 2009, para. 6.

⁵⁶ In its Article 74 Judgment, the Trial Chamber mentioned, inter alia, the attacks of 9 January 2001 and 14 August 2002 (paras 464, 474).

⁵⁷ See, inter alia, the following testimonies, referring to an attack against Bogoro in early February 2003, involving several casualties, mentioned in the Defence Closing Brief, ICC-01/04-01/07-3266-Conf-Corr2, at paras. 687-693: D2-300-T-322-p.30 (FRA-pp.30-31) ; D2-300-T-317-pp.60-61 (FRA-pp.52-53) ; P-166-T-226-p.9-l.11-to-p.10-l.3 (FRA-p.8-l.2-19) ; P-159-T-120-pp.70-71 (FRA-p.70) ; P-159-T-122-pp.18-19 (FRA-pp.16-18) ; D2-176-T-255-p.25-l.20-21 (FRA-p.25-l.21-22) ; T-256-p.56-l.8-12 (FRA-p.47-l.19-23) ; D2-176-T-257-p.15-l.9-10, pp.19-20 (FRA-p.13-l.20, p.17) ; D2-176-T-255-p.25 (FRA-p.25) ; T-256-p.56-l.8-12 (FRA-p.47-l.19-23) ; D2-176-T-255-p.25-l.24-25 (FRA-p.25-l.25-27) ; T-256-p.56-l.8-12 (FRA-p.47-l.19-23)..

⁵⁸ See ICC-01/04-01/07-933-tENG, Decision on the treatment of applications for participation, 09-07-2009. In the present case, this Chamber is also of the view that an application can be considered to be complete if it contains the following information:

- i) the identity of the applicant;
- ii) the date of the crime(s);
- iii) the location of the crime(s);
- iv) a description of the harm suffered as a result of the commission of any crime within the jurisdiction of the Court;
- v) proof of identity;
- vi) if the application is made by a person acting with the consent of the victim, the unequivocal consent of that victim;

- when it emanates from a person whose identity is not established;
 - when it alleges a moral harm on the basis of the murder of a close family member while the person has failed to supply a death certificate and/or certificate of family relationship;
 - when it is unsigned;⁵⁹ The defence understands that the victims already admitted to participate in the proceedings do not need to file and sign the standard form for reparation prepared by the Registry pursuant to Regulation 88 of the Regulations of the Court;⁶⁰ however, any new applicants should, “to the extent possible”, use the standard form for reparation prepared by the Registry, which has to be signed.⁶¹
- the victim applicant:
- (i) provides an account of events that fall outside either the temporal scope or the geographical scope of the case;
 - (ii) provides insufficient information to assess whether the events described amount to a crime for which Mr Katanga has been convicted;
 - (iii) provides inconsistent information in the narrative of the events that cast doubts on the veracity of the application and on the credibility of the victim applicant.⁶²

6. Accessibility and consultation with victims

50. The defence submits that the principles established by the Appeals Chamber regarding accessibility and consultation with victims⁶³ are applicable to the *Katanga* case. In particular, the victims of the crimes should be able to participate throughout the reparations process and receive adequate support to make their participation substantive and effective.

vii) if the application is made by a person acting on behalf of a victim, in the case of a victim who is a child, proof of kinship or legal guardianship; or, in the case of a victim who is disabled, proof of legal guardianship, subject to the observations set forth at paragraph 36 below;

viii) a signature or thumb-print of the applicant on the document, at the very least on the last page of the application (footnotes omitted).

⁵⁹ See ICC-01/04-01/07-1491-Red-tENG, Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims, 23 September 2009:

105. The Chamber recalls that the criteria used to assess whether an application is complete or not, as set out in paragraph 28 of its Decision of 26 February 2009, include the signature or thumbprint of the applicant, at the very least on the last page of the application.

106. The Chamber is therefore of the view that, in order to complete their applications for participation, applicants a/0211/09, a/0215/09 and a/0216/09 must confirm their intention in writing by appending a signature or an identifiable thumbprint. (footnotes omitted)

⁶⁰ ICC-01/04-01/07-3546, paras 17-18.

⁶¹ ICC-01/04-01/07-3546, paras 16, 19.

⁶² See ICC-01/04-02/06-211, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 15 January 2014, para. 67.

⁶³ *Lubanga* Order, para. 29-32.

51. In the *Lubanga* order, the Appeals Chamber indicated: “All victims are to be treated fairly and equally as regards reparations, irrespective of whether they participated in the trial proceedings leading to the decision under article 74 of the Statute.”⁶⁴ The defence endorses this principle and, taking note that any new application must be filed by 1st October⁶⁵, submits that all victims should indeed be treated fairly and equally, even if they have not participated previously in the proceedings.
52. In addition, reparations are entirely voluntary, therefore the informed consent of the recipient is necessary prior to any award of reparations, in particular in the respect of individual reparations.
53. The defence notes that in the presence case, a consultation process has already started, following the Trial Chamber’s Order instructing the Registry to report on applications for reparations of 27 August 2014.⁶⁶ The Registry has collected, orally, in presence of the Legal Representative of Victims, information from 305 (on 362) participating victims and/or applicants for reparations, regarding the harm suffered and the type and modalities of reparations requested. However, it has received only 127 written applications for reparations linked to the case.⁶⁷
54. The defence takes note of the Trial Chamber’s Decision of 8 May 2015, ordering the Legal Representative of Victims to submit consolidated documents and further relevant information for each victim already admitted to participate in the proceedings, and ordering the Registry to transmit to the parties any new request for reparations, by 1 October 2015 at the latest.⁶⁸
55. The defence should be given sufficient time to submit its observations on these consolidated documents and on any new application for reparation submitted before the 1 October 2015.⁶⁹

⁶⁴ Lubanga Order, para. 12.

⁶⁵ ICC-01/04-01/07-3546, *Décision sur la demande de clarification concernant la mise en oeuvre de la Règle 94 du Règlement de procédure et de preuve et étapes ultérieures de la procédure*, 8 mai 2015.

⁶⁶ ICC-01/04-01/07-3508.

⁶⁷ ICC-01/04-01/07-3535-Corr, Corrected version of “Registry’s Observations on the Legal Representative of Victims’ request for clarification ICC-01/04-01/07-3527”, notified on 13 April 2015 (ICC-01/04-01/07-3535), 16 April 2015, para. 2, p. 4.

⁶⁸ ICC-01/04-01/07-3546, *Décision sur la demande de clarification concernant la mise en oeuvre de la Règle 94 du Règlement de procédure et de preuve et étapes ultérieures de la procédure*, 8 May 2015.

⁶⁹ See ICC-01/04-01/07-3546, para. 21.

7. *Child victims*

56. The defence notes that the *Lubanga* Order establishes detailed principles for the reparations of child victims, and in particular child soldiers.⁷⁰ Though the issue of child soldiers is no longer relevant in the *Katanga* case, Mr Katanga having been acquitted of this charge, the defence submits that if some victims are children their specific needs should be taken into account, in accordance with article 68 of the Statute and Rule 86 of the Rules of Procedure and Evidence.

8. *Scope of Mr Katanga's liability for reparations*

57. The power to order reparations against Mr Katanga is founded on article 75(2) of the Rome Statute: *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.* The use of the word “may”, and not “shall”, renders the power discretionary, permitting a Trial Chamber scope in ordering, or not ordering, reparations.

58. The principle annunciated in the *Lubanga* case is that “it is the obligation of the convicted person to remedy the harm caused by the crimes for which he or she was convicted”.... “The Appeals Chamber therefore considers that the obligation to repair harm arises from the individual criminal responsibility for the crimes which caused the harm and, accordingly, the person found to be criminally responsible for those crimes is the person to be held liable for reparations.”. Any order made in this case in respect of reparations must therefore be made against Mr Katanga.

59. The Trial Chamber in *Lubanga*, given the convicted person's lack of means, took the pragmatic view not to order reparations against him as the realities of the situation were that any award would actually come from the Trust Fund's resources. The Appeals Chamber reversed that view, finding indigence to be irrelevant to the

⁷⁰ *Lubanga* Order, paras. 23-28.

principle that the convicted person should be liable for any reparations awarded. The decision renders the present discussion on reparations all the more relevant to Mr Katanga.

60. Any 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.⁷¹

61. In the *Lubanga* Judgement, “the Appeals Chamber stresses 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. Indeed, the Appeals Chamber considers it to be beyond question that a person subject to an order of a court of law must know the precise extent of his or her obligations arising from that court order, particularly in light of the corresponding right to effectively appeal such an order, and that the extent of those obligations must be determined by a court in a judicial process.”⁷²

62. 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. The situation differs from the *Lubanga* case, where the Trial Chamber had not made the necessary inquiries or findings that the Appeals Chamber judged crucial to satisfy the requirements of the five ‘minimum and essential elements’. Such findings were necessary in order “to specify the scope of Mr Lubanga’s liability for reparations and include such specification in the amended order contained in Annex A to the present judgment”.⁷³ Consequently, lacking that information, the Appeals Chamber found that it was ‘not appropriate for it to determine the scope of Mr Lubanga’s liability for reparations’⁷⁴ but instead took the ‘exceptional’ step of it seeking “the Trust Fund’s assistance in requesting that it provide, in the draft implementation plan, the anticipated monetary amount that it considers necessary to remedy the harms caused by the crimes for which Mr Lubanga was convicted, based on information gathered during the consultation period leading

⁷¹ Lubanga Order, para. 21.

⁷² *Lubanga* judgement, para. 237.

⁷³ *Lubanga* judgement, para. 238.

⁷⁴ *Lubanga* judgement, para. 239.

up to the submission of the draft implementation plan. The Trust Fund should also include the monetary amount, if the Board of Directors so decides, that it will complement as an advance in order that the awards can be implemented”.⁷⁵

63. The Appeals Chamber took account of the ‘implications of imposing liability at the appellate stage’, which would have led to unfairness in that case, (paras 237 - 243) by establishing ‘exceptional’ procedures. “The procedures regarding the imposition of liability and determination of its scope [...] are equally of an exceptional nature in view of the particular circumstances of the present case”.⁷⁶

64. In those circumstances, the Appeals Chamber afforded the parties –and Mr Lubanga – the opportunity to make submissions on the scope of Mr Lubanga’s liability, in light of the information provided by the Trust Fund, and prior ‘to the Trial Chamber setting the amount of Mr Lubanga’s liability’. In the Annexed Order the Appeals Chamber concludes by referring to ‘the Trial Chamber’s determination of the amount of Mr Lubanga’s liability for the awards for reparations’.⁷⁷

65. The defence interprets “amount” as meaning the sum of money he must provide to the victims, irrespective of the fact that he will not be able to pay any sum due to lack of means. The Trial Chamber, if minded to make an order against Mr Katanga for reparations, will require all the information necessary to be in a position to determine the specific amount of Mr Katanga’s liability for the awards, whatever form they may take –individual, community or both – so as to specify the amount of his liability in its order for reparations. Presumably, this will include, similar to the *Lubanga* order, ‘the anticipated monetary amount’ considered necessary to remedy the harms caused by the crimes for which Mr Katanga was convicted based on information gathered during the consultation process, together with any complementary amount that ‘the Board of Directors decides it will complement as an advance in order that the awards can be implemented.’⁷⁸

⁷⁵ *Lubanga* judgement, para 240

⁷⁶ *Lubanga* judgement, para. 237.

⁷⁷ *Lubanga* Order, para. 81

⁷⁸ *Lubanga* Order, para 78.

66. In addressing the scope of the convicted person's liability, 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."⁷⁹

67. Of considerable significance is the fact that Mr Katanga has not been convicted as originally charged, nor on the factual basis of the case as advanced by the prosecution, but on a different mode of liability consequent on the Trial Chamber, by a majority, invoking its powers under Regulation 55 and convicting Mr Katanga of having contributed to the crime. In the circumstances of this case, the defence submits that the change in mode of responsibility is in truth a reflection of a lower degree of culpability for the harm done. It has a direct effect on the scope of his liability for reparations. He has not been convicted for having personally committed the crimes physically, but for having contributed to their commission. Indeed, the Trial Chamber has been "unable to establish beyond reasonable doubt that Germain Katanga was present in Bogoro on 24 February 2003."⁸⁰

68. In addition, the Chamber found Mr Katanga's control over the crimes, or command over the perpetrators, or his physical presence at or near the crime scene, not to be proven to the requisite standard. Further, Mr Katanga's liability has been established on the basis of his awareness rather than his intent that the crimes be committed. In light of these findings, Mr. Katanga's moral culpability is greatly reduced.

69. The defence stresses that the scope of Mr Katanga's liability for reparations is necessarily limited to the crimes committed during the Bogoro attack of February 2003 itself, that is to say - to the crimes committed during one day in one village only.

⁷⁹ *Lubanga* Judgement, para. 118.

⁸⁰ Article 74 Judgment, para. 752.

70. In assessing the scope of his liability for reparations, plainly Mr Katanga can not be held accountable for all the damage and misery caused by the attack solely on the basis that he is the sole person convicted of offences resulting from the attack. Aside from his contributory role, due regard must be given to the role of others in the crimes. There were many other participants. Some, the defence submits, were superior in the overall hierarchy that planned and armed the attack.⁸¹ Others, unlike Mr Katanga, were present in Bogoro, physically committing the offences. It would be unfair, in the circumstances of the case, not to take such factors into account. Nor would it be fair to assign a principle of ‘joint and several’ liability to Mr Katanga, whereby he becomes liable for all the harm caused. Aside from the above factors such a principle would overlook the fact that prosecutions are selective and determined by the choices made by the Prosecutor.

71. Given that the present Trial Chamber is newly constituted and not composed of a judge who participated in the trial, it may face difficulties in defining the ‘precise’ scope of Mr Katanga’s liability for reparations; therefore the defence submits that, in fairness to the convicted person, any doubts on this aspect should be resolved in his favour.

72. The defence submits that while indigence does not preclude the Trial Chamber from issuing an order for reparations, the Trial Chamber cannot be blind to the current status of the convicted person. It would be unfair and unjust to place a financial burden on someone who lacks the means to be able to meet it. Mr Katanga was still at school at the time of the offences. He has been in prison for the past ten years. He is officially indigent in the eyes of the Registry. There is no suggestion that he has hidden assets. He comes from one of the poorest communities in the world.⁸² Any reparations order should limit the amount he has to pay to a reasonable, indeed nominal, figure. This is not inconsistent with the Appeals Chamber’s decision. It can be accommodated in an appropriately worded order.

⁸¹ See, *inter alia*, ICC-01/04-01/07-3266-Conf-Corr2 Second Corrigendum to the Defence Closing Brief, 23 April 2012, paras 654-662, 697-699.

⁸² The DRC is positioned at the penultimate rank of the rankings of the Human Development Index (186th of 187 countries); see <http://hdr.undp.org/en/countries/profiles/COD>.

73. The advantages of an order that reflects Mr Katanga's means and capacity to pay is that the Court will be perceived to be acting in a concrete, realistic manner, rather than in a theoretical manner divorced from the realities of the situation. It will also mean that the convicted person is not burdened with an order he can never hope to meet. It will help bring finality to his situation and enable him better to re-insert himself in society when released. It is to be noted that domestic criminal justice systems do not impose compensation orders where there is no reasonable prospect of it being met, and where it may even encourage future criminality to do so.⁸³
74. The Appeals Chamber, in deciding that orders for reparations must be directed against the convicted person, stated that the reason for doing so, aside from the appropriateness of it emphasising the convicted person's responsibility for his crimes, is that, in the event that the person's financial circumstances change for the better, the Trust Fund can claim back its disbursements. Given Mr Katanga's indigence, and the extreme unlikelihood of his coming into significant funds (other than, for example, by winning the lottery), the defence submits that such a view in his case is too fanciful. Any amount ordered to be paid by him in the order should be limited to such amount as is fair and reasonable in light of his present expectations and means. Should his circumstances change significantly then the Trust Fund should be entitled to make a recuperating claim – but such should be seen as exceptional and should, the defence submits, require the Fund to do so only on application to the court. Further, or in the alternative, the time within which the Fund can seek reimbursement should, in light of the principle of finality, be limited.

9. Modalities and forms of reparations

75. The defence acknowledges that the principles regarding the modalities of reparations⁸⁴ referred to in the Appeals judgement, and applied in the amended *Lubanga* order, paragraphs 33 to 42, are generally applicable to the *Katanga* case.

⁸³ For example, the UK law relating to compensation, restitution and reparation – see PCC (sentencing) Act 2000 sections 130-132 – need for an appropriate amount having regard to means. See Archbold, Pleading and Practice 2015 pp 5-691 onwards

⁸⁴ Lubanga Order, paras 33-43.

76. The *Lubanga* Appeals Chamber relied on several judgments from cases before international courts concerning an individual's claim against a State. While these judgments may be helpful in defining the principles, the manner in which they are applied cannot be automatically extended to cases before the ICC, dealing, as it must, with individuals and not States. The Trial Chamber is requested to keep this distinguishing aspect in mind when determining the extent of reparation to victims, given that the liability and capacity of an individual is markedly different to those of a State.
77. "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"⁸⁵.
78. In the instant case, the defence submits that material or other harms should be eligible for compensation only if they are sufficiently concrete and measurable, as stated in the *Lubanga* Order, adopting the UN Basic Principles, when dealing with the subject of compensation (paragraph 37).
79. The defence submits that any future awards, whether in respect of loss by institutions or individuals, should be discounted so as to take into account any previous benefits received, from NGO's or other sources, that addressed such loss.
80. The Trial Chamber's order on reparations should be as detailed as possible and should, to the extent possible, not delegate, the power of decision to the Trust Fund, as this would be unfair to the convicted person who can appeal only the decisions of the Trial Chamber.
81. As stated at paragraph 33 of the *Lubanga* Order; "individual and collective reparations are not mutually exclusive, and they may be awarded concurrently. Furthermore, individual reparations should be awarded in a way that avoids creating tensions and divisions within the relevant communities. When collective reparations

⁸⁵ Lubanga Order, para 37. UN Basic Principles on Reparation for Victims, principle 20.

are awarded, these should address the harm the victims suffered on an individual and collective basis.”

82. The defence agrees with the following principle as set out in the *Lubanga* Order:⁸⁶

“The present order for reparations may be implemented, where appropriate, with respect to communities, with due regard to the principles that members of communities are entitled to an award for reparations in so far as the harm they suffered meets the criterion of eligibility in relation to the crimes of which [Mr Katanga] was found guilty.”

83. The defence submits that, to determine the appropriate forms of reparations to be awarded, the Chamber should take into account the remedies already adopted. To the defence’s knowledge, the TFV⁸⁷ and a number of NGOs and other organisations have already implemented some measures in Bogoro. For instance, in its Sentencing Decision the Trial Chamber observed that “*un grand nombre des actuelles maisons du groupement avaient été reconstruites par des Organisations non gouvernementales (« ONG ») à la suite de l’attaque*”.⁸⁸ It is the understanding of the defence that in Bogoro, the Bogoro institute, a market, a centre for handicapped people, an administrative building, and the main road, amongst others, have also been re-built. A memorial to victims has also been built, albeit now neglected. In contrast, very little reconstruction has been done in Ngiti territory.

84. In those circumstances, and given that 12 years has elapsed since the attack, during which time rebuilding of homes and public buildings has, to some extent, been undertaken by NGO’s, it may be considered that personal awards to victims, rather than community projects for the benefit of the victims, is appropriate in this case. This also appears to be the overwhelming view of the victims.⁸⁹

⁸⁶ *Lubanga* Order, para. 54.

⁸⁷ See, for instance, TRUST FUND FOR VICTIMS PROGRAMME PROGRESS REPORT SUMMER 2014, ANNEX 2. DRC TFV PROJECT LOCATIONS, @ http://www.trustfundforvictims.org/sites/default/files/media_library/documents/pdf/TFV_PPR_Summer_2014Final.pdf, p. 52.

⁸⁸ Sentencing Decision, para. 51.

⁸⁹ See, *inter alia*, ICC-01/04-01/07-3514-Conf, *Observations des victimes sur les réparations*, paras 23, 27, 41.

85. In the current case, the defence tends to support the Registry recommendations according to which “the Chamber takes into account the clear preference of the victims for receiving individual benefits from reparations measures” and: “Any awards of reparations ordered, whether on an individual or a collective basis, should reflect the preferences expressed by victims”.⁹⁰
86. The defence submits therefore, that the Trial Chamber, in its reparation order, should favour individual reparations. However, the Trial Chamber may simultaneously 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. In doing so, it would be advisable to take account of the suggestions made by the United Nations and other organisations to submit observations pursuant to Article 75 of the Statute,⁹¹ upon which they will undoubtedly elaborate in future observations.
87. The Appeals Chamber strictly cautioned against an award of reparations “that may lead to imposing liability ... for reparations with respect to persons who, despite being members of the communities identified by the Trial Chamber, suffered harm that did not result from the crimes...”⁹² In doing so the Appeals Chamber was at pains to point out that this “should not be seen as precluding other members of the affected communities from being able to benefit from activities undertaken by the Trust Fund in relation to its assistance mandate”, and took note of the Trust Fund’s submission that “[p]rinciples of non-discrimination, doing no/less harm and aiming at reconciliation, measures that include education on the root and underlying causes of the conflict, background of crimes and conflict, as well as measures that aim at guaranteeing non-repetition of the crimes, necessarily and genuinely need to include broader communities.”⁹³
88. The Appeals Chamber considered it “appropriate for the Board of Directors of the Trust Fund 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 the affected communities in the assistance programmes operating in the situation area in the DRC,

⁹⁰ Registry Report, para. 94(a & b).

⁹¹ ICC-01/04-01/07-3523 (16 February 2015), *inter alia*, paras. 22-25, 26(ii) & (iii).

⁹² Lubanga Judgement, para. 214.

⁹³ *Lubanga* Judgement, para. 215.

where such persons do not meet the above-mentioned criteria.”⁹⁴ The *Lubanga* order includes several references to securing and promoting reconciliation.⁹⁵

89. Irrespective of any reparation order directed against Mr. Katanga personally, the defence requests the Chamber to 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 have suffered greatly as a result of the war in Ituri, of which the Bogoro attack formed part.

90. In its Article 74 Judgment, the Trial Chamber observed that, in 2002, inter-communal violence escalated in Ituri and that a cycle of reprisals and revenge evolved among the various ethnic groups. The Chamber noted that the Hema on the one hand, and the Lendu (i.e. the Southern Lendu (the Ngiti) and the Northern Lendu), on the other hand, were the two principal parties in the conflict, the other ethnicities, such as the Bira, Alur, Nyali, Lugbara, Kakwa, Ndo Okebo and Lese, being allied to one or other.

91. In its Sentencing Decision, the Trial Chamber also acknowledged that “ [...] *il est incontestable que Germain Katanga, comme d'ailleurs un grand nombre de personnes ayant appartenu à sa communauté, ont grandement souffert des actes de violences perpétrés contre la population civile de la collectivité à laquelle ils appartenaient [...].* »⁹⁶

92. The suffering of the Ngiti community has been inadequately addressed and it continues to endure great poverty and insecurity. While NGO's implemented several emergency projects in the Walendu-Bindi collectivity between 2006 and 2009, few of them have survived. Many reconstructed schools have since been destroyed. The affected communities in Walendu-Bindi would welcome the implementation of assistance programmes by the Trust Fund to help rebuild homes, schools, maternity

⁹⁴ *Idem.*

⁹⁵ Lubanga Order, paras 71-72.

⁹⁶ Sentencing Decision, para. 83. See also EVD-OTP-00206 (EN), EVD-OTP-00285 (FR), MONUC Special Report on the events in Ituri, January 2002-December 2003.

and health centres, water and sanitary facilities etc. The defence should participate in this process and be provided an opportunity to suggest needed projects. In that regard, it is currently liaising with the Ngiti community to assess their most urgent needs and has received proposals for projects to build and re-build schools.

93. At the ICC, only Hema have had the opportunity to be afforded victim status. In the *Lubanga* and *Katanga* trials the eligible victims of the crimes for which the defendants were convicted were of Hema ethnicity. Mr Lubanga is Hema, but his child soldiers were also Hema. They inflicted considerable harm on their neighbours. It cannot be a fair and just outcome for victims of war that the assistance they receive from the Court in compensation for their suffering depends on whether the Prosecutor is willing and able to prosecute their wrongdoers. This is problematic, in particular in countries like the DRC where the government has taken few, if any, initiatives to compensate victims.

94. As the Registry correctly pointed out, “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”⁹⁷ given that “there is a risk that the provision of reparation to victims of the present case could exacerbate, rather than alleviate, tensions between ethnic groups in the area. The attack on Bogoro of 24th February 2003 took place in the context of wider hostilities in which other communities, including some in the immediate vicinity of Bogoro, also suffered harm. Indeed, the Ngiti community has suffered substantially more than other communities, including the Hema. Awards of reparations, if not carefully managed, could fuel rivalries between communities and go against attempts at reconciliation.”⁹⁸

95. The defence strongly endorses that view and the inherent dangers of awarding financial reparations to the benefit of one ethnic group only, particularly given the role members of that community have played in attacking and oppressing the Ngiti. It is essential that the suffering caused to other communities be adequately addressed.

⁹⁷ Registry Report, para. 82.

⁹⁸ Registry Report, para. 78.

96. The Chamber should encourage the Trust Fund to adopt measures aimed at promoting reconciliation, as underlined by the Registry.⁹⁹

Other forms of reparation

97. Mr. Katanga undertakes to assist, to his fullest capacity, in any rehabilitation program suggested by the Chamber or Trust Fund, either now or on his return to the DRC. Efforts have been, and continue to be, made by Mr Katanga to contribute to the rehabilitation of victims and to reconciliation between the Ngiti and Hema people. Mr Katanga welcomes the observation of the Queen's University Belfast's Human Rights Centre and University of Ulster's Transitional Justice Institute as to; "how acknowledgment of responsibility and apology by the convicted person can be facilitated to be more sensitive to victims' needs".¹⁰⁰

10. Objectives of reparations

98. The objectives set out in paragraph 18 of the *Lubanga* Order are equally applicable to the present case in that the objective should be to 'relieve suffering caused', 'afford justice to the victims by alleviating the consequences of the wrongful acts,' and 'deter from future violations'. Such general sentiments can not be contradicted.
99. In accordance with the principles established by the Appeals Chamber, victims should receive appropriate, adequate and prompt reparations and the awards ought to be proportionate to the harm, injury, loss and damage as established by the Court.¹⁰¹
100. Given the high number of persons who may be identified as beneficiaries of reparations in the *Katanga* case, the defence stresses that it will be difficult to repair the totality of the harm caused during the Bogoro attack by the crimes for which Mr Katanga was convicted. Mr. Katanga's lack of means, combined with the fact that some persons have left Bogoro and may be unaware of their right to request reparations, makes this even more difficult.

⁹⁹ Registry Report, para. 94(g).

¹⁰⁰ ICC-01/04-01/07-3519, 3 February 2015, para. 4(f).

¹⁰¹ Lubanga Order, para. 10.

101. A primary objective of reparations in the present case should be pacification of the area and reconciliation between the Hema community and the Ngiti / Lendu. Care should be taken not to appear to be favouring one community over another, which was a causal factor of the conflict in Ituri.

11. Transmission of requests for reparations to the Trust Fund

102. The contents of the *Lubanga* order in this respect are particular to that case and to the decision to award only collective awards reparations.

12. Draft implementation plan

103. The defence notes the requirement in paragraph 77 of the *Lubanga* order that the defence in that case was provided ‘the opportunity to submit observations to the Chamber regarding those aspects of the draft plan affecting their interest and rights’. In particular, paragraph 80 and 81 of the *Lubanga* Order refers to the defence having ‘the opportunity to appear before the Trial Chamber or to make submissions in writing on the scope of Mr Lubanga’s liability’. Whatever procedure is now adopted, the defence submits that before any final determination is made in respect of Mr Katanga’s liability the defence should be granted the opportunity to make submissions. This should include submitting observations in respect of any draft implementation plan. The Trust Fund should also be requested to provide the anticipated monetary amount that it considers necessary to remedy the harms caused by the crimes for which Mr Katanga was convicted, together with any other sum set aside for awards relating to Ituri.

13. States and other stakeholders

104. According to the Appeals Chamber, reparations awarded pursuant to an ICC order do not interfere with the responsibility of States to award reparations to victims under other treaties or national law.¹⁰²

105. The defence submits that it would be in the wider interest that the ICC and the DRC liaise on the issue of reparations.¹⁰³ In particular, to liaise in respect of any measures or proposed measures by the DRC, in order to maximize the efficiency of the order. Indeed, the State is usually a key actor in reconciliation and/or rehabilitation processes. In the current case, the Chamber, Registry and/or the Trust Fund, could 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.

14. Rights of the defence

106. The Appeals Chamber made clear that “nothing in these principles will prejudice or be inconsistent with the rights of the convicted person to a fair and impartial trial”.¹⁰⁴ The reparation proceedings should be expeditious in order to respect Mr Katanga’s right to be tried without undue delay. The defence recalls that Trial Chamber V, in the two Kenyan cases, stated:

The accuseds' statutory rights also include the right to be tried without undue delay, the importance of which is demonstrated by the related duty imposed on the Chamber to ensure that the trial proceedings are expeditious. Also of relevance is the accuseds' right under Article 67(1)(b) of the Statute "[t]o have adequate time and facilities for the preparation of the defence". In accordance with these provisions, when deciding on the participation of victims in the trial, the Chamber must ensure that such participation does not unduly delay the proceedings or limit the accused's preparation of their defence due to the time and resources required for reviewing, and submitting observations on, victims' applications.¹⁰⁵

¹⁰² Lubanga Order, para. 50.

¹⁰³ See, in this regard, ICC-01/04-01/07-3514, Observations des victimes sur les réparations, para. 49.

¹⁰⁴ Lubanga Order, para. 49.

¹⁰⁵ ICC-01/09-01/11-460, (*Ruto & Sang*) Decision on victims’ representation and participation, 3 October 2012, para. 13; see also para. 36; ICC-01/09-02/11-498, (*Kenyatta & Muthaura*) Decision on victims’ representation and participation, 3 October 2012, para. 14.

Similarly, in the *Lubanga* case, Trial Chamber I decided that active participation by a high number of victims “*must not affect the right of the accused to a fair trial without undue delay.*”¹⁰⁶ The defence submits that, given the time that has already elapsed in this case, for the Trial Chamber to meet this obligation is difficult.

107. The reparation proceedings should be as transparent as possible. In particular, the defence should be entitled to challenge each application for reparation, especially considering Mr Katanga may be deemed financially liable. In the trial, cross-examination could expose lies and discrepancies. This tool is unavailable at the reparations stage, and the defence acknowledges it would be both impractical and cause even further delay. The defence submits it should at least be able to review and comment on the evidence produced by claimants in support of their identity, the material, psychological or physical harm they suffer or have suffered, and the link with any of the crimes for which Mr. Katanga has been convicted.

¹⁰⁶ ICC-01/04-01/06-1556-Corr, (*Lubanga*) Decision on the applications by victims to participate in the proceedings, 15 December 2008, para. 121.

CONCLUSION

108. 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 14th May 2015,
London.