

Victims' Right to Reparation in Light of Institutional and Financial Challenges

The International Criminal Court and the Reparation for the Victims of the Bogoro Massacre*

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Abstract

*The aim of the article is the presentation of the recently issued documents – the 'Order for reparation' issued by the Trial Chamber II of the ICC and the document called 'Notification', recently adopted by the Trust Fund for Victims of the ICC – which are important first and foremost in the reparation procedure of the victims of the Bogoro massacre, subsequent to the case *The Prosecutor v. Germain Katanga*. Second, these documents will also have a considerable impact on the reparation procedures to be carried out by the ICC in the future. The reader can also see the interactions between classic sources of public international law and those norms which are very difficult to be characterized legally but without a doubt play a very important role during the procedure.*

Keywords: Bogoro massacre (DRC), International Criminal Court, Katanga case, reparation, victims.

1. Introduction

The aim of this study is to present two legal documents recently issued by one of the Chambers of the ICC and by the Trust Fund for Victims, first and foremost significant in the reparation procedure of the case of the *Prosecutor v. Germain Katanga*, i.e. the reparation of the victims of the massacre perpetrated on 24 February 2003 in an East Congolese village called Bogoro. There is reason to believe that these legal documents will have an impact on reparation procedures in the future. The reader can also see the interactions between classic sources of public international law and norms which can hardly be described in our common legal terms, but which still play a very important role during the procedure.

* The article has been written in personal capacity; the thoughts expressed hereby cannot be attributed to the International Criminal Court.

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The two documents analysed in this article are the *Order for Reparation*¹ issued by the Trial Chamber II, and the document called *Notification*,² recently adopted by the Trust Fund for Victims.

2. Underlying Facts and Antecedents

The antecedents go back to the massacre of the village of Bogoro in the north-eastern Ituri region of the Democratic Republic of Congo, which occurred on 24 February 2003 and was perpetrated by militias made up of Lendu³ and Ngiti⁴ origin. The victims belonged mostly to the Hema community. Two persons, Germain Katanga and Ngudjulo Chui were charged with these crimes by the prosecutor, both being named as alleged leaders of their respective armed militia at the time of the massacre. During the criminal trial, however, doubts emerged *inter alia* as to the exact coincidence of the accused parties' alleged commanding position and the date 24 February 2003. Finally, Ngudjulo Chui profited from the 'benefit of the doubt' principle and was acquitted,⁵ while Germain Katanga was found guilty⁶; however, not under 'commandant responsibility'⁷ but only as an auxiliary,⁸ having equipped the militia with modern weapons. Twelve years of imprisonment was imposed on him in the sentence,⁹ which soon became final because the prosecutor and the defence withdrew their appeals.

In this chapter, I will not touch upon all the interesting aspects of the procedure of the criminal liability, e.g. the question of the transformation/re-character-

- 1 ICC-01/04-01/07-3728 24-03-2017, Ordonnance de réparation en vertu de l'article 75 du Statut (See the official English translation under: ICC-01/04-01/07-3728-tENG 17-08-2017. Page numbers are according to the English version.)
- 2 ICC-01/04-01/07-3740 17-05-2017, Notification pursuant to regulation 56 of the TFV Regulations regarding the Trust Fund Board of Director's decision relevant to complementing the payment of the individual and collective reparations awards as requested by Trial Chamber II in its 24 March 2017 order for reparations.
- 3 Front des nationalistes et intégrationnistes (FNI).
- 4 Force de résistance patriotique de l'Ituri (FRPI).
- 5 ICC-01/04-02/12-3 18-12-2012, available at: https://www.icc-cpi.int/CourtRecords/CR2012_10249.PDF (last accessed 28 March 2018), XI, p. 215.
- 6 ICC-01/04-01/07-3436 07-03-2014, available at: https://www.icc-cpi.int/CourtRecords/CR2014_02618.PDF (last accessed 28 March 2018), XII, pp. 709-710.
- 7 Rome Statute, Article 25 (3): 'In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
 - (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted'.
- 8 Rome Statute, Article 25 (3)(d): 'In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose'.
- 9 'For the reasons set out above, the Chamber imposes prison sentence of a total of 12 years for accessoryship in any other way to the commission of the crime of murder as a war crime and crime against humanity, the crime of attack against a civilian population as such or against individual civilians not taking direct part in hostilities, as a war crime, and the crime of destruction of enemy property as a war crime and the crime of pillaging as a war crime.' – ICC-01/04-01/07-3484-tENG 22-09-2015, Decision on Sentence pursuant to Article 76 of the Statute, H, §170, p. 66.

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ization of charges, which is the subject of several scholarly articles. I will limit myself to the overview of the assessment of Mr Katanga's civil law liability and only to the extent as this will be necessary for the understanding of the 'notification' of the Trust Fund.

3. The Statutory and Other Normative Rules of the Reparation

The order for reparation should be seen from two points of view: *What is the convicted perpetrator's precise scope of liability? What are the practical consequences of the answer given to the previous question?* Before entering into these details, one should be familiarized with the two main bodies dealing with reparations, namely, the Trial Chamber appointed by the presidency for a given reparation procedure and the Trust Fund for Victims.

The relationship of these bodies as well as the questions of the reparation procedure are very briefly mentioned in Article 75 of the Rome Statute, entitled 'Reparations to Victims'.¹⁰

In 2002, Jorda and de Hemptine considered that Article 75 "[c]onfers on victims a potential right."¹¹ They repeated that "[t]he victim's right to reparation is potential."¹²

As the Case-Matrix Commentary states,

[l]ogically, Article 75 implies that victims possess a right of reparations under international law and that this right can be satisfied in the framework of

10 Rome Statute, Article 75 Reparations to victims:

- 1 'The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.
- 2 The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in Article 79.
- 3 Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.
- 4 In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under Article 93, paragraph 1.
- 5 A State Party shall give effect to a decision under this article as if the provisions of Article 109 were applicable to this article.
- 6 Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.'

11 C. Jorda & J. de Hemptinne, 'The Status and the Role of the Victims', in A. Cassese, P. Gaeta & J. R. W. D. Jones (Eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford, Oxford University Press, 2002, p. 1406.

12 *Ibid.*, p. 1407.

international criminal proceedings ... A general concern, however, is that the perpetrator-centered reparation regime, which is also complex and requires expert advice, might create hierarchies or dividing lines among victims who fall inside or outside of the regime.¹³

The preparatory works (*travaux préparatoires*) prove that

[t]he legal principles and procedures for reparations in Article 75 are outlined only in very general terms and it was clear that implementing provisions were necessary in the Rules of Procedure and Evidence.¹⁴

As we will see later, Article 79 – hidden under the subtitle 'Penalties' – containing a reference to the Trust Fund,¹⁵ is equally important.

The Rules of Procedure and Evidence is more eloquent in the matter, when giving a definition of the victims,¹⁶ calling for the observance of their interests,¹⁷

13 H. Friman, 'Commentary to Article 75', available at: <https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-6/> (last accessed 28 March 2018).

14 *Ibid.*

15 Rome Statute, Article 79 Trust Fund:

- 1 'A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.
- 2 The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.
- 3 The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties'.

16 Rules of Procedure and Evidence, Rule 85 Definition of victims:

'For the purposes of the Statute and the Rules of Procedure and Evidence:

- a "Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
- b Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes'.

17 Rules of Procedure and Evidence, Rule 86 General principle:

'A Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with Article 68, in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence'.

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defining some procedural principles,¹⁸ e.g. how a claim shall be formulated,¹⁹ what happens in case of an *ex officio* reparation initiative,²⁰ what type of repara-

18 Rules of Procedure and Evidence, Chapter 4. Provisions relating to various stages of the proceedings, Section III. Victims and witnesses, Subsection 4. Reparations to victims.

19 Rules of Procedure and Evidence, Rule 94 Procedure upon request:

- 1 'A victim's request for reparations under Article 75 shall be made in writing and filed with the Registrar. It shall contain the following particulars:
 - a The identity and address of the claimant;
 - b A description of the injury, loss or harm;
 - c The location and date of the incident and, to the extent possible, the identity of the person or persons the victim believes to be responsible for the injury, loss or harm;
 - d Where restitution of assets, property or other tangible items is sought, a description of them;
 - e Claims for compensation;
 - f Claims for rehabilitation and other forms of remedy;
 - g To the extent possible, any relevant supporting documentation, including names and addresses of witnesses.

- 2 At commencement of the trial and subject to any protective measures, the Court shall ask the Registrar to provide notification of the request to the person or persons named in the request or identified in the charges and, to the extent possible, to any interested persons or any interested States. Those notified shall file with the Registry any representation made under Article 75, paragraph 3'.

20 Rules of Procedure and Evidence, Rule 95 Procedure on the motion of the Court:

- 1 'In cases where the Court intends to proceed on its own motion pursuant to Article 75, paragraph 1, it shall ask the Registrar to provide notification of its intention to the person or persons against whom the Court is considering making a determination, and, to the extent possible, to victims, interested persons and interested States. Those notified shall file with the Registry any representation made under Article 75, paragraph 3.
- 2 If, as a result of notification under sub-rule 1:
 - a A victim makes a request for reparations, that request will be determined as if it had been brought under rule 94;
 - b A victim requests that the Court does not make an order for reparations, the Court shall not proceed to make an individual order in respect of that victim'.

tions may be pronounced by the Court²¹ and when, where and how the Trust Fund is involved.²²

On the basis of § 3 of Article 79 of the Rome Statute, the Assembly of States Parties issued a comprehensive regulation for the Trust Fund,²³ containing 79 rules. These rules are structured in 'parts' and 'chapters' with several cross-references.²⁴

- 21 Rules of Procedure and Evidence, Rule 97 Assessment of reparations:
 - 1 'Taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both.
 - 2 At the request of victims or their legal representatives, or at the request of the convicted person, or on its own motion, the Court may appoint appropriate experts to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations. The Court shall invite, as appropriate, victims or their legal representatives, the convicted person as well as interested persons and interested States to make observations on the reports of the experts.
 - 3 In all cases, the Court shall respect the rights of victims and the convicted person'.
- 22 Rules of Procedure and Evidence, Rule 98 Trust Fund:
 - 1 'Individual awards for reparations shall be made directly against a convicted person.
 - 2 The Court may order that an award for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim. The award for reparations thus deposited in the Trust Fund shall be separated from other resources of the Trust Fund and shall be forwarded to each victim as soon as possible.
 - 3 The Court may order that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate.
 - 4 Following consultations with interested States and the Trust Fund, the Court may order that an award for reparations be made through the Trust Fund to an intergovernmental, international or national organization approved by the Trust Fund.
 - 5 Other resources of the Trust Fund may be used for the benefit of victims subject to the provisions of article 79'.
- 23 ICC-ASP/4/Res.3 Adopted at the 4th plenary meeting on 3 December 2005, Regulations of the Trust Fund for Victims, available at: https://www.icc-cpi.int/NR/rdonlyres/0CE5967F-EADC-44C9-8CCA-7A7E9AC89C30/140126/ICCASP432Res3_English.pdf (last accessed 28 March 2018).
- 24 Let us call the reader's attention on the Chapters of Part III, entitled 'The activities and projects of the Trust Fund', significant from the point of view of the basic aim of the present article. (Chapter I: Use of Funds; Chapter II: Implementation of the Activities and Project of the Trust Fund; Chapter III: Individual awards to victims pursuant to rule 98(2); Chapter IV: Collective awards to victims pursuant to rule 98(3); Chapter V: Awards to an intergovernmental, international or national organization, pursuant to rule 98(4).)

What is the legal relevance of this regulation? *Prima facie*, the traditional perception of international law denies that it could enjoy legally binding force.²⁵ We shall see, however, that the situation is much more complex, and it cannot be given an adequate description using the simple reference to the ‘applicable law’ according to Article 21 of the Rome Statute.²⁶

Moreover, it is worth mentioning that the Trust Fund for Victims enjoys a genuine autonomy²⁷ within the Court and *vis-à-vis* its chambers: this autonomy is affirmed already in case of the so-called own resources made up of fines and forfeiture from the convicted person,²⁸ but it is even more amplified in case of the *other resources*, i.e. the voluntary contributions whether from states, legal entities

25 ‘In 2011, the ASP adopted a resolution on reparations in which States tried to influence the judicial interpretation of Article 75 in order to avoid the unlikely scenario that orders for reparations against a convicted person would imply the use of assessed contributions or other direct financial contributions of States Parties. This resolution is, however, not legally binding for the Judges and other Court organs since ASP resolutions are no source of law within the meaning of Article 21’ – D. Donat-Cattin, ‘Commentary to Article 75’, in O. Triffterer & K. Ambos (Eds.), *The Rome Statute of the International Criminal Court – A Commentary*, Munich et al, C. H. Beck, Hart Publishing and Nomos, 2016, p. 1864.

26 See in this respect Donat-Cattin who also concludes that ‘[o]n a separate but connected plain, the rules and regulations pertaining to the effective functioning of the Trust Fund can have a profound significance for the implementation of the principles relating to reparations that will be produced by the Court’s jurisprudence’ – Donat-Cattin, 2016, p. 1870.

27 After giving a very detailed picture of the preparatory works, Sperfeldt states that ‘it was recognised that the Court did not have control over the TFV, whose operation was instead a manner for the Assembly of States Parties’ – C. Sperfeldt, ‘Negotiating the Reparations Mandate of the International Criminal Court’, *International Criminal Law Review*, Vol. 17, 2017, p. 376.

28 Regulations of the Trust Fund for Victims, Chapter I Use of Funds:

‘Section I Beneficiaries

42. The resources of the Trust Fund shall be for the benefit of victims of crimes within the jurisdiction of the Court, as defined in rule 85 of the Rules of Procedure and Evidence, and, where natural persons are concerned, their families.

Section II Resources collected through fines or forfeiture and awards for reparations

43. When resources collected through fines or forfeiture or awards for reparations are transferred to the Trust Fund pursuant to article 75, paragraph 2, or article 79, paragraph 2, of the Statute or rule 98, sub-rules 2-4, of the Rules of Procedure and Evidence, the Board of Directors shall determine the uses of such resources in accordance with any stipulations or instructions contained in such orders, in particular on the scope of beneficiaries and the nature and amount of the award(s).

44. Where no further stipulations or instructions accompany the orders, the Board of Directors may determine the uses of such resources in accordance with rule 98 of the Rules of Procedure and Evidence, taking into account any relevant decisions issued by the Court on the case at issue and, in particular, decisions issued pursuant to Article 75, paragraph 1, of the Statute and rule 97 of the Rules of Procedure and Evidence.

45. The Board of Directors may seek further instructions from the relevant Chamber on the implementation of its orders.

46. Resources collected through awards for reparations may only benefit victims as defined in rule 85 of the Rules of Procedure and Evidence, and, where natural persons are concerned, their families, affected directly or indirectly by the crimes committed by the convicted person’.

or private persons.²⁹ In the regulations of the Trust Fund for Victims, the role of its Board is emphasized in this context,³⁰ i.e. whether to complement or not to complement the sum constituted from imposed fines and forfeiture.³¹ (See on

- 29 Regulations of the Trust Fund for Victims, Section III Other resources of the Trust Fund:
 '47. For the purpose of these regulations, "other resources of the Trust Fund" set out in of rule 98, paragraph 5, of the Rules of Procedure and Evidence refers to resources other than those collected from awards for reparations, fines and forfeitures.
 48. Other resources of the Trust Fund shall be used to benefit victims of crimes as defined in rule 85 of the Rules of Procedure and Evidence, and, where natural persons are concerned, their families, who have suffered physical, psychological and/or material harm as a result of these crimes'.
- 30 Regulations of the Trust Fund for Victims, 54: 'When the Court orders that an award for reparations against a convicted person be deposited with the Trust Fund or made through the Trust Fund in accordance with rule 98, sub-rules 2 to 4, of the Rules of Procedure and Evidence, the Secretariat shall prepare a draft plan to implement the order of the Court, to be approved by the Board of Directors.
 55. Subject to the order of the Court, the Trust Fund shall take into account the following factors in determining the nature and/or size of awards, inter alia: the nature of the crimes, the particular injuries to the victims and the nature of the evidence to support such injuries, as well as the size and location of the beneficiary group.
 56. The Board of Directors shall determine whether to complement the resources collected through awards for reparations with "other resources of the Trust Fund" and shall advise the Court accordingly. Without prejudice to its activities under paragraph 50, subparagraph (a), the Board of Directors shall make all reasonable endeavours to manage the Fund taking into consideration the need to provide adequate resources to complement payments for awards under rule 98, sub-rules 3 and 4 of the Rules of Procedure and Evidence and taking particular account of ongoing legal proceedings that may give rise to such awards'.
- 31 'A more fundamental point is the absence of any provision in the Rules for automatic intervention by the Trust Fund in the event of the accused's absence or insolvency: the award of compensation to victims will thus remain shrouded in uncertainty', Jorda and de Hemptinne, 2002, p. 1415.

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this, e.g. Kai Ambos,³² Tom Dannenbaum,³³ Thordis Ingadottir,³⁴ Miriam Cohen,³⁵ etc.)

It should also be remembered that currently (and presumably for a long time yet) the envelope of the resources collected from fines and forfeiture is rather small due to the lack of financial capacities of most persons convicted until now. That is why – in view of the considerable costs of medical, psychological and educational reparation, etc. – the subsidies of the reparation programmes should be inevitably³⁶ looked for within the ‘other resources’.

The problem is, as Sperfeldt puts it, that

[a] broad human rights-inspired concept of reparations was introduced into a system that strictly adhered to the bedrock of criminal law – the notion of individual responsibility – that translated in the reparations realm to individual liability for the harm that resulted from crimes adjudicated before the Court. This imbalance constitutes one of the main challenges today for creating a system that can actually deliver reparations in the context of mass atrocities. Such a model is at risk of raising expectations among victims of a

- 32 Kai Ambos: ‘The TFV thus is free to decide whether or not to exercise its reparation mandate’ – K. Ambos, *Treatise on International Criminal Law, Volume III: International Criminal Procedure*, Oxford, Oxford University Press, 2016, p. 199.
- 33 ‘In sum, the Statute leaves the regulation of the TFV firmly in the hands of the ASP. The ASP, in turn, has passed regulations that make it explicitly clear that the “other resources” of the TFV are funds over which the Board of the TFV has control and over which the Court itself has no control. The Court is provided only the limited opportunity to object on very narrow grounds. Any amendment to this apportioning of responsibility would require the approval of the ASP’ – T. Dannenbaum, ‘The International Court, Article 79, and Transitional Justice: The Case for an Independent Trust Fund for Victims’, *Wisconsin International Law Journal*, Vol. 28, 2010-2011, p. 255.
- 34 ‘The Trust Fund is not obliged to make an award of reparations from the Trust Fund. That is to say it does not have to use other funds to supplement insufficient awards of reparations collected from the convicted person’ – T. Ingadottir, ‘Trust Fund for Victims (Article 79 of the Rome Statute)’, Project on Int’l Courts and Tribunals, Discussion Paper No. 3, Feb. 2001, available at: www.pict-cti.org/publications/ICC_paprs/Trust_Fund.pdf, p. 15 (last accessed 1 April 2018).
- 35 ‘In this light, the ICC Statute is not only innovative because it has incorporated the possibility for victims of the crimes within the jurisdiction of the ICC to claim reparation within international criminal justice, but also in its approach to the reparation mechanism, by the creation of an independent administrative mechanism connected to the Court, the TFV. ... From the above-mentioned provisions, it stems clearly that the TFV is not a judicial mechanism that deals with reparations, but rather an administrative mechanism linked to a judicial procedure (the ICC proceedings). It is a kind of complementary organ of the Court and an integral part of the reparative scheme set up by the ICC. The TFV is independent from the Court’ – M. Cohen, ‘Paving a New Road for Reparation for Victims of International Crimes: The ICC Trust Fund for Victims’, *Revista do Instituto Brasileiro de Direitos Humanos*, Vol. 13, 2013, available at: <http://revista.ibdh.org.br/index.php/ibdh/article/view/248/248>, pp. 250-251 (last accessed 1 April 2018).
- 36 Jorda & de Hemptinne saw well the problem already in 2002: ‘it will be necessary for the Trust Fund to have sufficient resources available to meet all such needs; it will be clearly impossible to meet those needs solely from the proceeds of fines and forfeited assets, and a specific budget will have to be voted in that regard’ – Jorda and de Hemptinne, 2002, p. 1415.

potential of reparations that are at odds with the means and resources at the Court's disposal.³⁷

Manirabona and Wemmers remind the states about their responsibility to give the Trust Fund for Victims financial support.³⁸ Mia Swart puts forth that the governments' eagerness to contribute may depend on the existence of a comprehensive reparations policy.³⁹ Dannenbaum adds that under the current conditions, the use of the other resources should be reserved to the assistance mandate and should not be used in favour of the reparations mandate.⁴⁰

4. Distinguishing between the Assistance Mandate and the Reparation Mandate of the Trust Fund for Victims

Why is the distinction between the assistance mandate and the reparation mandate so important? It should be noted that the Trust Fund for Victims is present in several situation countries also (and primarily) through its *assistance mandate* activity. Contrary to the activities engaged under the reparation mandate, assistance mandate activity does not require a previous condemnation and may also cover persons who – although they are victims – are directly concerned by a given crime for which a concrete person was convicted by the ICC.

37 Sperfeldt, 2017, p. 373.

38 'However, as we saw above, the Rome Statute provides that if the ICC is incapable of providing reparation, the Trust Fund can offer alternative reparation. But the Trust Fund is grossly underfunded, something that displays a massive gap between the legal rights of victims to reparation, and the actual resources available to them. Here, there is a duty for the State Parties to the Rome Statute of the ICC, as well as the whole international community, to provide adequate resources to the Trust Fund in order to provide effective redress including compensation and rehabilitation for war victims' – A. M. Manirabona & J-A. Wemmers, 'Specific Reparation for Specific Victimization: A Case for Suitable Reparation Strategies for War Crimes Victims in the DRC', *International Criminal Law Review*, Vol. 13, 2013, p. 1007.

39 'A comprehensive reparations policy will be attractive both to victims as well as to potential donor countries that will be approached to contribute funds to the TFV. State parties may also feel more comfortable contributing money to the Trust Fund if they knew that there is a comprehensive and principled reparations policy in place' – M. Swart, 'The Lubanga Reparations Decision: A Missed Opportunity?' *Polish Yearbook of International Law*, Vol. 32, 2012, p. 188.

40 'Such Court ordered reparations should be funded only by the wealth of the criminal against whom those reparations are ordered and by other Court-generated resources, such as fines and forfeitures. Neither is the TFV legally obliged to use its "other resources" to supplement Court-generated funds in order to meet the Court's reparative assessment, nor would such use of the TFV's resources be optimal.' 'Instead, the TFV should take full advantage of its legal freedom by engaging in reparative projects that seek to benefit and acknowledge those victims that are unlikely to be reached by the Court's Article 75 reparations process. This freedom, of course, is not limitless. The governing legal texts require that the TFV restrict its projects to those benefiting victims of crimes that fall within the ICC's jurisdiction, and as a matter of policy the Fund should direct its activities to situations 5 in which the prosecutor has issued indictments in which the prosecutor has issued indictments. However, within those confines, the Fund enjoys great discretion, and it is in the interest of transitional justice that it should exercise that discretion without restraints of the kind currently imposed by the Court' – Dannenbaum, 2010-2011, p. 236.

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This means in practice that the Trust Fund may act before the end of the lengthy procedure and also *vis-à-vis* persons, who might have been victims of other perpetrators against whom legal procedure was not opened (or if it was, it got stopped) by the Prosecutor (e.g. because of death, lack of adequate, accessible evidence or because of the relatively minor importance of the crime), or who were acquitted because there was no sufficient proof for the conviction beyond any reasonable doubt, or if the link of causality cannot be duly proven between the harm suffered by the given individual and the convicted person.

The autonomy of the Trust Fund prevails also in case of the activities under assistance mandate: it is an *ex officio* decision to launch such a programme, pending a kind of a veto right on behalf of the competent chamber.⁴¹ In practice, mostly major medical, psychological and educational projects have been launched so far under the assistance mandate in the Democratic Republic of Congo⁴² and Uganda,⁴³ and soon similar programmes will begin in Côte d'Ivoire.⁴⁴

5. The Victims' Eligibility and the Amount of Their Harm in the Order for Reparation

In this context, the order for reparation will be presented as in the Katanga case. The Chamber carried out a detailed analysis of the applicants claiming for victim

41 Regulations of the Trust Fund for Victims, 50: 'For the purposes of these regulations, the Trust Fund shall be considered to be seized when:

- i the Board of Directors considers it necessary to provide physical or psychological rehabilitation or material support for the benefit of victims and their families; and
- ii the Board has formally notified the Court of its conclusion to undertake specified activities under (i) and the relevant Chamber of the Court has responded and has not, within a period of 45 days of receiving such notification, informed the Board in writing that a specific activity or project, pursuant to rule 98, sub-rule 5 of the Rules of Procedure and Evidence, would pre-determine any issue to be determined by the Court, including the determination of jurisdiction pursuant to Article 19, admissibility pursuant to articles 17 and 18, or violate the presumption of innocence pursuant to Article 66, or be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
- iii Should there be no response from the Chamber or should additional time be needed by the Chamber, consultations may be held with the Board to agree on an extension. In the absence of such an agreement, the extension shall be 30 days from the expiry of the period specified in sub-paragraph (a) (ii). After the expiry of the relevant time period, and unless the Chamber has given an indication to the contrary based on the criteria in sub-paragraph (a)(ii), the Board may proceed with the specified activities'.

42 The Trust Fund for Victims, Annual Report Summary 2016, available at: www.trustfundforvictims.org/sites/default/files/imce/summary_EN_ONLINE.pdf, pp. 19-20 (last accessed 1 April 2018).

43 *Ibid.*, pp. 20-21 (last accessed 1 April 2018).

44 Press Release, Trust Fund for Victims decides to launch assistance programme in Côte d'Ivoire, 17 May 2017, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=pr1304> (last accessed 1 April 2018).

status⁴⁵ on the basis of the individual applications and using the test of balance of probabilities.⁴⁶

Victims are entitled to submit proof for the purpose of substantiating the information provided in their claims for reparations. Illustrative in this regard is article 94(1)(g) according to which victims are required to provide in their requests for reparations, supporting documentation, including identifying information of witnesses, to the degree possible,

as Tatiana Bachvarova puts it.⁴⁷

When the Chamber had checked the submitted claims, it was confronted with the problem of disappeared documents as well as the inexistence of a comprehensive land registration and cadastre system, or of other immobile properties, as well as the lack of an animal registry.⁴⁸

Besides the acceptance – preceded by their verification – of documents and declarations,⁴⁹ the Trial Chamber also used presumptions and indirect evidence, similarly to the practice of the Inter-American Court on Human Rights and to the experiences of transitional justice and Holocaust reparation.⁵⁰

In this sense, the existence of a locally average small house with furniture, a related quantity of utensils and clothes was presumed, complete with some household animals (one cow, two goats, three chickens) and a small garden beside. The price of the destroyed possessions was calculated according to the local value at the time of the ordonnance:⁵¹ if the applicant felt that his material

45 On the eligibility criteria of victims, see a deep and up to date ICC jurisprudential analysis in: T. Bachvarova, *The Standing of Victims in the Procedural Design of the International Criminal Court*, Leiden, Brill Nijhoff, 2017, pp. 10-67.

46 '50. Having regard to the foregoing, the Chamber will avail itself of the "balance of probabilities" standard. Thus the Chamber must be satisfied that the facts alleged by an Applicant in claiming reparations are established on a balance of probabilities. That standard means that the Applicant must show that it is more probable than not that he or she suffered harm as a consequence of one of the crimes of which Mr Katanga was convicted' – Order for reparation, p. 26.

47 Bachvarova, 2017, p. 230.

48 '53. As aforementioned, the Chamber must take account of the features of the case before it. To that end, the Chamber is attentive to the difficulties with which the victims have had to contend in providing supporting documentation, given the many years which have passed since the attack on Bogoro. The Chamber therefore takes note of the Legal Representative's observations, which invite it to take account of the local context the victims face, including the fact that proof of ownership of property or farm land does not exist' – Order for reparation, pp. 27-28.

49 '55. (...) and, to the extent possible, documentation to support the extent of the harm suffered and the causal nexus between the harm alleged and the crime committed; and any other application for reparations from persons who had yet to make themselves known and, to the extent possible, any supporting documentation. Further to the Decision of 8 May 2015, the Applicants finalized their applications for reparations with statements from witnesses, certificates of residence, habitation, family relationship and death, medical certificates and declarations of livestock ownership' – Order for reparation, p. 28.

50 Order for reparation, p. 30, §57.

51 E.g. the following values were established in the order: \$600 for a simple house, \$500 for the furniture, etc., \$75 for cloths, \$524 for the animals mentioned earlier, \$150 for garden or other agricultural surroundings of the family – Order for reparation, pp. 71-76, §193-222.

prejudice was of a higher amount, the burden of proof was on him.⁵² Taking into consideration the value calculated with 'from/to' proposals submitted by the defence and the representatives of the victims, the Chamber established the precise values *ex aequo et bono*.

Of the 341 applicants, the Chamber retained 297 applicants as eligible for reparations.⁵³ The reason for refusals was mostly related to a lack of adequate proof of paternity with a deceased direct victim, or of residence in Bogoro at the time of the massacre, or a lack of reply to the invitation to complete the application with corroborative evidences, documentation, etc.

The Chamber attributed a great deal of importance to the immaterial prejudices. When taking into account the jurisprudential practice of the RDC and of the international fora,⁵⁴ they were established on a higher level than the material ones. The most important forms of immaterial prejudices were the loss of a parent⁵⁵ and the psychological harm common to all survivors. \$8,000 was pronounced for the loss of a close parent, while \$4,000 for another parent within the family. The psychological harm was calculated at \$2,000.⁵⁶

The Chamber was not ready to recognize the transgenerational harm⁵⁷ alleged by five children born after the attack within the precarious situation, and since M. Katanga was acquitted of the charges of rape, this additional claim of four applicants, victims of sexual assault during the attack, was not retained.⁵⁸ Many survivors had cuts or shot wounds on their body, but the medical attestations (with the exception of two) were unable to establish that these wounds were caused on 24 February 2003. (Bogoro was attacked several times during the civil war in Ituri.)

As mentioned *supra*, the Ngiti and Lendu militia participated in the attack, and in much higher numbers in the first one. On the basis of the 2014 judgment, the Chamber concluded that there is no need to differentiate between harm caused by Ngitis and by Lendus when calculating Mr Katanga's financial liability. The criteria of the causality were met according to the test but/for and proximate cause.⁵⁹

On the basis of the foregoing account, a 1,000-page-long annex recapitulated the relevant harm and the corresponding value of reparation. The final sum reached was \$3,752,620.⁶⁰

52 *Ibid.*, pp. 44-45, §104-105.

53 *Ibid.*, see the table, p. 81 and §287, p. 100.

54 *Ibid.*, §230-231, pp. 78-79.

55 The applicants complained for the loss of 25 children and 35 elderly persons – Order for reparation §115, p. 48.

56 *Ibid.*, §232-236, pp. 79-80.

57 *Ibid.*, §132-135, pp. 54-55.

58 *Ibid.*, §150-152, pp. 59-60.

59 *Ibid.*, §167, p. 64.

60 *Ibid.*, §239, p. 80. The table shows that ca. 89% of this sum is composed of different forms of immaterial prejudices: \$1,608,000 for the loss of close parents, \$1,136,000 for another member of family and \$594,000 for the psychological harm common to all survivors.

6. Mr Katanga's Financial Liability and the Question of the Impact of His Insolvency in the Order for Reparation

The defence evoked the indigent character of Mr Katanga, and it claimed that this fact, which was continuously monitored and approved by the Registry of the ICC, should have a direct impact on the financial liability as such.

First, the Chamber summarized⁶¹ a *dictum* in a decision of the Appeals Chamber,⁶² and it concluded that

[a]ccordingly, the Chamber determines that Mr Katanga's current financial situation cannot be regarded as material to the determination of the size of the reparations award for which he is liable.⁶³

The other main applicable principle is proportionality⁶⁴ in the mirror of the established criminal responsibility during the previous trial.

Hereby, the Chamber summarized the main elements of the criminal procedure against Mr Katanga, duly taking into account the re-characterization of charges and the establishment of the auxiliary liability, as well as the particular circumstances of the attack, its evident anti-Hema direction, its particular cruelty and the durable consequences.⁶⁵ On this basis, the Chamber fixed Katanga's liability at \$1,000,000,⁶⁶ which is practically one quarter of the totalized harm.

61 'The Appeals Chamber adverted also to regulation 117 of the Regulations of the Court, which prescribes that the financial situation of the sentenced person be monitored. The Appeals Chamber has thus held that the indigence of a convicted person upon a Trial Chamber's pronouncement of an order for reparations is no impediment to the imposition of liability on that person' – Order for reparation, §245, p. 83.

62 Lubanga, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129, §102, 103, 105. See Stahn's remarks on these *dicta*: "This reading of Article 75 is a clear victory for victims who sought express judicial acknowledgement of accountability towards victims and liability for reparations through the Trial Chamber decision on reparations, independently of the perpetrator's indigence. It strengthens the expressionist dimensions of ICC reparations which are of key importance, in light of the limited resources of the Trust Fund" – C. Stahn, 'Reparative Justice after the Lubanga Appeal Judgment (New Prospects for Expressivism and Participatory Justice or 'Jurified Victimhood' by Other Means?)', *Journal of International Criminal Justice*, Vol. 13, 2015, p. 806.

63 Order for reparation, §246, p. 83.

64 '252. It must be further underlined that, in said case, the Appeals Chamber made the point that the scope of liability for reparations may differ depending on the mode of individual criminal responsibility established vis-à-vis the convicted person and on the specific elements of that responsibility. In sum, the Appeals Chamber enunciated the principle applicable to the determination of the scope of the liability for reparations as follows: "a convicted person's liability for reparations must be proportionate to the harm caused and, inter alia, his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case" – Order for reparation §252, pp. 86-87 (citing Lubanga, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129 Lubanga, §118).

65 Order for reparation, §257, pp. 88-89.

66 *Ibid.*, §264, p. 91.

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How to go further in order to grant a genuine reparation to the victims, when the convicted Mr Katanga is not, and probably will not be, in a position to cover the major part of this burden?

In such a situation, the outcome of a procedure before the ICC is manifestly different from that of the international human rights tribunals, where the courts order the compensation to be paid from the state budget. It differs also from the national jurisprudence of several countries, where the tribunals establish the financial liability of the perpetrator on a high level without thinking too much about what to do if the given person does not possess adequate personal or family wealth for the reparation.

7. The References to the Trust Fund for Victims in the Order for Reparation

Having taken into account those complicated legal criteria around the Trust Fund for Victims, as shown in the introductory part of this article, the Chamber is legally not in a position to bind this body with these obligations that concern the convicted perpetrator. Such an attempt was made some years ago in the still ongoing Lubanga reparation procedure, but the Appeals Chamber reversed this element of the decision and emphasized the observation of the autonomy of the Board of the Trust Fund for Victims.⁶⁷

Another element of the complexity of the legal situation is the coexistence of the treaty law (i.e. the Rome Statute) and other norms, the legal nature of which is subject to scholars' continuous attention.⁶⁸ The Rules of Procedure of Evidence is one of the documents of this type, and its particular importance is emphasized already in the Rome Statute, in Article 21, which plays more or less the same role

67 '4. The determination, pursuant to regulation 56 of the Regulations of the Trust Fund, of whether to allocate the Trust Fund's "other resources" for purposes of complementing the resources collected through awards for reparations falls solely within the discretion of the Trust Fund's Board of Directors'.

See also another paragraph:

'114. In view of the foregoing, the Appeals Chamber finds that the Trial Chamber erred by assuming authority over the "other resources" of the Trust Fund. The determination, pursuant to regulation 56 of the Regulations of the Trust Fund, of whether to allocate the Trust Fund's "other resources" for purposes of complementing the resources collected through awards for reparations falls solely within the discretion of the Trust Fund's Board of Directors' – Lubanga, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129.

68 Carolyn Hoyle and Leila Ullrich underlined the 'context of legal and normative uncertainty and diversity coupled with the ICC's status as a new international criminal justice institution' – C. Hoyle & L. Ullrich: 'New Court, New Justice? The Evolution of 'Justice for Victims' at Domestic Courts and at the International Criminal Court', *Journal of International Criminal Justice*, Vol. 12, 2014, p. 701.

for the International Criminal Court⁶⁹ as Article 38 of the ICJ Statute for the International Court of Justice.⁷⁰

Moreover, the special significance of the regulations of the Assembly of States Parties was highlighted by the Appeals Chamber in the Lubanga reparation appeal.⁷¹

That is why the Chamber used language that was evidently of an obligatory character when it concerned Mr Katanga, but that became much softer, close to a recommendatory character, when it addressed the Trust Fund.

First, the nature and the different forms of the collective reparations were analysed,⁷² adding that the victims would like to get individual reparation as well. Several forms of the collective reparations target the individual as well (e.g. medical and psychological services, schooling and *inter alia* the small farming or artisanal kits).

After their overview, the Chamber concluded

[t]hat it is appropriate to award collective reparations which are designed to benefit each victim so as to provide a meaningful remedy for the harm suffered by Mr Katanga's victims.⁷³

69 Article 21, Applicable law:

- 1 'The Court shall apply:
 - a In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
 - b In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
 - c Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
- 2 The Court may apply principles and rules of law as interpreted in its previous decisions.
- 3 The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in Article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status'.

70 See, however, the normative hierarchy within Article 21 of the Rome Statute, as compared with the absence of hierarchy within Article 38 of the statute of the ICJ.

71 '2. For purposes of awards for reparations made through the Trust Fund, resolutions of the Assembly of States Parties in this respect should be given due regard by Trial Chambers. To the extent that a Trial Chamber issues an order for reparations that impinges on the management of the Trust Fund's finances, resolutions of the Assembly of States Parties in this regard must be taken into account and are to be considered an authoritative source for purposes of interpreting the Regulations of the Trust Fund' – Lubanga, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129.

72 Order for reparation, §271-294, pp. 93-102.

73 *Ibid.*, §295, p. 102.

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In this context,

[i]t is appropriate, in the Chamber's view, that each victim to whom it has accorded such *locus standi* receive a symbolic award of USD 250 compensation. The Chamber underscores that the symbolic award is not intended as compensation for the harm in its entirety. Yet, the Chamber believes that that award may provide some measure of relief for the harm suffered by the victims. It could help the victims become financially independent, by enabling them, for instance, to purchase tools or livestock, or to set up a small business. That way, the victims would be able to take their own decisions on the basis of their needs.⁷⁴

The Chamber invited the Trust Fund for Victims to prepare a project on the details of the reparation according to the above mentioned principles, while assuring priority to those who are most in need.⁷⁵ (It is worth mentioning that different international humanitarian NGOs and other organizations are engaged in a large-scale reconstruction in Bogoro, which also resulted in a considerable growth of the population and changes in its ethnic repartition.) This project will be approved by the Chamber after having consulted the interested parties for their opinion.

Mr Katanga should assist in the reparation even during his insolvency, which should be continuously monitored *inter alia* by expressing his regrets *vis-à-vis* the victims.⁷⁶ Through his defence, he expressed his will to participate in the different reparation programmes, first and foremost, in symbolic ones, whether individual or collective. The Chamber invited the Trust Fund for Victims to concretize the forms of this participation.⁷⁷

The Chamber called the Presidency of the ICC and the Registry to permanently monitor Mr Katanga's financial situation, in the realization of which the government of the RDC should cooperate.⁷⁸ The Trust Fund for Victims was invited to enter into contact with the government in order to assess its contribution to the reparation.⁷⁹

Mindful of the fact that the reparation should be significant for the victims in a direct manner, the Chamber decided on a \$250 symbolic, individual reparation "in addition to dedicated collective reparations."⁸⁰ It expressed that

[t]he burden of a convict's indigence should not be borne by the victims alone. Otherwise put, the award of individual reparations should not hinge on the indigence of the convicted person.⁸¹

74 *Ibid.*, §300, p. 104.

75 *Ibid.*, §307-311, pp. 107-108.

76 *Ibid.*, §315, p. 109.

77 *Ibid.*, §316-317, pp. 109-110.

78 *Ibid.*, §329, pp. 112-113.

79 *Ibid.*, §325, pp. 111-112.

80 *Ibid.*, §334, pp. 114-115 ("*réparations collectives ciblées*").

81 *Ibid.*, §335, p. 115.

As regards \$250, if granted to all the recognized victims, only 7% of the costs of reparation of prejudices imputed to Mr Katanga would reach them; so this sum is symbolic and

[t]he order for reparations would, for the most part, be missing its mark – delivery of justice to and reparation of the harm done to the victims as a result of the crimes committed by Mr Katanga – were it to disregard their almost unanimous preference, by awarding only collective reparations.⁸²

Recognizing the limits of its competences *vis-à-vis* the 'other resources' of the Trust Fund for Victims, according to the legal coordinates,⁸³ as mentioned before, the Chamber invited the Board to communicate whether

[i]t is minded to use its "other resources" for the funding and implementation of reparations, and to apprise it in the Draft Plan of the monetary amount. Specifically, the Chamber invites the Board of Directors of the TFV to avail itself of the latitude accorded to it by the instruments of the Court and to afford consideration to the provisions applicable to reparations with a view to the award of reparations which are meaningful to the victims. It thus advises the Board of Directors of the TFV to be amenable to exploring the possibility of using compensation outwith the collective awards, and to agree to providing resources to complement the individual reparations.⁸⁴

The Chamber called on the Trust Fund for Victims to take duly into consideration the needs of those whose harm (like rape, sexual slavery, transgenerational harm, child soldiering) were understood as not falling under the *reparation mandate*, according to the text of the judgment pronounced against Mr Katanga, when it will shape its future *assistance mandate* activity on the field.⁸⁵

82 *Ibid.*, §339, p. 116.

83 '336. It is to be acknowledged that as prescribed by regulation 56 of the Regulations of the TFV, the decision whether to set aside funds from the "other resources" of TFV to complement the resources collected through awards for reparations lies within the sole discretion of Board of Directors of the TFV. In this connection, the Chamber notes that regulation 56 of the Regulations of the TFV provides that the Board of Directors "shall make all reasonable endeavours to manage the Fund taking into consideration the need to provide adequate resources to complement payments for awards. 337. That said, the Chamber does not see any provision in the Regulations to bar the Board of Directors of the TFV from managing its resources to complement the individual reparations, even if the Regulations cast no such obligation' – Order for reparation, §336-337, p. 115.

84 Order for reparation, §342, p. 116.

85 *Ibid.*, §343-344, p. 117.

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8. The Notification of the Trust Fund for Victims on Complementing the Payment of the Individual and Collective Reparations Awards for the Victims of the Bogoro Massacre

The Trust Fund for Victims reacted to the order of 17 May 2017, and a detailed legal analysis preceded the decision *in merito*. First, it pointed out that

[i]n this regard, the Trust Fund recalls that it has previously submitted in this and in other cases that there existed an unresolved legal question as to whether, as a matter of law, the TFV Board's discretionary authority under regulation 56 of the TFV Regulations extends to complementing the payment of individual awards for reparations or, alternatively, whether the TFV Board has such discretionary authority only with respect to deciding whether to complement the payment of collective and organizational awards pursuant to rules 98 (3) and (4) of the Rules. The Trust Fund notes that, in the Order for Reparations, the Trial Chamber carried a legal analysis of this question, concluding that, in its view, the TFV Regulations do not operate as a legal bar to the TFV Board complementing the payment of individual awards for reparations, while equally not obliging it to do so.⁸⁶

The Trust Fund for Victims went through the references and cross-references of the legal and other normative criteria – already presented at the beginning of our article – and evoked that

[f]or the reasons that follow, the TFV Board considered that the first sentence of regulation 56 of the TFV Regulations grants it the discretionary authority to complement the payment of awards for reparations ordered under rule 98 (2), (3), and/or (4) of the Rules. In other words, to complement the payment of individual awards, collective awards, or organizational awards.⁸⁷

The notification pointed out that

[g]iven that an organizational award may include individual awards for reparations, the TFV Board considered that deciding that it may never complement individual awards risks rendering the text of regulation 75 moot and seemingly directly contradicts the plain text of the regulations relevant to organizational awards and its complement authority provided therefor in regulation 56 of the TFV Regulations.⁸⁸

86 Notification, §7, p. 5.

87 Notification, §18, pp. 8-9.

88 Notification, §19, p. 9.

While recognizing that there are undoubtedly some differences of wording, the Trust Fund for Victims concluded that these should not be overemphasized.⁸⁹

After these remarks completed with other textual, systemic and teleological considerations, the notification stated that the second sentence of the referred regulation

[d]oes not exclude complementing the payment of individual awards for reparations, but rather refers to how the TFV Board should manage the Trust Fund's resources. In other words, the TFV Board determined that the second sentence provides a clear prioritization of how the Trust Fund's other resources should be managed, but does not per se limit the TFV Board's complement authority to only collective or organizational awards.⁹⁰

It added that this more flexible interpretation could amplify the cooperation with some potential donors, favouring eventually the 'earmarked' contributions.⁹¹

Having pronounced on the discretionary possibility of individual reparation, the Trust Fund reiterated its determination to work first and foremost alongside the collective approach:

In other words, if the prioritized activities are adequately funded and the Trust Fund still has resources available – or may secure additional funding – to complement an individual award for reparations, the TFV Board may decide to do so. But, the TFV Board is not under any positive obligation to manage its resources for the specific purpose of having resources to complement individual awards for reparations and may decide not to do so if it would mean that there were not adequate resources to fund collective and organiza-

89 'Regarding the differing language of "deposited with the Trust Fund" and "made through the Trust Fund" contained in rule 98 (2) and 98 (3)-(4) of the Rules, the TFV Board considered that these differing terms also cannot be read as limiting the scope of the complement authority in the first sentence of regulation 56 of the TFV Regulations to only collective or organizational awards.¹⁸ This is because regulation 43 makes clear that the term "resources collected through awards for reparations" also includes those resources "deposited with the Trust Fund" by its express inclusion of rule 98 (2). Finally, as a separate matter, the TFV Board noted that regulation 56 refers to "resources collected through [...]", which it noted could raise the question of whether the TFV Board can "complement" an award for reparations when the convicted person has not contributed any of his or her own funds towards the award' –Notification, §21-22, pp. 9-10.

90 *Ibid.*, §25, pp. 10-11.

91 'The TFV Board considered that this conclusion is supported by how the Trust Fund's activities can be funded- specifically by earmarked voluntary contributions from donors. In other words, while the TFV Board has an obligation to manage its other resources so that it is in a financial position to adequately fund its assistance mandate activities and to complement potential awards for reparations under rule 98 (3) and (4), the TFV Board was of the view that it would not be fiscally wise to turn away additional voluntary contributions where there is an interest specifically in funding an individual award for reparations. The TFV Board equally took into account the possibility that certain State Parties and/or private donors, who may have an interest in funding a specific individual award for reparations, might not be interested in also contributing to a collective award or to activities under the assistance mandate' – Notification, §26, p. 11.

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tional awards ordered in the same case or with respect to ongoing cases where such awards may be ordered or if funding an individual award would prejudice its ability to carry out its assistance mandate activities.⁹²

When deciding in a discretionary manner also on covering some forms of individual reparation from its budget, the victims' desiderata,⁹³ if evident and overwhelming, as well as the likelihood of the accessibility⁹⁴ of an earmarked donation could play a very important role. The low level of administrative costs⁹⁵ and the specificities of the given case should be additional factors.⁹⁶

Following these abstract considerations and underlining the priority⁹⁷ of collective reparations, the Trust Fund for Victims declared that it is ready to engage \$1,000,000 for the reparation project for Mr Katanga's victims,⁹⁸ and on the basis of the earmarked contribution of the Dutch government, the payment of \$250 as a symbolic compensation award to the 297 recognized victims will be granted.⁹⁹

9. Conclusion

Shortly after the adoption of the 'order' and the 'notification', it would be very daring to enter into a deep analysis.

It should be put forward that three notices of appeal were submitted at the end of April 2017 against the order. The legal representative of the victim complained mainly of the non-recognition of the transgenerational harm,¹⁰⁰ the non-recognition of the victims' capacity to some applicants,¹⁰¹ and the Office of the

92 *Ibid.*, §31, p. 12.

93 'The TFV Board considered that, in reparations proceedings, the wishes of the victims concerned should be given tremendous deference by the Trust Fund. In the TFV Board's view, the Trust Fund should, to the extent feasible, facilitate the realisation of the wishes of victims with respect to how best to remedy the harm that they have suffered' – Notification, §35, p. 13.

94 'Second, the TFV Board also considered that the likelihood of identifying a donor willing to make an earmarked contribution for the payment of the individual awards should be taken into account. In this regard, the TFV Board was of the view that if the Trust Fund considers it likely that it would be able to fundraise for a donation covering an individual award for reparations, this factor would weigh heavily in favor towards deciding to complement the award' – Notification, §36, p. 13.

95 *Ibid.*, §37, p. 13.

96 *Ibid.*, §38, p. 13.

97 'With respect to the collective reparations aspects of the Request, the TFV Board recalled that complementing the payment of collective awards takes priority over individual awards with respect to the case in which a request arises and with regard to future potential collective and organizational awards' – Notification, §43, p. 14.

98 *Ibid.*, §48, p. 15.

99 *Ibid.*, §47 and §50, p. 15.

100 Notice of Appeal against the 'Ordonnance de réparation en vertu de l'article 75 du Statut' and its Annex II, ICC-01/04-01/07-3737-tENG 09-05-2017, available at: https://www.icc-cpi.int/CourtRecords/CR2017_03074.PDF, §6, p. 4 (last accessed 1 April 2018).

101 *Ibid.*, §8, p. 4.

Public Counsel for Victims complained also in favour of 37 non-recognized applicants.¹⁰²

The defence appealed against the “[s]tandard of proof when assessing the harm alleged by the applicants,”¹⁰³ and the “[t]oo broad an interpretation of a parent whose death warrants reparations to the remaining children,”¹⁰⁴ and that “[t]he Trial Chamber ruled *ultra petita* by allocating compensation exceeding several applicants’ claims.”¹⁰⁵ (Nota bene: this concerns the decision on the \$250 *per capita* symbolic compensation: the defence was ready to pay a symbolic compensation but to an amount of \$1.) Moreover, the defence appealed against the \$1,000,000, “[b]ecause it is not proportionate to, and does not fairly reflect the part played by the accused in the crimes.”¹⁰⁶

At the date of the submission of the manuscript of this article, the detailed argumentation of these appeals is not accessible and – what is more important – the Appeals Chamber has not yet adopted its own decision on them.

Nevertheless, it is worth stating that in the order of the Trial Chamber II and in the subsequent notification of the Trust Fund for Victims, (1) a creative interpretation emerged in order to get closer to the genuine realization of reparations for victims of committed crimes belonging under the jurisdiction of the ICC. This was realized despite the difficulties¹⁰⁷ of the harmonization of the interpretation of respective norms applicable for the given actors in the procedure; (2) the victims who are at first glance *ex lege* entitled for reparation are recognized (i) as persons entitled for a reparation from the convicted perpetrator but (ii) in case of the perpetrators’ insolvency, they enjoy a legal title for at least a partial, symbolic and mostly collective type of ‘compensation’ on behalf of the Trust Fund for Victims.

Moreover, it has to be emphasized that Katanga’s victims’ reparation procedure provides a good example to study – if not to understand – how the classic sources of international law (i.e. treaties and customs, according to Article 38 of the statute of the ICJ) live definitely together with a series of norms (normative rules), which cannot be qualified properly within the context of the regime under Article 38 of the ICJ.¹⁰⁸

102 Notice of Appeal against the Reparations Order and its Annex II issued in accordance with Article 75 of the Statute on 24 March 2017, ICC-01/04-01/07-3739 26-04-2017, available at: https://www.icc-cpi.int/CourtRecords/CR2017_02652.PDF, §5, p. 4 (last accessed 1 April 2018).

103 Defence Notice of Appeal against the *Ordonnance de réparation en vertu de l'article 75 du Statut*, ICC-01/04-01/07-3738, §4 (c) (1), p. 3.

104 *Ibid.*, §4 (c) (2), p. 4.

105 *Ibid.*, §4 (c) (3), p. 4.

106 *Ibid.*, §4 (c) (4), p. 4.

107 ‘It is, however controversial whether the Chambers may order the TVF to exercise its complementary function’ – Ambos, 2016, p. 199.

108 See, for a deeper research of the problematics, P. Kovács, ‘Erreurs ou métamorphoses autour de la personnalité juridique et des sources dans le droit international?: (A propos des tribunaux internationaux en nombre grandissant...), in P. Kovács (Ed.), *Le droit international au tournant du millénaire - l'approche hongroise (International Law at the Turn of the Millennium - The Hungarian Approach)*, Budapest: Pázmány Péter Catholic University, 2000, pp. 96-115 and P. Kovács, ‘Métamorphoses autour de la personnalité juridique et des sources dans le droit international? (A propos des tribunaux internationaux en nombre grandissant...), *Miskolc Journal of International Law*, Vol. 2, 2005, pp. 1-17.

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In my reading, the genuine impact of these norms and the logic of their relationship with the treaty law of the ICC are very close to what we find when scrutinizing the relationship of the primary law and secondary law of the European Union. One can say that upon the treaty law-based mandate conferred by contracting parties to the Rome Statute, certain organs of the International Criminal Court may apparently issue such *sui generis* norms, which are not only necessary for the proper functioning of the legal complex in a concrete case but also clarify the content of a given treaty law article, and due to their normative nature, contribute to the emergence of a coherent practice. They may benefit from the jurisprudential practice, and they can contribute to a harmonious interinstitutional cooperation. The Assembly of States Parties definitely enjoys a special position in this sense, but the Trust Fund for Victims also has a specific status due to its autonomy, as shaped by the drafters of the Rome Statute.

But this could be the subject of another article yet to be written...

Addendum

On 8 March 2018, the Appeals Chamber delivered its Judgment on the appeals. While expressing some criticism vis-à-vis the method chosen by Chamber II in the order, it confirmed the assessment and also the concrete decisions, figures and

sums of the order. The critical remarks were also put in some of the key findings in order to serve as guidelines for the future.¹⁰⁹

109 ICC-01/04-01/07-3778-Red 09-03-2018, Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled 'Order for Reparations pursuant to Article 75 of the Statute', §1-6, pp. 4-6:

- 1 'The Appeals Chamber is not persuaded that the approach chosen by the Trial Chamber for the reparations proceedings in this case, which was based on an individual assessment of each application by the Trial Chamber, was the most appropriate in this regard as it has led to unnecessary delays in the award of reparations. However, the Appeals Chamber considers that the Trial Chamber's approach did not amount to an error of law or an abuse of discretion that would justify the reversal of the Impugned Decision.
- 2 Rather than attempting to determine the "sum-total" of the monetary value of the harm caused, trial chambers should seek to define the harms and to determine the appropriate modalities for repairing the harm caused with a view to, ultimately, assessing the costs of the identified remedy. The Appeals Chamber considers that focusing on the cost to repair is appropriate, in light of the overall purpose of reparations, which is indeed to repair.
- 3 There may be circumstances where a trial chamber finds it necessary to individually set out findings in respect of all applications in order to identify the harms in question (for example, if there is a very small number of victims to whom the chamber intends to award individual and personalised reparations). However, when there are more than a very small number of victims, this is neither necessary nor desirable. This is not to say that trial chambers should not consider those applications – indeed the information therein may be crucial to assess the types of harm alleged and it can assist a chamber in making findings as to that harm. However, setting out an analysis for each individual, in particular in circumstances where a subsequent individual award bears no relation to that detailed analysis, appears to be contrary to the need for fair and expeditious proceedings.
- 4 Resort to factual presumptions in reparations proceedings is within a trial chamber's discretion. However, this discretion is not unlimited and a trial chamber must respect the rights of victims as well as the convicted person when resorting to presumptions.
- 5 The definition of 'victims' in rule 85 (a) of the Rules as "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court" emphasises the requirement of the existence of harm rather than whether the indirect victim was a close or distant family member of the direct victim.
- 6 In principle, the question of whether other individuals may also have contributed to the harm resulting from the crimes for which the person has been convicted is irrelevant to the convicted person's liability to repair that harm. While a reparations order must not exceed the overall cost to repair the harm caused, it is not, *per se*, inappropriate to hold the person liable for the full amount necessary to repair the harm'.

Péter Kovács

The only point where the Appeals Chamber claimed a new and detailed assessment, is the issue of the transgenerational harms, which concerned five applicants.¹¹⁰ This was done and released in a new order¹¹¹

110 '259. In relation to the appeal brought by the LRV, the Appeals Chamber has found that the Trial Chamber erred by failing to properly reason its decision in relation to the causal nexus between the attack on Bogoro and the harm suffered by the Five Applicants.

260. The Appeals Chamber recalls that, in this case, the Trial Chamber assessed all applications for reparations individually with a view to determining whether the applicants were victims and the harm suffered. These determinations were then the basis for awarding symbolic individual as well as collective reparations. While the Appeals Chamber has expressed concerns about this approach in this case, it has not found that it amounted to an error of law or an abuse of discretion. In these circumstances, and bearing in mind that the number of applications alleging transgenerational harm is low, the Appeals Chamber considers it appropriate that these applications be reassessed. Thus, the Appeals Chamber considers it appropriate to reverse the Trial Chamber's findings in relation to the Five Applicants and to remand the matter to the Trial Chamber, which has detailed knowledge of the case, for it to reassess the question of the causal nexus between the crimes for which Mr Katanga was convicted and their psychological harm and whether they should be awarded reparations' – ICC-01/04-01/07-3778-Red 09-03-2018, Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled 'Order for Reparations pursuant to Article 75 of the Statute', §259-260, pp. 110-111.

111 ICC-01/04-01/07-3804-Red 19-07-2018, available at https://www.icc-cpi.int/CourtRecords/CR2018_03793.PDF (last accessed 20 July 2018).] on the 19th July 2018. After having presented the two main doctrinal approaches of transgenerational harms (i.e. (i) the so-called epigenetic school and (ii) the sociological school or family behavioural school), the Chamber reassessed the five demands in the light of the proximate cause and confirmed its previous decision while inviting the Trust Fund at the same time to observe and take into consideration the applicants' needs during the implementation of its assistance mandate.