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TRIAL CHAMBER II

**Before: Judge Marc Pierre PERRIN DE BRICHAMBAUT
, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Péter KOVÁCS**

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

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

Public Document

**Queen's University Belfast's Human Rights Centre (HRC) and University of
Ulster's Transitional Justice Institute (TJI) Submission on Reparations Issues
pursuant to Article 75 of the Statute**

**Source: Queen's University Belfast's Human Rights Centre (HRC) and
University of Ulster's Transitional Justice Institute (TJI)**

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I. Introduction

1. This submission begins with some general comments on principles to be adopted in the *Katanga* case. The substantive part of this submission will provide information on the six areas (a-f) outlined in the original submission: a. the procedural role of victims in reparation proceedings; b. modalities of reparations; c. eligibility of victims and apportionment; d. the role of the Trust Fund; e. state cooperation; and f. acknowledgement of responsibility and apology.¹ The submission will conclude with some final remarks.²

II. General Principles

2. Trial Chamber I as amended by the Appeals Chamber has set down a number of reparation principles. Although these principles relate to the circumstances of the *Lubanga* case, we believe that the Court in subsequent cases should follow and build on these initial principles, only diverging to respond to the specific facts and needs of victims in each case. Such consistency can provide uniformity so as to better manage victims' expectations of reparations at the ICC.
3. In light of consistency and managing victims' expectation we believe the Court should develop a clear working definition and express a rationale regarding purpose of reparation at the ICC. Article 75 sets out the framework for reparations, but does not include a definition. We define reparations as a range of individual and/or collective measures ordered against a convicted person to alleviate the harm suffered by victims, funded by the convicted person and/or the Trust Fund for Victims.³ In general terms reparations are measures that are meant to acknowledge and repair the harm caused to an injured party. Given the ICC's specific jurisdiction

¹ Request for leave to file submission on reparations issues pursuant to Article 75 of the Statute ICC-01/04-01/07-3519, 2 February 2015, para 4. Granted - Ordonnance enjoignant les parties et les participants à déposer des observations pour la procédure en réparation, ICC-01/04-01/07-3532, 1 April 2015.

² This submission was prepared by members of the HRC and TJI: Luke Moffett, Rachel Killean, Kieran McEvoy, Ellen Martin, Philipp Schultz, Hedley Abernethy, Egle Vasiliauskaite, and Steven van de Put. Thanks to the helpful comments by Cath Collins.

³ Article 75(1) and (2), Rome Statute. Rules 97 and 98, RPE.

for reparations as contained within the Rome Statute, ‘injured parties’ in this instance are restricted to those victims who have suffered harm as a result of the crimes for which an individual has been convicted.⁴

4. In terms of the purpose of reparations, in the *Lubanga* case the Court stated that reparations fulfil two main objectives: ‘they oblige those responsible for serious crimes to repair the harm they caused to the victims and they enable the Court to ensure that offenders account for their acts.’⁵ Ordering reparations against a responsible party to harmed victims reflects that reparations are about redress, rather than general assistance or charity. Accordingly, reparations at the ICC should be viewed as one element of the Court’s broader responsibilities to ensure accountability by publicly acknowledging and redressing victims’ harm.⁶
5. We would add that from the perspective of many victims, reparations also serve to acknowledge, redress and alleviate their harm. This is consistent with the oft-cited *Chorzów Factory* case that states the purpose of reparations is to ‘as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed’.⁷ The 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UNBPG) states that reparations are intended to ‘promote justice by redress’.⁸ More recently Judge Cançado Trindade has suggested that ‘reparation cannot “efface” [a violation], but it can rather avoid

⁴ See Christopher Muttukumar, Reparations to Victims, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute; Issues, Negotiations, Results*, (Kluwer 1999), 262–270, p264; and Luke Moffett, *Justice for Victims before the International Criminal Court*, (Routledge 2014), 143-195.

⁵ Order for Reparations, ICC-01/04-01/06-3129-AnxA, 3 March 2015, para 2.

⁶ Termed ‘justice for victims’ by Fiona McKay, Are Reparations Appropriately Addressed in the ICC Statute? In D. Shelton (ed.), *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court*, (Transnational Publishers 2000) 163–174, p164.

⁷ *Germany v Poland, The Factory at Chorzów* (Claim for Indemnity) (The Merits), Permanent Court of International Justice, File E. c. XIII. Docket XIV:I Judgment No. 13, 13 September 1928 (*‘Chorzów Factory’* case), para 125.

⁸ Principle 15, A/RES/60/147.

the negative consequences of the wrongful act.’⁹ The Inter-American Court of Human Rights found that reparations must include ‘the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for pecuniary and non-pecuniary damages, including moral harm.’¹⁰

6. Given that the ICC is a court, not an administrative reparation body, reparations are ordered on the basis of the legal concepts of equity and fairness. As such reparation orders seek to deliver justice to those victims before it, rather than trying to achieve more political goals of reconciliation.¹¹ We contrast the reparation orders by the ICC, with the assistance mandate of the Trust Fund for Victims, which can encourage more political goals. Such political aims are best left to more comprehensive state reparations programmes, which can capture a wider scope of victimisation and provide more comprehensive reparations to a greater number of victims.¹² As discussed below (sub-section e.) the state has the mandate, responsibility and legitimacy to engage in national reparations that promote reconciliation, tackle underlying causes of victimisation, prevent further violence, and are transformative. According to observations by the victims’ legal representative in the *Katanga* case many victims believe reconciliation is the responsibility of the state, and that it is therefore unfeasible for the ICC to achieve.¹³ We would argue that the role of the Court is to primarily do justice to those eligible victims before it, rather than trying to satisfy macro-political issues of promoting peace and reconciliation, by widening the benefits of reparations to communities or victims beyond the crimes for which Mr Katanga was convicted. Moreover, forgiveness and acceptance of apologies are private and personal decisions by

⁹ Separate Opinion of Judge Cañado Trindade, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation Judgment, ICJ Reports (2012) 324, para 26.

¹⁰ *Velásquez Rodríguez v Honduras*, Reparations and Costs. Judgment of 21 July 1989, Series C No. 7, para 26.

¹¹ This was the intention of the drafters. See Muttukumaru note 4; Moffett note 4; and McKay note 6.

¹² See Luke Moffett, *Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague*, *Journal of International Criminal Justice* (2015).

¹³ 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), ICC-01/04-01/07-3514, 27 janvier 2015, para 25.

victims, which cannot be ordered by the Court. However, Mr Katanga can voluntarily acknowledge his responsibility and apologise more comprehensively, as suggested in sub-section f.

7. As individual compensation awards at the ICC are likely to be small, it should not bar victims from obtaining compensation or other forms of reparations from any future national reparations programmes, as such reparations by the ICC could be seen as interim reparations.¹⁴
8. Other principles highlighted in the *Lubanga* case are also important including treating victims with humanity, respect and dignity, as well as non-discrimination and avoiding stigmatisation. Non-discrimination should include the avoidance of any imposition of direct or hidden costs for victims related to access or proving eligibility. For instance, Paraguayan reparation programmes required recipients to travel to national or state capitals and have ID cards, which cost money and physical challenges for those elderly or disabled victims.¹⁵
9. We believe that reparation processes are as important as the reparative measures ordered. Victim participation in the reparation process is key to satisfying victims' needs and ensuring appropriate reparations are delivered. While victim participation is not just about victims expressing their views and concerns, such interests are considered important in determining the content of suitable reparations. Imperative to this process is that victims' consent is obtained and there is an element of choice to cater to different needs, where feasible. As stated in the Registry's Report 'victims themselves know best how to reconstruct their lives.'¹⁶ Victims do not speak with one voice. Each victim has a unique experience, and reparations should cater to his or her personal harm as far as possible. Victims'

¹⁴ Similar to those in Sierra Leone. See Mohamad Suma and Cristián Correa, *Report and Proposals for the Implementation of Reparations in Sierra Leone*, ICTJ (2009).

¹⁵ Cath Collins with Boris Hau, Paraguay: Emerging from the shadow of Stroessner, In C. Collins, J. Garcia Godos and E. Skaar (eds.), *Reconceptualising Transitional Justice: The Latin American Experience*, Routledge (forthcoming).

¹⁶ Registry's Report, para 64.

interests and needs are key to determining reparations, but they have to be balanced against limited resources available for reparations at the ICC.

10. We strongly support the importance of a gender-inclusive approach to reparations at the ICC in design, access and implementation.¹⁷ Women and girls can suffer harm differently from men and boys. Wider social inequalities can disproportionately compound the suffering of women and girls, such as being subjected to sexual and domestic violence, being forced to abandon their education or career to care for their family after parents or a spouse is killed or seriously injured, suffering loss of income, or being left to search for the remains of loved ones and to demand justice.¹⁸ In the experience of the HRC and TJI, girls and women can also have distinct reparation preferences from their male counterparts. For instance in Northern Ireland amongst certain victim organisations, some males appear to prefer individual counselling and support, whereas many females appear to find more group counselling sessions and collective measures of satisfaction, such as storytelling and art projects, as more therapeutic in responding to their psychological rehabilitation. It may be appropriate for the Court to adopt certain bespoke reparations based on gender. Reparations as such should also be gender-sensitive in content and delivery.

11. The Court should additionally consider the transgenerational impact of international crimes on children and grandchildren. In the context of Northern Ireland for instance, there is increasing psychological research pointing to the transgenerational impact of harm caused by the conflict/Troubles that has not been addressed. This can take the form of economic hardship, psychological impact or carer responsibilities for children and grandchildren of direct victims, or carer

¹⁷ See Nairobi Declaration; and Reparations for Conflict-Related Sexual Violence, UN Guidance Note of the Secretary-General, June 2014.

¹⁸ Ruth Rubin-Marín, A Gender and Reparations Taxonomy, R. Rubin-Marín (ed.), *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations*, (CUP 2009), 1-17, p2.

responsibilities for parents and grandparents of direct victims.¹⁹ In other contexts, the government has mainstreamed such an approach. For example, this perspective is embedded in the Peruvian Comprehensive Reparations Plan, one of whose guiding principles is prevention of the transfer of harm from one generation to another.²⁰ Accordingly when ordering individual or collective forms of reparations, rehabilitation should be made available not only to the direct victims, but also their next-of-kin. Similarly for individual compensation awards, alternatives could be educational scholarships for direct victims' heirs.

12. We would like to draw the Court's attention to the need to prioritise the implementation of reparations to the elderly and other victims with demonstrably urgent need. Elderly people do not have the luxury to wait on protracted reparation proceedings, and thus require prioritisation so that they can avail of reparations as soon as possible. In the case of reparations made to Japanese-American internees, it was reported that with every passing month before the payment two hundred internees died.²¹ States have often prioritised elderly victims. In Peru individual reparations were paid first to the elderly, given their vulnerability from failing health.²² In Sierra Leone the payment of interim reparations of \$100 USD as well as health and educational support to those most vulnerable victims helped to minimise the temporal lag of reparation orders.²³ The recent Tunisian Transitional Justice Law provides for 'immediate care and temporary compensation' for all victims, in particular 'the elderly, the women, the children, the disabled and individuals with special needs, the sick and vulnerable groups, without waiting for

¹⁹ Transgenerational Trauma: Dealing with the Past in Northern Ireland, WAVE Trauma Centre, March 2014.

²⁰ Article 7(c), Reglamento de la Ley N° 28592, Ley Que Crea El Plan Integral de Reparaciones (Pir), Decreto Supremo N° 015-2006-JUS.

²¹ Eric K. Yamamoto and Liann Ebesugawa, Report on Redress: The Japanese American Internment, in Pablo De Greiff (ed), *The Handbook of Reparations* (Oxford: Oxford University Press), pp. 257 – 283; Mitchell T. Maki, Harry H. L. Kitano, and S. Megan Berthold, *Achieving the Impossible Dream: How Japanese Americans Obtained Redress* (Chicago: University of Illinois Press, 1999), p200.

²² Cristián Correa, *Reparations in Peru: From Recommendations to Implementation*, ICTJ, June 2013, p16.

²³ See Suma and Correa note 14.

the reparations decisions or judgments to be issued.²⁴ Similarly the Luxembourg Agreement between the Federal Republic of Germany and Israel stipulated that victims over the age of sixty, amongst others, 'shall be accorded priority over all other claims, both in adjudication and payment.'²⁵ Elderly victims can be prioritised through fast-tracking their applications for reparations for those over a certain age.

13. In our main submission below further experience in other countries is cited to support these principles or suggest further ones to be developed depending on the circumstances in the *Katanga* case.

III. Main submission

a. The procedural role of victims in reparation proceedings

14. The ICC has identified victims as parties to reparation proceedings;²⁶ it is therefore important that they are treated as such, both during the process of determining reparations, and during the implementation phase, distinguishing them from simply participants in trial proceedings.²⁷ As parties, victims should be given ample opportunity to express their views with regards to reparation and present evidence through their legal representatives, but also, if possible and desired, in person. It is vital that this opportunity is given to as many victims as possible, including those who have not yet applied, but may qualify for reparations.

15. With this in mind, it would be advisable to follow the Registry's recommendation that a period of time is allowed for additional victims to make applications to participate in reparation proceedings, given the difficulties of contacting some

²⁴ Article 12, Organic Law on Establishing and Organizing Transitional Justice 2013, Unofficial Translation by the International Centre for Transitional Justice (ICTJ), available at: <http://www.ohchr.org/Documents/Countries/TN/TransitionalJusticeTunisia.pdf>.

²⁵ §16, Agreement between the Federal Republic of Germany and the State of Israel 1952.

²⁶ *Prosecutor v. Lubanga*, ICC-01/04-01/06-2904, 7 August 2012, para 267; Rule 144(1), RPE.

²⁷ *Bemba*, Fourth Decision on Victims' Participation, ICC-01/05-01/08-320, 12 December 2008, para 20; *Lubanga*, Decision Public on the Manner of Questioning Witnesses Representatives of Victims, ICC-01/04-01/06-2127, 16 September 2009, para 24.

individuals.²⁸ Following this, the Court may wish to consider arranging for reparation hearings in different locales proximate to victims within Ituri Province, as well as in The Hague. Article 3(3) of the Court's Statute allows it to 'sit elsewhere, whenever it considers it desirable.' The Court should attempt to hear from as many victims as possible, in order to ensure reparations adequately reflect the wishes of those most affected. Such measures would ensure that the ICC acts in accordance with the UN Basic Principles and Guidelines on a Right to a Remedy and Reparation, which requires that victims have their right to access to justice and redress mechanisms fully respected, and are granted access to relevant information concerning violations and reparation mechanisms.²⁹ The Inter-American Court of Human Rights has also ruled on the importance of hearing victims' views on the content, implementation, and operation of reparations, such as the location of a clinic, services offered, and forms of memorials, in order to effectively remedy the harm suffered.³⁰

16. The Registry's Report highlights a number of issues that are likely to significantly impact on the process of determining and implementing reparations, including the strong preference for individual reparations amongst victims, the distrust and lack of understanding with regards to collective reparations and the difficulty of contacting all victims who are likely to qualify for reparations.³¹ These issues stress the importance of continued consultation with victims during the implementation stage, and a close working relationship between the Trust Fund for Victims, Registry, Chamber and the victims' legal representatives. Failing to provide a

²⁸ ICC Registry, Report on applications for reparations in accordance with Trial Chamber II's Order of 27 August, 21 January 2015, ICC-01/04-01/07-3512-Anx1-Red2. Discussed further in sub-section c.

²⁹ Principle 7, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147, 21 March 2006.

³⁰ *Case of the Moiwana Community v. Suriname*, Series C No. 124 (IACtHR), 15 June 2005, paras 213 and 217; *Case of the Saramaka People v Suriname*, Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs, Series C No. 185 (IACtHR), 12 August 2008, para 17.

³¹ ICC Registry, Report on applications for reparations in accordance with Trial Chamber II's Order of 27 August, 21 January 2015, ICC-01/04-01/07-3512-Anx1-Red2.

meaningful role for victims in negotiating and processes, risks undermining the effectiveness of their outcomes.³²

i. Reparative benefits of victim participation

17. Ensuring the Court adequately respects the rights of victims may provide some reparative relief to those who participate. Studies in both domestic and international jurisdictions have repeatedly shown that fair procedures, as well as fair outcomes, are extremely important to participants, and that being granted a voice and being treated with dignity and respect are considered particularly valuable.³³ Treating victims as legal parties to the reparations proceedings, and affording them the corresponding rights, could provide a particularly significant mode of participation, enhancing their perception of the Court and the positive impact of the Court on victim populations.

18. Victim participation in the reparation process is also important in psychological terms for victims, as it helps to convey public recognition of both their suffering and the worth of their views.³⁴ Consulting victims and allowing them to participate in the decision-making process can affirm their dignity and status as citizens in the new political order, by demonstrating that their voices and interests have value. For example, Hamber suggests that this fosters ‘social belonging ... [and] helps counter...the consequences of ‘extreme’ political trauma’.³⁵ Participation in the design and process of reparation mechanisms can also offer recognition to victims as ‘valuable agents of political and social transformation’, in particular for those

³² Carlton Waterhouse, *The Good, The Bad, And The Ugly: Moral Agency And The Role of Victims in Reparations Programs*, *University of Pennsylvania Journal of International Law* 31 (2009) 257-294, p258.

³³ Linda Musante et al., *The effects of control on perceived fairness of procedure and outcome*, 19 *Journal of Experimental Social Psychology* (1983); Mariana Pena and Gaelle Carayon, *Is the ICC making the Most of Victim Participation?* 7 *International Journal of Transitional Justice* 3 (2013) 518; T.R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law* 30 *Crime and Justice* (2003) 283; Jo-Anne Wemmers, *Victims in the Criminal Justice System* (Amsterdam: Kugler Publications, 1996); Jo-Anne Wemmers, *Victims and the International Criminal Court (ICC): Evaluating the Success of the ICC with Respect to Victims* 16 *International Review of Victimology* (2009) 211.

³⁴ Brandon Hamber, *The dilemmas of reparations: In search of a process-driven approach*, in K. De Feyter, S. Parmnetier, M. Bossuyt and P. Lemmens (eds.), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia 2005), 135-149, p141.

³⁵ *Ibid.*

groups previously marginalised, such as women and minorities; this would comply with the principle of gender-inclusion.³⁶

19. The experiences of other international(ised) criminal courts suggests that allowing for meaningful participation can have some reparative impact on those who participate. The acknowledgement of a right to participate as a party has been described as ‘valuable reparation’ by a lawyer acting on behalf of victims participating as Civil Parties in the Extraordinary Chambers in the Courts of Cambodia (ECCC).³⁷ Civil Party lawyers have also noted the empowering effects of allowing victims to testify and attend court proceedings.³⁸ Studies have repeatedly shown that while Civil Parties may have specific criticisms to make about the ECCC, they are generally pleased to have been granted party status and have found participating in the Court’s proceedings to be an overall positive experience. Some have found that being a party to the trial has made them feel better about their past victimisation, and have reported feelings of empowerment as a result of participating.³⁹

20. The ICC should allow victims the opportunity to express themselves directly to the Court. The desire to be heard appears to be held by victims across the world. A 2006 study with 1,114 victims of war from 12 different countries and regions revealed that the majority wished for some role in judicial proceedings, and that while views on the method of participation varied, there was a strong desire in

³⁶ Rubin-Marín note 18, p17.

³⁷ *Co-Prosecutors v. Kaing Guek Eav, alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Transcript of Trial Day 73, 23 November 2009, at 80.

³⁸ K. Un, Kheang and J. Ledgerwood, Is the Trial of Duch a Catalyst for Change in Cambodia’s Courts? - Asia Pacific Issues, *Analysis from the East-West Center*, No 95, June 2010, at 9.

³⁹ E Hoven, M Feiler and S Scheibel, Victims in Trials of Mass Crimes: A Multi-Perspective Study of Civil Party Participation at the Extraordinary Chambers in the Courts of Cambodia, *Cologne Occasional Papers on International Peace and Security Law*, Number 3 (September 2013); Rachel Killean (QUB), Field Work Interviews with Civil Parties 7, 8, 9, 11, 13, 14, 15 (17 – 18 December 2013) and 22 (27 October 2014); P.N. Pham, P. Vinck, M. Balthazard, J. Strasser and C. Om, Victim Participation and the Trial of Duch at the Extraordinary Chambers in the Courts of Cambodia, 3 *Journal of Human Rights Practice* (2011); E. Stover, M. Balthazard, and K. A. Koenig, Confronting Duch: civil party participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia, 93 *International Review of the Red Cross* (2011).

particular to have the opportunity to present their views and ‘a profound need to being heard.’⁴⁰ Victims who have been given the chance to give oral testimony in a role other than as a witness in various transitional justice mechanisms have often reported positive reactions to the experience.⁴¹ The ICC might consider taking the ECCC as an example and allowing for victims who wish to make submissions in reparation hearings to also make broader statements of suffering. The ECCC has allowed Civil Parties to do so at the end of their testimony during the trial phase of Case 002/01,⁴² a move that appears to have brought real benefit to those availing of the opportunity.⁴³ The gratitude and satisfaction expressed by many of the Civil Parties suggests that the opportunity to express themselves may have performed a reparative function.⁴⁴ In the words of one Civil Party lawyer:

‘[In] Case 002 at least from the clients that I examined or that were on the stand... they felt relieved and proud of having testified and relieved of having spoken the truth in public in that way.’⁴⁵

21. This participation should be carefully arranged and managed to ensure victims are kept safe and treated with dignity and respect throughout, as required by the UN

⁴⁰ E Kiza, C Rathgeber and H Rohne, *Victims of War: An Empirical Study on War-Victimization and Victims’ Attitudes towards Addressing Atrocities*, Max-Planck-Institute, Hamburger Edition (2006) at 110.

⁴¹ J.D. Ciorciari and A. Heindel, *Victim Testimony in International and Hybrid Criminal Courts: Narrative Opportunities, Challenges, and Fair Trial Demands* 1 April 2015, available at SSRN: ssrn.com/abstract=2588577; Rachel Killean (QUB), *Field Work Interviews with Civil Parties* 9, 11, 12, 14 (17-18 December 2013), Interview with ECCC Victim Support Services Staff (27 November 2013 and 13 January 2014); Comisión Nacional sobre Prisión Política y Tortura, *Informe de la Comisión Nacional sobre Prisión Política y Tortura*, Santiago, 2004; Commission of Reception, Truth and Reconciliation, “Chega!” Report of the Commission of Reception, Truth and Reconciliation of Timor-Leste, Dili, Timor-Leste, 2005; Comisión de Verdad y Reconciliación, *Informe Final de la Comisión de Verdad y Reconciliación*, Lima, 2003.

⁴² ECCC Case 002, Decision on Request to Recall Civil Party TCCP-187, for Review of Procedure Concerning Civil Parties’ Statements on Suffering and Related Motions and Responses (E240, E240/1, E250/1, E267, E267/1 and E267/2), 2 May 2013, 002/19-09-2007IECCC/TC

⁴³ E.g. Civil Party Lay Bony has said “[T]his is the best opportunity after 30 years I have been living with all the suffering... I have kept this suffering in my heart for a very long period of time, and I would like to thank you, the Chamber, very much for giving me this opportunity to speak it out.” ECCC Case 002 transcript (Oct. 24, 2012), at 59.

⁴⁴ See, e.g., ECCC Case 002 transcript (Aug. 29, 2012), at 28-29 (with Em Oeum describing it as “the moment” he had waited for many years); ECCC Case 002 transcript (Oct. 22, 2012), at 22 (including Yim Sovann’s remark that she had “suffered psychological suffering for so long,” finally had “the opportunity to express such suffering,” and believed the court would deliver justice and that “the psychological wound[s]” of victims and civil parties “would be cured”). At least a dozen other civil parties expressed similar gratitude, see J.D. Ciorciari and A. Heindel note 41.

⁴⁵ Rachel Killean (QUB), *Field Work Interview with Civil Party lawyer*, 12th November 2013.

Reparation Principles.⁴⁶ Furthermore, regardless of the reparations being ordered, the Chamber should strive to acknowledge the information and views provided by victims, in order to assure those victims that their voices have been heard and respected. The Appeal Chamber's *Lubanga* Decision on Reparations has made clear that a reparations order must acknowledge the accountability of the accused, clearly define the harm caused, establish causality, identify appropriate reparations and specify those victims who are eligible.⁴⁷ Specifically acknowledging the harm experienced by victims by quoting from or citing their submissions to the Court within the reparations order would benefit this process, and further strengthen the expressivist dimension of reparations, providing victims with recognition and acknowledgement of their harm. This is of crucial importance to the Court, in light of the limited resources available to the Trust Fund to support more substantial reparations. It may be appropriate for the Registry, victim legal representatives and/or the TFV to collect such victims' testimonies and narratives in a written report or audio-visual archive, bearing in mind victims' privacy and personal integrity.

ii. Managing expectation

22. The ICC must ensure that the expectations of the victims are managed, in order to avoid disappointment and potential secondary victimization if the reparations are not what the victims expected. This management of expectations must also occur with regards to any invitations to provide oral testimony. While this submission highlights that participation *may* have reparative effects and empirical studies report positive reactions amongst victims who do participate, the act of providing oral testimony should not be sold to victims as having natural therapeutic effects or amounting to substantive reparations. This would risk instilling false

⁴⁶ Principe 6, A/RES/60/147.

⁴⁷ *Prosecutor v Lubanga*, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012, ICC-01/04-01/06-3129, para 32.

expectations amongst victims, leading to potential disappointment and secondary victimisation.⁴⁸

23. Legal provisions for victims to participate or be consulted are not enough. Access to reparations also requires effective outreach and information provision to victims and affected communities, as well as capacity building and support for victim groups and civil society. In the case of Peru, where collective reparations were created in consultation with victimised communities, Correa notes that some found it difficult to access technical support to make informed decisions in implementing projects. As a result, without sufficient informed outreach to victims some local government officials were able to manipulate the funding for community projects, which did not primarily focus on the victimised communities' interests.⁴⁹

24. The managing of expectations can be done by providing up to date and accurate information to victims at every stage of the process and implementation of reparations, and through local public debates organised by the TFV during the implementation phase. Information should clearly inform victims what the ICC can and cannot do in terms of reparations.⁵⁰ Information should be distributed to the victims and their representatives in a clear and easy to understand format. In addition to mitigating the potentially harmful effects of raised expectations, this provision of information may also demonstrate to the victims that they are being treated with dignity and respect. Information provision has been identified as one of the most important victims' rights in (international) criminal courts, with being kept up to date ensuring that victims feel valued and respected. Similarly, a lack of information can make them feel forgotten and neglected, leading to potential

⁴⁸ D. Ciorciari and A. Heindel note 41.

⁴⁹ Correa note 22, p13.

⁵⁰ We are concerned that a member of the ICC outreach team in Ituri commented on a Bunia based radio station that 'reparations will be collective. I think that as they will be collective, everyone will win.' Radio Canal Révélation, March 2015 <http://www.ijmonitor.org/2015/04/voices-from-the-ground-reactions-from-ituri-on-recent-icc-judgments/>

secondary victimisation.⁵¹ Information provision can be done through victims' associations and service organisations as well as individually. Information needs to reach *not* only victims, but any state and any other local agencies that will be called on to supply the ancillary services that the Court will not provide and/or step in to support people negatively affected by the process.

25. The reactions of victims to the first reparations order from the ECCC is an important example of the need to manage expectations. The ECCC allowed for the printing of the names of the Civil Parties in the final judgment and the publishing of any apologies made by Duch. However, many Civil Parties had believed that they were entitled to individual monetary reparations, leading to distress when the true extent of the reparations was made known.⁵² Similarly, the ECCC Trial Chamber's decision to deny Civil Party status to a number of victims at the judgment stage of Case 001, and the initial sentence given to Duch, both resulted in 'intense emotional stress.'⁵³ These incidents, while not related to reparations, show the real danger of secondary victimisation where victims are inadequately informed. The provision of accurate, clear and easy to understand information could potentially have helped to minimise this secondary victimisation. Indeed, qualitative studies conducted within Cambodia revealed that victims were often not being kept up to date by their lawyers, and many, particularly those living in the provinces, were unable to access information about the Court, a fact that was contributing to their lack of understanding and the raising of expectations that the Court was unable to fulfil.⁵⁴ As it is unlikely that the ICC will be able to deliver

⁵¹ J Acevedo, *Victims' Status at International and Hybrid Criminal Courts: Victims' Status as Witnesses, Victim Participants/Civil Parties and Reparations Claimants*, Åbo Akademi University Press, Åbo, Finland, (2014) p453; Hoven, Feiler and Scheibel, note 39.

⁵² JP Blair, From the Numbers Who Died to Those Who Survived: Victim Participation in the Extraordinary Chambers in the Courts of Cambodia, 31 *University of Hawaii Law Review* 508 (2008-2009) at 537; Madhev Mohan, The Paradox of Victim-Centrism: Victim Participation at the Khmer Rouge Tribunal, 9 *International Criminal Law Review* (2009)

⁵³ Transcultural Psychosocial Organization, Report on TPO's After-Verdict Intervention with Case 001 Civil Parties, 27 July 2010 at 2; see also Hoven, Feiler and Scheibel, note 39.

⁵⁴ *Ibid*; Rachel Killean (QUB), Field Work Interview with Civil Parties, 1, 2, 3, 4, 5, 6, 9, 11, 13, 14 (17 – 18 December 2013) and 16 – 26 (27 October 2014).

reparations to the satisfaction of all victims, it is necessary to ensure an honest assessment and evaluation of victims' wishes, and to meet these wishes with coherent and continuing information addressing the limitations of the Court.

b. Modalities of reparations

26. A strong respect for victims' rights in procedural aspect of reparations can help to inform appropriate substantive reparation awards by the ICC. This sub-section addresses the fundamental issue of appropriate individual and collective reparations, which drawing from the Registry's Report seem to be the most contentious aspect of the reparation order in the *Katanga* case. While Mr Katanga is currently indigent,⁵⁵ following the *Lubanga* appeal decision, reparations can be awarded against a convicted person 'through' the Trust Fund, which will have to provide reparations on his behalf.

27. At the outset we would like to draw the Court's attention to the language of Rule 98 on the Trust Fund. Although Rule 98(1) envisages individual reparations being awarded against the convicted person, Rules 98(2) and (3) suggest that reparation awards either deposited or made through the Trust Fund will be collective in nature. Such a collective form of reparations is based on the number of victims, scope, forms and modalities in delivering redress to make it more feasible. As Mr Katanga is indigent, Rule 98(3) is the most relevant, since reparations will be made 'through' the Trust Fund. However in both Rules 98(2) and (3) the language used is 'may', not shall, indicating that the ordering of collective reparations through the Trust Fund is only indicative, not definite in each case. Thus the Trial Chamber judges remain free to order individual reparations through the Trust Fund at their discretion. Such an interpretation is consistent with Article 75(2), which states the

⁵⁵ *Prosecutor v Katanga*, Report on applications for reparations in accordance with Trial Chamber II's order of 27 August, ICC-01/04-01/07-3512-Conf-Exp-Anx1 notified on 16 December 2014, para 49. *Décision du Greffier sur les demandes d'aide judiciaire aux frais de la Cour déposées par Mr. Germain Katanga*, ICC-01/04-01/07-79, 23 November 2007; *Observations du Greffe relatives à la solvabilité, l'indemnisation des victimes et au comportement en détention de Germain Katanga*, ICC-01/04-01/07-3453, 20 March 2014; *Décision relative à la peine (article 76 du Statut)*, para 169, ICC-01/04-01/07-3484, 23 May 2014.

Court can order appropriate reparations against a convicted person or through the Trust Fund, explicitly naming individual forms of reparation: 'restitution, compensation and rehabilitation.'

i. Individual reparations through the Trust Fund

28. It would be remiss of the Court to ignore victims' explicit views in requesting individual reparations. The Registry's Report found that 99% of those consulted expressed a specific desire for economic and financial reparations.⁵⁶ The report specifically finds a strong correlation between the impact of the crime and the respective harms on the victims and their request for reparations: 95% of victims state that the crime had an impact on their financial and economic independence.⁵⁷ As such 58% of individuals surveyed by the Registry preferred individual compensation.⁵⁸

29. We suggest that the Court consider awarding victims in the Katanga case individual compensation awards. Individual compensation awards to victims can provide a personal and symbolic acknowledgement of their suffering by the ICC. Compensation also recognises victims' agency as 'money speaks', by enabling them the 'freedom of choice' to spend the money as they see fit to redress their suffering.⁵⁹ As suggested by Shelton compensation is 'incapable of restoring or replacing the rights that have been violated and, as a substitute remedy, are sometimes inadequate to redress fully the harm . . . [it can however] supply the means for whatever part of the former life and projects remain possible and may allow for new ones.'⁶⁰ As the Registry's Report finds, victims as a result of the attack on Bogoro suffer from a range of economic costs and struggle to provide for themselves and their family, particularly women.⁶¹ Monetary awards can thus

⁵⁶ Ibid., para 43.

⁵⁷ Ibid., para 36.

⁵⁸ Registry's Report, para 49.

⁵⁹ Moffett note 4, p228; and Truth and Reconciliation Commission of South Africa Report (1998) Vol. 5, p179.

⁶⁰ Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press 2005), p291.

⁶¹ Registry's Report, para 37.

provide short-term alleviation and potentially long-term economic self-sufficiency for victims. In addition, as voiced by the victims in the Registry's Report, compensation can be more discreet than collective measures, given ongoing security concerns over victims' safety.

30. Although the TFV cannot afford to provide proportional reparation awards in amounts similar to human rights courts of €10,000-120,000 to each individual victim,⁶² it can provide a symbolic amount that acknowledges each individual's personal loss and suffering. Although 365 victims are currently recognised by the Court, there are likely to be further eligible individuals. Nevertheless, the Trust Fund has €4.8 million in reserve funds for reparations, and likely at least €1.2 million for the *Katanga* case. If there are roughly 500 eligible victims in the *Katanga* case this would average at €2,400 per individual. Of course some victims will have suffered more than others, meaning that some individuals may require further compensation to reflect their multiple and so a more scaled system of compensation of this €1.2 million is required based on harm suffered. In addition, a proportion of the €1.2 million amount will be required to administer and deliver reparations to victims. In order to protect victims' privacy the delivery of reparations should be discreetly carried out by the Trust Fund, such as the use of mobile phone money transfers to victims' phones, if used by victims.

31. Individual compensation awards should reflect the value of certain possessions or opportunities loss, and respond to each individual victims' suffering. For instance, for individuals who lost cattle and their home, they should be awarded the market value of one cow (e.g. \$300)⁶³ and construction materials for a new home (~\$500). Providing compensation that enables victims to purchase cattle can also serve a further psychological and cultural function in enabling them to rebuild their identity, which was previously strongly associated with cattle ownership.⁶⁴

⁶² Moffett note 4, p178.

⁶³ Registry's Report, fn.78.

⁶⁴ Registry's Report, para.36.

32. The Court could order the restocking of cattle, rather than providing compensation. However, in northern Uganda, victims alleged that such cattle in restocking programmes were weak and sick, costing them further money to pay for veterinarian fees and medicine.⁶⁵ Alternatively providing monetary awards may inflate the local market value of cattle, pricing victims out of purchasing animals. Affirming the principles of victim consent and choice, the Court could leave the decision up to victims to select either to have a cash award or delivery of a cow or goats. Similarly, for housing materials the TFV may be able to source such resources in bulk reducing cost, it may be worthwhile to offer victims a choice between compensation or materials. Again there are concerns over victims' safety that distribution of building materials may lead to resentment, identification of victims, or corruption. Delivery of reparations needs to be conducted in a discreet manner to protect victims' safety and privacy. The Registry's report notes that victims believed alternative forms of compensation, such as health vouchers, would be unworkable in practice. Cash to individuals can provide targeted, discreet and safe support, which can stimulate local communities' economy and can be more cost-effective than delivering commodities.⁶⁶ The Court should take into consideration the safety of victims in such circumstances, perhaps utilising the Victims and Witnesses Unit to provide appropriate protective and security measures in implementing reparations.

33. In terms of those killed or seriously injured, no amount of money can ever adequately repair the harm caused. As noted by Judge Cañado Trindade we should not reduce the value of human life to economic terms, or 'homo oeconomicus'.⁶⁷ However, money provides some form of means to alleviate victims' harm. A symbolic amount of €1,000 may provide recognition of their suffering and provide some form of short-term monetary support, especially for

⁶⁵ Moffett note 4, p228.

⁶⁶ Paul Harvey, *Cash-based responses in emergencies*, Humanitarian Policy Group, January 2007.

⁶⁷ *The Street Children case*, Separate Opinion of Judge Cañado Trindade, para 34, citing *Loayza Tamayo v Peru*, Joint Separate Opinion of Judges A.A. Cañado Trindade and A. Abreu Burelli, para 9.

those who lost a breadwinner or missed out in attending school. While of course there are not enough resources to fully or completely remedy victims' harm, Hamber suggests the notion of 'good enough', whereby sufficient effort and recognition is made to victims leaves them psychologically satisfied, in turn rebuilding community and societal bonds.⁶⁸ Verdeja asserts the personal value of compensation, rather than collective programmes, as 'individual symbolic recognition emphasizes the importance of remembering that victims are not merely a statistic but actual people who often suffered intolerable cruelties.'⁶⁹

34. In Chile and Argentina, monthly or annual pensions have been a way to offer long-term support to victims, but can also offset the upfront financial cost of large lump sums to victims.⁷⁰ In South Africa and Peru amounts of \$4,900 and \$10,000-13,350 were reached respectively in each context per eligible victim, without providing reasons or consulting victims, which was met with dissatisfaction by many survivors.⁷¹ These experiences emphasise the need for effective victim consultation and information on the ICC reparation process to develop creative ways of delivering compensation to victims and to manage their expectations on individual forms of reparations, with the quantum of compensation based on harm suffered. Importantly, reparations ordered by the ICC need to be complemented by a more

⁶⁸ Brandon Hamber, The dilemmas of reparations: In search of a process-driven approach, in K. De Feyter, S. Parmnetier, M. Bossuyt and P. Lemmens (eds.), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia 2005), 135-149, p137. See Registry's Report, fn.75 p25 "'even if the ICC would provide victims with \$100 each we would be more satisfied than receiving collective reparation in any form"; 'I want individual compensation, even if it is small, this way I will be responsible and can take care of my family myself.'"

⁶⁹ Ernesto Verdeja, A Normative Theory of Reparations in Transitional Democracies, *Metaphilosophy* 37(3/4) (2006), 449-469, p456.

⁷⁰ In Argentina Law 23,466, 30 October 1986 provided a pension to next of kin of those disappeared up to the value of 75% of the lifetime salary. Law 24,043, 23 December 1991 stipulated a smaller pension to those arrested and detained by the military junta, to the value of one thirtieth of the highest scale of civil servant salary. In Chile Law 19,123, 8 February 1992 provided a monthly lifetime pension (valued in 1996 as \$537) to victims of human rights violations or political violations identified in the Rettig National Truth and Reconciliation Commission.

⁷¹ Hamber note 68, p143-145; and Correa note 22, p16.

comprehensive national reparation programme by the Congolese government that can offer long-term and effective redress to victims.⁷²

35. Preferences of individual financial compensation in the *Katanga* case are mirrored by experience and empirical evidence from other conflict-affected situations. For example in northern Uganda, victims groups frequently voiced concern over collective reparations.⁷³ In-depth research with these victim organisations indicated that generally the majority of victims were dissatisfied with collective developmental and rehabilitation programs, and the lack of (individual) monetary compensation payments.⁷⁴ In northern Uganda, individual compensation is perceived as being best equipped to meet the individual victims' needs, helping them to recover from their harms suffered and consequentially encouraging reconciliation with ex-LRA combatants and abductees who returned and availed of demobilisation packages.⁷⁵ Individual compensation also corresponds to traditional justice practices of *culo kwor*, where perpetrators pay compensation to victims.⁷⁶ Even though in northern Uganda the demands for reparations are not (yet) primarily directed at the ICC or the TFV, but rather at the Ugandan government, the victims' general preferences of individual financial reparation are comparable to the perspectives of victims in the *Katanga* case. In addition, individual compensation may correspond to traditional or cultural justice practices offering some continuity in justice between the ICC and Ituri.

ii. Collective reparations through the Trust Fund

⁷² See Luke Moffett, Reparative complementarity: ensuring an effective remedy for victims in the reparations regime of the International Criminal Court, *The International Journal of Human Rights* 17(3) 368-390.

⁷³ Justice and Reconciliation Project (JRP), *Paying Back what Belongs to us: Victims' Groups in Northern Uganda and their Quest for Reparations*, Field Note XVI, October 2012.

⁷⁴ *Ibid.*, p4. Luke Moffett (QUB), Interviews with different victim groups in northern Uganda, June-July 2011 and April 2015.

⁷⁵ *Ibid.*

⁷⁶ 'Compensation to atone for homicide'. Roco Wat I Acoli, Restoring Relationships in Acholi-land: Traditional Approaches to Justice and Reintegration, Liu Institute for Global Issues, Gulu District NGO Forum, Ker Kwaro Acholi, 2005.

36. Despite the clearly expressed preference for individual financial assistance, collective reparations may be beneficial if they are creatively designed to provide individual benefits, such as micro-finance cooperatives or individual counselling for identified groups of victims like former child soldiers or widows. The UN Special Rapporteur on Truth, Justice, Reparation and Guarantees of Non-Recurrence Pablo de Greiff suggests that reparations should include individual and collective measures to distribute a wide range of benefits that can maximise resources and respond to the complexity of victims' suffering.⁷⁷ Collective reparations can be seen as 'avoiding a hierarchy of victims sometimes associated with individual compensation awards.'⁷⁸ Such a potential hierarchy of victims occurs when only a limited number of individuals receive reparations, excluding others, and might cause tensions within communities.

37. Collective reparations should only be ordered if requested by victims. Collective measures can better respond to the common interests or suffering of victims. By way of example, in *Awas Tingi community v Nicaragua* the Inter-American Court of Human Rights awarded compensation collectively to an indigenous group, as their land had not been officially recognised or titled to them, reflecting that the group understood property rights in land as communal ownership.⁷⁹ Similar collective reparations were recommended in the Timor Leste's Commission for Reception, Truth and Reconciliation (CAVR) for rehabilitation for widows, recognising that recovery occurs in the community, but it has yet to be implemented.⁸⁰ Accordingly, collective reparations can better fulfil victims' shared needs.

⁷⁷ Report by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, A/69/518, 8 October 2014, para 29-31.

⁷⁸ Moffett note 72, p378.

⁷⁹ *Mayagna (Sumo) Awas Tingi Community v. Nicaragua*, Judgment of 31 August 2001 (Merits, Reparations and Costs), para 149 and 167.

⁸⁰ §12.7, *Chega!* CAVR 2005. See *Unfulfilled Expectations: Victims' perceptions of justice and reparations in Timor-Leste*, ICTJ (2010). See also Per Memoriam Ad Spem: Final Report of Commission of Truth and Friendship (CTF), Indonesia-Timor-Leste (2009) §§288-304, which only recommended collective reparations for the recovery of those disappeared, document collection center, and survivor rehabilitation programs, alongside institutional reform and acknowledgments of responsibility.

38. We would distinguish this case from Bogoro, given that the victims in the *Awas Tingi community* case collectively suffered harm as an *identifiable group* with closely shared bonds and land ownership. Moreover, many victims have been displaced from Bogoro, breaking such shared community bonds. In addition victims' legal representatives in the *Lubanga* and *Ruto and Sang* cases raised concerns that reparations made to the community risked perpetrators benefiting from awards, and instead preferred small individual sums of compensation.⁸¹

39. There still may be some use in ordering collective reparations in the forms of rehabilitation, as in the Timor Leste situation for widows. The Court could also award collective reparations in the form of a housing programme,⁸² given that most victims in the *Katanga* case have a housing need. Many victims were forcibly displaced from their homes, and some live in extreme poverty including internal displaced person camps; a housing programme or the provision of housing materials, such as iron sheets for roofing, could be appropriate collective reparation.⁸³ Alternatively the Trust Fund could provide a micro-financing scheme, which could provide short-term loans for victims while providing a source of income to the victims collectively.⁸⁴ However, research in northern Uganda has shown that such collective ownership and decision-making amongst victims can cause friction amongst members, with disagreements over how money is spent, and corruption.⁸⁵

⁸¹ Lubanga, Observations on the Sentence and Reparations by Victims a/0001/06, a/0003/06, a/0007/06, a/00049/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0523/08, a/0610/08, a/0611/08, a/0053/09, a/0249/09, a/0292/09, a/0398/09, and a/1622/10, ICC-01/04-01/06-2864-tENG, 18 April 2012, para 15 and 16; and Ruto and Sang, Common Legal Representative for Victims' Comprehensive Report on the Withdrawal of Victims from the Turbo area by Letter dated 5 June 2013, ICC-01/09-01/11-896-Corr-Red, 5 September 2013, para 12.

⁸² See *Plan de Sanchez Massacre v Guatemala*, Judgment of 19 November 2004 (Reparations), para 105.

⁸³ 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), ICC-01/04-01/07-3514, 27 janvier 2015, para 18 and 22.

⁸⁴ Hans Dieter Seibel and Andrea Armstrong, Reparations and Microfinance Scheme in P. de Greiff note 21, 676-698.

⁸⁵ Justice and Reconciliation Project (JRP) note 73.

40. Finally, other forms of collective reparations could be ordered to complement individual reparations. We would suggest that the Court reserve €10,000 for a memorial in Bogoro. While memorials and commemorations scored low on victims' views on reparations, victims' needs can change over time. In many other victim communities we have worked in a memorial can be a focal point for remembrance and bringing victims annually together on the dates of atrocities. In addition, dissemination of international judgments can be an important measure of satisfaction by attributing responsibility of the convicted person and publicly acknowledging the harm suffered by victims.⁸⁶ This was witnessed for example, in Cambodia, where the judgment against Kaing Guek Eav alias Duch was made widely available throughout Cambodia.⁸⁷ We would suggest that the Court provides a simplified and accessible summary of the key findings in the Katanga case, including the facts established on the Bogoro massacre. This should be relatively cheap to do whether through local and national media. The Congolese government or independent organisations, such as Radio Okapi, may be able to facilitate such dissemination. Such cooperation of the DRC government would be consistent with Article 93(1)(l) of the Rome Statute, which permits the Court to request cooperation from a state to provide 'any other type of assistance' to give effect to a reparations order.

c. Eligibility of victims and apportionment

41. Determining which victims are eligible for reparations is a contentious and delicate issue, which inevitably has to be balanced against limited resources and trying to maximise benefits to those most vulnerable. Rule 85 of the Rules of Procedure and Evidence provides a definition of victims and the ICC through its jurisprudence to include:

a. direct victims, and

⁸⁶ See *Corfu Channe*; case, Judgment of 9th April 1949: *International Court of Justice Reports* 1949 p4, p35; Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair, *Reports of International Arbitral Awards*, VOLUME XX, 30 April 1990, 215-284, p272–273.

⁸⁷ *Prosecutor v. Kaing Guek Eav alias Duch* (Case 001), ECCC Trial Chamber, 26 July 2010.

- b. indirect victims, including
 - (i) the family members of direct victims,
 - (ii) anyone who attempted to prevent the commission of one or more of the crimes under consideration,
 - (iii) individuals who suffered harm when helping or intervening on behalf of direct victims, and
 - (iv) other persons who suffered personal harm as a result of these offences.
- c. legal persons under Rule 85(b).

i. Application procedure

42. As noted above, women, elderly and disabled can be additionally marginalised from completing applications and reparation processes by their physical immobility, illiteracy, or stigma.⁸⁸ Thus there is an acute need for outreach to inform claimants of the reparation scheme, application forms and deadlines.⁸⁹ In Timor-Leste the commission kept its application deadline open for two years after the closing of its mandate to ensure most victims could access redress.⁹⁰ The Inter-American Court of Human Rights (IACtHR) in the *Miguel Castro Castro Prison v Peru* case kept reparation claims open for 8 months,⁹¹ in the *Plan de Sanchez massacre v Guatemala* case the deadline was left open for 24 months after the judgment.⁹² In this latter case the court only provided reparations to those 91 individuals identified with sufficient evidence who have suffered harm, with the remaining 193 without evidence to support their claim only able to benefit from collective reparations.

43. Extending deadlines and lowering evidential burdens brings the risk of fraudulent claims, such as members of a neo-Nazi group claiming compensation from a Holocaust claims process to deplete funds available for victims.⁹³ Again care needs

⁸⁸ Rubin-Marín note 18, p12.

⁸⁹ Edda Kristjánsdóttir, International Mass Claims Processes and the ICC Trust Fund for Victims, in C. Ferstman, M. Goetz, and A. Stephens (eds), *Reparations for Victims of Genocide, Crimes Against Humanity and War Crimes: Systems in Place and Systems in the Making*, (Martinus Nijhoff 2009), 167-195, p184-5.

⁹⁰ Rubin-Marín note 18, p13.

⁹¹ *Miguel Castro Castro Prison v Peru*, Merits, Reparations and Costs. Judgment 25 November 2006, Series C No.160 (IACtHR).para 420.

⁹² *Case of the Plan de Sánchez Massacre v. Guatemala*, Judgment of 19 November 2004 (Reparations), para 62-65.

⁹³ Kristjánsdóttir note 89, p185.

to be taken to avoid fraudulent claims or corruption through a transparent application procedure for further reparation claimants. The approach by the IACtHR may be instructive here in that an appropriate deadline can be left open with only those individuals with sufficient evidence able to obtain individual reparations. Of course the Registry should make every effort to ensure access and information for marginalised groups so that they are able to present sufficient evidence.

ii. Identification

44. A pressing practical concern in determining eligibility for reparations is sufficient evidence for the identification of victims. The IACtHR takes a proactive approach in identifying eligible victims through using the evidence presented by the parties, as well as requesting the claimants and state to provide further evidence on such individuals.⁹⁴ The IACtHR has held that a victim should present a ‘birth certificate, death certificate, or identification card’ or appear before a competent national authority with similar evidence to support their claim.⁹⁵ In identifying further victims it may be worthwhile working with local intermediaries such as community leaders. In the *Moiwana Community* case the IACtHR accepted a statement before a competent state official by a recognised community leader as well as witness statements by two further individuals. The court accepted such statements as sufficient for evidencing the person’s identity and harm, given that the indigenous community did not possess any formal identification documentation and were not included in any national registry.⁹⁶

45. The ICC has in previous decisions on victim participation accepted official and non-official documentation of victims’ identity, such as school reports, passports,

⁹⁴ *Ituanga massacre v Colombia*, Judgment of 1 July 2006 (Preliminary Objections, Merits, Reparations and Costs), para 94; *Mapiripán massacre v Colombia*, Judgment of 15 September 2005, (Merits, Reparations, and Costs), para 255.

⁹⁵ *Plan de Sanchez massacre*, para 63; and *Mapiripán massacre*, para 257.

⁹⁶ *Moiwana Community v Suriname*, Judgment of 15 June 2005, (Preliminary Objections, Merits, Reparations and Costs), para 178.

student cards, birth certificates, driving licences and camp registration cards.⁹⁷ The Court has recognised that not all victims will have passports or official documents, as these are usually only owned by urban elites.⁹⁸ In the absence of these documents the Court has accepted signed statements by two credible witnesses, who have identification documents, on the identification of the undocumented individual.⁹⁹ This position reflects the reality that in times of conflict official documentation can be destroyed or unobtainable.

46. We would point out that eligibility for reparations requires more than providing sufficient evidence for identification of the victim, but also proof of the harm they suffered as a result of the crime of which Mr Katanga has been convicted. A *prima facie* burden of proof of identity is sufficient for victim applications to participate at the ICC, but it is insufficient for claiming reparations, given concerns over fraudulent claimants and the limited resources of the Trust Fund. In evidential terms the cases discussed on the IACtHR assert official identification or two credible witnesses' statements are necessary.¹⁰⁰ Further corroborating evidence would be required to connect the victim with the harm they suffered, such as medical records, death record, property damage record, or alternatively two credible witnesses.

47. It may be difficult for eligible victims in the *Katanga* case to provide sufficient evidence, as many were forcibly displaced from their homes. Internally displaced victims are often excluded from reparations due the burden of proof placed on

⁹⁷ *Prosecutor v Lubanga*, Decision on victim's participation, ICC-01/04-01/06-1119, 18 January 2008, para 87; *Prosecutor v Kony et al*, Decision on victim's application 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, ICC-02/04-01/05-282, 14 March 2008, para 6.

⁹⁸ ICC-02/04-01/05-282, para 5.

⁹⁹ ICC-01/04-01/06-1119, para 88.

¹⁰⁰ Carla Ferstman and Mariana Goetz, *Reparations before the International Criminal Court: The Early Jurisprudence on Victim Participation and its Impact on Future Reparations Proceedings*, in Ferstman et al, note 89, 313–350, p323. *Uganda Situation*, Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 of 10 August 2007, ICC-02/04-101, 10 August 2007, para 14.

applicants for identification.¹⁰¹ Article 13 of the Kampala Convention on internally displaced persons (IDPs) stipulates that State Parties are to facilitate the issuance of new documents necessary for the enjoyment and exercise of human rights where these have been lost or destroyed in the course of displacement; it also establishes that the failure to issue internally displaced persons with such documents should not in any way impair the exercise or enjoyment of these rights.¹⁰² In situations involving large numbers of victims both the IACtHR and the European Court of Human Rights (ECtHR) have relaxed the burden of proof for harm suffered. In cases of destruction of homes and properties by security forces in Turkey for example, the ECtHR assumed the existence of pecuniary damage when documentary evidence was lacking, awarding damages that were necessarily 'speculative and based on the principles of equity.'¹⁰³ Local market values have for example been used to determine the size of the award.¹⁰⁴

48. For personal harm both the IACtHR and the ECtHR have chosen not to impose a high evidential burden on victims, on the basis that it is reasonable to assume that anyone subjected to abuses that amount to gross violations of human rights and humanitarian law will experience moral suffering.¹⁰⁵ The IACtHR has stated in cases of mass violations that determination of probative evidence is 'not subject to the same formalities as domestic judicial actions' and the court pays 'special attention to the circumstances of the specific case and taking into account the limits imposed by the respect to legal security and the procedural balance of the parties.'¹⁰⁶ As noted by the Iraq-Kuwait UN Claims Commission the general

¹⁰¹ See for example: Internal Displacement Monitoring Centre and Norwegian Refugee Council, 'Peru: Reparations begin but IDPs excluded', 8 January 2009.

¹⁰² Article 13(2), African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), 22 October 2009.

¹⁰³ *Selçuk and Asker v Turkey*, Judgement of 24 April 1998, *Rep.* 1998-II, 915 para 106.

¹⁰⁴ Heidy Rombouts, Pietro Sardaro and Stef Vandeginste, *The Right to Reparation for Victims of Gross and Systematic Violations of Human Rights*, in Koen de Feyter, Stephan Parmentier, Marc Bossuyt, and Paul Lemmens (eds) *Out of the Ashes: Reparation for Victims of Gross Human Rights Violations*, 2006, Intersentia, p386.

¹⁰⁵ *Ibid*, 383.

¹⁰⁶ *Miguel Castro Castro Prison v Peru*, Merits, Reparations and Costs. Judgment 25 November 2006, Series C No.160 (IACtHR), para 184.

situation of emergency and breakdown of civil order, resulted in a scarcity of evidence meaning many victims would be unable to provide sufficient evidence to support their claims. The UNCC took a flexible approach requiring claimants to provide 'simply' documentation on the proof of the fact and the date of injury or death, i.e. *prima facia* proof.¹⁰⁷ For those claiming for property damage up to \$100,000 they had to be 'supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and the amount of the claimed loss', i.e. on the higher evidential burden of a balance of probabilities.¹⁰⁸

49. In such cases courts and tribunals have generally accepted the burden of proof to be *prima facie* or on the balance of probabilities. In cases of state violations, claimants need only show *prima facie* evidence of abuse with the burden of proof then placed on the state to prove that it is not responsible for such harm.¹⁰⁹ Human rights jurisprudence on evidential standards are of limited use in reparations before criminal courts, given that the state has sufficient resources to discharge such a reverse burden of proof, whereas convicted persons are unlikely to have the capacity to examine and provide evidence against hundreds or thousands of victims. Accordingly to ensure equality of arms and fair trial rights of both parties, the appropriate standard of proof for harm should be balance of probabilities. Although many victims were displaced and unlikely to have official records, the Court can allow corroboration of the victims' identity and harm through two credible witnesses or through the claimant appearing before a competent state official.

iii. Eligibility

50. Reparation programmes by states usually concentrate redress on those who are vulnerable and continue to suffer. Truth commissions in Timor Leste and Sierra Leone recommended that reparations should focus on those who suffered the most

¹⁰⁷ Recommendations made by the Panel of Commissioners Concerning Individual Claims for Serious Personal Injury or Death (Category "B" Claims), S/AC.26/1994/1 26 May 1994, at 34-5. Article 35(2)(b), UNCC Rules.

¹⁰⁸ Article 35(2)(c), UNCC Rules.

¹⁰⁹ *Aksoy v Turkey*, (Application no. 21987/93), 18 December 1996, para 61.

and as a result were made vulnerable, such as amputees, orphans, widows, victims of sexual violence, and victims of torture.¹¹⁰ The Registry report refers to the possibility of limited financial resources and asks whether awards should be distributed equally or distributed on the basis of harm and/or needs.¹¹¹ As stated by the IACtHR, 'every human act produces diverse consequences, some proximate and others remote'.¹¹² The TFV's limited resources mean the Court must consider carefully how to best address the harms suffered by victims as a result of Mr Katanga's crimes; it may not be possible to equally address all harms suffered.

51. The approach taken in the United States *Marcos* litigation case provides an example of how courts have sought to maximise the resources available while maintaining an appropriate balance between fairness and reparations that are in proportion to the gravity of the violation. Instead of holding separate hearings on over 10,000 claims, the U.S. District Court used a statistical and randomly selected sample of the claims to determine standard damage amounts to be awarded against the nature of the harm suffered, physical and mental injuries sustained, the age of the victim, material losses, and loss of earnings.¹¹³

52. The Appeals Chamber in *Lubanga* stipulated that reparations require a causal link between the crime and the harm suffered.¹¹⁴ The Appeals Chamber also noted, with reference to principles of non-discrimination, doing no harm and promoting reconciliation, that if the meaningfulness of reparation programmes depend on the inclusion of members of the wider community, it may be appropriate to consider doing so through the TFV's assistance mandate.¹¹⁵

¹¹⁰ *Chega! Commission for Reception, Truth and Reconciliation in East Timor (CAVR)*, (2005), §12.1; and Sierra Leone Truth and Reconciliation Commission Report Vol.II, Chapter 4, para 69-70.

¹¹¹ Report on applications for reparations in accordance with Trial Chamber II's Order of 27 August' ICC-01/04-01/07-3512-Anx1-Red2, 21 January 2015 §94 e

¹¹² *Aloeboetoe and others v Suriname*, Judgment of September 10, 1993 (Reparations and Costs), para 48.

¹¹³ *Hilao v Estate of Marcos*, 17 December 1996, 103 F.3d 767, (9th Cir. 1996) p782.

¹¹⁴ Judgement on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012 with AMENDED order for reparations, 3 March 2015, ICC-01/04-01/06-3129, para 211.

¹¹⁵ *Ibid.*, para 215.

53. With respect to identifying the harm caused to direct and indirect victims as a result of the crimes of which Mr Katanga is convicted, it may prove important to tie the element of causality to an analysis that clearly distinguishes harms caused directly by the acts themselves from other underlying elements which may have exacerbated the harm caused directly or occurred at the same time (such as general insecurity, land conflicts or poverty). As has been highlighted elsewhere, for example in relation to the Peruvian Comprehensive Reparations Programme, this can help minimise the risk that reparations lead both to frustrations amongst individuals who suffer from similar problems, but are not included in a programme, as well as the loss of the recognition element of reparations.¹¹⁶
54. Mr Katanga is convicted of murder as a crime against humanity and murder, attacking a civilian population, destruction of property and pillaging as war crimes. To focus on those most vulnerable the Court could prioritise based on harm suffered, i.e. next of kin of those murdered, and victims who were seriously injured and suffered sexual violence as part of the attack on the civilian population in Bogoro. This category of victims are generally prioritised over those who lost property or their homes, i.e. those who were forcibly displaced, as they may have suffered more acute harm, and moreover may be facing serious economic consequences as a result, for example through the loss of a bread winner or the creation of a disability which prevents them from working. Moreover, those who are forcibly displaced or have lost property are likely to be in larger numbers. The Court may need to prioritise resources to address those with the most acute needs.
55. The findings of the Kenyan Truth, Justice and Reconciliation Commission may be helpful in such circumstances. The Commission recommended that reparations be organised with victims of gross violations of human rights placed into the following categories: (1) violations of the right to life; (2) violations to the right to personal integrity, including sexual or gender based violence; (3) forcible transfer

¹¹⁶ See Lisa Magarrell, Reparations for massive or widespread human rights violations: Sorting out claims for reparations and social justice, *Windsor Yearbook of Access to Justice* 22 (2003) 85–98, p94.

of populations; (4) historical and contemporary land injustices; and (5) systematic marginalisation. The Commission then prioritised victims in categories 1 and 2 as those most vulnerable as Priority A, including those in category 3 who had died as a result of displacement. Victims in the Priority A group would be eligible for monetary compensation through a ten year annual pension, as well as medical and psychological vouchers to fund rehabilitation.¹¹⁷ All victims in the five categories are entitled to collective reparations, with victims in Priority B only able to claim collective reparations. These collective reparations are to address the 'policies and practices that negatives impacted entire groups of people', and include measures such as apologies, memorials, micro-financing for business opportunities, health services, counselling, or skill training, as well as land restitution or resettlement for those displaced.¹¹⁸

56. Similarly in the Philippines priority for reparations is organised based on a point system ranging from 1-10. Victims who died or disappeared and are still missing are given 10 points; victims who were tortured and/or raped or sexually abused are given 6-9 points; victims who were detained are given 3-5 points; and victims who suffered from involuntary exile caused by intimidation, forceful takeover of businesses and property, or kidnapping would get 1-2 points.¹¹⁹ The reparations board has discretion to determine points for each victim taking into account the type of violation, its frequency and duration. Both the Kenyan and Philippines experience can provide some guidance to the Court in prioritising reparations to those who have suffered the most.

iv. Apportionment

57. Apportionment relates to how individual compensation awards can be divided amongst next-of-kin of those who were killed or seriously injured and subsequently died. In cases of mass atrocities, the direct victims may have been

¹¹⁷ Final Report of Truth, Justice and Reconciliation Commission, Vol. IV (2013), p97–122.

¹¹⁸ Ibid., p107-8.

¹¹⁹ S.19, Act Providing for Reparation and Recognition of Victims of Human Rights Violations during the Marcos Regime, Documentation of Said Violations, Appropriating Funds Therefor and for Other Purposes, Republic Act No. 10368, 25 February 2013.

killed leaving a number of indirect victims as next-of-kin or dependants. In Chile reparations were allocated according to a standard formula whereby the pension for a person disappeared or killed was apportioned as 40% for a surviving spouse, 30% for a mother or father in the absence of a surviving spouse, 15% for the mother or father of victim's biological children and 15% for each child of a victim.¹²⁰ Such objective standards may streamline the reparation determination process. That said apportionment of reparations does not have to follow domestic inheritance law. The Moroccan Equity and Reconciliation Commission (IER) departed from sharia-based inheritance law to give a larger percentage to widows (40% rather than 12.5%) instead of the eldest son.¹²¹ In Peru the Comisión de la Verdad y Reconciliación (CVR) prioritised compensation to the spouse or widow, over children and parents. This amount was to be split with the spouse or cohabitee partner to obtain not less than 2/5, with 2/5 for children (to be equally divided), and not less than 1/5 for the parents (equally divided).¹²²

58. In the Swiss Bank Holocaust settlement it was recognised that given the limited nature of the funds, not all heirs for the purpose of personal injury claims should be eligible for compensation, as it would otherwise dilute the amount of money available to those directly harmed.¹²³ Recognition of eligible victims can be sensitive to such surviving heirs' needs. For children of those disappeared the Chilean National Corporation of Reparation and Reconciliation provided a pension, as well as military service waivers and education support, including university fees and expenses.¹²⁴ Such reparations, while not fully remedying the

¹²⁰ Article 20, Law 19.123, Establishes the National Corporation for Reparation and Reconciliation and Grants other Benefits to Persons as Indicated, Official Gazette No. 34 (188), 8, February 1992.

¹²¹ Rubin-Marín note 18, p17. In Chile Article 20, Law 19.123, Establishes the National Corporation for Reparation and Reconciliation and Grants other Benefits to Persons as Indicated, Official Gazette No.34 (188), 8 February 1992.

¹²² Comisión de la Verdad y Reconciliación (CVR), 27 August 2003, p190-191, available at: <http://www.cverdad.org.pe/ifinal/pdf/TOMO%20IX/2.2.%20PIR.pdf>

¹²³ Judah Gribetz and Shari C. Reig, The Swiss Banks Holocaust Settlement, in Ferstman et al, note 89, 115-142.

¹²⁴ Law 19.123, 8 February 1992; educational scholarships were made transferrable to grandchildren under Law 20.405, 10 December 2009. Ernesto Verdeja, A Normative Theory of Reparations in Transitional Democracies, *Metaphilosophy* 37(3/4) (2006), 449-469, at 459.

past, do allow victims and their families new opportunities. Accordingly, reparations are generally limited to first the surviving spouse, then children and parents (if the deceased had no children). The challenge is to delineate those who have been harmed and continue to need redress, while balancing the need with the amount of resources available for reparations.

d. The role of the Trust Fund for Victims (TFV)

59. The Trust Fund for Victims (TFV) plays an important support function in facilitating reparations ordered by the ICC, as well as broader assistance to victims in a situation. Pursuant to Article 79 of the Rome Statute the Trust Fund's primary mandate is to support and implement measures and initiatives to respond to and deal with harms and suffering resulting from crimes covered by the Rome Statute.¹²⁵ To contribute to achieving this mission, the TFV's mandate is two-fold:

- (i) to implement Court-ordered reparations;
- (ii) to provide physical, psychological, and material support to victims and their families.

Through these specific measures, the Trust Fund aims to contribute to long-lasting peace through *inter alia* promoting reconciliation.

i. Reparations and the TFV

60. Reparations awards by the ICC are directly linked to and dependent on a conviction and a guilty verdict, and only apply to groups of victims who procedurally participate in proceedings by claiming reparations. Furthermore, court-ordered reparations are necessarily limited to the crimes recognised in the prosecution and conviction of the accused. Victims' eligibility for ICC reparations is therefore dependent 'on whether the crimes they suffered from are charged and successfully prosecuted, as well as being able to sufficiently evidence their harm.'¹²⁶

Therefore, only a very limited number of (individual) victims will generally be

¹²⁵ Article 79, Rome Statute.

¹²⁶ Moffett note 91, p375.

capable to demand and receive reparations from the court, and often only years or even decades after the crimes were committed.¹²⁷

61. It remains important for victims to be able to participate before the ICC in the development of reparations in the *Katanga* case, rather than such implementation being delivered alone by the Trust Fund. This is based on the more transparent and accessible participatory rights available to victims through the Court, including the right of appeal, which are absent from the TFV. As argued by victim legal representatives in the *Lubanga* case delegating the design and delivery solely to the Trust Fund undermined victims' rights and agency in shaping meaningful reparations.¹²⁸

62. Consequentially, it can be assumed that reparations ordered by the ICC and delivered through the TFV are unlikely to effectively remedy all victims harmed by the crimes under consideration.¹²⁹ Rather, complementary state reparation programmes and community-based support with the Trust Fund's assistance mandate has the potential to benefit a wider group of affected communities, including victims of other atrocities.

ii. The Trust Fund's secondary assistance mandate

63. Against this background, the Trust Fund's second mandate becomes of fundamental importance in more holistically delivering redress and remedy for conflict-affected communities in an inclusive manner. The TFV's assistance mandate enables victims of crimes in a situation and their families who have suffered physical, psychological and/or material harm as result of war crimes, to receive assistance independent from, and prior to, a conviction by the Court.

64. Specifically, the assistance mandate consists of three forms of support:

¹²⁷ *ibid.*

¹²⁸ Observations of the Vo2 Team of Legal Representatives of Victims in Accordance with Directions, ICC 01/04 01/06-2923, ICC-01/04-01/06-2931-Corr-tENG, 19 October 2012, paras 19–22.

¹²⁹ Moffett note 91, p375.

- I. Physical Rehabilitation: To address the care and rehabilitation of those victims who have suffered physical injury; to recover and resume their roles as productive and contributing members of their societies.
- II. Psychological Rehabilitation: To offer psychological, social and other health benefits; to assist in the recovery of victims, and to educate local populations about the needs of victims.
- III. Material Support: To improve the economic status of victims as a means to assist in their recovery.

65. The key difference between the assistance and reparations mandates is that reparations serve to directly acknowledge victims' harms and are ordered against a convicted person, and are therefore linked to accountability. Whereas the assistance mandate lacks the element of responsibility, therefore applying to a wider population of victims and conflict-affected communities.¹³⁰

66. This ultimately covers a wider category of beneficiaries than the limited numbers of victims eligible to demand and receive reparations.¹³¹ Regarding the wider scope of potential beneficiaries of assistance activities, these are primarily selected based upon demographic information, and consultation with victims in order to identify those most vulnerable and those most in need.¹³² Time wise, the second mandate of the TFV is likewise more flexible by not being dependent on and tied to a conviction. Therefore, under its second mandate of assistance, the TFV is capable of providing support to a wider group of victims and potential beneficiaries, which is crucial in holistically redressing harms of conflict-affected communities and aiding reconciliation processes.

iii. Reparations, the TFV and Reconciliation

67. Reparations in conjunction with assistance to victims are crucial in repairing the harm suffered by victims and survivors of violence, and are expected to aid post-

¹³⁰ Ibid., p373.

¹³¹ Ibid.

¹³² Regulations 60 and 61, TFV Regulations.

conflict reconciliation processes. However, what is important to remember is that collective and individual reparations, as well as wider community-based assistance measures under the TFV mandate, are not mutually exclusive, but should rather be interpreted as complementary to each other, and should consequentially be implemented as such.

68. Community-based assistance measures can be seen as directly supporting reparations, such as community sensitisation on victimisation, community health centres or counselling facilitates. In fact, only providing individual reparations linked to individual responsibility without any additional collective support initiatives would be unlikely to sufficiently respond to all or most victims' harms.¹³³ Therefore, such assistance measures must be seen as complementary measures in addition to individual reparations, rather than alternatives to it, which aim to ensure effective remedies for wider groups of victims.¹³⁴

69. Specifically, under the rubric of psychological rehabilitation and in line with its mandate to educate local populations, the TFV can provide assistance to victims by implementing sensitization measures directed at the wider communities to clarify and explain the awarding of reparations to individual victims. Such sensitization and outreach campaigns should aim to be accessible to groups and communities throughout the conflict-affected areas. By ensuring that wider conflict-affected communities have an understanding as to why and how individual victims received monetary compensation or individual reparations, such activities would aim at easing community-based tensions, therefore aiding community relations and reconciliation while avoiding any perceived hierarchies of victims or of suffering. Alternative community-based assistance measures, which could fall under the TFV's second mandate, could be designed to provide support for victims and aid reconciliation processes, such as education scholarships for conflict-affected communities. Likewise, the TFV's assistance mandate could provide

¹³³ Moffett note 91, p375.

¹³⁴ Ibid., p378.

physical and psychological rehabilitation to assist groups or entire communities of victims and conflict-affected populations without any explicit acknowledgement of their suffering linked to criminal responsibility of the accused.

70. The Trust Fund could also make a special call for voluntary contributions for earmarked projects from donors to be made to affected communities that are subject to ICC reparation orders, such as Bogoro.¹³⁵ The assistance mandate is to any victim in a situation, not limited to particular sites of crimes or victims, restricting the Trust Fund's flexibility in providing assistance where needed. Moreover, assistance by the TFV is not meant to pre-determine any issue of responsibility before the ICC.¹³⁶ Yet given that Mr Katanga's responsibility has been determined by the Court, such assistance may be a valuable way of widening the benefits of justice at the ICC and reduce tension of reparations to individual victims.¹³⁷ It will be up to the Court in consultation with the TFV and the victim legal representatives as to whether or not such an approach is possible in using the assistance mandate to complement reparations ordered by the ICC.

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

¹³⁵ Regulation 27, TFV Regulations, ICC-ASP/4/Res.3, as amended by ICC-ASP/6/Res.3.

¹³⁶ Regulation 50(a), TFV Regulations.

¹³⁷ *Lubanga*, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012, ICC-01/04-01/06-2904, para 199.

e. State cooperation

72. State Parties under the Rome Statute are obliged to cooperate with the Court in terms of the enforcement of reparations.¹³⁸ The ICC cannot deliver justice or reparations to all victims in the DRC situation. The responsibility of delivering justice and reparations rests with states. As the Rome Statute does not give the ICC jurisdiction over states for reparations, the Court can call upon states to complement reparations ordered in each case.¹³⁹ Moreover, given that most of the violence in eastern DRC occurred before the establishment of the ICC in 2002, a national reparations programme can be more inclusive in terms of eligible victims and forms of reparations than the ICC. In addition, the Congolese government is best placed to prevent the recurrence of violence and tackle the causes of victimisation.

73. Criminal trials narrow responsibility of international crimes to an individual with victims' claims being at the end of proceedings, dependent on the conviction of the accused. The conflict in eastern DRC, including in the Ituri region, has different levels of responsibility, as it involves both national and regional non-state and state actors.¹⁴⁰ The UN Mapping Report into the most serious violations of human rights and humanitarian law in DRC provides recommendations on the components of a comprehensive national reparations programme.¹⁴¹ The UN Mapping Report also suggests that support from the international community would be necessary to implement such a national reparation programme. Reparations ordered in the *Katanga* and other cases in Ituri can contribute to transitional justice in eastern DRC,

¹³⁸ Parts 9 and 10, Rome Statute.

¹³⁹ Moffett note 91. During drafting of the Rome Statute drafters recognised that the state was in the best place to provide reparations for victims, and the principles ordered by the ICC would be implemented by State Parties. See *Réparations dues aux victimes: Intervention de la France*, Rome Conference, 17 March 1998, p3; and Draft Article 43(3)(c), Proposal Submitted by Egypt for Article 43, A/ AC.249/WP.11, 19 August 1996.

¹⁴⁰ See Case Concerning Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v Uganda*), Judgment of 19 December 2005.

¹⁴¹ United Nations High Commission for Human Rights, 'Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003', June 2010, 487-499.

but are only a small part in a much-needed national process. Reparations ordered in the *Katanga* could perhaps offer a focal point on the necessity of such a national programme.

74. Although we support victims' claims for individual reparations, we are acutely aware that such payment of compensation to only the victims in the *Katanga* case and not other victims in Ituri or eastern DRC has the potential to cause resentment. Paying money to certain individuals over others creates a hierarchy of victimhood, where some victims are seen as more deserving of redress than others. The ICC can do little to militate against this, as it is mandated to provide reparations to victims in a case where an individual has been convicted. However the ICC is bound under Article 68(3) to protect victims before the Court, including reparation proceedings and implementation, requiring cooperation of the DRC government and utilisation of the Victims and Witnesses Unit. Perhaps the Trust Fund through its community sensitisation programme can explain to affected communities the decision by the Court in this case and others.

75. These views reflect the victims' legal representative response to the Registry's report, which suggests that reparations ordered by the ICC should be complemented by a national reparation process by the DRC government, which itself could also make a donation to the Trust Fund.¹⁴² Moreover, given that Mr Katanga was commander of the FRPI militia, which collectively committed the massacre in Bogoro with other armed groups, the DRC government may be able to trace and seize assets of former FRPI members to be provided to the Trust Fund. Assets of former non-state armed groups as well as state contributions have been used in Colombia to fund reparations to victims of paramilitary groups.¹⁴³ The

¹⁴² 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), ICC-01/04-01/07-3514, 27 janvier 2015, para 49.

¹⁴³ Article 42, Justice and Peace Law 975 (2005). See Luke Moffett, Beyond Attribution: Responsibility of Armed Non-State Actors for Reparations in Northern Ireland, Colombia and Uganda, in N. Gal-Or, C. Ryngaert, and M. Noortmann (eds.), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place: Theoretical Considerations and Empirical Findings*, Brill 2015.

Rome Statute provides for such cooperation in terms of reparations under Article 93(1)(k) and (l) on 'other cooperation'. In addition, Article 93(1)(g) on 'the exhumation and examination of grave sites' could also be important for measures of satisfaction ordered by the ICC in identifying and returning the bodies of victims to their next of kin. Notably, Article 93(1) on cooperation with the ICC stipulates that State Parties 'shall' comply with any requests made by the Court under this article, and could be an important way for ensuring reparative complementarity.

f. Acknowledgement of responsibility and apology

76. Acknowledgement of responsibility and apology can be an important complement to individual forms of reparations. In June 2014 Mr Katanga's defence attached to the notification of discontinuation of appeal a signed statement of regret by Mr Katanga himself for the crimes he committed, and an apology to the victims of Bogoro stating:

'J'accepte les conclusions rendues à mon encontre dans ce Jugement et j'exprime mes sincères regrets à tous ceux qui ont souffert en raison de ma conduite, y compris les victimes des Bogoro.'¹⁴⁴

77. The rest of this sub-section explores how a more effective acknowledgement of responsibility and apology by Mr Katanga could be made to satisfy victims.

i. Acknowledgement of responsibility

78. Pablo de Greiff states that 'in order for something to count as reparation, as a justice measure, it has to be accompanied by an acknowledgement of responsibility and it has to be linked, precisely, with truth, justice, and guarantees.'¹⁴⁵ A failure to include acknowledgement of responsibility within a comprehensive programme of reparations – even if those programmes have generous compensation packages – often fail to satisfy victims.¹⁴⁶ If individual compensation awards are not

¹⁴⁴ Defence Notice of Discontinuance of Appeal against the 'Jugement rendu en application de l'article 74 du Statut' rendered by Trial Chamber II on 7 April 2014, Annex 1, ICC-01/04-01/07-3497-AnxA, 25 June 2014.

¹⁴⁵ Report by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, A/69/518, 8 October 2014, para 4.

¹⁴⁶ International Center for Transitional Justice (ICTJ), Canada: Submission to the Universal Periodic Review of the UN Human Rights Council Fourth Session, (2008).

accompanied with acknowledgement of responsibility, they can appear as simply 'blood money' to buy victims' silence.¹⁴⁷

79. Of course the power of acknowledgement is limited and will never bring back the dead or necessarily heal the pain of survivors.¹⁴⁸ However the premise remains: acknowledgement of responsibility to make reparations based on past wrongdoing is necessary if such measures are to be legitimate and a form of accountability.¹⁴⁹ In the case of *Aloeboetoe et al.* the Inter-American Court made it clear that the Suriname government's acceptance of its responsibility was 'a significant and important form of reparation and moral satisfaction for the families of the victims.'¹⁵⁰

80. While reparations may be seen as fulfilling the legal maxim of *ubi jus ibi remedium* - for the violation of every right, there must be a remedy - acknowledgement of responsibility adds a symbolic and psychological function to making reparations. In relation to Bosnia and Herzegovina Brown and Cehajic remark that the establishment of a reparations programme will be made easier if the group making the reparations 'perceive that they have some responsibility for, or control over, their ingroup's misdeeds or the subsequent repercussions of those misdeeds.'¹⁵¹ Yet undue haste to acknowledge responsibility with a view to closing the chapter on the past might 'make survivors feel that reparations are being used to buy their silence and put a stop to their continuing quest for truth and justice.'¹⁵²

¹⁴⁷ Mark Osiel, "Transitional Justice" in Israel/Palestine? Symbolism and Materialism in Reparations for Mass Violence, *Ethics and International Affairs* (2015 forthcoming); and Claire Moon, "Who'll Pay Reparations on My Soul?" Compensation, Social Control and Social Suffering, 21 *Social Legal Studies* (2012) 187.

¹⁴⁸ Brandon Hamber and Richard Wilson, (2002) Symbolic closure through memory, reparation and revenge in post-conflict societies, *Journal of Human Rights*, 1 (1), 35-53.

¹⁴⁹ Gray, D.C., No-Excuse Approach to Transitional Justice: Reparations as Tools of Extraordinary Justice, *A. Wash. U.L. Rev.* 87 (2009) 1043, p1071.

¹⁵⁰ Judgment of 10 September 1993, Inter-Am. Ct. H.R. (Ser. C) No. 15, para 63.

¹⁵¹ Rupert Brown and Sabina Cehajic, Dealing with the past and facing the future: Mediators of the effects of collective guilt and shame in Bosnia and Herzegovina, *European Journal of Social Psychology* 38 (4) (2008), 669-684, p671.

¹⁵² Hamber and Wilson, note 148, p46.

81. For many victims of international crimes simply granting reparations as symbolic acknowledgment of their suffering is not enough. An acknowledgment of responsibility by those who caused the victims' harm is needed. In Chile a group of the families of disappeared detainees known as *La Agrupacion de Familiares de Detenidos Desaparecidos* maintained that 'we can only agree with the reparation policies on the understanding that the state assumes its responsibility for the harm done by the actions of its agents during the dictatorship. This would be the only way of restoring rights to the victims.'¹⁵³ This acknowledgement has never been received as the Chilean armed forces and Supreme Court rejected the truth commission's report. Similarly Turkey's Compensation Law 5233 (The Law on the Compensation of Damages that Occurred Due to Terror and the Fight Against Terror) offered reparations in the form of material compensation although it offered no support for those suffering trauma as result of the government's violations of human rights and makes no allusion to acknowledging responsibility for past wrongs.¹⁵⁴

82. The inclusion of an acknowledgement of responsibility as an integral part of a reparations programme can appear somewhat idealistic. However, experience of reparations programmes indicates that the absence of public acknowledgement that a wrong has been committed by those responsible, leaves victims of atrocities at best the beneficiaries of an administrative programme of compensation payments, without any sense of the reason for their victimhood being explicitly stated. At worst, reparations schemes become an opportunity to buy-off victims and render them mute in terms of further opportunities for truth-recovery and justice. On a societal level, a lack of acknowledgement may allow a society to close the chapter on a violent past. However, this lack of discourse about the roots of that violence may be the spark for further violence in the future.

¹⁵³ *La Agrupacion de Familiares de Detenidos Desaparecidos* (1991) Resumen de actividades año 1991. English translation in Elizabeth Lira, *The Reparations Policy for Human Rights Violations in Chile*, in de Greiff note 21, 55-101, p58.

¹⁵⁴ Edward Tawil, *Property Rights in Kosovo: A Haunting Legacy of a Society in Transition*, International Center for Transitional Justice (2009).

ii. Apologies

83. As with acknowledgments of responsibility, apologies are rarely made, due to perpetrators wanting to deny responsibility, to perpetuate their narrative of the conflict and to avoid implicating themselves further. Even when apologies are made in criminal proceedings, they may be perceived as lacking sincerity, due to criminal and appeal proceedings being complete or if it appears the apology is made in order to obtain a reduced sentence. Yet, acknowledgment of responsibility and apology by the convicted person can play an important role in addressing the moral and psychological needs for victims, especially through their contribution to the restoration of their dignity and self-respect.¹⁵⁵ Their value as a means of providing a remedy to victims is acknowledged in the UN's Basic Principles of Reparation, with apologies including acknowledgement of the facts and acceptance of responsibility.¹⁵⁶

84. An apology serves as a *remorseful* acknowledgement of responsibility for past wrongdoing.¹⁵⁷ It does not undo the physical or economic harm caused, but it symbolically and publicly affirms victims' suffering and experience as unjustifiable crimes. An apology without follow up reparations may be seen as insincere or incomplete, it is therefore advisable that any statements of apology made by Katanga are included within the context of a wider range of reparations.¹⁵⁸

85. Since the 1990s, there has been growing interest in the value of apologies as a means of promoting accountability and reconciliation, and modern history is replete with examples of those that have been largely successful,¹⁵⁹ and those that

¹⁵⁵ J. B. Hatch, *Race and Reconciliation: Redressing Wounds of Injustice* (Lexington Books, Plymouth, 2010), p189.

¹⁵⁶ Principle 22(e), A/RES/60/147.

¹⁵⁷ F Lenzerini, *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press, Oxford, 2008), p119.

¹⁵⁸ C.W. Blatz, K. Schumann, and M. Ross, 'Government Apologies for Historical Injustices,' 30 *Political Psychology* (2009), p233.

¹⁵⁹ E.g. Stefaans Coetzee's apology for his part in a 1996 bombing in South Africa, J. Brankovic, *Responsabilidad y Reconciliación Nacional en Sudáfrica*, 2 *Ediciones InfoJus: Derechos Humanos* 4 (2013)

have been less so.¹⁶⁰ Studies into what makes an apology successful have revealed a number of common factors that may influence the impact an apology has, with desirable tenets including: timeliness,¹⁶¹ explicit statements of apology and regret,¹⁶² an acceptance of personal responsibility,¹⁶³ the avoidance of offensive explanations¹⁶⁴ or excuses,¹⁶⁵ sincerity,¹⁶⁶ willingness to make amends and promises to avoid future transgressions.¹⁶⁷

86. Thus far, it appears that Katanga's apology has been found to be inadequate for victims, and the Registry's Report suggests that some victims were angry and emotional at his apology.¹⁶⁸ It appears that more effort is required to carefully craft an apology that is acceptable to those affected. Lessons may be drawn from successful apologies and the studies highlighted above. It may also be beneficial, if possible, to arrange for dialogue to occur between Katanga and victims or their representatives. This would enable the shaping of an apology more specifically suited to the needs of those affected, and would allow for Mr Katanga's acknowledgement of his victims' narrative and experiences of harm. The benefit of such a dialogue has been evidenced for example by the reconciliation that occurred between Stefaans Coetzee and the victims of his bomb attack in South

55; Adriaan Vlok's apology to the Reverend Frank Chikane for atrocities committed during the apartheid era, M. Swart, *Sorry Seems to be the Hardest Word: Apology as a Form of Symbolic Reparation*, 24 *South African Journal on Human Rights* 51 (2008); David Cameron's apology for Bloody Sunday, House of Commons Debate, Column 739-742, 15 June 2010. Available at: <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm100615/debtext/100615-0004.htm>

¹⁶⁰ E.g. Kaing Guek Eav alias Duch's apologies for the atrocities committed in S-21, A. Ryano, *Exploring the Role of Apology in Cambodia's Reconciliation Process*, in B Charbonneau and G Parent, *Peacebuilding, Memory and Reconciliation: Bridging Top-Down and Bottom Up Approaches* (Routledge, 2011); F.W. De Klerk's apology to the South African Truth and Reconciliation Commission, T. Govier and W. Verwoerd, *The Promise and Pitfalls of Apology*, (2002) 33(1) *Journal of Social Philosophy* 67

¹⁶¹ C Ancarno, 'Press Representations of Successful Public Apologies in Britain and France,' 3 *University of Reading Language Studies Working Papers* (2011) 38.

¹⁶² Hatch note 155, p189.

¹⁶³ M.R. Marrus, 'Official apologies and the quest for historical justice' 6 *Journal of Human Rights* (2007) 75.

¹⁶⁴ C Ancarno, note 161.

¹⁶⁵ N Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation* (Stanford University Press, Stanford, 1991), p17.

¹⁶⁶ M. Cunningham, *Saying sorry: the politics of apology*, 70 *The Political Quarterly* (1999) 285.

¹⁶⁷ Marrus, note 163.

¹⁶⁸ Registry's Report, para 18 and 28.

Africa. A key component in this case was the dialogue that occurred between Stefaans and the victims, leading to his acknowledgment and apology for the specific harms they experienced.¹⁶⁹ It may also be that Katanga's apology is too brief and ambiguous. We contrast this to more comprehensive apology made by UK Prime Minister David Cameron in 2010 over the Bloody Sunday massacre, where he acknowledged the specific wrongs done and the suffering of victims.¹⁷⁰

87. As mentioned above, an apology and acknowledgement of responsibility can be accompanied by other measures of satisfaction, a move that can enhance both the apology and the other measures. In this case, as well as the apology and other forms of collective and individual reparations, it might be that Katanga could make a full public disclosure as to what happened on the 24th February 2003 in Bogoro, as Jean Kambanda did at the ICTR,¹⁷¹ write individual letters of apology to each victim,¹⁷² or call upon all Lendu and Ngiti militias to renounce violence. Of course the trial against Katanga only found him responsible for certain offences, whereas other charges for sexual violence were found to have insufficient evidence. To fully atone and apologise for harm caused, Mr Katanga should perhaps address these other crimes committed by his militia. Nevertheless, it must be acknowledged that he may have legal concerns that admitting responsibility for further crimes may be to his detriment. There are ways to avoid admissions of full responsibility within apologies, as demonstrated by F. W. De Klerk's apology to black South Africans during the Truth and Reconciliation process,¹⁷³ and Nuon Chea and Khieu Samphan's statements of apology to victims of the Khmer Rouge during their trial at the ECCC.¹⁷⁴ However, the risk is then that, as in those cases,

¹⁶⁹ See note 159.

¹⁷⁰ Ibid.

¹⁷¹ *Prosecutor v Jean Kambanda*, ICTR 97-23-S, 4 September 1998, para 50.

¹⁷² Report by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, A/69/518, 8 October 2014, para 33.

¹⁷³ M. Swart, Sorry Seems to be the Hardest Word: Apology as a Form of Symbolic Reparation, *South African Journal on Human Rights* 24 (2008) 51; T. Govier and W. Verwoerd, 'The Promise and Pitfalls of Apology', *Journal of Social Philosophy* 33(1) (2002) 67.

¹⁷⁴ 'Khmer Rouge leader Nuon Chea expresses 'remorse'', BBC News, available at www.bbc.co.uk/news/world-asia-22726373

the apologies will not be widely accepted by the victim populations. Again, the need for an apology to be thought out and carefully constructed is highlighted.

88. The means of distributing the apology should also be considered. Mr Katanga's apology was placed in the annex to discontinuation of appeal proceedings. Such a discrete apology is unlikely to be accessible to victims in the case. In Cambodia apologies and acknowledgements of responsibility by Kaing Guek Eav *alias* Duch have been made available by the ECCC as part of their reparations.¹⁷⁵ A similar project could perhaps be undertaken by the Trust Fund, if Mr Katanga makes any further apologies. Such apologies should be recorded in a way that ensures they are accessible to as many victims as possible, perhaps through the creation of a recording, which can be shown to victims, allowing for public debate and for them to ask questions of the Trust Fund and their legal representatives. The provision of written copies that the victims can keep would also be beneficial.

89. It may be the case that no form of apology will be sufficient for victims. Forgiveness and the acceptance of apologies are private and personal choices that cannot be expected, particularly in cases of international crime, where the nature of the offense may be too severe to allow for forgiveness in the eyes of the victims.¹⁷⁶ Indeed, there should be no suggestion to the victims that forgiveness is necessary, as to do so may lead to them feeling obliged or burdened by the apology, as was shown to be the case for some participants in the South African Truth and Reconciliation Commission.¹⁷⁷ However, an apology may be of benefit to a victim even if they do not feel capable of full forgiveness, and may therefore

¹⁷⁵ Available here: <http://www.eccc.gov.kh/en/video/apology>

¹⁷⁶ See for example the reactions of survivors of S-21 to the apologies of Duch, as expressed to Terith Chy of the Documentation Center of Cambodia, available at www.dccam.org/Projects/Tribunal_Response_Team/Victim_Participation/PDF/Victims'_Reactions_to_Duch_apology.pdf.

¹⁷⁷ See e.g. the words of Kalu, quoted in C Villa-Vicencio, Living in the wake of the Truth and Reconciliation Commission: A Retroactive Reflection, *Law Democracy and Development* 3(2) (1999) 195-207: "What makes me angry about the TRC and Tutu is that they are putting pressure on me to forgive I don't know if I will ever be able to forgive. I carry this ball of anger within me and I don't know where to begin dealing with it. The oppression was bad, but what is much worse, what makes me even angrier, is that they are trying to dictate my forgiveness".

still contribute to the reconciliatory goals of the Trust Fund.¹⁷⁸ Reparations at the ICC as judicial orders aimed at ensuring accountability may mean that apologies for the purposes of reconciliation and prevention of violence are secondary concerns. However, we would argue that an apology, while it has to be voluntarily made by Mr Katanga, could serve an important accountability function by publicly and specifically acknowledging his wrongdoing to the victims in the case.

IV. Final remarks

90. Throughout our submission we have emphasised the principle of effective victim participation, choice and consent. Moreover, we support the Appeals Chamber position in the *Lubanga* case that reparations are about accountability at the ICC, not reconciliation. In light of both these points and the express views of victims in the Registry's Report we have suggested the need for compensation to be made to eligible individual victims. Although the Trust Fund is likely to be responsible for delivering reparations, based on Mr Katanga's indigence, we suggest that the Rules of Procedure and Evidence do not prevent individual compensation to be made through the Trust Fund.

91. Although Mr Katanga's apology has been upsetting for some victims or seen as insincere, we have discussed at length the importance of a fuller acknowledgement of responsibility and apology by Mr Katanga as necessary in complementing individual and/or collective reparations. Without such an acknowledgement of responsibility and apology, individual compensation may be seen as paying off victims, without contributing to wider accountability goals of reparations in providing an official narrative of the massacre in Bogoro and publicly declaring the unjustified and wrongful nature of the crimes that occurred there. Although we have discussed the experiences in a number of countries in delivering reparations, the ICC can be creative in ordering bespoke measures crafted in consultation with victims. Accordingly, reparations at the ICC will be effective and meaningful for

¹⁷⁸ M La Caze, *The Asymmetry between Apology and Forgiveness*, 5 *Contemporary Political Theory* 4 (2006) p448.

those victims before the Court where victims' views are considered in shaping appropriate reparations.



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Dated this 14th May 2015

At Belfast, Northern Ireland