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Date: **24 March 2017**

**TRIAL CHAMBER II**

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

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

**Public Document**

**Order for Reparations pursuant to Article 75 of the Statute**

**With one public annex (Annex I) and one confidential annex *ex parte*, Common  
Legal Representative of the Victims, Office of Public Counsel for Victims and  
Defence team for Germain Katanga (Annex II)**

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

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Queen's University Belfast's Human Rights Centre

University of Ulster's Transitional Justice Institute

*Ligue pour la Paix, les Droits de l'Homme et la Justice*

United Nations

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**States' representatives**

The Government of the Democratic Republic of the Congo

**Trust Fund for Victims**

Mr Pieter de Baan

**REGISTRY**

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In the case of *The Prosecutor v. Germain Katanga*, Trial Chamber II of the International Criminal Court (“Chamber” and “Court”, respectively), acting pursuant to article 75 of the Rome Statute (“Statute”) and rules 97(1), 98(2) and 98(3) of the Rules of Procedure and Evidence, unanimously hands down the present order for reparations.

## I. PROCEDURAL OVERVIEW<sup>1</sup>

1. On 7 March 2014, Trial Chamber II, sitting in its previous composition, handed down the “Judgment pursuant to article 74 of the Statute” (“Judgment Handing Down Conviction”).<sup>2</sup>

2. On 23 May 2014, Trial Chamber II, sitting in its previous composition, also by majority, passed its decision on sentence pursuant to article 76 of the Statute (“Decision on Sentence”), imposing a 12-year term of imprisonment on Germain Katanga (“Mr Katanga”).<sup>3</sup>

3. On 1 April 2015, the Chamber, acting pursuant to article 75 of the Statute and rules 97 and 98 of the Rules of Procedure and Evidence, issued an order instructing the parties to file observations on the principles and procedure applicable to reparations in the case.<sup>4</sup> That same day, it accorded leave to the Redress Trust; Queen’s University Belfast’s Human Rights Centre and University of Ulster’s Transitional Justice Institute; the *Ligue pour la Paix, les Droits de l’Homme et la Justice*; and the United Nations also to file representations.<sup>5</sup>

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<sup>1</sup> A comprehensive review of the entire proceedings is provided in Annex I to the present order.

<sup>2</sup> “Judgment pursuant to article 74 of the Statute”, 7 March 2014, ICC-01/04-01/07-3436-tENG and “Minority Opinion of Judge Christine Van den Wyngaert”, ICC-01/04-01/07-3436-AnxI.

<sup>3</sup> “Decision on Sentence pursuant to article 76 of the Statute”, 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr and separate opinion of Judge Christine Van den Wyngaert, dated 23 May 2014 and registered on 24 May 2014, ICC-01/04-01/07-3484-Anx1.

<sup>4</sup> “Order instructing the parties and participants to file observations in respect of the reparations proceedings”, 1 April 2015, ICC-01/04-01/07-3532-tENG.

<sup>5</sup> “Order granting leave to file representations pursuant to article 75(3) of the Statute”, dated 1 April 2015 and reclassified as public on 4 June 2015, ICC-01/04-01/07-3533-tENG.

4. On 8 May 2015, the Chamber instructed the Common Legal Representative of Victims (“Legal Representative”) to, in consultation with the Registry, compile and to file by 1 October 2015 all applications for participation and/or reparations initially made by the victims authorized to participate in the proceedings, and, where possible, supporting documentation attesting to the extent of the harm suffered and the causal nexus between the harm alleged and the crime committed. The Chamber directed the Registry to impart, in redacted form, to the Bench and to the parties, any other applications for reparations from victims who had yet to make themselves known, and, where possible, supporting documentation, and directed the Legal Representative to represent any victims identified subsequently (“Decision of 8 May 2015”).<sup>6</sup>

5. Between 12 November 2015 and 29 February 2016 at the behest<sup>7</sup> of the Chamber, the Registry imparted to the Chamber 304 applications for reparations in seven batches containing consolidated and new applications (“Batches”).<sup>8</sup>

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<sup>6</sup> “Decision on the ‘*Demande de clarification concernant la mise en œuvre de la Règle 94 du Règlement de procédure et de preuve*’ and future stages of the proceedings”, 8 May 2015, ICC-01/04-01/07-3546-tENG, p. 9. For the Applicants to whom Trial Chamber II, sitting in its previous composition, accorded the *locus standi* of victim participating in the proceedings against Mr Katanga, see Annex I, paras. 7-9.

<sup>7</sup> See, *inter alia*, Decision of 8 May 2015, ICC-01/04-01/07-3546-tENG; “Decision on the ‘Defence Request for the Disclosure of Unredacted or Less Redacted Victim Applications’”, 1 September 2015, ICC-01/04-01/07-3583-tENG; “*Demande de réplique au document de la Défense intitulé ‘Defence Consolidated Response to the Legal Representative of Victims and the Registry’s Requests for an extension of time limit’* (ICC-01/04-01/07-3591)”, 11 September 2015, ICC-01/04-01/07-3592; “Decision on the requests of the Common Legal Representative of Victims and the Registry for an extension of time limit for transmitting and filing applications for reparations”, 21 September 2015, ICC-01/04-01/07-3599-tENG; “Decision on the request of the common legal representative of victims for assistance from the Victims and Witnesses Unit”, 9 October 2015, ICC-01/04-01/07-3608-tENG; “*Décision accordant une nouvelle prorogation de délai au Représentant légal commun des victimes pour le dépôt des demandes en réparation*”, 8 December 2015, ICC-01/04-01/07-3628; “Decision granting extension of time to submit Defence observations on requests for reparations”, 1 February 2016, ICC-01/04-01/07-3645-tENG; “Corrigendum to the ‘Order relating to the submission of the Legal Representative of Victims’”, 16 February 2016, ICC-01/04-01/07-3653-Corr-tENG (“16 February 2016 Corrected Version of the Order of 1 February 2016”).

<sup>8</sup> “*Transmission de demandes en réparation*”, 12 November 2015, ICC-01/04-01/07-3614 (“Batch One”) and 43 confidential annexes, *ex parte* Registry and Legal Representative of Victims. A confidential redacted version of the annexes was filed on 24 November 2015 for the attention of the Defence (ICC-01/04-01/07-3619); “*Seconde transmission de demandes en réparation*”, 20 November 2015, ICC-01/04-01/07-3617 (“Batch Two”) and 19 confidential annexes, *ex parte* Registry and Legal Representative of Victims. A

6. On 24 February and 11 April 2016, the Defence team for Mr Katanga (“Defence”), as directed by the Chamber, filed observations on the Batches.<sup>9</sup>

7. On 15 July 2016, the Chamber directed from the Legal Representative, the Defence and the Trust Fund for Victims (“TFV”) additional observations on the monetary value they considered fair for each type of harm alleged.<sup>10</sup>

8. On 6 September 2016, the Chamber decided to entertain the 38 dossiers of persons whom Trial Chamber II, sitting in its previous composition, had accorded the *locus standi* of victim participating in the trial against Mr Katanga (“participating victims”), and the forms from 3 persons who had filed an application for reparations

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confidential redacted version of the annexes was filed for the attention of the Defence on 27 November 2015 (ICC-01/04-01/07-3622); “Troisième transmission de demandes en réparation”, 27 November 2015, ICC-01/04-01/07-3621 (“Batch Three”) and 33 confidential annexes, *ex parte* Registry and Legal Representative of Victims. A confidential redacted version of the annexes was filed that day for the attention of the Defence (ICC-01/04-01/07-3624); “Quatrième Transmission de Demandes en réparation”, 2 February 2016, ICC-01/04-01/07-3646 (“Batch Four”) and 35 confidential annexes, *ex parte* Registry and Legal Representative of Victims. A confidential redacted version of the annexes was filed that day for the attention of the Defence (ICC-01/04-01/07-3648); “Cinquième transmission de Demandes en réparation”, 17 February 2016, ICC-01/04-01/07-3656 (“Batch Five”) and 85 confidential annexes, *ex parte* Registry and Legal Representative of Victims. A confidential redacted version of the annexes was filed for the attention of the Defence on 18 February 2016 (ICC-01/04-01/07-3659); “Sixième transmission de Demandes en réparation à la Défense”, 26 February 2016, ICC-01/04-01/07-3661 (“Batch Six”) and 80 confidential annexes, *ex parte* Registry and Legal Representative of Victims. A confidential redacted version of the annexes was filed that day for the attention of the Defence (ICC-01/04-01/07-3663); “Septième transmission de Demandes en réparation” (“Batch Seven”), 29 February 2016, ICC-01/04-01/07-3664 and 15 confidential annexes, *ex parte* Registry and Legal Representative of Victims. A confidential redacted version of the annexes was filed that day for the attention of the Defence (ICC-01/04-01/07-3665).

<sup>9</sup> “Defence Observations on the Victims Applications for Reparation”, dated 24 February 2016 and reclassified as confidential on 3 March 2016, ICC-01/04-01/07-3660-Conf (“First Defence Observations”) and annex, ICC-01/04-01/07-3660-Conf-Exp-AnxA; “Second Defence Observations on the Victims Applications for Reparation”, dated 11 April 2016 and reclassified as confidential *ex parte*, Legal Representative for the Victims, Defence and Trust Fund for Victims, ICC-01/04-01/07-3681-Conf-Exp (“Second Defence Observations”) and confidential annex, ICC-01/04-01/07-3681-Conf-Exp-AnxA and public annex ICC-01/04-01/07-3681-AnxB.

<sup>10</sup> “Order instructing the parties and the Trust Fund for Victims to file observations on the monetary value of the alleged harm”, 15 July 2016, ICC-01/04-01/07-3702-tENG.



in 2008.<sup>11</sup> On 20 September 2016, the Defence filed observations on the 41 dossiers of the aforementioned applicants and participating victims.<sup>12</sup>

9. On 30 September 2016, the Legal Representative,<sup>13</sup> the Defence<sup>14</sup> and the TFV<sup>15</sup> filed observations on the monetary value of the harm alleged.

10. On 8 December 2016, the Legal Representative laid before the Chamber the victims' proposals regarding the modalities of reparations in the case.<sup>16</sup>

11. On 30 December 2016, the Defence conveyed to the Chamber its response to said proposals.<sup>17</sup>

12. On 22 February 2017, the Chamber scheduled the order for reparations to be pronounced in public on 24 March 2017.<sup>18</sup>

13. On 15 March 2017, the Chamber decided not to consider further the dossiers of four participating victims on account of their death.<sup>19</sup>

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<sup>11</sup> "Second decision on the Legal Representative of the Victims' request for termination of the representation agreement", 6 September 2016, ICC-01/04-01/07-3706-Conf-tENG.

<sup>12</sup> "Defence Observations on 41 victims' applications pursuant to the *Deuxième décision relative à la demande de retrait de mandat du Représentant légal des victimes*", 20 September 2016, ICC-01/04-01/07-3709-Conf.

<sup>13</sup> "*Observations des victimes sur la valeur monétaire des préjudices allégués (Ordonnances ICC-01/04-01/07-3702 et ICC-01/04-01/07-3705)*", 30 September 2016, ICC-01/04-01/07-3713 ("Victims' Observations of 30 September 2016").

<sup>14</sup> "Defence Observations on the Monetary Value of the Alleged Harm", 30 September 2016, ICC-01/04-01/07-3711 ("Defence Observations of 30 September 2016").

<sup>15</sup> "Observations in response to the Trial Chamber's order of 15 July 2016", 30 September 2016, ICC-01/04-01/07-3714-Conf-Exp ("TFV Observations of 30 September 2016").

<sup>16</sup> "*Propositions des victimes sur des modalités de réparation dans la présente affaire (Article 75 du Statut et norme 38-1-f du Règlement de la Cour)*", 8 December 2016, ICC-01/04-01/07-3720 ("Victims' Proposals of 8 December 2016") and annex ICC-01/04-01/07-3720-Anx1.

<sup>17</sup> "Defence Response to the *Propositions des victimes sur des modalités de réparation dans la présente affaire*", 30 December 2016, ICC-01/04-01/07-3722 ("Defence Response of 30 December 2016").

<sup>18</sup> "*Ordonnance fixant la date du prononcé de l'ordonnance de réparation*", 22 February 2017, ICC-01/04-01/07-3724.

<sup>19</sup> "*Décision relative à la requête du Représentant légal commun des victimes du 2 mars 2017*", 15 March 2017, ICC-01/04-01/07-3727.

## II. INTRODUCTION

14. From the outset, the Chamber must underscore the importance of the reparations phase, which marks a critical juncture in the administration of justice, and it is of one mind with Trial Chamber I in *The Prosecutor v. Thomas Lubanga Dyilo* (“*Lubanga*”): the success of the Court is, to some extent, linked to the success of its reparation system.<sup>20</sup>

15. The Chamber recalls that the purpose of the reparation proceedings is to oblige those responsible for grave crimes to repair the harm they caused to the victims and to enable the Court to ensure that offenders account for their acts.<sup>21</sup> It is by virtue of the reparation proceedings that the Court gives public acknowledgement to the suffering which the grave crimes committed by the convicted person caused to the victims,<sup>22</sup> and delivers to them justice by alleviating, as far as possible, the consequences of the wrongful acts.<sup>23</sup> To such end, the Court must strive to the utmost to ensure that reparations are meaningful to the victims<sup>24</sup> and that, to the extent possible, they receive reparations which are appropriate, adequate and prompt.<sup>25</sup> The Chamber further underlines that at the reparations stage victims and convicted person are cast in the position of parties to the proceedings.<sup>26</sup>

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<sup>20</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, “Decision establishing the principles and procedures to be applied to reparations”, dated 7 August 2012, [French] translation registered on 19 February 2013, ICC-01/04-01/06-2904, para. 178 (“*Lubanga*, Trial Chamber I, Decision on Reparations”); *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, “Order for reparations” (amended), 3 March 2015, [French] translation registered on 1 August 2016, ICC-01/04-01/06-3129-AnxA, para. 3 (“*Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA”).

<sup>21</sup> *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 2.

<sup>22</sup> See Christopher Muttukumaru, “Reparations to Victims” in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute; Issues, Negotiations, Results* (Kluwer 1999), pp. 262–270, in particular p. 264; Luke Moffett, *Justice for Victims before the International Criminal Court* (Routledge 2014), pp. 143-195.

<sup>23</sup> *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 71.

<sup>24</sup> *Report of the Bureau on the impact of the Rome Statute system on victims and affected communities*, ICC-ASP/9/25, Appendix III, 22 November 2010, para. 19.

<sup>25</sup> *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 44.

<sup>26</sup> See *Lubanga*, “Decision on the request of the Trust Fund for Victims for leave to appeal against the order of 9 February 2016”, 4 March 2016, ICC-01/04-01/06-3202-tENG, para. 12. Furthermore, article 82(4) of the Statute provides that both the accused person and the victims have *locus standi* to enter an

16. The Chamber sees reparation proceedings as connected to and yet distinct from the penal proceedings. They are so connected in that liability for reparations is intrinsically linked to the crimes of which the person was convicted.<sup>27</sup> They are distinct in that they constitute a discrete set of proceedings,<sup>28</sup> where the victims tender evidence which is proper to that phase and which, where possible and duly redacted, the convicted person may impugn. It is then that the parties engage in exchanges of observations and argument, oral and written, on the various legal and factual aspects of the proceedings. The order for reparations is the culmination of all such exchanges.

17. An order for reparations, it is to be noted, must reflect the context from which it arises – that is, at this Court, a legal system, whereby individual criminal responsibility for offences under the Statute is established<sup>29</sup> – and it must be treated in the same manner as a decision to convict or sentence.<sup>30</sup>

18. The reparations phase, like all proceedings before the Court, is a judicial process.<sup>31</sup> Accordingly, the Chamber must strike a fair balance between the divergent

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appeal against an order for reparations made pursuant to article 75(2) of the Statute. See also *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 29: “The victims [...] should be able to participate throughout the reparations process and they should receive adequate support in order to make their participation substantive and effective”.

<sup>27</sup> *Lubanga*, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129, para. 99: “it is the obligation of the convicted person to remedy the harm caused by the crimes for which he or she was convicted”.

<sup>28</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, “Decision on the admissibility of the appeals against Trial Chamber I’s ‘Decision establishing the principles and procedures to be applied to reparations’ and directions on the further conduct of proceedings”, 14 December 2013, ICC-01/04-01/06-2953, para. 70: “the reparations proceedings are a distinct stage of the proceedings and it is conceivable that different evidentiary standards and procedural rules apply to the question of who is a victim for the purposes of those proceedings”.

<sup>29</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, “Judgment 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 (Annex A) and public annexes 1 and 2”, 3 March 2015, ICC-01/04-01/06-3129, para. 65 (“*Lubanga*, Appeals Chamber, Appeals Judgment on Reparations”).

<sup>30</sup> *Lubanga*, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129, para. 67.

<sup>31</sup> *Lubanga*, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129, para. 237: “the Appeals Chamber considers it to be beyond question that a person subject to an order of a court of law must know the precise extent of his or her obligations arising from that court order, particularly

rights and interests of the victims on the one hand and those of the convicted person on the other.<sup>32</sup>

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in light of the corresponding right to effectively appeal such an order, and that the extent of those obligations must be determined by a court in a judicial process”.

<sup>32</sup> *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, paras. 20, 21, 22, 45 and 49. Nothing in the principles applicable to reparations will prejudice or be inconsistent with the rights of the convicted person to a fair and impartial trial; rule 97(3) of the Rules of Procedure and Evidence.

### III. CONTEXT OF THE KATANGA CASE

19. The attack on Bogoro, which took place on 24 February 2003, is central to the case. Bogoro village, in Ituri, is located at the intersection of Bagaya and Dodoy *localités*, and is the administrative centre of Babiase *groupement*, which falls under Bahema Sud *collectivité*.<sup>33</sup> The population of Ituri is made up of at least different 18 ethnic groups, of which the Hema, the Ngiti and the Lendu are the largest. In the estimation of Trial Chamber II, sitting in its previous composition, at least 800 civilians were living in Bogoro in 2003.<sup>34</sup>

20. When tension between the Hema and Lendu escalated in 2001, the Lendu population left Bogoro.<sup>35</sup> The school known as the “Bogoro Institute” was turned into a military camp by Ugandan army soldiers who occupied Bogoro at the time. *Union des patriotes congolais* [Union of Congolese Patriots] (UPC) troops subsequently took over the defence of Bogoro. In 2003, the Bogoro camp was thus under UPC control.<sup>36</sup>

21. All the militias which were present in the district of Ituri between 2002 and 2003 and launched attacks assaulted unarmed civilians who had no part in combat, killing, pillaging and destroying houses, and subjecting women to sexual violence.<sup>37</sup>

22. Mr Katanga, of Ngiti ethnicity, belonged to the military leadership of a group which consisted essentially of Ngiti combatants. The group allegedly became known in Ituri as the *Forces de résistance patriotique en Ituri* [Patriotic Force of Resistance in Ituri]. Mr Katanga was subsequently appointed Brigadier General in the *Forces Armées de la RDC* [Armed Forces of the Democratic Republic of the Congo] by the President of the DRC in December 2004.<sup>38</sup>

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<sup>33</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, paras. 2-4.

<sup>34</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 730.

<sup>35</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 725.

<sup>36</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 726.

<sup>37</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 516.

<sup>38</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, paras. 5-6.

23. On 7 March 2014, Trial Chamber II, sitting in its previous composition, found that the attack on Bogoro began at around 5 a.m. on 24 February 2003. The attackers, who included women and children, came from several different directions, via roads and tracks leading from areas mostly inhabited by Ngiti and Lendu. The various testimonies taken confirmed that on that day Ngiti combatants from Walendu-Bindi *collectivité* and Lendu combatants from Bedu-Ezekere *groupement* surrounded the village of Bogoro in order to attack it.<sup>39</sup>

24. In the Judgment Handing Down Conviction of 7 March 2014, the Chamber found that

on 24 February 2003, Ngiti combatants from Walendu-Bindi *collectivité* committed the crimes of murder as a crime against humanity and as a war crime; attack against civilians as a war crime; pillaging and destruction as war crimes; and lastly, rape and, as of 24 February 2003, sexual slavery as war crimes and as crimes against humanity.<sup>40</sup>

25. It further determined that

the influence of all of [Mr Katanga's] actions – which brought to pass the crimes of attack against civilians, murder (as a war crime and as a crime against humanity), pillaging and destruction of property – proved important.<sup>41</sup>

26. The Chamber went on to say:

[Mr Katanga's] activities as a whole and the various forms which his contribution took, [...], in the circumstances, had a significant influence on the commission of those crimes.<sup>42</sup>

27. Further, it found:

beyond reasonable doubt that [Mr] Katanga's intentional contribution to the crimes of murder (as a war crime and as a crime against humanity), attack against civilians, destruction of property and pillaging (as war crimes) was significant and made in the knowledge of the intention of the group to commit the crimes.<sup>43</sup>

28. Ultimately the Chamber found, by majority, Mr Katanga guilty, under article 25(3)(d) of the Statute, as an accessory to the crimes committed on 24 February 2003, of murder as a crime against humanity under article 7(1)(a) of the Statute;

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<sup>39</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 755.

<sup>40</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 1652.

<sup>41</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 1681.

<sup>42</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 1681.

<sup>43</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 1691.

murder as a war crime under article 8(2)(c)(i) of the Statute; attack against a civilian population as such or against individual civilians not taking direct part in hostilities, as a war crime under article 8(2)(e)(i) of the Statute; destruction of enemy property as a war crime under article 8(2)(e)(xii) of the Statute; and pillaging as a war crime under article 8(2)(e)(v) of the Statute. The Chamber was unanimous in finding Mr Katanga not guilty, under article 25(3)(d) of the Statute, as an accessory to the crimes of rape and sexual slavery as crimes against humanity under article 7(1)(g) of the Statute; and of rape and sexual slavery as war crimes under article 8(2)(e)(vi) of the Statute. The Chamber was unanimous in finding Mr Katanga not guilty, under article 25(3)(a) of the Statute, of the crime of using children under the age of 15 years to participate actively in hostilities as a war crime under article 8(2)(e)(vii) of the Statute.<sup>44</sup>

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<sup>44</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, pp. 709 and 710.

#### IV. PRINCIPLES AND CRITERIA APPLICABLE TO THE ORDER FOR REPARATIONS AND THE CHAMBER'S GENERAL APPROACH

29. In the first place, the Chamber would recall that in *Lubanga*, the Appeals Chamber, acting pursuant to article 75(1) of the Statute, established the principles applicable to reparation proceedings.<sup>45</sup> The principles, the Appeals Chamber made clear, may be applied, adapted, expanded upon, or added to by future Trial Chambers.<sup>46</sup>

30. The Chamber takes the view that the principles established by the Appeals Chamber in *Lubanga* find application, *mutatis mutandis*, in the case at bar.<sup>47</sup> Thus, the Chamber points out that in all matters pertaining to reparations, it “shall treat the victims with humanity and shall respect their dignity and human rights”.<sup>48</sup> It is further duty-bound to treat all victims “fairly and equally [...], irrespective of whether they participated in the trial proceedings leading to the decision under article 74 of the Statute”.<sup>49</sup> The Chamber would also recall that, as set out in article 68 of the Statute and rule 86 of the Rules of Procedure and Evidence, it shall take into account the needs of all victims.<sup>50</sup> What is more, rules 87 and 88 of the Rules of Procedure and Evidence mandate that appropriate measures be put in place to ensure the victims’ safety, physical and psychological well-being, and privacy.<sup>51</sup> Furthermore, it is paramount that reparations are awarded and are accessible to victims “without adverse distinction on the grounds of gender,<sup>52</sup> age, race, colour,

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<sup>45</sup> *Lubanga*, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129, paras. 3 and 52. See also *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, paras. 1-52.

<sup>46</sup> *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 5.

<sup>47</sup> Article 75(1) of the Statute provides that the Court must state “the principles on which it is acting”.

<sup>48</sup> *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 15.

<sup>49</sup> *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 12.

<sup>50</sup> *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 34.

<sup>51</sup> *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 34.

<sup>52</sup> *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 18.



language, religion or belief, political or other opinion, sexual orientation, national, ethnic or social origin, wealth, birth or other status”.<sup>53</sup>

31. Secondly, the Chamber recalls that an order for reparations pursuant to article 75 of the Statute must, at a minimum, contain five essential elements:<sup>54</sup>

- (1) The order for reparations must be made against the convicted person.
- (2) The Chamber must identify the victims eligible to benefit from the awards for reparations or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes of which the person was convicted.<sup>55</sup>
- (3) The Chamber must define the harm caused to victims as a result of the crimes of which the person was convicted.<sup>56</sup> The Chamber notes that the assessment of the extent of that harm for the purposes of determining the nature and/or the size of the reparation awards may be undertaken by a Trial Chamber in handing down the order for reparations<sup>57</sup> or by the TFV thereafter.<sup>58</sup>
- (4) The Chamber must determine the liability of the convicted person for reparations<sup>59</sup> and inform him or her thereof.<sup>60</sup> To that end, the Chamber

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<sup>53</sup> See also *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 16.

<sup>54</sup> *Lubanga*, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129, paras. 1 and 32. The Appeals Chamber has pointed out that a first-instance Chamber may address these elements in a different sequence for the purposes of issuing an order for reparations under article 75 of the Statute (*Lubanga*, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129, para. 33).

<sup>55</sup> See Section “V. CONCEPT OF ‘VICTIM’”, Section “VI. EVIDENTIARY CRITERIA APPLIED BY THE CHAMBER”, Section “VII. INDIVIDUAL ANALYSIS OF THE APPLICATIONS FOR REPARATIONS” and Annex II to the present order.

<sup>56</sup> See Section “V. CONCEPT OF ‘VICTIM’” and Section “VII. C. Definition of the harm and evaluation of the evidence presented to substantiate the harm alleged by the Applicants”.

<sup>57</sup> Rule 97(2) of the Rules of Procedure and Evidence provides that the Chamber may avail itself of experts (*Lubanga*, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129, para. 183). See also Section “IX. ASSESSMENT OF THE EXTENT OF THE HARM”.

<sup>58</sup> *Lubanga*, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129, para. 183.

<sup>59</sup> See Section “X. MR KATANGA’S LIABILITY FOR REPARATIONS”.

<sup>60</sup> *Lubanga*, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129, para. 1.

must delineate the scope of that liability<sup>61</sup> by setting the size of the award for which that person is liable.<sup>62</sup> It is to be noted in this respect that a convicted person's liability for reparations is founded on and confined to the harm caused by the crimes of which said person was convicted.<sup>63</sup> In *Lubanga* the Appeals Chamber held that reparations are intrinsically linked to the individual whose criminal responsibility is established in a conviction and whose culpability for those criminal acts is determined in a sentence.<sup>64</sup> The Appeals Chamber further underlined that it is beyond question that a person subject to an order for reparations must be apprised of the precise extent of his or her obligations arising from that order, particularly in the light of the corresponding right to appeal the order under article 82(4) of the Statute, and that the extent of those obligations must be determined by the Chamber concerned in a judicial process.<sup>65</sup>

- (5) The Chamber must specify and provide reasons for the type of reparations ordered – be they collective, individual or both – pursuant to rules 97(1) and 98 of the Rules of Procedure and Evidence. It also must identify the

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<sup>61</sup> *Lubanga*, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129, para. 237: "At the outset, the Appeals Chamber stresses that the imposition of liability on a convicted person, including the precise scope of that liability, should be done by the Trial Chamber in the order for reparations".

<sup>62</sup> *Lubanga*, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129, paras. 241-242.

<sup>63</sup> In this connection, see Section "V. CONCEPT OF 'VICTIM'".

<sup>64</sup> *Lubanga*, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129, para. 65. See also *Lubanga*, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129, para. 238: "In the present case, the Appeals Chamber notes that in order to give effect to the determinations in this judgment with respect to liability for the awards for reparations, it would need to, *inter alia*, specify the scope of Mr Lubanga's liability for reparations and include such specification in the amended order contained in Annex A to the present judgment. In order to make such a determination, the Appeals Chamber would need to be provided with relevant information, given that the Trial Chamber had only made limited enquiries previous to the issuance of the Impugned Decision. In the view of the Appeals Chamber, this would require it to engage in an activity for which a Trial Chamber is better placed."

<sup>65</sup> *Lubanga*, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129, para. 237.

modalities of reparations that the Chamber considers appropriate on the basis of the circumstances of the specific case before it.<sup>66</sup>

32. In the case at bar, 341 applications for reparations are put before the Chamber; they consist of forms for reparation or forms for participation in the trial against Mr Katanga, together with supporting documentation and other additional documents<sup>67</sup> (“Applicants”). The Defence made observations, general and specific, on the 341 applications for reparations filed.<sup>68</sup> The Chamber notes further that the crimes of which Mr Katanga was convicted took place as part of the attack on Bogoro, that is, an attack on a definite place throughout the course of one day.

33. That being so, the Chamber hereby decides that satisfaction of the five essential elements laid down by the Appeals Chamber requires that the 341 applications for reparations be analysed individually.<sup>69</sup> That individual analysis of the 341 applications for reparations will inform the Chamber’s assessment of the total extent of the harm caused to the Applicants.<sup>70</sup> The assessment, will, amongst other factors, form the basis of the Chamber’s determination of the size of the award for which Mr Katanga is personally liable. It is the Chamber’s view that by so proceeding Mr Katanga’s liability for reparations, and hence, the size of the award for reparations against him, may be determined in a just and fair manner. What is

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<sup>66</sup> See Section “XI. TYPES AND MODALITIES OF REPARATIONS”.

<sup>67</sup> See Section “I. PROCEDURAL OVERVIEW” and Annex I to the present order.

<sup>68</sup> See Annex I to the present order, “Procedural History”. “Defence Response to the ‘*Soumission du Représentant légal relative aux expurgations pratiquées sur les demandes en réparation déposées par les victimes qui ne se sont pas encore fait connaître de la Cour*’”, 8 February 2016, ICC-01/04-01/07-3651; First Defence Observations, 24 February 2016, ICC-01/04-01/07-3660-Conf and annex, ICC-01/04-01/07-3660-Conf-Exp-AnxA; Second Defence Observations, 11 April 2016, ICC-01/04-01/07-3681-Conf-Exp and confidential annex, ICC-01/04-01/07-3681-Conf-Exp-AnxA and public annex ICC-01/04-01/07-3681-AnxB.

<sup>69</sup> Procedure at rules 94 and 95 of the Rules of Procedure and Evidence (*Lubanga*, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129, para. 149).

<sup>70</sup> The Chamber notes in this respect that rule 145(1)(c) of the Rules of Procedure and Evidence provides that the extent of the harm is among the factors to be given consideration in the determination of sentence.

more, the parties may thereby exercise in full the right of appeal vested in them by article 82(4) of the Statute.<sup>71</sup>

34. In the Section which follows, the Chamber will define the concept of “victim” for the purpose of reparations.

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<sup>71</sup> The Chamber is nonetheless cognizant that the modus operandi adopted in the case at bar will not necessarily apply to other cases, in particular where the number of potential victims is very high and/or where the acts of which the person was convicted encompass a considerable stretch of time and/or their geographical reach is much greater than it is here.

## V. CONCEPT OF “VICTIM”

35. For the purposes of rule 85 of 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 as a result of the commission of any crime within the jurisdiction of the Court.<sup>72</sup>

36. The Chamber notes that to accord the status of victim participating at the trial stage to a person who has applied to that end, the Chambers have relied on the four conditions defined by the Appeals Chamber in *Lubanga*,<sup>73</sup> viz., the applicant must be a natural or legal person; the applicant must have suffered harm; the crime which caused the harm must fall within the jurisdiction of the Court; and there must be a causal nexus between the harm suffered and the crime.<sup>74</sup>

37. The Chamber holds that said conditions find application at the reparations phase, but one qualification attaches to the condition that “the crime which caused the harm falls within the jurisdiction of the Court”: it must be a crime of which the person in question was convicted.<sup>75</sup>

38. From the outset the Chamber must underscore that the matter as to whether a person suffered harm as a consequence of the commission of one or more

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<sup>72</sup> See also “Queen’s University Belfast’s Human Rights Centre (HRC) and University of Ulster’s Transitional Justice Institute (TIJ) Submission on Reparations Issues pursuant to Article 75 of the Statute”, 14 May 2015, ICC-01/04-01/07-3551, para. 41 (“HRC and TIJ Submission of 14 May 2015”).

<sup>73</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, “Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008”, dated 11 July 2008, [French] translation registered on 27 August 2008, ICC-01/04-01/06-1432, paras. 61-65 (“*Lubanga*, Appeals Chamber, “Decision on Victims’ Participation”).

<sup>74</sup> In *Katanga*, see e.g. “Corrigendum of Operative part of the Decision on the 345 applications for participation as victim in the proceedings”, dated 5 August 2009, [original French version] registered on 6 August 2009, ICC-01/04-01/07-1347-Corr-tENG, para. 6; “Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims”, 23 September 2009, ICC-01/04-01/07-1491-Conf-tENG, para. 57. Moreover, as explained hereinafter, the standard of proof to be met for a victim to qualify for reparations is more stringent than that required for a victim to participate at trial (See Section “VI. B. Standard of proof”).

<sup>75</sup> The Chamber defines the harm resulting from the crimes of which Mr Katanga was convicted in Section “VII. INDIVIDUAL ANALYSIS OF THE APPLICATIONS FOR REPARATIONS”.

of the crimes by the convicted person and so, in the view of the Court, qualifies as a victim, must be determined in the light of the particular circumstances of the case at bar.<sup>76</sup>

39. The Chamber recalls that the Court has consistently held that, in determining whether a natural person suffered harm, the Chamber must inquire as to whether the harm was personally suffered.<sup>77</sup> In that respect, the concept of victim necessarily implies the existence of personal harm but not necessarily direct harm.<sup>78</sup> The Chamber recognizes that the harm suffered by a victim, by reason of the commission of a crime within the jurisdiction of the Court and, in the instant case, by reason of the commission of one or more of the crimes of which the person was convicted, may be the cause of harm to persons other than the direct victims.<sup>79</sup> Accordingly, a natural person may be a direct victim or an indirect victim.<sup>80</sup>

40. The Chamber notes the point made by the Defence that the Bench must take care to ensure that UPC combatants and their families are not considered to be

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<sup>76</sup> *Lubanga*, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129, para. 80; *Lubanga*, Appeals Chamber, Decision on Victims' Participation, ICC-01/04-01/06-1432, para. 32.

<sup>77</sup> *Lubanga*, Appeals Chamber, Decision on Victims' Participation, ICC-01/04-01/06-1432, para. 32. See also *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 10. See also "Observations of the victims on the principles and procedures to be applied to reparations", 15 May 2015, ICC-01/04-01/07-3555-tENG, para. 36 ("Victims' Observations of 15 May 2015").

<sup>78</sup> *Lubanga*, Appeals Chamber, Decision on Victims' Participation, ICC-01/04-01/06-1432, para. 38. Therefore, the Chamber does not accept the Defence submissions in this regard ("Defence Observations on Reparations", 14 May 2015, ICC-01/04-01/07-3549, para. 15 ("Defence Observations of 14 May 2015")). See also "Defence Consolidated Response to the Parties, Participants and Other Interested Persons' Observations on Reparation", 16 June 2015, ICC-01/04-01/07-3564, para. 8 ("Defence Consolidated Response of 16 June 2015"). See also "Observations on Reparations Procedure", 13 May 2015, ICC-01/04-01/07-3548, para. 102 ("TFV Observations of 13 May 2015").

<sup>79</sup> *Lubanga*, Appeals Chamber, Decision on Victims' Participation, ICC-01/04-01/06-1432, para. 32.

<sup>80</sup> *Lubanga*, Appeals Chamber, Decision on Victims' Participation, ICC-01/04-01/06-1432, para. 32; *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 6. See also "Prosecution's Observations on the Procedure for Reparations", 30 April 2015, ICC-01/04-01/07-3544, para. 6 ("Prosecution's Observations of 30 April 2015"); TFV Observations of 13 May 2015, ICC-01/04-01/07-3548, para. 129. As to legal persons, rule 85(b) of the Rules of Procedure and Evidence confines the definition of victims to those such persons who "have sustained direct harm to any of their property".

victims eligible for reparations.<sup>81</sup> It would, however, underscore that in the Judgment Handing Down Conviction, Trial Chamber II, sitting in its previous composition, determined that although Bogoro was a strategic military position, those who lived there also led civilian lives.<sup>82</sup> Said Bench further pointed out that

whilst the Chamber cannot rule out that on 24 February 2003, some inhabitants who were members of the self-defence group participated directly in the hostilities, or that some soldiers were dressed in civilian clothing, it considers that most of the inhabitants were readily identifiable as civilians who were not taking direct part in combat.<sup>83</sup>

41. Furthermore, Trial Chamber II, sitting in its previous composition, made the finding that, during the attack on the Bogoro Institute,

although it can be reasonably argued that soldiers or civilians who directly participated in the hostilities may have been present in or around the Institute when the attackers entered it, the Chamber considers it established that the villagers killed at the Institute on the day of the attack had not put up any resistance, and it notes that the vast majority of them were defenceless and only seeking refuge in the classrooms.<sup>84</sup>

42. The Chamber must also underline that the villagers of Bogoro were systematically targeted; the attackers committed crimes against civilians in accordance with a regular pattern and great violence during the attack on Bogoro.<sup>85</sup> The Ngiti attackers sought to pursue and kill the UPC combatants, but also the Hema population.<sup>86</sup>

43. Having regard to the conditions prescribed by rule 85 of the Rules of Procedure and Evidence and earlier decisions of the Court, the Chamber will undertake an individual analysis of each of the 341 applications for reparations

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<sup>81</sup> Defence Observations of 14 May 2015, ICC-01/04-01/07-3549, para. 21. See also TFV Observations of 13 May 2015, ICC-01/04-01/07-3548, para. 106 (c).

<sup>82</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 730.

<sup>83</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 729. See also Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, paras. 820, 864, 1656-1657.

<sup>84</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 820. See also Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, paras. 864, 1656-1657.

<sup>85</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, Section IX(A)(2)(b) and para. 1656.

<sup>86</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 1656 and Section VIII(b)(2)(h).

placed before it so as to determine whether the Applicants qualify as victims for the purposes of reparations.<sup>87</sup>

44. In the subsequent Section, the Chamber will set out the criteria underpinning its evaluation of the evidence brought by the Applicants to substantiate their allegations.

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<sup>87</sup> In this regard, see 16 February 2016 Corrected Version of the Order of 1 February 2016, ICC-01/04-01/07-3653-Corr-tENG, para. 12.



## VI. EVIDENTIARY CRITERIA APPLIED BY THE CHAMBER

### A. Objects and burden of proof

45. The Chamber recalls that it rests with the applicant seeking reparations to provide sufficient proof of identity, of the harm suffered and of the causal nexus between said harm and the crime of which the person was convicted.<sup>88</sup>

### B. Standard of proof

46. It bears recalling that at the trial phase, article 66(3) of the Statute requires the Prosecution to establish the material facts “beyond reasonable doubt”.

47. In determination of the standard of proof applicable to the reparation proceedings, the Chamber has regard to the features of the case, specifically the difficulty victims may face in obtaining evidence in support of their claim due to the destruction or the unavailability of evidence in the relevant circumstances.<sup>89</sup> In the case at bar, it is worth recalling that fourteen years have elapsed since the attack on Bogoro.

48. Also worthy of note is that the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) in their consideration of the admissibility of Civil Party applications,<sup>90</sup> the Inter-American Court of Human Rights<sup>91</sup> (“Inter-American Court”)

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<sup>88</sup> *Lubanga*, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129, para. 81; *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 22.

<sup>89</sup> In this connection, see *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 22 and *Lubanga*, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129, para. 81. The Prosecution elaborates on that aspect (Prosecution’s Observations of 30 April 2015, ICC-01/04-01/07-3544, para. 18) as does the Legal Representative of Victims (Victims’ Observations of 15 May 2015, ICC-01/04-01/07-3555-tENG, para. 79).

<sup>90</sup> Internal Rules of the ECCC, rule 23 *bis* (1), 16 January 2015 (Rev.9): “When considering the admissibility of the Civil Party application, the Co-Investigating Judges shall be satisfied that facts alleged to sustain the application are more likely than not to be true”. See also ECCC, *Kaing Guek Eav alias Duch*, Judgement, 26 July 2010, Case File No. 001/18-07-2007-ECCC/SC, paras. 523 and 527.

<sup>91</sup> See e.g. Inter-American Court, *Velásquez Rodríguez v. Honduras (Merits)*, 29 July 1988, paras. 127-128; Inter-American Court, *Perozo et al. v. Venezuela (Preliminary Objections, Merits, Reparations, and Costs)*, 28 January 2009, para. 112; Inter-American Court, *Rosendo Cantú et al. v. Mexico (Preliminary Objections, Merits, Reparations and Costs)*, 31 August 2010, para. 105. For a similar case, see Inter-American Court, *Fernández Ortega et al. v. Mexico (Preliminary Objections, Merits, Reparations and Costs)*, 30 August 2010.

and certain transitional justice mechanisms<sup>92</sup> apply criteria more flexible than the “beyond reasonable doubt” standard in determining whether a person seeking reparations has proven the facts he or she alleges.<sup>93</sup>

49. Lastly it is noted that in the reparation proceedings in *Lubanga*, the Appeals Chamber made clear that the standard of proof termed “the balance of probabilities” is germane.<sup>94</sup>

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.<sup>95</sup> 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.

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<sup>92</sup> Claims Resolution Tribunal for Dormant Accounts in Switzerland, Rules Governing the Claims Resolution Process CRT II, article 17 ([http://www.crt-ii.org/pdf/governing\\_rules\\_en.pdf](http://www.crt-ii.org/pdf/governing_rules_en.pdf), accessed on 17 March 2017); Steven Less, “International Administration of Holocaust Compensation: The International Commission on Holocaust Era Insurance Claims (ICHEIC)”, 9 (11) *German Law Journal* (1 November 2008) pp. 1651-1692 and p. 1668 (Relaxed Standards of Proof) ([https://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/56b85ca9859fd0b8c4b20192/1454922922252/GLJ\\_Vol\\_09\\_No\\_11\\_Less.pdf](https://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/56b85ca9859fd0b8c4b20192/1454922922252/GLJ_Vol_09_No_11_Less.pdf), accessed on 17 March 2017); German Forced Labour Compensation Programme, Article 11 (2) of the Law on the Creation of a German Foundation “Remembrance, Responsibility and Future” (<http://www.stiftung-evz.de/eng/the-foundation/law.html>, accessed on 17 March 2017); United Nations Compensation Commission, UNCC Provisional Rules for Claims Procedures, UN Doc. S/AC.26/1991/10, 26 June 1992, article 35(2) (c) (Category C), <http://www.uncc.ch/sites/default/files/attachments/S-AC.26-DEC%2010%20%5B1992%5D.pdf>, accessed on 17 March 2017. For the Chilean Commission on Political Imprisonment and Torture, see Lisa Magarrell, “Reparations in Theory and Practice” in International Center for Transitional Justice, *Reparative Justice Series* (2007), p. 8. See also Heike Niebergall, “Overcoming Evidentiary Weaknesses in Reparation Claims Programmes” in Clara Ferstman *et al.* (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (Brill 2009), pp. 156-159. See also Section “VI. D. Use of presumptions and circumstantial evidence”.

<sup>93</sup> The Chamber is mindful that save for the ECCC, those bodies address the responsibility of the State and not that of the individual.

<sup>94</sup> *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 65. *Lubanga*, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129, paras. 81-84.

<sup>95</sup> See *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, footnote 37. See also, *Lubanga*, Trial Chamber I, Decision on Reparations, ICC-01/04-01/06-2904, para. 253: “Given the Article 74 stage of the trial has concluded, the standard of ‘a balance of probabilities’ is sufficient and proportionate to establish the facts that are relevant to an order for reparations when it is directed against the convicted person”.

51. Lastly, it is apposite, in the Chamber's view, to point out that a finding on its part that an allegation of harm is not proven on a balance of probabilities does not, however, entail that the Bench calls into question the existence per se of the harm alleged. It means only that the Chamber has determined, having regard to the standard of proof, that insufficiently reliable evidence has been put before it for it to adjudge the veracity of the harm alleged in the present reparation proceedings.

### C. Evidence and admissibility

52. Rule 94(1) of the Rules of Procedure and Evidence prescribes that a victim's application for reparations under article 75 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.

53. As aforementioned, the Chamber must take account of the features of the case before it.<sup>96</sup> 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

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<sup>96</sup> In this connection, see *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 22. *Lubanga*, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129, para. 81.

of the local context the victims face, including the fact that proof of ownership of property or farm land does not exist.<sup>97</sup>

54. Also worthy of note is that the Defence invites the Chamber to consider that the population of eastern Congo is in utter destitution<sup>98</sup> and, in that vein, it contends that some victims may wish to take advantage of reparations to improve their circumstances. The Chamber also takes note of the Defence submission that to require of victims sufficient and credible evidence in support of their claims does not place on them an onerous burden.<sup>99</sup>

55. The Chamber recalls that in its Decision of 8 May 2015, it directed the Legal Representative to, in consultation with the Registry, compile and to file by 1 October 2015:<sup>100</sup> all applications for participation and/or reparations initially made by persons authorized to participate in the proceedings 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.

56. The Chamber considers the aforementioned evidence to be admissible, subject to its determination as to its probative value.<sup>101</sup>

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<sup>97</sup> Victims' Observations of 15 May 2015, ICC-01/04-01/07-3555-tENG, para. 79. See also "Registry's Observations pursuant to Order ICC-01/04-01/07-3532", 15 May 2015, ICC-01/04-01/07-3553, para. 10 ("Registry Observations of 15 May 2015").

<sup>98</sup> See also Registry Observations of 15 May 2015, ICC-01/04-01/07-3553, para. 10.

<sup>99</sup> Defence Observations of 14 May 2015, ICC-01/04-01/07-3549, paras. 41 and 44.

<sup>100</sup> The Legal Representative was subsequently afforded a number of extensions of time (See Annex I to the present order).

<sup>101</sup> See articles 64(9)(a) and 69(4) of the Statute and rule 63(2) of the Rules of Procedure and Evidence. See also in that regard the Chambers' practice in the penal part of the proceedings. *The Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the admissibility of four documents", 13 June 2008, ICC-01/04-01/06-1399, paras. 27-28; "Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the

#### D. Use of presumptions and circumstantial evidence

57. The Chamber notes that the Inter-American Court and certain transitional justice mechanisms have proceeded on the basis of presumptions and circumstantial evidence in determining the harm suffered by a claimant to be established.<sup>102</sup> For instance, the Inter-American Court considers parents to be the indirect victims of the human rights violations suffered by their offspring and that the psychological harm resulting from the cruel death of their offspring may be presumed from the family relationship.<sup>103</sup> What is more, difficulties encountered by claimants in showing a causal nexus between loss of property and the involvement of German companies prompted the German Forced Labour Compensation Programme to rely on a presumption of fact that the harm was due to the involvement of German companies

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Prosecutor against the decision of Trial Chamber III entitled ‘Decision on the admission into evidence of materials contained in the prosecution’s list of evidence’’, 3 May 2011, ICC-01/05-01/08-1386, para. 37; *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ‘Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute’, 23 January 2012, ICC-01/09-01/11-373, paras. 66-67; *The Prosecutor v. Francis Kirimi Muthaura Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ‘Decision on the Confirmation of Charges Pursuant to Article 61 (7)(a) and (b) of the Rome Statute’, 23 January 2012, ICC-01/09-02/11, paras. 79-80; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, ‘Judgment pursuant to Article 74 of the Statute’, dated 21 March 2016, [French] translation registered on 3 October 2016, ICC-01/05-01/08-3343, paras. 222-223. See also ‘Section VI. E. General method of assessment of the evidence’.

<sup>102</sup> The Chamber notes that the Inter-American Court and certain transitional justice mechanisms apply standards of proof which, by and large, resemble the balance of probabilities standard. It must, however, be stressed that the Inter-American Court and said mechanisms address the responsibility of the State and not that of the individual. See Heike Niebergall, ‘Overcoming Evidentiary Weaknesses in Reparation Claims Programmes’, p. 160 (See footnote 92 to the present order). By way of example, see the practice of the Chilean Commission on Political Imprisonment and Torture (Lisa Magarrell, ‘Reparations in Theory and Practice’ in International Centre for Transitional Justice, *Reparative Justice Series* (2007), p. 8) and the practice of the Truth and Reconciliation Commission in Peru (*Reglamento de inscripción en el Registro Único de Víctimas de la Violencia a cargo del Consejo de Reparaciones*, article VI). The European Court of Human Rights (‘ECtHR’), which in appraising evidence against the ‘beyond reasonable doubt’ standard of proof also proceeds on presumptions. See e.g. ECtHR, *Ireland v. The United Kingdom*, Judgment of 18 January 1978, Application no. 5310/71, para. 161. See also ECtHR, *Aydin v. Turkey*, Grand Chamber Judgment of 25 September 1997, Application no. 23178/94, paras. 72 and 73; ECtHR, *Mentes and others v. Turkey*, Grand Chamber Judgment of 28 November 1997, Application no. 23186/94, para. 66; ECtHR, *Nachova and others v. Bulgaria*, Grand Chamber Judgment of 6 July 2005, Application nos. 43577/98 and 43579/98, para. 147.

<sup>103</sup> Inter-American Court, *Aloeboetoe et al. v Suriname (Reparations and Costs)*, 10 September 1993, para. 76: ‘It can be presumed that the parents have suffered morally as a result of the cruel death of their offspring, for it is essentially human for all persons to feel pain at the torment of their child’.

if it had occurred in a certain period and territory occupied by the German *Reich*.<sup>104</sup> The United Nations Compensation Commission presumed a causal nexus between the forced departure of a person claiming compensation and Iraq's occupation of Kuwait to be established where the claimant provided simple documentation showing departure from Kuwait on a date within the period of occupation.<sup>105</sup>

58. As to circumstantial evidence, the Chamber notes that, at the penal phase of the proceedings, reliance thereon has not been precluded by other Chambers of the Court in determining that certain facts are established and to so proceed has not been regarded as antithetical to the standard of proof termed "beyond reasonable doubt".<sup>106</sup>

59. The Chamber recalls that at this phase in the proceedings, victims must substantiate their allegations on a balance of probabilities – a standard of proof more flexible than the "beyond reasonable doubt" standard, which applies at the penal phase of the proceedings.

60. Furthermore, the Chamber notes, rule 94(1)(g) of the Rules of Procedure and Evidence requires victims to furnish supporting documentation to bolster their applications for reparations "[t]o the extent possible". It is the view of the Chamber that the rule makes allowance for the difficulties the victims encountered in gathering evidence, including for the passage of time since the crimes at issue were committed.

61. That being so, and having regard to the practice of the Inter-American Court and certain transitional justice mechanisms, the Chamber sees fit to proceed on

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<sup>104</sup> Heike Niebergall, "Overcoming Evidentiary Weaknesses in Reparation Claims Programmes", p. 160 (See footnote 92 to the present order).

<sup>105</sup> Linda A. Taylor, "The United Nations Compensation Commission" in Clara Ferstman *et al.* (eds.) *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (Brill 2009), p. 209.

<sup>106</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 109 (direct evidence); *The Prosecutor v. Thomas Lubanga*, Trial Chamber I, "Judgment pursuant to Article 74 of the Statute", dated 20 March 2012, [French] translation registered on 31 August 2012, ICC-01/04-01/06-2842, para. 111; *The Prosecutor v. Mathieu Ngudjolo Chui*, Trial Chamber II, "Judgment pursuant to article 74 of the Statute", 18 December 2012, ICC-01/04-02/12-3-tENG, para. 71; *Bemba*, Trial Chamber III, Judgment Handing Down Conviction, ICC-01/05-01/08-3343, para. 239.

presumptions and to act on circumstantial evidence to satisfy itself of certain facts in the case.

#### **E. General method of assessment of the evidence**

62. The Applicants' statements and the evidence furnished in support of the applications for reparations will be analysed by the Chamber on an individual basis, as a whole, and vis-à-vis the Defence submissions. The Chamber's assessment will advert also to the findings which Trial Chamber II, sitting in its previous composition, entered in the Judgment Handing Down Conviction and the Decision on Sentence. Furthermore, as aforementioned, the Chamber will, where it sees fit, proceed on presumptions and rely on circumstantial evidence in satisfying itself of certain facts in the case.

63. From said analysis, the Chamber will determine whether the Applicants have established on a balance of probabilities the existence of the harm alleged and the causal nexus between the harm<sup>107</sup> and the crimes of which Mr Katanga was convicted.<sup>108</sup>

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<sup>107</sup> See Section "VII. INDIVIDUAL ANALYSIS OF THE APPLICATIONS FOR REPARATIONS".

<sup>108</sup> See Section "VII. D. Causal nexus between the harm alleged and the crimes of which Mr Katanga was convicted".

## VII. INDIVIDUAL ANALYSIS OF THE APPLICATIONS FOR REPARATIONS

64. The Chamber comes to the individual analysis of the 341 applications for reparations and the evidence presented in support. For ease of consultation and presentation, the individual analysis of the applications for reparations is provided in Annex II hereto.<sup>109</sup>

65. The modus operandi of the Chamber is now set out.

### A. Credibility of the various evidence and treatment of minor discrepancies

66. By and large, the Chamber sees some similarity in the allegations which form the applications for reparations. They do not, at first sight, seem to contain exaggerated or extravagant allegations and appear credible, including vis-à-vis the findings of fact entered by Trial Chamber II, sitting in its previous composition, in its Judgment Handing Down Conviction.

67. The Chamber pays particular attention to the internal consistency, the level of detail, and the plausibility of the applications vis-à-vis the evidence as a whole provided by each Applicant. Furthermore, where it sees fit, the Chamber considers the situation of an Applicant in the light of the information furnished in other applications.

68. Minor discrepancies are discernible among the various supporting documentation contained in some applications for reparations. The discrepancies concern corrections or rectifications to the additional forms, the information in the initial application, and names and dates of birth or death. The Chamber sees that the Defence disputes the credibility of certain applications for reparations on account of discrepancies of that ilk.<sup>110</sup>

69. In that regard, the Chamber notes that Legal Representative has striven to distinguish the events encompassed by the attack on Bogoro from those which

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<sup>109</sup> Annex II is an integral part of the present order.

<sup>110</sup> Second Defence Observations, 11 April 2016, ICC-01/04-01/07-3681-Conf-Exp, para. 26.



occurred at some other place or point in time.<sup>111</sup> The myriad attacks carried out in the area within a short time frame led certain Applicants to confuse the site and date of the harm suffered.<sup>112</sup> The Legal Representative's efforts have thus prompted many Applicants, when finalizing the additional forms, to correct, and, in some cases, retract some of the allegations made in their initial applications.<sup>113</sup> In the individual analysis undertaken of the applications for reparations, the Chamber is, therefore, circumspect in considering the initial applications for reparations and comparing them with the additional forms finalized by the Legal Representative.

70. Having regard to the foregoing considerations and the Legal Representative's efforts at verification, the corrections must be regarded in the same vein as the applications, that is, as having been made wholly *bona fide*. The Chamber considers, as have other Chambers of this Court in relation to applications for participation,<sup>114</sup> that the mere fact that an application for reparations contains slight discrepancies does not, on the face of it, cast doubt on its credibility.

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<sup>111</sup> Similarly, see "*Rapport sur la mise en œuvre de la Décision n°3546, en ce compris l'identification des préjudices subis par les victimes suite aux crimes commis par G. Katanga (Article 75-1 du Statut et Norme 38-1-f) du Règlement de la Cour*", 13 May 2016, ICC-01/04-01/07-3687, paras. 8-24 ("Legal Representative's Report of 13 May 2016").

<sup>112</sup> Similarly, see Legal Representative's Report of 13 May 2016, ICC-01/04-01/07-3687, paras. 8-24.

<sup>113</sup> Similarly, see Legal Representative's Report of 13 May 2016, ICC-01/04-01/07-3687, paras. 8-24.

<sup>114</sup> "Decision on the treatment of applications for participation", dated 26 February 2009, [original French version] registered on 27 February 2009, ICC-01/04-01/07-933-tENG, paras. 33 and 34; "Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims", 23 September 2009, ICC-01/04-01/07-1491-Red-tENG, para. 32; *The Prosecutor v. Bosco Ntaganda*, Pre-Trial Chamber II, "Decision on victims' participation at the confirmation of charges hearing and in the related proceedings", 15 January 2014, ICC-01/04-02/06-211, para. 23; *The Prosecutor v. Bosco Ntaganda*, Trial Chamber VI, "Decision on victims' participation in trial proceedings", dated 6 February 2015, [French] translation registered on 13 March 2015, ICC-01/04-02/06-449, para. 46; *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Trial Chamber IV, "Corrigendum to Decision on the Registry Report on six applications to participate in the proceedings", 28 October 2011, ICC-02/05-03/09-231-Corr, para. 24.

## **B. Evaluation of the evidence presented to substantiate the Applicants' identity**

71. The Chamber recalls that the Court has consistently held that applicants may use official or unofficial identification, or any other means of proof of identity.<sup>115</sup> Where an applicant is unable to present acceptable documentation, the Chamber may accept a statement signed by two credible witnesses establishing the identity of the applicant.<sup>116</sup>

72. In the case at bar, the Chamber notes that as proof of identity the Applicants have presented voter's cards, refugee cards, certificates serving as identification and certificates of loss of identification.

73. Upon examination of that aspect of the applications for reparations, the Chamber finds that all of the Applicants have established their identity on a balance of probabilities.

## **C. Definition of the harm and evaluation of the evidence presented to substantiate the harm alleged by the Applicants**

### **1. Introduction**

74. The Chamber must define the harm done to natural persons and the harm caused to legal persons as a result of the crimes of which Mr Katanga was convicted.<sup>117</sup> "Harm" within the meaning of rule 85(a) of the Rules of Procedure and Evidence, it is recalled, signifies "injury, loss or damage".<sup>118</sup> It denotes hurt, injury and damage.<sup>119</sup> The Chamber further recalls that material, physical and psychological

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<sup>115</sup> *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 57.

<sup>116</sup> *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 57.

<sup>117</sup> See Section, "IV. PRINCIPLES AND CRITERIA APPLICABLE TO THE ORDER FOR REPARATIONS AND THE CHAMBER'S GENERAL APPROACH" and Section "V. CONCEPT OF 'VICTIM'".

<sup>118</sup> Rule 85(b) of the Rules of Procedure and Evidence lays down that harm sustained by a legal person must be direct.

<sup>119</sup> *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 10. See *Lubanga*, Appeals Chamber, Decision on Victims' Participation, ICC-01/04-01/06-1432, para. 31. See also Victims' Observations of 15 May 2015, ICC-01/04-01/07-3555-tENG, para. 51; TFV Observations of 13 May 2015, ICC-01/04-01/07-3548, para. 25; and Defence Observations of 14 May 2015, ICC-01/04-

harm, equally, are species of harm encompassed by rule 85 of the Rules of Procedure and Evidence<sup>120</sup> where suffered personally by the victim.<sup>121</sup>

75. The Chamber sees that the applications for reparations submitted by the Applicants allege material, physical, psychological and *sui generis* harm.

## **2. Harm ensuing from one or more of the crimes of which Mr Katanga was convicted**

### **(a) Material harm**

#### **i. Destruction of houses, outbuildings of houses, and business premises**

##### *a. Introduction*

76. The Chamber notes that in their applications for reparations, the Applicants allege for the most part that during the attack on Bogoro they suffered material harm as a result of the destruction of houses, outbuildings of houses, and business premises.<sup>122</sup>

77. The Chamber will treat material harm resulting from the destruction of houses, outbuildings of houses, and business premises by: first, determining whether the harm alleged by the Applicants ensued from one or more of the crimes of which Mr Katanga was convicted (*b.*); second, assessing the evidence presented by the Applicants in support of the harm alleged (*c.*) and, lastly, deciding with regard to the evidence and findings of Trial Chamber II, sitting in its previous composition, whether the harm at issue is established, subject to the particular circumstances

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01/07-3549, para. 29. See also the definition in the United Nations, 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, 16 December 2015: “physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights”. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>, accessed 17 March 2017).

<sup>120</sup> See *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 10.

<sup>121</sup> See para. 23 of the present order.

<sup>122</sup> The Chamber considers that business premises include small shops, kiosks, restaurants and hairdressing salons.

which emerge from an individual analysis of each application for reparations and the relevant Defence observations.<sup>123</sup> (*d.*).

*b. Whether the harm alleged ensued from one or more of the crimes of which Mr Katanga was convicted*

78. It is to be noted that Trial Chamber II, sitting in its previous composition, found that during the attack on Bogoro the attackers demolished and/or set ablaze or removed the roofs of the houses owned and occupied by the predominantly Hema population of Bogoro, and the civilian buildings used by the population.<sup>124</sup> That Chamber also found that they attacked thatched houses, houses with roofing sheets,<sup>125</sup> and civilian buildings. It found that the acts of destruction took place throughout the village of Bogoro and throughout the day, 24 February 2003.<sup>126</sup>

79. Having regard to these findings of fact, the Chamber determines that the material harm alleged by the Applicants as a result of the destruction of houses, outbuildings of houses, and business premises ensued from the crimes of which Mr Katanga was convicted, *viz.*, destruction of enemy property as a war crime under article 8(2)(e)(xii) of the Statute,<sup>127</sup> insofar as the existence of said harm<sup>128</sup> and the causal nexus with the crimes<sup>129</sup> are established on a balance of probabilities.

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<sup>123</sup> Absent other information, the Chamber will so proceed in relation to all harm alleged by the Applicants.

<sup>124</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 924. See also Decision on Sentence of 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr, para. 51 (the Diguna mission and the CECA 20 church): “a large number of the existing houses in the *groupement* were rebuilt by non-governmental organisations (NGOs)”.

<sup>125</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, paras. 917-918 and 922, 942 and 957 (“most of the buildings were torched and destroyed”).

<sup>126</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, paras. 924-925.

<sup>127</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, p. 659.

<sup>128</sup> See Annex II to the present order.

<sup>129</sup> See Section “VII. D. Causal nexus between the harm alleged and the crimes of which Mr Katanga was convicted”.

*c. Evidence presented in support of the harm alleged; Defence observations*

80. To lend support to their allegations, some Applicants have tendered documents entitled “*attestation de résidence*” [residence certificate] or “*attestation de logement*” [habitation certificate] and other untitled documents of the kind. On that subject, the Defence submits that the documents presented by the Applicants must be treated with caution given that they were issued over 12 years after the attack on Bogoro<sup>130</sup> and were signed by P-166, a witness for the Prosecution in the proceedings against Mr Katanga.<sup>131</sup> Further, the Defence argues, the extensive attacks on Bogoro village over the years and the ensuing destruction mean that not all of the harm alleged by the Applicants was necessarily the result of the attack on 24 February 2003.<sup>132</sup>

81. The Chamber sees that the residence and habitation certificates and other untitled documents of the kind (“residence certificates”) were signed by a person acting in an official capacity and by P-166, as a witness, and that they bear the official seal of the DRC. Regarding P-166, it is to be noted that in the proceedings against Mr Katanga, Trial Chamber II, sitting in its previous composition, availed itself on a number of occasions of the witness’s evidence to corroborate various pieces of information about the population living in Bogoro and the events before, during and after the attack on Bogoro,<sup>133</sup> and that that Bench voiced no particular doubts about him at trial. Nor has the Chamber uncovered anything to cast doubt on the credibility or reliability of P-166’s statements.

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<sup>130</sup> First Defence Observations, 24 February 2016, ICC-01/04-01/07-3660-Conf, para. 16: “[T]he certificates of residence should be considered with caution, given that they were issued 12 years after the events with the specific purpose of being tendered in the reparation proceedings, are signed by a victim/prosecution witness, and are drafted in a standard form”.

<sup>131</sup> First Defence Observations, 24 February 2016, ICC-01/04-01/07-3660-Conf, para. 16 (“former chef of Bogoro, P-166”).

<sup>132</sup> First Defence Observations, 24 February 2016, ICC-01/04-01/07-3660-Conf, para. 18; see also Defence Observations of 14 May 2015, ICC-01/04-01/07-3549, para. 48.

<sup>133</sup> See e.g. Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, paras. 601, 693, 695-696, 724-725-726-727, 738, 820, 842, 837, 917, 922, 933, 936, 1207 and 1213.

82. Moreover, the Chamber notes that the residence certificates state that the Applicants variously owned houses, outbuildings of houses, or small shops, and that that immovable property was destroyed in the attack on Bogoro.<sup>134</sup> The Chamber notes that some residence certificates also state that the Applicants were living in Bogoro until February 2003. The Chamber also sees that the residence certificates specify whether the destruction occurred during the attack.<sup>135</sup>

83. In view of the information contained in the residence certificates and, in particular, their signature by a person who was acting in an official capacity and a credible witness, the Chamber finds them to be of sufficient probative value to be entertained in its individual analysis of the applications for reparations.

*d. Determination of the Chamber*

84. The Chamber recalls that the standard of proof on a balance of probabilities requires the Chamber to determine whether it is more probable than not that the Applicant suffered the harm alleged and that the harm was a consequence of one or more of the crimes of which Mr Katanga was convicted.<sup>136</sup> In undertaking an individual analysis of an application for reparations, the Chamber will afford consideration to all of the evidence put before it and, as aforementioned, will rely on presumptions where, in the light of the circumstances, it sees fit. The Chamber is thus also mindful that the Applicants were not always in a position to furnish documentary evidence in support of all of the harm alleged, given the circumstances in the DRC, and it takes into account the Defence observations.

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<sup>134</sup> The Chamber notes that the residence certificates use for the most part the term “house”, even where the Applicant alleges the destruction of an outbuilding or a business premises. The Chamber therefore construes the term “house” as “building”. So, where a residence certificate refers to the destruction of one or more houses, it might denote a house in the strict sense of the word or an outbuilding, a small shop or some other business premises.

<sup>135</sup> The Chamber would further point out that it will scrutinize on a case-by-case basis the causal nexus, that is, whether the harm alleged was a consequence of the crimes of which Mr Katanga was convicted (See Section “VII. D. Causal nexus between the harm alleged and the crimes of which Mr Katanga”).

<sup>136</sup> See para. 50 of the present order.

85. The Chamber considers that, subject to the individual analysis,<sup>137</sup> material harm resulting from the destruction of a house, an outbuilding or a business premises is established to the requisite standard of proof by the following: a statement by an Applicant alleging the destruction of a house, an outbuilding of a house, or a business premises; a residence certificate or any similar such evidence, where issued in the name of the Applicant, dated and signed by a person acting in an official capacity and where it is stated that the immovable property belonging to the Applicant was destroyed in the attack; and the findings of Trial Chamber II, sitting in its previous composition, concerning the destruction of enemy property as a war crime under article 8(2)(e)(xii) of the Statute.

86. Lastly, it is noted, the Defence having made the point,<sup>138</sup> that the residence certificates do not provide particulars of the immovable property, save that it consisted of houses and, in some cases, outbuildings or business premises. Accordingly, the Chamber is not in a position to determine whether such immovable property was, for example, made of straw, rammed earth, or fired or unfired brick.<sup>139</sup>

ii. Destruction or pillaging of furniture, personal effects and wares

87. The Chamber notes that, in their applications for reparations, the Applicants allege that they suffered material harm as a result of the destruction or pillaging of their furniture and other personal effects and their wares. By and large, the Applicants have not presented any supporting documentation to specifically prove ownership of furniture, personal effects or wares. For that reason, the Defence submits that the Applicants have not presented sufficient and cogent proof.<sup>140</sup>

88. The Chamber notes that Trial Chamber II, sitting in its previous composition, found that during the attack on Bogoro, the attackers did not stop at the destruction of some Hema dwellings and other civilian buildings, but also took away

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<sup>137</sup> See Annex II to the present order.

<sup>138</sup> Defence Observations of 14 May 2015, ICC-01/04-01/07-3549, para. 17.

<sup>139</sup> See Section "IX. ASSESSMENT OF THE EXTENT OF THE HARM".

<sup>140</sup> Defence Observations of 14 May 2015, ICC-01/04-01/07-3549, para. 14.

much houseware.<sup>141</sup> Said Bench took particular note of the pillaging of roofing sheets from houses,<sup>142</sup> furniture and other personal effects from the dwellings, and food and wares,<sup>143</sup> finding that such property belonged to the predominantly Hema civilian population of Bogoro and was essential to its daily life.<sup>144</sup>

89. Having regard to the foregoing, the Chamber determines that the material harm alleged by the Applicants ensued from the crimes of which Mr Katanga was convicted, *viz.*, pillaging as a war crime under article 8(2)(e)(v) of the Statute,<sup>145</sup> and destruction of enemy property as a war crime under article 8(2)(e)(xii) of the Statute,<sup>146</sup> insofar as the existence of the harm<sup>147</sup> and the causal nexus with the crimes<sup>148</sup> are established on a balance of probabilities.

90. In the view of the Chamber, it is reasonable to presume<sup>149</sup> that the great majority of the population of Bogoro owned property essential to daily life and that by reason of the destruction of houses, outbuildings of houses, and business premises in the attack on Bogoro, the property within was destroyed or pillaged.

91. Therefore, the Chamber is of the view that, where an Applicant establishes that he or she suffered material harm as a result of the destruction of a house, an outbuilding of a house, or a business premises,<sup>150</sup> the material harm resulting from

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<sup>141</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07, paras. 924-925.

<sup>142</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, paras. 925 and 928.

<sup>143</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, paras. 927-928 and 932.

<sup>144</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, paras. 928 and 932. See also Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 953: "the property represented the bulk of the owners' possessions". See also Decision on Sentence of 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr, para. 52.

<sup>145</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, p. 710.

<sup>146</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, p. 710.

<sup>147</sup> See Annex II to the present order.

<sup>148</sup> See Section "VII. D. Causal nexus between the harm alleged and the crimes of which Mr Katanga was convicted".

<sup>149</sup> See Section "VI. D. Use of presumptions and circumstantial evidence".

<sup>150</sup> See Section "VII. C. 3. (a) i. Destruction of houses, outbuildings of houses, and business premises".



the destruction or pillaging of furniture, personal effects<sup>151</sup> or wares is presumed to be established, absent any specific piece of evidence.<sup>152</sup>

92. The Chamber also considers that the material harm sustained by an Applicant as a result of the destruction or pillaging of property essential to daily life is presumed<sup>153</sup> to be established where the Applicant provides proof of the destruction of the house in which he or she lived, but did not own.<sup>154</sup>

93. As to an Applicant who alleges solely destruction or pillaging of personal effects essential to daily life, the Chamber regards such harm as established where through corroboration the Applicant shows to the requisite standard of proof that he or she was present or living in Bogoro during the attack.<sup>155</sup>

94. However, from the evidence presented, the Chamber is not in a position to determine the type and quantity of furniture,<sup>156</sup> personal effects<sup>157</sup> and wares<sup>158</sup> owned by the Applicants.

iii. Pillaging of livestock; destruction of fields and harvests;  
pillaging of harvests

95. The Chamber notes that in their applications for reparations, the Applicants allege that they suffered material harm as a result of the pillaging of their livestock or other animals, the destruction of their fields and harvests or the pillaging

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<sup>151</sup> The Chamber regards personal effects as a category of property which may encompass clothing, school supplies, bicycles and other effects essential to daily life (See e.g. Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, paras. 927-928). In the case at bar, the Chamber sees that the Applicants alleged only the loss of clothing and school supplies.

<sup>152</sup> The Chamber also takes account of the Applicant's statements, the Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG and the Decision on Sentence of 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr.

<sup>153</sup> See Section "VI. D. Use of presumptions and circumstantial evidence".

<sup>154</sup> See e.g. Annex 6 to Batch One, 12 November 2015, ICC-01/04-01/07-3614-Conf-Exp-Anx6.

<sup>155</sup> That is the case where a finding is made of harm resulting from the destruction of an Applicant's house and that person's family relationship (parent-child) with an Applicant claiming destruction and pillaging of personal effects is established.

<sup>156</sup> See Section "IX. D. 1. (c) Destruction or pillaging of furniture".

<sup>157</sup> See Section "IX. D. 1. (d) Destruction or pillaging of personal effects".

<sup>158</sup> See Section "IX. D. 1. (f) Destruction or pillaging of wares".

of their harvests. To lend support to their allegations of pillaging of livestock, some Applicants have presented documents entitled “*déclaration de possession de bétail*” [declaration of livestock ownership]. The Defence argues that the Applicants have not presented sufficient and cogent proof to buttress the harm alleged.<sup>159</sup>

96. It is noted that Trial Chamber II, sitting in its previous composition, entered a finding of pillaging of livestock and domestic animals (cows, goats and hens) and pillaging of food belonging to the civilian population of Bogoro.<sup>160</sup> Of further note is that keeping livestock was a significant activity in Bogoro and its population farmed the land.<sup>161</sup>

97. Having regard to those findings, the Chamber determines that the material harm alleged by the Applicants ensued from the crimes of which Mr Katanga was convicted, *viz.*, pillaging as a war crime under article 8(2)(e)(v) of the Statute,<sup>162</sup> insofar as the existence of said harm<sup>163</sup> and the causal nexus with the crimes<sup>164</sup> are established on a balance of probabilities.

98. The Chamber would reiterate its observation that the population of Bogoro’s livelihood came in part from keeping livestock and farming the land.<sup>165</sup> Moreover, Trial Chamber II, sitting in its previous composition, made a finding of pillaging of domestic animals and livestock.<sup>166</sup> Given the importance to the local

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<sup>159</sup> Defence Observations of 14 May 2015, ICC-01/04-01/07-3549, paras. 14 and 18. See also Defence Consolidated Response of 16 June 2015, ICC-01/04-01/07-3564, para. 29.

<sup>160</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, paras. 928, 932, 953 and 956; Decision on Sentence of 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr, para. 52.

<sup>161</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, paras. 724 and 730.

<sup>162</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, p. 710.

<sup>163</sup> See Annex II to the present order.

<sup>164</sup> See Section “VII. D. Causal nexus between the harm alleged and the crimes of which Mr Katanga was convicted”.

<sup>165</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, paras. 724 and 730 (livestock market). See also “*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)*”, dated 8 January 2015 and reclassified as confidential, *ex parte* Registry, Trust Fund for Victims and the Legal Representative, ICC-01/04-01/07-3514-Conf, para. 21 (“Victims’ Observations of 8 January 2015”).

<sup>166</sup> Decision on Sentence of 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr, para. 52; Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, paras. 928, 932 and 953.

society of agriculture and keeping livestock, the Chamber considers that it is reasonable to presume<sup>167</sup> that the great majority of Bogoro's population owned livestock and/or fields to meet their daily needs. It follows that it is more probable than not that during the attack on Bogoro the destruction of houses was accompanied by pillaging or destruction of livestock, fields and harvests.

99. Having regard to the foregoing, the Chamber determines that where an Applicant establishes harm resulting from the destruction of a house,<sup>168</sup> the material harm resulting from the pillaging of livestock or other animals and the destruction of fields and harvests or the pillaging of harvests is presumed to be established,<sup>169</sup> absent any specific evidence.<sup>170</sup>

100. The Chamber also determines that the material harm resulting from the pillaging of livestock and the destruction of fields and harvests or the pillaging of harvests is presumed to be established<sup>171</sup> where an Applicant provides proof of the destruction of the house in which he or she was living, but which he or she did not own.

101. As to the extent of the harm alleged, absent specific evidence, the Chamber is not in a position to ascertain, in most cases, the type and quantity of livestock pillaged, the area of the fields destroyed or the type and quantity of harvests destroyed or pillaged. For that reason, the Chamber considers the harm sustained, in general, to be equivalent to consumption per capita. The Chamber determines that consumption of livestock per capita amounts to the value of the total livestock kept –

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<sup>167</sup> See Section "VI. D. Use of presumptions and circumstantial evidence".

<sup>168</sup> See Section "VII. C. 3. (a) i. Destruction of houses, outbuildings of houses, and business premises".

<sup>169</sup> See Section "VI. D. Use of presumptions and circumstantial evidence".

<sup>170</sup> The Chamber also takes into account the Applicant's statements, the Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG and the Decision on Sentence of 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr. The Chamber further notes that some Applicants furnished declarations of livestock ownership.

<sup>171</sup> See Section "VI. D. Use of presumptions and circumstantial evidence".

one cow, two goats and three hens – and consumption of fields or harvests per capita amounts to the price fetched by ten *piquets* of the commonest crops in Bogoro.<sup>172</sup>

102. As the Chamber has observed, some Applicants have presented declarations of livestock ownership. The Defence submits that those documents were written and signed by two persons who were not acting in any official capacity and contain incomplete information, and so must be treated with caution by the Chamber.<sup>173</sup>

103. The Chamber is of the view that the Court's previous decisions on proof of identity find application in the case at bar:<sup>174</sup> where an Applicant is unable to present a document signed by a person acting in an official capacity, a document signed by two credible witnesses may be accepted. The Chamber therefore accepts official and unofficial documents in support of the harm alleged. In the case before it, the Chamber regards the two persons who signed declarations of livestock ownership as credible, specifically given the position they previously held. Moreover, the Chamber notes that some declarations of livestock ownership specify the type and quantity of livestock owned by the Applicants in 2003.

104. The Chamber regards a statement signed by two credible witnesses mentioning the type and quantity of livestock the Applicants owned in 2003 to be of sufficient probative value to establish the extent of the harm as described therein. Where, for example, an Applicant alleges the loss of ten or so cows in the attack on Bogoro and tenders a declaration of livestock ownership signed by two credible witnesses, stating that he or she owned ten or so cows in 2003, the Chamber will determine that the extent of the harm suffered by the Applicant amounts to the loss of ten cows.

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<sup>172</sup> See Section "IX. ASSESSMENT OF THE EXTENT OF THE HARM".

<sup>173</sup> See e.g. the Defence observations on Applicant a/0083/09 (ICC-01/04-01/07-3695-Conf-Exp-Anx9) in Annex A to "Defence Observations on 41 victims' applications pursuant to the *Deuxième décision relative à la demande de retrait de mandat du Représentant légal des victimes*", 20 September 2016, ICC-01/04-01/07-3709-Conf-Exp-AnxA, p. 5.

<sup>174</sup> See para. 71 of the present order.

105. The Chamber sees that some declarations of livestock ownership tendered state a lower quantity of livestock than that defined as consumption per capita. In the particular circumstances of the case, the Chamber sees no justification in arriving at a figure below the consumption per capita laid down in this Section. To so proceed would give rise to a situation of unfairness, where detailed proof stating the type and quantity of livestock could result in a figure below that derived from proof which provides little detail and makes no mention of the type or quantity of livestock. Thus, the Chamber takes the view that if a presumption of pillaging of livestock in an amount corresponding to consumption per capita is applicable to an Applicant who did not tender a declaration of livestock ownership, it must apply all the more to an Applicant who tenders a declaration stating a quantity of livestock owned which falls below that of consumption per capita, or an Applicant who presents a declaration which does not specify the type or quantity of livestock owned. Accordingly, fairness dictates that the Chamber assess the harm suffered by such persons as being equivalent to consumption per capita.

iv. Destruction or pillaging of the family property

106. The Chamber notes that, in their applications for reparations, some Applicants allege that they suffered material harm ensuing from the destruction or pillaging of the family property in the attack on Bogoro. The Applicants mainly present residence certificates in the names of their ascendants but no other evidence to substantiate succession of the family property specifically.

107. The Chamber does not consider itself competent to adjudge such matters, which are the province of Congolese national law. Accordingly, the Chamber is not in a position to make a finding of succession of family property, and hence, of personal harm suffered by the Applicants who allege loss of the family property.

**(b) Physical harm**

108. The Chamber sees that, in their applications for reparations, some Applicants allege that they suffered physical harm in the attack on Bogoro.

109. It is to be noted that Trial Chamber II, sitting in its previous composition, found “beyond reasonable doubt” that some civilians sustained bullet or bladed-weapon wounds in the attack on Bogoro<sup>175</sup> – wounds which have meant that some survivors have had a limb amputated and others continue to suffer from physical disability.<sup>176</sup>

110. Having regard to the foregoing, the Chamber determines that the physical harm alleged by the Applicants ensued from the crimes of which Mr Katanga was convicted, *viz.*, attack against a civilian population as such or against individual civilians not taking direct part in hostilities, as a war crime under article 8(2)(e)(i) of the Statute,<sup>177</sup> insofar as the existence of said harm<sup>178</sup> and the causal nexus with the crimes<sup>179</sup> are established on a balance of probabilities.

111. The Chamber sees that in support of their allegations, the Applicants have, for the most part, presented medical reports.<sup>180</sup> The Chamber also notices a medical certificate from a non-governmental organization in Uganda,<sup>181</sup> a hospital record<sup>182</sup> and a forensic report.<sup>183</sup> That said, the Chamber sees that, by and large, the documents tendered by the Applicants do not specify that the wounds were

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<sup>175</sup> See e.g. Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, paras. 810-817, paras. 818-824 and paras. 825-834.

<sup>176</sup> Decision on Sentence of 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr, paras. 49 and 57.

<sup>177</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, p. 710.

<sup>178</sup> See Annex II to the present order.

<sup>179</sup> See Section “VII. D. Causal nexus between the harm alleged and the crimes of which Mr Katanga was convicted”.

<sup>180</sup> See e.g. Annex 33 to Batch Three, 27 November 2015, ICC-01/04-01/07-3621-Conf-Exp-Anx33, p. 11; Annex 14 to Batch Four, 2 February 2016, ICC-01/04-01/07-3646-Conf-Exp-Anx14, p. 26; Annex 29 to Batch Four, 2 February 2016, ICC-01/04-01/07-3646-Conf-Exp-Anx29, p. 27; Annex 32 to Batch Four, 2 February 2016, ICC-01/04-01/07-3646-Conf-Exp-Anx32, p. 27; Annex 52 to Batch Five, 17 February 2016, ICC-01/04-01/07-3656-Conf-Exp-Anx52, p. 9; Annex 16 to Batch Six, 26 February 2016, ICC-01/04-01/07-3661-Conf-Exp-Anx16, p. 18; Annex 26 to Batch Six, 26 February 2016, ICC-01/04-01/07-3661-Conf-Exp-Anx26, p. 13; Annex 59 to Batch Six, 26 February 2016, ICC-01/04-01/07-3661-Conf-Exp-Anx59, p. 11.

<sup>181</sup> See e.g. Annex 61 to Batch Five, 17 February 2016, ICC-01/04-01/07-3656-Conf-Exp-Anx61, p. 9.

<sup>182</sup> See e.g. Annex 1 to Batch Six, 26 February 2016, ICC-01/04-01/07-3661-Conf-Exp-Anx1, p. 22.

<sup>183</sup> See DRC-OTP-1033-0025, Annex 7 to Batch Seven, 29 February 2016, ICC-01/04-01/07-3664-Conf-Exp-Anx7.

sustained in the attack on Bogoro. In most such cases, then, the causal nexus is not established to the requisite standard of proof.<sup>184</sup>

**(c) Psychological harm**

i. Psychological harm connected to the death of a relative

a. *Introduction*

112. The Chamber notes that in their applications for reparations, some Applicants allege psychological harm connected to the death of a relative. The Applicants have mostly presented death certificates and certificates of family relationship with the deceased.

113. The Chamber first recalls that it has been consistently held that indirect victims are eligible for reparations.<sup>185</sup> The harm caused to an indirect victim may include psychological suffering experienced as a result of the sudden loss of a family member.<sup>186</sup> To qualify as an indirect victim, the Chamber recalls, an applicant must also establish that the harm was personally suffered.<sup>187</sup> To that end, the applicant must show that he or she had a close personal relationship with the direct victim.<sup>188</sup> In *Lubanga*, the Appeals Chamber made particular reference to the close personal relationship binding offspring and parents.<sup>189</sup>

114. The Chamber will treat psychological harm as a result of the death of a relative by first satisfying itself that the harm alleged by the Applicant ensued from

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<sup>184</sup> A hospital record dated 26 February 2003 and a forensic report allowed the Chamber to make a finding that the wound was connected to the attack on Bogoro in two cases (Applicant a/0013/08, who tendered a hospital record. See Second Defence Observations, 11 April 2016, ICC-01/04-01/07-3681-Conf-Exp-Anx1; Applicant a/1205/10, who tendered a forensic report. See Second Defence Observations, 11 April 2016, ICC-01/04-01/07-3681-Conf-Exp-Anx7).

<sup>185</sup> See Section "V. CONCEPT OF 'VICTIM'".

<sup>186</sup> *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 58. *Lubanga*, Appeals Chamber, Decision on Victims' Participation, ICC-01/04-01/06-1432, para. 32. See also *Lubanga*, Trial Chamber I, Decision on Indirect Victims, ICC-01/04-01/06-1813, para. 50.

<sup>187</sup> *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 10.

<sup>188</sup> *Lubanga*, Appeals Chamber, Decision on Victims' Participation, ICC-01/04-01/06-1432, para. 32. See also *Lubanga*, Trial Chamber I, Decision on Indirect Victims, ICC-01/04-01/06-1813, para. 50.

<sup>189</sup> *Lubanga*, Appeals Chamber, Decision on Victims' Participation, ICC-01/04-01/06-1432, para. 32; *Lubanga*, Trial Chamber I, Decision on Indirect Victims, ICC-01/04-01/06-1813, para. 50.

one or more of the crimes of which Mr Katanga was convicted (*b.*). Then, to determine whether the Applicant is an indirect victim, the Chamber will satisfy itself that the death of a direct victim in the attack on Bogoro has been established (*c.*) and the Applicant had a close personal relationship with the direct victim (*d.*).

*b. Whether the harm alleged ensued from one or more of the crimes of which Mr Katanga was convicted*

115. The Chamber notes that Trial Chamber II, sitting in its previous composition, took note of the murder of civilians,<sup>190</sup> the separation of families in the aftermath of the attack on Bogoro,<sup>191</sup> the disappearance of corpses, the lack of mourning ceremonies,<sup>192</sup> and the fear of returning home harboured by some civilians due to the traumatic memories connected to the attack on Bogoro.<sup>193</sup> It found that 60 people, including 25 children, were killed on the day of the attack on Bogoro. However, it considered that death toll to be a minimum and that the attack had claimed considerably more lives.<sup>194</sup>

116. Having regard to the foregoing, the Chamber determines that psychological harm resulting from the death of a relative alleged by the Applicants ensued from the crimes of which Mr Katanga was convicted, *viz.*, murder as a crime against humanity under article 7(1)(a) of the Statute and murder as a war crime under article 8(2)(c)(i) of the Statute,<sup>195</sup> insofar as the criteria set out below are established on a balance of probabilities.

*c. Death of a direct victim*

117. The Defence sees discrepancies between the death certificates tendered by the Applicants which are dated 2008 and 2009, and those dated 2015. According to

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<sup>190</sup> Decision on Sentence of 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr, paras. 47-48.

<sup>191</sup> Decision on Sentence of 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr, para. 50.

<sup>192</sup> Decision on Sentence of 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr, paras. 50 and 58.

<sup>193</sup> Decision on Sentence of 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr, para. 58.

<sup>194</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, paras. 838, 839 and 841.

<sup>195</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, p. 710.



the Defence, the 2015 certificates were adapted to changes to the Applicants' statements. The Defence draws the Chamber's attention to the fact that the death certificates appear mostly to have been issued on the sole basis of the word of the Applicants, who did not witness the death of the direct victims. The Defence notes that, in some instances, the Applicants claim to have heard of the death after the attack or, in other cases, have inferred death from disappearance in the aftermath of the attack. To the Defence, the certificates do not amount to irrefutable evidence that the direct victims died as the Applicants so claim. The Defence argues that those persons might have fled the attack and not returned to Bogoro or Bunia. Thus, the Defence invites the Chamber to treat the Applicants' certificates and statements with caution, where there are discrepancies between the statements and/or the death certificates.<sup>196</sup>

118. The Chamber sees that, for the most part, the death certificates state the date and place of death of the direct victim, namely 24 February 2003 in Bogoro. The Chamber notes that some death certificates, issued in 2008, state 24 February 2008. However, it takes that date to be simply a slip, which should read 24 February 2003.

119. Turning to the Defence remark that the death certificates do not entail an irrefutable finding of a direct victim's death, the Chamber finds that one Applicant's statements as a whole and the death certificate, which was signed by a civil status registrar in the DRC,<sup>197</sup> are sufficient evidence to establish to the requisite standard of proof that the direct victim in question did in fact die in the attack on Bogoro. This finding is conditional upon the particularities of the individual analysis.

*d. Close personal relationship with the direct victim*

120. The Chamber notices that as proof of a close personal relationship with a direct victim, the Applicants generally provide a certificate of family relationship, dated and signed by a civil status registrar, stating the family relationship between

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<sup>196</sup> First Defence Observations, 24 February 2016, ICC-01/04-01/07-3660-Conf, para. 15.

<sup>197</sup> See para. 71 of the present order.

the direct victim and the Applicant. In that regard, the Chamber heeds the Defence submissions on how family relationships between a direct victim and an Applicant are recorded in the certificates.<sup>198</sup> Nonetheless, the Chamber takes the view that it rests with it, in its individual analysis of the applications for reparations, to assess how the direct victim and the Applicant are related, with due consideration for the documentation and evidence as a whole provided in support of the applications for reparations. Hence, the Chamber is of the opinion that the family relationship may be proven without tendering any such certificate. This will be so where family relationship may be established by the fact that the parents' names on a voter's card accord with those on a death certificate. The Chamber also looks at family relationships between Applicants for corroboration of the allegations.

121. The Chamber notes the Defence submission that family members of direct victims qualify for reparations only where they are sufficiently close to the direct victim, as in, for instance, a parent-child relationship, or where they have otherwise shown that they were a dependent of the direct victim.<sup>199</sup> In that connection, the Chamber recalls that the concept of "family" must be understood in relation to the relevant family and social structures.<sup>200</sup> In *Lubanga*, the Appeals Chamber adverted to the widely accepted presumption "that an individual is succeeded by his or her

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<sup>198</sup> See e.g. the observations on Applicant a/0044/08 (ICC-01/04-01/07-3695-Conf-Exp-Anx 5) in Annex A to "Defence Observations on 41 victims' applications pursuant to the *Deuxième décision relative à la demande de retrait de mandat du Représentant légal des victimes*", 20 September 2016, ICC-01/04-01/07-3709-Conf-Exp-AnxA, p. 3.

<sup>199</sup> Defence Consolidated Response of 16 June 2015, ICC-01/04-01/07-3564, para. 9; Defence Observations of 14 May 2015, ICC-01/04-01/07-3549, para. 20, and, in particular, footnote reference to *The Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I, "Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo", 29 June 2006, ICC-01/04-01/06-172-tEN, pp. 7-8. See also Victims' Observations of 15 May 2015, ICC-01/04-01/07-3555-tENG, para. 33.

<sup>200</sup> *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 7. See also Victims' Observations of 15 May 2015, ICC-01/04-01/07-3555-tENG, para. 33; "Réponse consolidée des victimes aux observations déposées par la Défense, les participants et les organisations invitées à déposer leurs observations sur les principes et la procédure en réparation", 16 June 2015, ICC-01/04-01/07-3565, paras. 8-10 ("Victims' Consolidated Response of 16 June 2015").

spouse and children”.<sup>201</sup> In the case at bar, the Chamber has treated the concept of “family” with due regard for family and social structures in the DRC and in Ituri in particular.<sup>202</sup> The issue to which the Chamber must turn its attention is whether “as a result of their [the indirect victims’] relationship with the direct victim, the loss, injury, or damage suffered by the latter gives rise to harm to them”.<sup>203</sup> In the specific circumstances of the attack on Bogoro, the Chamber regards the loss of a family member as a traumatic experience entailing psychological suffering – it is of little consequence whether the relative was near or distant.

*e. Determination of the Chamber*

122. Accordingly, where the death of a direct victim in the attack on Bogoro and the family relationship between the direct victim and the Applicant are established in the light of the documents and evidence as a whole furnished in support of an application for reparations, the Chamber considers psychological harm resulting from the death of a relative to be established.<sup>204</sup>

ii. Psychological harm connected to the experience of the attack on Bogoro

123. The Chamber notes that, in their applications for reparations, some Applicants allege psychological harm connected to the experience of the attack on Bogoro. Otherwise put, the harm ensued from seeing and/or fleeing the atrocities and massacres perpetrated then and is unconnected to the death of a relative. The Chamber sees that some Applicants have tendered mental health certificates.

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<sup>201</sup> *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 7. See also Defence Consolidated Response of 16 June 2015, ICC-01/04-01/07-3564, para. 9.

<sup>202</sup> Similarly, see Victims’ Consolidated Response of 16 June 2015, ICC-01/04-01/07-3565, paras. 8-10; TFV Observations of 13 May 2015, ICC-01/04-01/07-3548, paras. 21 and 129. The Defence also appears to favour that approach (Defence Consolidated Response of 16 June 2015, ICC-01/04-01/07-3564, paras. 10-11).

<sup>203</sup> See e.g. *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, “Redacted version of ‘Decision on “indirect victims”’, dated 8 April 2009, [French] translation registered on 22 April 2015, ICC-01/04-01/06-1813, para. 49 (“*Lubanga*, Trial Chamber I, Decision on Indirect Victims”).

<sup>204</sup> For the requirements of a family relationship, see Section “VII. D. Causal nexus between the harm alleged and the crimes of which Mr Katanga was convicted”.

124. From the outset, the Chamber must underscore the extreme violence which held Bogoro in its grip on 24 February 2003 and led to the murder of scores of civilians – children, women and elderly persons – and to the destruction and pillaging of their property.<sup>205</sup> The effects of the fighting persist and psychological trauma continues to afflict some of the population.<sup>206</sup>

125. The Chamber regards the fact alone of having been in Bogoro on 24 February 2003 during the attack and of having seen or fled the massacres and atrocities perpetrated had major ramifications for the mental health of the persons present that day.

126. In that connection, the Defence submits that

any victim present at the Bogoro attack of 24 February 2003 can claim financial compensation for the psychological harm caused, and that this compensation should be the same, fixed amount for all the applicants fulfilling this condition. To do otherwise and attempt to assess the extent of the psychological harm for each applicant is not possible as only a few have tendered medical certificates.<sup>207</sup>

127. The Chamber further notes the findings of the Inter-American Court:

It is obvious to the Court that the victim suffered moral damages, for it is characteristic of human nature that anyone subjected to the kind of aggression and abuse proven in the instant Case will experience moral suffering. No evidence is required to arrive at this finding.<sup>208</sup>

128. In a similar vein, the Inter-American Court ruled:

The non-pecuniary damage inflicted on the victims is evident, because it is inherent in human nature that all those subjected to brutal acts in the context of this case experienced intense suffering, anguish, terror and insecurity, so that this damage does not have to be proved.<sup>209</sup>

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<sup>205</sup> See, e.g. Decision on Sentence of 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr, para. 47. See also Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 516.

<sup>206</sup> Decision on Sentence of 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr, paras. 44, 49-50, 57-58.

<sup>207</sup> Second Defence Observations, 11 April 2016, ICC-01/04-01/07-3681-Conf-Exp, para. 27.

<sup>208</sup> Inter-American Court, *Loayza-Tamayo v. Peru (Reparations and Costs)*, 27 November 1998, para. 138.

<sup>209</sup> Inter-American Court, *Pueblo Bello Massacre v. Colombia (Merits, Reparations and Costs)*, 31 January 2006, para. 255 (“Inter-American Court, *Pueblo Bello Massacre v. Colombia (Merits, Reparations and Costs)*”); Inter-American Court, *Mapiripán Massacre v. Colombia (Preliminary objections and Acknowledgement of responsibility)*, 7 March 2005, para. 283; Inter-American Court, *Tibi v. Ecuador (Preliminary objections, Merits, Reparations and Costs)*, 7 September 2004, para. 244. See also Inter-

129. Having regard to those findings and considerations, the Chamber has decided to make a finding that an Applicant sustained psychological harm connected to the experience of the attack on Bogoro, where it is proven that that person suffered other harm during the attack, even if he or she makes no explicit allegation of psychological harm. To so proceed is, in the Chamber's estimation, warranted by the fact that every Applicant who establishes that he or she was affected in a material or physical way by the attack on Bogoro may be presumed to have suffered repercussions on his or her mental health.

130. The Chamber notes that some Applicants have been in a position to present medical certificates in support of the harm. In such cases, the Chamber finds the psychological harm connected to the experience of the attack on Bogoro to be established to the requisite standard of proof, *viz.*, on a balance of probabilities,<sup>210</sup> subject to the particular circumstances which may emerge from an individual analysis of the applications for reparations.

131. Lastly, the Chamber reiterates that it will make a finding of psychological harm connected to the experience of the attack, irrespective of any other psychological harm. So, where an Applicant alleges psychological harm resulting from the death of a relative and psychological harm connected to the experience of the attack on Bogoro, the Chamber will consider the Applicant to have suffered two distinct types of psychological harm.<sup>211</sup>

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American Court, *Aguado-Alfaro et al. v. Peru (Preliminary Objections, Merits, Reparations and Costs)*, 24 November 2006, para. 150; Inter-American Court, *Ituango Massacres v. Colombia (Preliminary Objections, Merits, Reparations and Costs)*, 1 July 2006, para. 384; Inter-American Court, *Gómez-Paquiyaury Brothers v. Peru (Merits, Reparations and Costs)*, 8 July 2004, para. 217; Inter-American Court, *Merchants v. Colombia (Merits, Reparations and Costs)*, 5 July 2004, para. 248.

<sup>210</sup> Psychological harm connected to the experience of the attack on Bogoro is established on the basis of an Applicant's statements; a medical certificate issued in the name of the Applicant and dated and signed by a person acting in an official capacity (see para. 71 of the present order), stating that the harm alleged by the Applicant was a consequence of the attack on Bogoro; and the findings of Trial Chamber II, sitting in its previous composition.

<sup>211</sup> Thus, the Chamber has used different monetary values for the two types of psychological harm (See Section "IX. D. 3. Psychological harm").

iii. Transgenerational harm

132. The Chamber notes that, in their applications for reparations, five Applicants born after the attack on Bogoro allege transgenerational psychological harm, which the “*Rapport d’expertise sur l’évaluation de l’état psychique des enfants victimes de l’attaque de Bogoro du 24 février 2003*” (“Report”) describes as a phenomenon, whereby social violence is passed on from ascendants to descendants with traumatic consequences for the latter.<sup>212</sup>

133. The Chamber notes the findings of the Report, which speaks of the transgenerational psychological trauma that presents in many children whose parents experienced the attack on Bogoro at first hand.<sup>213</sup> The Chamber also has regard to the Defence Observations,<sup>214</sup> which argue that

[the] children born after the 24th February 2003 should be authorised to claim compensation only because of the death of one parent during the Bogoro attack. [...] The report remains extremely vague and hypothetical. It therefore insufficient to establish a sufficient close link between the crimes for which Mr Katanga was convicted and any eventual harm which would be endured by the children born after the Bogoro attack.<sup>215</sup>

134. Even where those Applicants are, in all likelihood, suffering from transgenerational psychological harm, the point must be made, as the Defence has,

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<sup>212</sup> “*Transmission du ‘Rapport d’expertise sur l’évaluation de l’état psychique des enfants victimes de l’attaque de Bogoro du 24 février 2003’*”, 26 May 2016, ICC-01/04-01/07-3692-Conf-Exp (“Expert Report of 26 May 2016”) and one confidential annex, *ex parte* Legal Representative (“Annex to the Expert Report of 26 May 2016”) and one public annex. A confidential redacted version was filed on 31 May 2016 with one confidential redacted annex and one public annex. A public redacted version was also filed on 31 May 2016 with one confidential redacted annex and one public annex; “*Addendum au document intitulé Transmission du ‘Rapport d’expertise sur l’évaluation de l’état psychique des enfants victimes de l’attaque de Bogoro du 24 février 2003’*” (ICC-01/04-01/07-3692-Conf-Red), 10 June 2016, ICC-01/04-01/07-3698-Conf and two public annexes.

<sup>213</sup> Annex to the Expert Report of 26 May 2016, ICC-01/04-01/07-3692-Conf-Exp-Anx1, p. 32.

<sup>214</sup> “Defence Observations on the Legal Representative of Victims’ *Transmission du ‘Rapport d’expertise sur l’évaluation de l’état psychique des enfants victimes de l’attaque de Bogoro du 24 février 2003’ and its Addendum*”, 22 June 2016, ICC-01/04-01/07-3699-Conf, paras. 11 and 13 (“Defence Observations of 22 June 2016”).

<sup>215</sup> Defence Observations of 22 June 2016, ICC-01/04-01/07-3699-Conf, paras. 11 and 13.

that no evidence is laid before the Chamber to establish on a balance of probabilities the causal nexus between the trauma suffered and the attack on Bogoro.<sup>216</sup>

135. The Chamber nonetheless recommends that the children in question be monitored and afforded particular attention.<sup>217</sup>

**(d) *Sui generis* harm: loss of standard of living, loss of opportunity and forced departure**

136. The Chamber sees that in some applications for reparations, it is alleged that the attack on Bogoro entailed a loss of standard of living due to the death of a relative on whom all or part of the family's livelihood depended, or due to the fact that the Applicants now have dependents who are the offspring of a deceased family member (loss of standard of living). The Chamber notes also that some Applicants allege that the attack on Bogoro robbed them of the opportunity to pursue education or vocational training (loss of opportunity). It is also to be noted that a number of Applicants allege that the attack on Bogoro compelled them to take flight (forced departure).

137. Moreover, Trial Chamber II, sitting in its previous composition, noted that "[t]he survivors of the massacres were forced to flee, leaving behind all their possessions"<sup>218</sup> and "many locals have since been forced to start life afresh away from Bogoro, where they chose not to return as they would have had to start again from scratch or simply did not have the means".<sup>219</sup> Further, the Chamber notes, in *Lubanga*,

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<sup>216</sup> The Defence submits, in the first instance, that the Report should not be admitted into evidence as, in its view, its provenance and content cannot be authenticated (Defence Observations of 22 June 2016, ICC-01/04-01/07-3699-Conf, paras. 9 and 18). The Chamber has decided that since the Expert Report of 26 May 2016 did not set forth any information to allow it to determine that a causal nexus between the attack on Bogoro and the trauma suffered has been established, it need not entertain the Defence arguments further.

<sup>217</sup> See Section "XII. D Assistance mandate of the TFV": the Chamber invites the TFV to give consideration as part of its assistance mandate, wherever possible, to the harm suffered by the Applicants in the attack on Bogoro upon which the Chamber has not been in a position to act in the case.

<sup>218</sup> Decision on Sentence of 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr, para. 50.

<sup>219</sup> Decision on Sentence of 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr, para. 52.

the Appeals Chamber underlined that the harm suffered by indirect victims may include material deprivation that accompanies the loss of his or her [the direct victim's] contributions".<sup>220</sup>

138. Yet, the Chamber sees that the Applicants have not tendered any specific proof of *sui generis* harm, save for harm ensuing from forced departure where they provided a refugee card or a refugee family certificate. For want of any further information or evidence, the Chamber does not consider itself in a position to determine whether it has been established to the requisite standard of proof that as a consequence of the attack on Bogoro, said Applicants suffered separate material and/or psychological harm ensuing from a loss of standard of living, loss of opportunity or forced departure.<sup>221</sup> Where, in support of their allegations, the Applicants tender a refugee family certificate and/or a refugee card, the Chamber will make the finding that they had to flee the DRC. Be that as it may, absent further information, the Chamber will not be in a position to connect that material and/or psychological harm to the attack on Bogoro.

139. The Chamber must, however, underline that it will make a finding of existence of psychological harm connected to the experience of the attack on Bogoro where other harm resulting from the attack has been proven. The Chamber determines that a finding of psychological harm connected to the experience of the attack on Bogoro encompasses loss of opportunity, loss of standard of living and forced departure.

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<sup>220</sup> *Lubanga*, Appeals Chamber, Decision on Victims' Participation, ICC-01/04-01/06-1432, para. 32. See also *Lubanga*, Trial Chamber I, Decision on Indirect Victims, ICC-01/04-01/06-1813, para. 50.

<sup>221</sup> The European Court has, in numerous cases brought before it, said that it could not speculate as to what the outcome would have been had a violation not occurred. At times, said Court has nonetheless stated that the possibility that a benefit might have existed could not be ruled out in the absence of a violation. See ECtHR, *Goddi v. Italy*, Judgment 9 April 1984, Application no. 8966/80; ECtHR, *Delta v. France*, 19 December 1990, Application no. 11444/85; ECtHR, *Vidal v. Belgium*, 28 October 1992, Application no. 12351/86; ECtHR, *Chiro v. Italy*, 27 July 2010, Application no. 63630/00.



**3. Harm not ensuing from one or more of the crimes of which Mr Katanga was convicted**

**(a) Physical and psychological harm occasioned by rape and/or sexual violence or gender-based violence during the attack on Bogoro**

140. The Chamber notes that, in their applications for reparations, some Applicants allege that they suffered physical and psychological harm occasioned by rape and sexual slavery in the attack on Bogoro.

i. Submissions of the parties, the Prosecution, the TFV and organizations authorized to file observations

141. The Legal Representative of Victims submits that since the Chamber entered findings that said crimes were committed, the Court-ordered reparation programmes must include the victims of the crimes of rape and sexual slavery without, however, that quota being ascribed to Mr Katanga.<sup>222</sup>

142. The Prosecution argues that the conviction handed down against Mr Katanga under article 8(2)(e)(i) of the Statute encompasses the acts of rape committed during the attack. Accordingly, it is of the view that the victims of the acts of rape are entitled to reparations for the harm suffered as direct victims of war crimes committed in the attack on civilians.<sup>223</sup>

143. The TFV submits that the Chamber should invite it to make use of its assistance mandate for the victims who were subjected to sexual violence during the attack, despite Mr Katanga's acquittal of those crimes.<sup>224</sup>

144. The United Nations submits that the victims of sexual violence must be able to obtain reparation. But, where Trial Chamber II determines that the causal nexus between the crime of sexual violence and the crimes of which Mr Katanga was

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<sup>222</sup> Victims' Observations of 15 May 2015, ICC-01/04-01/07-3555-tENG, paras. 45-47.

<sup>223</sup> Prosecution's Observations of 30 April 2015, ICC-01/04-01/07-3544, para. 13.

<sup>224</sup> TFV Observations of 13 May 2015, ICC-01/04-01/07-3548, para. 130.

convicted has not been shown, the United Nations suggests that other resources be used so that the victims may nonetheless benefit from reparations, specifically through the TFV.<sup>225</sup>

145. It is the Defence's submission that, even if Mr Katanga cannot be held liable for harm resulting from sexual violence, the TFV should, in discharging its assistance mandate, include members of the affected communities who do not qualify as victims.<sup>226</sup> It also makes the point the Chamber should also include a process of referral to other competent NGOs in the affected areas that can help the victims of sexual violence.<sup>227</sup>

ii. Analysis and determination of the Chamber

146. From the outset, the Chamber must underscore the gravity of the crimes of rape and sexual slavery, which stems from both the act and from the ensuing psychological consequences for the victims.<sup>228</sup> The Chamber considers the physical pain from the act of rape to be compounded by psychological pain, which cannot be disregarded and which has repercussions on the life of the victim, but also on the lives of the victim's nearest and dearest. In that regard, the Trial Chamber, sitting in its previous composition, recalled that "subsequently victims of sexual violence were often rejected by their community, which compounded the harm they suffered".<sup>229</sup>

147. The Chamber recalls that, in the case at bar, a victim must show that he or she suffered harm ensuing from one or more of the crimes of which Mr Katanga was

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<sup>225</sup> "United Nations Joint Submission on Reparation", 14 May 2015, ICC-01/04-01/07-3550, paras. 66-69 ("United Nations Submission of 14 May 2015").

<sup>226</sup> *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 55.

<sup>227</sup> Defence Observations of 14 May 2015, ICC-01/04-01/07-3549, paras. 30-33.

<sup>228</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 204: Trial Chamber II, sitting in its previous composition, recalled that "victims of sexual violence are particularly vulnerable witnesses. [...] The Chamber is alive to the fact [...] that women who are victims of such acts run a very high risk of being rejected by their own community when they decide to tell the truth about their ordeal."

<sup>229</sup> Decision on Sentence of 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr, footnote 92. Trial Chamber II, sitting in its previous composition, stated that the women who had been raped and then abducted disappeared and that some of them had been presumed dead until they managed to break free. See also Decision on Sentence, 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr, footnote 97.

convicted.<sup>230</sup> That being so, the Chamber considers itself to be intrinsically bound by the parameters of the conviction handed down against Mr Katanga, as determined by Trial Chamber II, sitting in its previous composition.

148. Of note in that connection is the finding of said Chamber, sitting in its previous composition, that the evidence established beyond reasonable doubt that during the attack on Bogoro, Ngiti combatants from Walendu-Bindi *collectivité* committed the crimes of rape and sexual slavery as crimes against humanity and war crimes.<sup>231</sup>

149. Furthermore, in the context of the war crime of attack against a civilian population of which Mr Katanga was convicted, Trial Chamber II, sitting in its previous composition, found, in accordance with its definition of the objective element of the crime (“acts of violence against the adversary”)<sup>232</sup> that Ngiti combatants, in pursuit of the Bogoro inhabitants hiding in the bush, had sexually assaulted some women.<sup>233</sup>

150. Be that as it may, the Chamber notes that Trial Chamber II, sitting in its previous composition, found Mr Katanga not guilty as an accessory to the crimes of rape and sexual slavery, since the necessary evidence had not been presented to substantiate the Ngiti militia combatants’ criminal purpose as regards those crimes.<sup>234</sup> No evidence, it said, had been laid before it

to allow it to find that the acts of rape and enslavement were committed on a wide scale and repeatedly on 24 February 2003, or furthermore that the obliteration of the village of Bogoro perforce entailed the commission of such acts, even though the acts were

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<sup>230</sup> See Section “V. CONCEPT OF ‘VICTIM’” and para. 42.

<sup>231</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, paras. 999 and 1023. The gravity of the crimes of rape and sexual slavery and their use as a “weapon of war” has recently been affirmed in the judgment handed down by High Risk Tribunal A of Guatemala in the *Sepur Zarco* case (High Risk Tribunal A, *Sepur Zarco* case, Judgment C-01076-2012-00021 *Of. 2*, 26 February 2016, p. 5).

<sup>232</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 798.

<sup>233</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, paras. 833, 876 and 848.

<sup>234</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 1664.

entertained by the Chamber in its findings on the crime of attack against civilians as a war crime.<sup>235</sup>

151. In that connection, it emphasized:

although the acts of rape and enslavement formed an integral part of the militia's design to attack the [...] Hema civilian population [...], the Chamber cannot, however, find, [...] that the criminal purpose pursued [...] necessarily encompassed the commission of the specific crimes proscribed by articles 7(1)(g) and 8(2)(e)(vi) of the Statute.<sup>236</sup>

152. Having regard to the findings made by Trial Chamber II, sitting in its previous composition, and to the foregoing considerations,<sup>237</sup> the Chamber does not regard itself as in a position to determine that the physical and psychological harm occasioned by rape and/or sexual violence or gender-based violence during the attack on Bogoro ensued from one of the crimes of which Mr Katanga was convicted.

153. However, the Chamber must point out that that the Applicants who allege that they suffered physical and psychological harm occasioned by rape, sexual violence or gender-based violence have also sought reparations for other harm resulting from the attack on Bogoro; the Chamber has found that other harm to be established.

154. Further, the Chamber invites the TFV to afford consideration as part of its assistance mandate, wherever possible, to these Applicants.<sup>238</sup>

**(b) Harm not alleged by the Applicants – the case of former child soldiers**

i. Submissions of the parties, the Prosecution and the TFV

155. The Legal Representative recalls that Mr Katanga was acquitted of the crimes of using children under the age of 15 years to participate actively in hostilities.

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<sup>235</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 1663.

<sup>236</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 1664. In its Decision on Sentence, Trial Chamber II, sitting in its previous composition, took account of the "sexual violence" perpetrated against some women in its analysis of "[the] violence and scale of the crimes committed" (Decision on Sentence of 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr, para. 48).

<sup>237</sup> Of further note is that the Legal Representative takes the view that Mr Katanga should not be held liable for reparation of the harm at issue. See Victims' Observations of 15 May 2015, ICC-01/04-01/07-3555-tENG, para. 47.

<sup>238</sup> See Section "XII. D. Assistance mandate of the TFV".

He submits, however, that the former child soldiers should not be neglected and that they may benefit from the projects which the TFV has implemented as part of its general assistance mandate.<sup>239</sup> The Prosecution and the TFV so concur.<sup>240</sup>

156. The Defence submits that in view of Mr Katanga's acquittal of those crimes, if some Applicants are former child soldiers, their specific needs should be taken into account by the Court, in accordance with article 68 of the Statute and rule 86 of the Rules of Procedure and Evidence.<sup>241</sup>

ii. Analysis and determination of the Chamber

157. The Chamber must first lay stress on the gravity of the crime of using children under the age of 15 years to participate actively in hostilities as a war crime under article 8(2)(e)(vii) of the Statute, and its devastating consequences on former child soldiers.<sup>242</sup>

158. The Chamber nonetheless notes that the Applicants have not alleged harm in respect of that crime. Furthermore, to be awarded reparations, a person must have suffered harm as a consequence of the crimes of which the person was convicted.

159. The Chamber notes on the subject that Trial Chamber II, sitting in its previous composition, determined:

that children under the age of 15 years were fully integrated into the Ngiti militia of Walendu-Bindi *collectivité* during the hostilities connected to the 24 February 2003 battle of Bogoro and that, alongside the adult combatants, they participated directly in combat and in the crimes committed.<sup>243</sup>

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<sup>239</sup> Victims' Observations of 15 May 2015, ICC-01/04-01/07-3555-tENG, paras. 48-49. See also Prosecution's Observations of 30 April 2015, ICC-01/04-01/07-3544, para. 14.

<sup>240</sup> Prosecution's Observations of 30 April 2015, ICC-01/04-01/07-3544, para. 14 and TFV Observations of 13 May 2015, ICC-01/04-01/07-3548, para. 130.

<sup>241</sup> Defence Observations of 14 May 2015, ICC-01/04-01/07-3549, para. 56.

<sup>242</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, "Decision on Sentence pursuant to Article 76 of the Statute", Trial Chamber I, 10 July 2012, ICC-01/04-01/06-2901, para. 39 ("*Lubanga*, Trial Chamber I, Decision on Sentence"). Expert witness Schauer described child soldiers as a particularly vulnerable group.

<sup>243</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, paras. 1086-1088.

160. However, that Bench “was unable to infer a direct nexus to suggest that the Accused used these children to participate in the hostilities”.<sup>244</sup> Hence it ruled that it could not “find that [Mr.] Katanga committed the crime of using child soldiers under article 8(2)(e)(vii) and, consequently, find him responsible under article 25(3)(a) of the Statute”.<sup>245</sup> Accordingly, it found Mr Katanga not guilty under article 25(3)(a) of the Statute of the crime of using children under the age of 15 years to participate actively in hostilities as a war crime under article 8(2)(e)(vii) of the Statute, and so it acquitted him thereof.

161. Having regard to the foregoing, the Chamber holds that the former child soldiers are ineligible for reparations in the present proceedings brought in connection with the crimes of which Mr Katanga was convicted. Be that as it may, the Chamber invites the TFV to give consideration as part of its assistance mandate, wherever possible, to the harm suffered by the Applicants in the attack on Bogoro upon which the Chamber has not been in a position to act in the case.<sup>246</sup>

#### **D. Causal nexus between the harm alleged and the crimes of which Mr Katanga was convicted**

##### **1. Principles laid down by the Appeals Chamber and standard of causation**

162. The Appeals Chamber held that the standard of causation is a but-for relationship between the harm and the crime. There is a further requirement that the crimes of which the person was convicted were the “proximate cause” of the harm for which reparations are sought.<sup>247</sup>

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<sup>244</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 1087.

<sup>245</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, paras. 1086-1088.

<sup>246</sup> See Section “XII. D. Assistance mandate of the TFV”.

<sup>247</sup> *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 59. The Chamber notes in that regard that the parties and the TFV argue that [that standard] should apply to the case at bar (Defence Observations of 14 May 2015, ICC-01/04-01/07-3549, para. 39; TFV Observations of 13 May 2015, ICC-01/04-01/07-3548, para. 26 and Prosecution’s Observations of 30 April 2015, ICC-01/04-01/07-3544, paras. 17-18).

163. As aforementioned,<sup>248</sup> it lies with the Applicant to provide sufficient proof of the causal nexus between the harm alleged and the crimes of which the person was convicted. The Appeals Chamber has also made plain that the causal nexus between the crime and the harm must be determined in view of the characteristics of the case under consideration.<sup>249</sup>

## 2. The Chamber's approach

164. It is to be recalled that Trial Chamber II, sitting in its previous composition, found that Mr Katanga made "a significant contribution to the commission of [...] crimes by the group of commanders and combatants of Walendu-Bindi *collectivité* since that contribution had considerable influence on their perpetration and the manner of their perpetration".<sup>250</sup> Further, said Chamber made clear that Mr Katanga had a part in conceiving the design to attack Bogoro<sup>251</sup> and "without his contribution of weapons and ammunition, Ngiti combatants would not have had the necessary means to successfully carry out the attack [on Bogoro]".<sup>252</sup>

165. That said, Trial Chamber II, sitting in its previous composition, also noted, in the light of some oral evidence, that "overall during the attack or in the specific context of acts constituting the crimes of murder and attack against civilians, Bira elements were at the *locus in quo*", and that "other testimonies briefly mention the participation of APC combatants or [...] persons in APC uniform".<sup>253</sup> It concluded that "most of the witnesses clearly identified the people who together committed

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<sup>248</sup> See Section "VI. A. Objects and burden of proof".

<sup>249</sup> *Lubanga*, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129, para. 80. *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 11.

<sup>250</sup> Decision on Sentence of 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr, para. 64; See also Decision on Sentence of 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr, paras. 65-69; See also Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 1671.

<sup>251</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 1682.

<sup>252</sup> Decision on Sentence of 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr, para. 65.

<sup>253</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 842.

these acts as being Lendu [from Bedu-Ezekere *groupement*] and Ngiti [from Walendu-Bindi *collectivité*] combatants".<sup>254</sup>

166. The Chamber recalls that the causal nexus between the crime and the harm must be determined in view of the characteristics of the case under consideration.<sup>255</sup> Hence, the causal nexus between the harm alleged and the crimes of which Mr Katanga was convicted must be considered in the light of the aforementioned circumstances. It must in particular be underlined that Mr Katanga had a part in conceiving the design to attack Bogoro, that he provided weapons to the Ngiti combatants, but also that combatants other than the Ngiti took part in the attack on Bogoro. Having regard to the foregoing, the Chamber determines that where the Applicants have established that the harm was a consequence of the attack on Bogoro, they have established the requisite causal nexus for the purposes of the present reparation proceedings.<sup>256</sup>

167. Accordingly, the Chamber finds that the harm alleged by the Applicants may attract an award of reparations.

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<sup>254</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 842 (footnote omitted). See also Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, paras. 755 and 933. The Chamber notes that Trial Chamber II, sitting in its previous composition, held against Mr Katanga only that evidence which could establish that the acts committed during the attack on Bogoro were committed by Ngiti combatants from Walendu-Bindi *collectivité*. (See e.g. Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, paras. 842 and 933).

<sup>255</sup> *Lubanga*, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129, para. 80; *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 11.

<sup>256</sup> In the Chamber's analysis of Mr Katanga's liability it is noted that combatants other than the Ngiti also took part in the attack on Bogoro (See Section "X. MR KATANGA'S LIABILITY FOR REPARATIONS").



## VIII. FINDINGS OF THE CHAMBER'S INDIVIDUAL ANALYSIS OF THE APPLICATIONS FOR REPARATIONS

168. The Chamber received 341 applications for reparations in all. It has undertaken an individual analysis of each application. The Chamber has determined that 297 Applicants have shown on a balance of probabilities that they are victims of the crimes of which Mr Katanga was convicted and accordingly, are entitled to reparations ordered by the Chamber in the case.

169. The Chamber has found that the Applicants have established that 230 houses were destroyed. The Chamber has determined that the destruction of 6 outbuildings has been established. The Chamber has found that the Applicants have established the destruction and pillaging of 3 business premises made of durable material and 18 business premises whose building material the Chamber has not been in a position to ascertain.

170. As regards Applicants who established the destruction of a house, the Chamber has found the material harm as a result of the destruction and pillaging of furniture also to have been shown. The Chamber has found that 74 Applicants have established that personal effects were pillaged. One Applicant has established the pillaging of the wares housed in the business premises which he was renting.

171. The Chamber recalls that the population of Bogoro on the whole appears to have engaged in subsistence farming and kept livestock. Thus, the Applicants have drawn attention to the pillaging of livestock of various kinds, the destruction of their fields and harvests or the pillaging of harvests.<sup>257</sup> The Chamber has determined that 130 Applicants have established that they suffered harm as a result of the pillaging of livestock. On the whole, it has not been in a position to rule on the type and quantity of livestock which the Applicants lost. In such cases, the Chamber has determined that the loss amounted to the average total livestock kept. In respect of other

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<sup>257</sup> See Section "VII. INDIVIDUAL ANALYSIS OF THE APPLICATIONS FOR REPARATIONS", para. 95.

Applicants, however, the Chamber found that 150 cows and 8 goats were pillaged in the attack. The Chamber found that 109 Applicants have shown that they suffered material harm as a result of the destruction of fields and harvests or the pillaging of harvests in the attack on Bogoro.

172. The Chamber recalls that some Applicants made assertions of material harm connected to the loss of the family property due to the upheavals to their lives brought about by the attack on Bogoro or the death of a relative in the attack. Absent evidence to so prove, the Chamber has not been in a position to find that harm established on a balance of probabilities.

173. Physical harm was found by the Chamber to be established in only two cases.

174. The Chamber has found 201 instances of psychological harm connected to the death of a near relative and 284 instances of psychological harm connected to the death of a distant relative to have been established.

175. The Chamber has considered every Applicant, who has shown that he or she suffered harm of any kind during the attack or that he or she was present at the time of the attack on Bogoro, suffered psychological harm connected to the experience of the attack. It has determined that, by their nature, the circumstances of the attack on Bogoro inflicted trauma of every sort on the victims of the attack. It has further noted that an individual examination of the psychological state of each victim could not readily be undertaken. Accordingly, the Chamber has considered it reasonable to presume that 297 Applicants suffered psychological harm connected to the experience of the attack on Bogoro.

176. It must be recalled that some Applicants have alleged that they are suffering from transgenerational trauma. As it has said, the Chamber has not been in a position to determine on a balance of probabilities the causal nexus between the trauma suffered and the attack on Bogoro.

177. The Chamber recalls that some Applicants are claiming reparation for loss of standard of living and/or loss of opportunity suffered as a result of the attack on Bogoro. As the foregoing has explained, the Chamber has not been in a position to determine that the Applicants suffered trauma distinct from the harm brought about by the experience of the attack on Bogoro.

178. Some Applicants alleged that they suffered psychological harm connected to the forced departure occasioned by the attack on Bogoro. As it has said above, the Chamber has not been in a position to determine on a balance of probabilities the causal nexus between that harm and the attack on Bogoro.

179. The Chamber has noted that some Applicants are claiming reparation for the rape, sexual violence or gender-based violence to which they were subjected in the attack on Bogoro. Having regard to the findings of Trial Chamber II, sitting in its previous composition,<sup>258</sup> the Chamber has concluded that it is not in a position to determine that that harm was a consequence of one or more of the crimes of which Mr Katanga was convicted.

180. Lastly, having regard to the findings of Trial Chamber II, sitting in its previous composition,<sup>259</sup> the Chamber concluded that it has not been in a position to consider the former child soldiers to be victims for the purposes of reparations in the case.

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<sup>258</sup> See paras. 148-151 of the present order.

<sup>259</sup> See paras. 159-160 of the present order.

## IX. ASSESSMENT OF THE EXTENT OF THE HARM

### A. Introduction

181. The Chamber takes the view that the extent of the harm suffered by the victims for the purposes of reparations in the case, with due regard for the 341 applications for reparations put before it, is the sum-total of the harm which the Chamber has found to be established. Accordingly, the Chamber will undertake an assessment of the monetary value of each head of harm it has defined above<sup>260</sup> so as then to set the size of the reparations award for which Mr Katanga is liable.<sup>261</sup>

182. Before it so proceeds, it must dispose of the arguments raised by the parties regarding the time frame of reference for the assessment of the harm and the consideration to be afforded to the general context of the harm. The Chamber will then examine in turn each head of harm which it considers to be established, taking into account the input of the parties and the TFV, so as to set its monetary value.

### B. Time frame of reference for the assessment of the monetary value of the harm

183. The Chamber takes note of the observations of the Legal Representative which argue that harm must be determined “[TRANSLATION] in accordance with the present value of the property which has been damaged or destroyed”, that is to say, in accordance with the value of the property at the time of the award.<sup>262</sup> The Chamber also takes note of his observations sounding caution given the lapse of time since the acts were committed and the present award: “[TRANSLATION] a considerable disparity between the value at the material time of the property which was lost [...] and its value now”. On that point, the Chamber sees that the Legal Representative raises the

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<sup>260</sup> See Section “VII. C. Definition of the harm and evaluation of the evidence presented to substantiate the harm alleged by the Applicants”.

<sup>261</sup> See Section “X. MR KATANGA’S LIABILITY FOR REPARATIONS”.

<sup>262</sup> Victims’ Observations of 30 September 2016, ICC-01/04-01/07-3713, para. 15. See also TFV Observations of 30 September 2016, ICC-01/04-01/07-3714-Conf-Exp, para. 17.

difficulty of providing proof of the value of property destroyed at the time of the attack on Bogoro, that is, over a decade ago.<sup>263</sup>

184. The Chamber notes that the Defence takes no objection to an assessment of harm at the time of the award, provided that consideration is afforded to the fact that most of the property allegedly destroyed was old and damaged, not new.<sup>264</sup>

185. Having regard to the foregoing, and cognizant of the disparity between the value at the material time of the property lost and its value now, and of the difficulty of providing proof of the value of the property destroyed at time of the attack on Bogoro, the Chamber determines that the harm must be assessed at the time of the award.

### **C. General context of the harm suffered by Mr Katanga's victims**

186. The Chamber takes note of the observations of the TFV, which speak of the possibility of factoring the economic context of the DRC – specifically the local economic context of Ituri – into the monetary assessment of the harm alleged. For non-pecuniary harm, however, the TFV submits that standard international monetary values could be used, regardless of the economic context of the country where the crimes were committed. That standard could apply across cases which come before this Court or other international courts.<sup>265</sup> The Chamber notes the TFV's reference to academic studies<sup>266</sup> of large numbers of judgments, including those handed down by international courts such as the European Court of Human Rights. The judgments show that “different monetary values are attached also to non

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<sup>263</sup> Victims' Observations of 30 September 2016, ICC-01/04-01/07-3713, para. 15. See also TFV Observations of 30 September 2016, ICC-01/04-01/07-3714-Conf-Exp, para. 17.

<sup>264</sup> Defence Observations of 30 September 2016, ICC-01/04-01/07-3711, paras. 9 and 10.

<sup>265</sup> TFV Observations of 30 September 2016, ICC-01/04-01/07-3714-Conf-Exp, para. 20.

<sup>266</sup> The TFV cites the following paper: S. Altwicker-Hàmori, T. Altwicker and A. Peters, “Measuring violations of Human rights: An empirical perspective of awards in respect of non-pecuniary damage under the European convention of Human rights”, 16 July 2015, revised on 9 July 2016, [http://www.mpil.de/files/pdf4/Quant\\_Human.Rights1.pdf](http://www.mpil.de/files/pdf4/Quant_Human.Rights1.pdf), accessed 15 March 2017, p. 20.

pecuniary damage depending 'on the overall context in which the breach occurred, i.e. the local economic circumstances'''.<sup>267</sup>

187. The Defence also invites the Chamber to afford consideration to the economic, social and family situation of the victims at the time of the attack.<sup>268</sup>

188. The Chamber is of the view that the monetary assessment of pecuniary harm is inseverable from the economic context of the Ituri region and that of the village of Bogoro in particular. To that end, the Chamber directed from the parties and the TFV observations on prices on the local market of the property whose destruction the victims allege.

189. However, the Chamber regards the economic situation of Ituri as immaterial to the determination of the size of the award for non-pecuniary harm. The monetary assessment of the psychological harm resulting from the ordeal which the victims endured at the time of the attack, and the psychological harm connected to the death of a relative, must, in no circumstances, be made contingent on the victims' financial situation.

#### **D. Assessment of the monetary value per head of harm**

190. As aforementioned, the Chamber directed from the Legal Representative, the Defence and the TFV observations on the monetary value of the various heads of harm.

191. Harm under each of the heads defined by the Chamber will now be examined against the information in the applications for reparations and the observations of the parties and the TFV. Where it cannot identify any specific particulars to consult, the Chamber will make an *ex aequo et bono* assessment of the harm which has been established. The Chamber has considered that it need not avail itself of experts to such end in the case at bar.

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<sup>267</sup> TFV Observations of 30 September 2016, ICC-01/04-01/07-3714-Conf-Exp, para. 21.

<sup>268</sup> Defence Observations of 30 September 2016, ICC-01/04-01/07-3711, para. 11.

192. The monetary value per head of harm set forth below is stated in the tabular summary which concludes this Section.

### 1. Material harm

#### (a) Destruction of houses

193. The Legal Representative recommends a fixed sum derived from the average in terms of type and size of house and its contents. He puts a reed wattle house at USD 600 and a house made of material other than brick or stone at the value of a four-room house made of rammed-earth, USD 2,000. He puts a house built from durable material at the value of a house made of unfired brick, USD 3,200.<sup>269</sup> The Defence agrees with the figures<sup>270</sup> but points out that Bogoro was attacked several times before 24 February 2003 and that on that day, many of the houses were not new.<sup>271</sup>

194. The TFV consulted several NGOs working in the Bunia area (Caritas, COOPI, *Missionnaires d'Afrique* and ADRA), the chief of Bogoro *groupement* and the *Société de Génie de l'information et des travaux*. On the basis of their input, it values the houses at USD 450-25 000.<sup>272</sup>

195. The Chamber recalls that the residence certificates presented do not specify the type of house or its condition. Hence, the Chamber sees fit to accept the minimum figure suggested by the Legal Representative and the Defence, and hereby sets the harm connected to destruction of a house at USD 600. As to the Defence argument that Bogoro was subjected to several attacks before 24 February 2003, the Chamber recalls that it has examined the causal nexus between the harm suffered and the crimes committed by Mr Katanga in the individual analysis of each application for reparations.

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<sup>269</sup> Victims' Observations of 30 September 2016, ICC-01/04-01/07-3713, para. 17.

<sup>270</sup> Defence Observations of 30 September 2016, ICC-01/04-01/07-3711-AnxA.

<sup>271</sup> Defence Observations of 30 September 2016, ICC-01/04-01/07-3711, paras. 28 and 32.

<sup>272</sup> TFV Observations of 30 September 2016, ICC-01/04-01/07-3714-Conf-Exp-Anx1.

**(b) Destruction of outbuildings**

196. The Legal Representative, the TFV and the Defence do not put forward any assessment of the outbuildings.

197. From the analysis of the applications for reparations the Chamber has not been in a position to determine the features of the outbuildings, and so puts *ex aequo et bono* the material harm connected to the destruction of an outbuilding at USD 100.

**(c) Destruction or pillaging of furniture**

198. The Legal Representative and the Defence are agreed as to the value of “a basic set of kitchen utensils”, putting them at USD 75.<sup>273</sup>

199. They are agreed as to the value of the furniture, but diverge slightly on how much furniture forms a basic set. The Legal Representative puts a basic set of furniture for seven persons at a fixed sum of USD 500.<sup>274</sup> The Defence estimates that furniture for a family of three comes to USD 250.<sup>275</sup>

200. The TFV tenders invoices from local shops which give the following estimates: a dining room for six (USD 150-190), a double bed (USD 170), three single beds (USD 195) and kitchen utensils (USD 150).<sup>276</sup>

201. To begin, the Chamber notes the Legal Representative’s proposal to factor in, for each house destroyed, a further fixed sum of USD 1,000 to cover: loss of a set of furniture for a two-parent family with five children, a fixed sum for “kitchen utensils”, personal effects, small livestock (put at one goat, one sheep, one cockerel and five hens) and the modest harvests from a plot of land.<sup>277</sup> The Chamber will not proceed on that basis and has decided to assess that material harm separately.

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<sup>273</sup> Victims’ Observations of 30 September 2016, ICC-01/04-01/07-3713, para. 17; Defence Observations of 30 September 2016, ICC-01/04-01/07-3711-AnxA.

<sup>274</sup> Victims’ Observations of 30 September 2016, ICC-01/04-01/07-3713, para. 17.

<sup>275</sup> Second Defence Observations, 11 April 2016, ICC-01/04-01/07-3681-Conf-Exp, para. 36.

<sup>276</sup> TFV Observations of 30 September 2016, ICC-01/04-01/07-3714-Conf-Exp-Anx7.

<sup>277</sup> Victims’ Observations of 30 September 2016, ICC-01/04-01/07-3713, para. 23.



202. The Chamber sees fit to accept the Legal Representative's suggestion for a basic set of furniture for seven persons and so reckons the harm resulting from the destruction or pillaging of furniture at USD 500 per house. That figure includes kitchen utensils.

**(d) Destruction or pillaging of personal effects**

203. The Legal Representative and the Defence put forward a figure of USD 500 for a family with five children.<sup>278</sup>

204. The TFV has presented invoices from local shops which state the following prices amongst others: a pair of trousers (USD 10), a dress (USD 10), a shirt (USD 10) and shoes (USD 10).<sup>279</sup>

205. As to personal effects, the Chamber sees that the Applicants allege mostly pillaging of clothing and school supplies. The Chamber recalls that, absent detailed evidence, it has not been in a position to determine what precisely the Applicants lost. Accordingly, harm connected to the destruction or pillaging of personal effects is put *ex aequo et bono* at USD 75 per person.

**(e) Destruction or pillaging of business premises**

206. The Legal Representative suggests a fixed sum of USD 250 for each of the 36 basic small shops and their stock. For the six small shops and restaurants built from durable material, he suggests a fixed amount of USD 1,000 per building and its contents. The ten-bedroom hotel made of rammed earth is put at USD 4,300, which includes losses connected to the pillaging.<sup>280</sup>

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<sup>278</sup> Victims' Observations of 30 September 2016, ICC-01/04-01/07-3713, para. 17; Defence Observations of 30 September 2016, ICC-01/04-01/07-3711-AnxA.

<sup>279</sup> TFV Observations of 30 September 2016, ICC-01/04-01/07-3714-Conf-Exp-Anx7.

<sup>280</sup> Victims' Observations of 30 September 2016, ICC-01/04-01/07-3713, para. 31.

207. As a guide, the Defence puts forward USD 150 for a basic small shop and its contents; USD 4,000 for a small shop made of stone or brick; USD 350 for a restaurant; USD 300 for a small bakery; and USD 3,000 for the hotel in Bogoro.<sup>281</sup>

208. The TFV does not provide any specific information.

209. The Chamber recalls that, in most cases, it is not in a position to determine the business premises' features, such as building material. The Chamber therefore accepts the suggestions of the Legal Representative and the Defence regarding the average value of a business premises made of straw. The Chamber thus sets the harm connected to the destruction and pillaging of a business premises whose features it has not been in a position to determine at a figure of USD 300, which includes its contents.<sup>282</sup>

210. The Chamber has been in a position to enter a finding of destruction and pillaging of two business premises made of durable material (restaurants). The Chamber sets the harm connected to that destruction and pillaging at a figure of USD 800, which includes the contents. The Chamber has also been in a position to make a finding of destruction and pillaging of a hotel made of durable material. It puts the harm connected to its destruction and pillaging at a figure of USD 3,000, which includes its contents.

#### **(f) Destruction or pillaging of wares**

211. In the view of the Legal Representative, a building housing one small shop, and the shop's stock may reasonably be put at USD 100.<sup>283</sup>

212. The Defence suggests USD 150 for a basic small shop and its contents.<sup>284</sup>

213. The TFV makes no assessment of the wares.

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<sup>281</sup> Defence Observations of 30 September 2016, ICC-01/04-01/07-3711-AnxA.

<sup>282</sup> That figure appears in the overview table under "Business premises (building material unknown)".

<sup>283</sup> Victims' Observations of 30 September 2016, ICC-01/04-01/07-3713, para. 28.

<sup>284</sup> Defence Observations of 30 September 2016, ICC-01/04-01/07-3711-AnxA.

214. The Chamber recalls that some Applicants alleged that they were renting the business premises they were using and that the wares inside were pillaged. Having regard to the parties' observations, the Chamber sets the harm connected to the destruction or pillaging of wares of a business premises at USD 100.

**(g) Pillaging of livestock**

215. The Legal Representative puts a cow, a goat and a hen at USD 200-750, USD 40-70 and USD 5-10, respectively.<sup>285</sup> In his estimation, 10 to 15 cows make up the total livestock kept per family in Bogoro.

216. The Defence puts a cow, a goat and a hen at USD 200-860, USD 40-70 and USD 5-10, respectively.<sup>286</sup>

217. The TFV puts a cow, a goat and a hen at USD 250-500, USD 50, and USD 8-10, respectively.<sup>287</sup>

218. Where the Chamber is in a position to make a finding as to the precise type and quantity of livestock which an Applicant owned and to determine that the type and number exceed the monetary value of what the Chamber considers to be the average total livestock kept,<sup>288</sup> the Chamber will assess the corresponding harm on the basis of the following figures: USD 400 for a cow, USD 50 for a goat, and USD 8 for a hen. Where the Chamber is not in a position to make a finding as to the precise type and quantity of livestock which the Applicant owned, the harm resulting from the pillaging of livestock will be put at USD 524, which corresponds to the monetary value of what the Chamber considers to be the average total livestock kept.<sup>289</sup>

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<sup>285</sup> Victims' Observations of 30 September 2016, ICC-01/04-01/07-3713, para. 17.

<sup>286</sup> Defence Observations of 30 September 2016, ICC-01/04-01/07-3711-AnxA.

<sup>287</sup> TFV Observations of 30 September 2016, ICC-01/04-01/07-3714-Conf-Exp-Anx2 and ICC-01/04-01/07-3714-Conf-Exp-Anx6.

<sup>288</sup> As aforementioned, total livestock kept consists of one cow, two goats and three hens (see para. 101 of the present order).

<sup>289</sup> See Section "VII. C. 3. Harm not ensuing from one or more of the crimes of which Mr Katanga was convicted".

### (h) Destruction of fields and harvests; pillaging of harvests

219. The Legal Representative suggests a figure of USD 150 per Applicant for the loss of harvests from fields farmed outside of the Applicant's plot of land. That figure is predicated on the average area farmed by the population of Bogoro, 45 m<sup>2</sup>, and on the price fetched per *piquet* of the most frequently grown crops (corn and sweet potato), which is USD 15 per *piquet*.<sup>290</sup>

220. The Defence makes no comment on the average area farmed. It puts forward prices fetched for the most frequently grown crops (cassava and sweet potato at USD 15 per *piquet*, bananas at USD 10 per *régime*, dried corn at USD 6 per *bassin* and beans at USD 8 per *bassin*).<sup>291</sup>

221. The TFV refers to various NGOs' estimates which range from 35-10 000 m<sup>2</sup> of land farmed per household in Bogoro.<sup>292</sup>

222. It is to be noted that, upon analysis of the applications for reparations, the Chamber considered some Applicants to have suffered harm as a result of the destruction of fields and harvests or the pillaging of harvests, but, absent sufficient evidence, it has not been in a position to determine the area of the fields or the type of crops grown. Given the considerable disparity in the tracts of land owned, the crops grown and, hence, the extent of the harm suffered by the Applicants, the Chamber accepts the Legal Representative's suggestion of USD 150 per Applicant, which corresponds to the price fetched by ten *piquets* of sweet potato or corn.

## 2. Physical harm

223. The Legal Representative proposes that personal injury should attract USD 300 compensation, which would cover emotional harm and physical and material harm.<sup>293</sup>

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<sup>290</sup> Victims' Observations of 30 September 2016, ICC-01/04-01/07-3713, para. 36.

<sup>291</sup> Defence Observations of 30 September 2016, ICC-01/04-01/07-3711-AnxA.

<sup>292</sup> TFV Observations of 30 September 2016, ICC-01/04-01/07-3714-Conf-Exp-Anx-2 and ICC-01/04-01/07-3714-Conf-Exp-Anx6.

224. In the Defence's estimation, striking and wounding may attract USD 200 compensation.<sup>294</sup>

225. The TFV provides two lists of medical fees.<sup>295</sup>

226. The Chamber has found that head of harm to be established in respect of two Applicants. Both cases involve *bullet wounds*. The Chamber is not in a position to determine a precise figure for the harm on the basis of their applications for reparations. Accordingly, in each case the physical harm is reckoned *ex aequo et bono* at USD 250.

### 3. Psychological harm

#### (a) Psychological harm as a result of the death of a relative

227. The Legal Representative puts forward the following three categories of victims: very near relatives (father, mother, spouse, offspring and persons deemed as offspring); near relatives (siblings and persons deemed as such); and other more distant relatives. He suggests USD 25 000-50 000, USD 12 500-25 000, and USD 6,000-12 000 for the first, second and third categories, respectively.<sup>296</sup>

228. The Defence arrives at three categories identical in composition to the three put forward by the Legal Representative. It suggests USD 10 000, USD 6,000, and USD 4,000 for the first, second and third categories, respectively.<sup>297</sup>

229. The TFV has not set out its view on the matter.

230. The Chamber has reviewed the practice of France<sup>298</sup> and Belgium<sup>299</sup> in that regard, and that of the military courts in the DRC,<sup>300</sup> the United Nations

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<sup>293</sup> Victims' Observations of 30 September 2016, ICC-01/04-01/07-3713, para. 54.

<sup>294</sup> Defence Observations of 30 September 2016, ICC-01/04-01/07-3711-AnxB.

<sup>295</sup> TFV Observations of 30 September 2016, ICC-01/04-01/07-3714-Conf-Exp-Anx11 and ICC-01/04-01/07-3714-Conf-Exp-Anx12.

<sup>296</sup> Victims' Observations of 30 September 2016, ICC-01/04-01/07-3713, paras. 70-72.

<sup>297</sup> Defence Observations of 30 September 2016, ICC-01/04-01/07-3711-AnxB.

<sup>298</sup> *Référentiel indicatif de l'indemnisation du préjudice corporel*, French *Cours d'appel* [courts of appeal hearing appeals from civil and criminal first instance courts] (outwith Paris), 2011, [www.avocatparis.org/system/files/worksandcommissions/att5e6i9.pdf](http://www.avocatparis.org/system/files/worksandcommissions/att5e6i9.pdf), accessed 17 March 2017.

Compensation Commission<sup>301</sup> and the Inter-American Court.<sup>302</sup> The results of the review are tabulated below:

Deceased victim	France (€) <sup>303</sup>	Belgium (€) <sup>304</sup>	DRC military courts (US\$) <sup>305</sup>	UNCC (US\$) <sup>306</sup>	Inter-American Court (US\$)
Spouse	20 000/ 30 000	12 500			
Father/ mother	10 000/ 30 000	Household member: 12 500	10 000/ 20 000	2,500 per person / 10 000 per family	8,000 <sup>307</sup> / 20 000 <sup>308</sup>
		Child in household who has already lost one parent: 20 000			
		Not household member: 5,000			
Child	15 000/ 30 000	Household member: 12 500	10 000/ 20 000	2,500 per person / 10 000 per family	8,000 <sup>307</sup> / 20 000 <sup>308</sup>
		Not household member: 5,000			
Grandchildren	7,000/ 14 000	Household member: 2,500		2,500 per person / 10 000 per family	8,000 <sup>307</sup> / 20 000 <sup>308</sup>
		Not household member: 1,250			
Grandparents	7,000/ 14 000	Household member: 2,500		2,500 per person / 10 000 per family	8,000 <sup>307</sup> / 20 000 <sup>308</sup>
		Not household member: 1,250			
Sibling	6,000/ 12 000	Household member: 2,500		2,500 per person / 10 000 per family	500 <sup>309</sup>
		Not household member: 1,500			
Other relatives or close, unrelated persons		1,500-5,000			

<sup>299</sup> *Tableau Indicatif belge 2012* (Die Keure- La Charte 2012 (6<sup>th</sup> ed.)), p. 12, [http://www.fcgb-bgwf.be/documents/Tabl\\_Ind\\_2012\\_Fr.pdf](http://www.fcgb-bgwf.be/documents/Tabl_Ind_2012_Fr.pdf), accessed 14 March 2017 (“Tabulated Belgian Guidelines”).

<sup>300</sup> “*La réparation des crimes internationaux en droit congolais*”, report by Avocats sans frontières, December 2014, p. 82, [http://www.asf.be/wp-content/uploads/2015/09/ASF\\_RDC\\_R--pararationCrimesInternat\\_201509.pdf](http://www.asf.be/wp-content/uploads/2015/09/ASF_RDC_R--pararationCrimesInternat_201509.pdf).

<sup>301</sup> United Nations Compensation Commission, <http://www.uncc.ch/category-b>, accessed 17 March 2017.

<sup>302</sup> Inter-American Court, *Pueblo Bello Massacre v. Colombia (Merits, Reparations and Costs)*, para. 258; Inter-American Court, *Plan de Sánchez Massacre v. Guatemala (Reparations)*, 19 November 2004, para. 88.

<sup>303</sup> *Référentiel indicatif de l’indemnisation du préjudice corporel*, French *Cours d’appel*.

<sup>304</sup> Tabulated Belgian Guidelines, p. 12.

<sup>305</sup> “*La réparation des crimes internationaux en droit congolais*”, Avocats sans frontières, p. 82.

<sup>306</sup> United Nations Compensation Commission, <http://www.uncc.ch/category-b>, accessed 17 March 2017.

<sup>307</sup> Inter-American Court, *Pueblo Bello Massacre v. Colombia (Merits, Reparations and Costs)*, para. 258.

<sup>308</sup> Inter-American Court, *Plan de Sánchez Massacre v. Guatemala (Reparations)*, para. 88.

<sup>309</sup> Inter-American Court, *Pueblo Bello Massacre v. Colombia (Merits, Reparations and Costs)*, para. 258.

231. The Chamber has also paid close attention to the factors heeded by the Inter-American Court, such as suffering connected to the loss of a relative in the event of the death of several members of the same family,<sup>310</sup> changes in living conditions, anguish caused by the suffering experienced by the nearest and dearest,<sup>311</sup> the impossibility of burying corpses, the indignity of burials not performed in keeping with the rites and customs of the people in question, the destruction of family roles, the fragmentation of the community as a result of a massacre and the exacerbation of suffering due to a failure on the part of the national authorities to prosecute or convict. The Chamber has had particular regard to the *Puerto Bello Massacre v. Colombia* case,<sup>312</sup> wherein the Inter-American Court:

reiterates that the suffering caused to a victim “extends to the closest members of the family, particularly those who were in close affective contact with the victim.” In addition, the [Inter-American] Court has presumed that the suffering or death of a person causes their children, spouse or companion, mother, father and siblings a non-pecuniary damage that need not be proved.

232. The Chamber thus lays down two categories of death affecting each victim: death of near relatives (spouses, parents, children, grandparents and grandchildren); and death of other, more distant relatives (other relatives). Psychological harm connected to the death of a near relative is reckoned *ex aequo et bono* at USD 8,000 and psychological harm connected to the death of a more distant relative is reckoned *ex aequo et bono* at USD 4,000.

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<sup>310</sup> See e.g. Inter-American Court, *Pueblo Bello Massacre v. Colombia (Merits, Reparations and Costs)*, paras. 254-257.

<sup>311</sup> See e.g. Inter-American Court, *Plan de Sánchez Massacre v. Guatemala (Reparations)*, paras. 77 *et seq.*

<sup>312</sup> Inter-American Court, *Pueblo Bello Massacre v. Colombia (Merits, Reparations and Costs)*, para. 257.

**(b) Psychological harm connected to the experience of the attack on Bogoro**

233. The Legal Representative considers that all of the victims have, to some extent, suffered emotional harm ensuing from the trauma of the attack or from post-traumatic stress disorders.<sup>313</sup> He puts that harm at USD 25 000 per Applicant.<sup>314</sup>

234. The Defence's proposal is that psychological harm connected to the experience of the attack on Bogoro should attract a figure of USD 800 and post-traumatic stress should attract USD 600.<sup>315</sup>

235. The TFV has not commented on the matter.

236. The psychological harm connected to the experience of the attack is reckoned *ex aequo et bono* at USD 2,000 per Applicant. The Chamber reiterates that it has made a finding of psychological harm connected to the experience of the attack on Bogoro, irrespective of psychological harm connected to the death of a relative.<sup>316</sup>

**E. Findings of the Chamber as to the extent of the harm suffered by the victims**

237. The Chamber has thus arrived at a break-down of the harm suffered by each victim by dint of the crimes of which Mr Katanga was convicted and established the monetary value per head of harm, and so is in a position to reckon the monetary value of the extent of the harm suffered by the victims in the attack on Bogoro.

238. The table below sets out the calculation of the total monetary value per head of harm suffered by the victims. The sum-total of each such value then gives the monetary value of the extent of the harm suffered by the victims identified by the Chamber as such.

239. The monetary value of the extent of the harm is USD 3 752 620.

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<sup>313</sup> Victims' Proposals of 8 December 2016, ICC-01/04-01/07-3720, para. 71.

<sup>314</sup> Victims' Observations of 30 September 2016, ICC-01/04-01/07-3713, paras. 78-84.

<sup>315</sup> Defence Observations of 30 September 2016, ICC-01/04-01/07-3711-AnxB.

<sup>316</sup> See para. 131 of the present order.



## F. Overview table

		DETERMINATION OF EXTENT OF HARM SUFFERED (USD)			
		Head of harm	Total number per head of harm established	Monetary value per unit of head of harm	Total monetary value per head of harm
<b>Material harm</b>	House		230	600	138 000
	Outbuilding		6	100	600
	Furniture		230	500	115 000
	Business premises (building material unknown) <sup>317</sup>		18	300	5,400
	Business premises made of durable material		2	800	1,600
	Hotel		1	3,000	3,000
	Wares		1	100	100
	Personal effects		74	75	5,550
	Average total livestock kept		130	524	68 120
	Cows		150	400	60 000
	Goats		8	50	400
	Harvests/fields		109	150	16 350
<b>Physical harm</b>	Bullet wound		2	250	500
<b>Psychological harm</b>	As a result of the death of a	near relative	201	8,000	1 608 000
		distant relative <sup>318</sup>	284	4,000	1 136 000
	Connected to the experience of the attack		297	2,000	594 000
<b>TOTAL MONETARY VALUE OF EXTENT OF HARM</b>					<b>USD 3 752 620</b>

<sup>317</sup> See para. 209 of the present order.

<sup>318</sup> See para. 232 of the present order.

## X. MR KATANGA'S LIABILITY FOR REPARATIONS

### A. Introduction

240. The Chamber now proceeds to determine the scope of Mr Katanga's liability for reparations and to set the size of the award for which he is liable.

241. First, it is the Defence's contention that the Chamber should give consideration to Mr Katanga's indigence and thereby set a reparations award which reflects his means and capacity to pay.<sup>319</sup> The Chamber takes the view that it must first be determined whether Mr Katanga's current financial situation has a bearing on the size of the reparations award for which he is liable.<sup>320</sup>

### B. Whether Mr Katanga's current financial situation has a bearing on the size of the reparations award for which he is liable

242. The Defence suggests that consideration be afforded to Mr Katanga's indigence in defining the scope of his liability for reparations. In the view of the Defence, given Mr Katanga's reduced circumstances, the reparations against him should be limited to a reasonable figure.<sup>321</sup>

243. Regard for the financial situation of the convicted person would, in its opinion, bolster the perception that the Court is acting in a concrete, realistic manner rather than in a theoretical manner divorced from the realities of the situation.<sup>322</sup> To so proceed, would, in its view, mean that Mr Katanga is not burdened with an order he can never hope to meet and would be conducive to more successful reintegration on his part once he has served his sentence.<sup>323</sup>

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<sup>319</sup> Defence Observations of 14 May 2015, ICC-01/04-01/07-3549, paras. 72-73; Defence Consolidated Response of 16 June 2015, ICC-01/04-01/07-3564, para. 86.

<sup>320</sup> This determination has no bearing on the decision to be taken by the Chamber on Mr Katanga's current financial situation (See Section "XII. HOW EFFECT IS TO BE GIVEN TO THE PRESENT ORDER FOR REPARATIONS").

<sup>321</sup> Defence Observations of 14 May 2015, ICC-01/04-01/07-3549, para. 72.

<sup>322</sup> Defence Observations of 14 May 2015, ICC-01/04-01/07-3549, para. 73.

<sup>323</sup> Defence Observations of 14 May 2015, ICC-01/04-01/07-3549, para. 73.

244. The Legal Representative takes issue with the Defence submissions and argues, amongst other points, that the Chamber may order that Mr Katanga's assets and income be set aside for the reparation of the crimes of which he was convicted, irrespective of whether the assets and income are currently available.<sup>324</sup>

245. The Chamber recalls that, in *Lubanga*, the Appeals Chamber found that Trial Chamber I had erred in ordering that awards be paid out of the "other resources" of the TFV on account of Mr Lubanga's indigence.<sup>325</sup> The Appeals Chamber arrived at that conclusion on the basis of, *inter alia*, the reference in article 75(4) of the Statute to the possibility of seeking the assistance of States Parties in the identification and freezing of property and assets; that reference, in its opinion, indicates that the indigence of the convicted person is not an obstacle to the imposition of financial liability for reparations on that person.<sup>326</sup> 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.<sup>327</sup>

246. The Chamber sees no reason in the case at bar to depart from the Appeals Chamber's holding. Accordingly, 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.

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<sup>324</sup> Victims' Observations of 15 May 2015, ICC-01/04-01/07-3555-tENG, para. 86.

<sup>325</sup> *Lubanga*, Trial Chamber I, Decision on Reparations, ICC-01/04-01/06-2904, para. 269. See also *Lubanga*, Trial Chamber I, Decision on Reparations, ICC-01/04-01/06-2904, paras. 70 and 270-274.

<sup>326</sup> *Lubanga*, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129, para. 103.

<sup>327</sup> *Lubanga*, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129, paras. 102-105.

## C. Determination of the scope of Mr Katanga's liability for reparations

### 1. Submissions of the parties

247. It is the Legal Representative's submission that the Chamber should not found its determination of Mr Katanga's liability for reparations on an analysis of the relative gravity of the various modes of criminal liability foreseen at articles 25 and 28 of the Statute.<sup>328</sup> To buttress the argument, he cites the Judgment Handing Down Conviction, wherein Trial Chamber II, sitting in its previous composition, held that "the distinction between perpetrator of and accessory to a crime inheres in the Statute but does not, nonetheless, entail a hierarchy, whether in respect of guilt or penalty".<sup>329</sup>

248. The Legal Representative argues that in defining the scope of Mr Katanga's liability for reparations, the Chamber must instead ponder the facts of the case before it so as to assess the true nature of Mr Katanga's participation in the crimes of which he was convicted.<sup>330</sup> He further contends that the Chamber must have regard to the gravity of the crimes of which Mr Katanga was convicted and the extent of the harm occasioned by the commission of the crimes.<sup>331</sup> In that connection, the Legal Representative relies on the fact that Trial Chamber II, sitting in its previous composition, found that Mr Katanga's role was pivotal to the commission of the crimes of which he was convicted<sup>332</sup> and that the attack, by dint of Mr Katanga's contribution, struck a veritable blow.<sup>333</sup> Thus, the Legal Representative maintains, "had it not been for [Mr] Katanga and the support he gave to the combatants, Bogoro

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<sup>328</sup> Victims' Consolidated Response of 16 June 2015, ICC-01/04-01/07-3565, paras. 49-50. See also Prosecution's Observations of 30 April 2015, ICC-01/04-01/07-3544, paras. 20-21.

<sup>329</sup> Victims' Consolidated Response of 16 June 2015, ICC-01/04-01/07-3565, para. 52, referring to the Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 1387.

<sup>330</sup> Victims' Consolidated Response of 16 June 2015, ICC-01/04-01/07-3565, paras. 49-50. See also Prosecution's Observations of 30 April 2015, ICC-01/04-01/07-3544, paras. 20-21.

<sup>331</sup> Victims' Observations of 15 May 2015, ICC-01/04-01/07-3555-tENG, paras. 88-89.

<sup>332</sup> Victims' Observations of 15 May 2015, ICC-01/04-01/07-3555-tENG, para. 89; See also Victims' Consolidated Response of 16 June 2015, ICC-01/04-01/07-3565, paras. 53-54.

<sup>333</sup> Victims' Observations of 15 May 2015, ICC-01/04-01/07-3555-tENG, para. 90.

would not have had its inhabitants and property decimated in the way that it did".<sup>334</sup> It is his submission that full liability must rest with Mr Katanga for the totality of the harm suffered by the victims.<sup>335</sup>

249. The Defence asserts that the scope of Mr Katanga's liability for reparations must be assessed in the light of the mode of criminal responsibility held against him.<sup>336</sup> In that connection, the Defence points out that Mr Katanga initially stood charged on the basis of article 25(3)(a) of the Statute, but was ultimately convicted on the basis of article 25(3)(d).<sup>337</sup> To the Defence, that change is a reflection of a lower degree of culpability for the harm done<sup>338</sup> and, therefore, a consideration which the Chamber must factor into its determination.<sup>339</sup> The Defence goes on to argue that Mr Katanga was not convicted for having committed the crimes physically but for having contributed to their commission<sup>340</sup> and his criminal responsibility was established on the basis of his awareness, rather than his intent that the crimes would occur.<sup>341</sup>

250. Lastly, the Defence maintains that it would be manifestly improper to apply the common law principle of joint and several liability<sup>342</sup> in cases before the

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<sup>334</sup> Victims' Observations of 15 May 2015, ICC-01/04-01/07-3555-tENG, para. 90. See also Victims' Consolidated Response of 16 June 2015, ICC-01/04-01/07-3565, para. 55 (footnote omitted).

<sup>335</sup> Victims' Observations of 15 May 2015, ICC-01/04-01/07-3555-tENG, para. 90. See also Victims' Consolidated Response of 16 June 2015, ICC-01/04-01/07-3565, para. 51. See also TFV Observations of 13 May 2015, ICC-01/04-01/07-3548, para. 34. In support, the Legal Representative cites the principle of *responsabilité conjointe*, whereby the damage sustained by the victim is foreseen as single and indivisible, and, hence, the liability incurred for the debt of reparation is, perforce, regarded as inseverable (Victims' Consolidated Response of 16 June 2015, ICC-01/04-01/07-3565, footnote 55. See also TFV Observations of 13 May 2015, ICC-01/04-01/07-3548, paras. 31-32).

<sup>336</sup> Defence Consolidated Response of 16 June 2015, ICC-01/04-01/07-3564, paras. 77-79.

<sup>337</sup> Defence Observations of 14 May 2015, ICC-01/04-01/07-3549, para. 67.

<sup>338</sup> Defence Observations of 14 May 2015, ICC-01/04-01/07-3549, para. 67. See also Defence Consolidated Response of 16 June 2015, ICC-01/04-01/07-3564, para. 80.

<sup>339</sup> Defence Observations of 14 May 2015, ICC-01/04-01/07-3549, para. 67.

<sup>340</sup> Defence Observations of 14 May 2015, ICC-01/04-01/07-3549, para. 67.

<sup>341</sup> Defence Observations of 14 May 2015, ICC-01/04-01/07-3549, para. 68.

<sup>342</sup> In certain legal systems, the principle corresponds to that of *responsabilité solidaire* or that of *responsabilité in solidum*.

Court<sup>343</sup> instead of the principle enunciated by the Appeals Chamber in *Lubanga*, given that the charges laid against an accused person before the Court tend to be very wide in scope, involving many criminal acts for which a host of perpetrators may be held responsible<sup>344</sup> and, what is more, prosecutions are selective and determined by the choices made by the Prosecutor.<sup>345</sup> Therefore, it argues, it would be unfair if one individual, who played a relatively minor role in the commission of the crimes, were to be held liable for the harm in its totality, whereas the other persons who potentially bear responsibility for the same crimes would never be brought to justice.<sup>346</sup> Furthermore, were the Chamber to adopt that principle, it is the Defence submission that, in the case *sub judice*, Mr Katanga would never be able to recover the amount paid out as reparations from the other persons involved in the commission of the crimes during the attack.<sup>347</sup>

## 2. The Chamber's approach

251. First, it is worth recalling that in *Lubanga*, the Appeals Chamber held that an order for reparations is intrinsically linked to the individual whose criminal responsibility is established in a conviction and whose culpability for those criminal acts is determined in a sentence.<sup>348</sup>

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

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<sup>343</sup> Defence Observations of 14 May 2015, ICC-01/04-01/07-3549, para. 70; Defence Consolidated Response of 16 June 2015, ICC-01/04-01/07-3564, paras. 82 and 84.

<sup>344</sup> Defence Consolidated Response of 16 June 2015, ICC-01/04-01/07-3564, paras. 85 and 86.

<sup>345</sup> Defence Observations of 14 May 2015, ICC-01/04-01/07-3549, para. 70.

<sup>346</sup> Defence Consolidated Response of 16 June 2015, ICC-01/04-01/07-3564, paras. 85-87. See also Defence Observations of 14 May 2015, ICC-01/04-01/07-3549, para. 70.

<sup>347</sup> Defence Consolidated Response of 16 June 2015, ICC-01/04-01/07-3564, para. 87.

<sup>348</sup> *Lubanga*, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129, para. 65. Of note is that rule 145 of the Rules of Procedure and Evidence expounds on article 78 of the Statute, which governs determination of sentence, and prescribes that in determination of the sentence consideration be given to "the extent of the damage caused [...] to the victims" and "the degree of participation [in the commission of the crimes]". The Chamber further points out that at the reparations phase, a trial chamber may assess "the extent of the damage caused [...] to the victims". Therein, in the Chamber's view, lies confirmation of the intrinsic link between the penal proceedings and the reparation proceedings.

mode of individual criminal responsibility established vis-à-vis the convicted person and on the specific elements of that responsibility.<sup>349</sup> 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”.<sup>350</sup>

253. In the first place, the Chamber notes the Defence arguments that Mr Katanga was convicted on the basis of a mode of criminal responsibility other than that of which he initially stood charged.

254. Mr Katanga, it must be recalled, was convicted on the basis of article 25(3)(d) of the Statute as an accessory for his contribution “in any other way to the commission of a crime by a group of persons acting with a common purpose”.<sup>351</sup>

255. The Chamber notes, as has the Legal Representative,<sup>352</sup> that Trial Chamber II, sitting in its previous composition, made plain that

article 25 of the Statute adverts not to the guilt of accused persons but to their individual criminal responsibility. Therefore, a person responsible as an instigator, for the purposes of article 25(3)(b), may incur a penalty akin or even identical to that handed down against a person found responsible as a perpetrator of the same crime. In effect, article 25 of the Statute merely identifies various forms of unlawful conduct and, in that sense, the distinction between the liability of a perpetrator of and an accessory to a crime does not under any circumstances constitute a “hierarchy of blameworthiness”, let alone enunciate a tariff, not even implicitly. Hence, it is not precluded that having adjudged guilt, a bench may choose to mete out mitigated penalties to accessories, although to do so is not peremptory. The fact remains that neither the Statute nor the Rules of Procedure and Evidence prescribe a rule for the mitigation of penalty for forms of liability other than commission and the Chamber sees no automatic correlation between mode of liability

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<sup>349</sup> *Lubanga*, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129, para. 118.

<sup>350</sup> *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 21; *Lubanga*, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129, para. 118.

<sup>351</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, pp. 658 and 659.

<sup>352</sup> Victims’ Consolidated Response of 16 June 2015, ICC-01/04-01/07-3565, paras. 51-52.

and penalty. From this it is clear that a perpetrator of a crime is not always viewed as more reprehensible than an accessory.<sup>353</sup>

256. The Chamber must point out that in *Lubanga*, the Appeals Chamber, after stating that the Statute differentiates between two main forms of criminal responsibility, *viz.* principal and accessorial,<sup>354</sup> went on to hold:

this distinction is not merely terminological; making this distinction is important because, generally speaking and all other things being equal, a person who is found to commit a crime him- or herself bears more blameworthiness than a person who contributes to the crime of another person or persons.<sup>355</sup>

257. However, as the Appeals Chamber in *Lubanga* made clear, the Chamber must first and foremost examine, *vis-à-vis* the specific circumstances of the case, Mr Katanga's participation in the commission of the crimes of which he was convicted. Accordingly, the Chamber will proceed to examine the factual and legal elements of

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<sup>353</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 1386. See also Decision on Sentence of 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr, para. 61.

<sup>354</sup> "Public redacted Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction", 1 December 2014, ICC-01/04-01/06-3121-Red, para. 462 ("*Lubanga*, Appeals Chamber, Judgment on Appeal against Conviction"), referring to E. Van Sliedregt, *Individual criminal responsibility in international law*, (Oxford University Press 2012), pp. 37, 66 and 67; K. Ambos, *Treaties on International Criminal Law*, vol. I (Oxford University Press 2013), pp. 146 and 147; G. Werle and B. Burghardt, "Establishing Degree of Responsibility. Modes of Participation in Article 25 of the ICC Statute", in E. van Sliedregt and S. Vasiliev (eds.), *Pluralism in International Criminal Law* (Oxford University Press 2014), pp. 302 and 303; J. D. Ohlin, "Organizational Criminality", in E. van Sliedregt and S. Vasiliev, *Pluralism in International Criminal Law* (Oxford University Press 2014), pp. 107-116. See also Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, paras. 1383-1389. For opinions against differentiation of the two modes of participation and/or in favour of the "unitary" model: J. G. Stewart, "The End of 'Modes of Liability' for International Crimes", 25 *Leiden Journal of International Law* (2012) p. 165. See also J. G. Stewart, "Ten Reasons for Adopting a Universal Concept of Participation in Atrocity", in E. van Sliedregt and S. Vasiliev, *Pluralism in International Criminal Law* (Oxford University Press 2014), pp. 320-341; L. N. Sadat and J. M. Jolly, "Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25's Rorschach Blot", 27 *Leiden Journal of International Law* (2014), p. 782; M. D. Dubber, "Criminalizing Complicity. A Comparative Analysis", 5 *Journal of International Criminal Justice* (2007), pp. 1000 and 1001.

<sup>355</sup> *Lubanga*, Appeals Chamber, Judgment on Appeal against Conviction, ICC-01/04-01/06-3121-Red, para. 462, referring to K. Ambos, *Treaties on International Criminal Law*, vol. I (Oxford University Press 2013), pp. 146-147. For a different stance, see *The Prosecutor v. Thomas Lubanga Dyilo*, "Judgment pursuant to Article 74 of the Statute", Separate Opinion of Judge Adrian Fulford, 14 March 2012, ICC-01/04-01/06-2842, paras. 8-9; *The Prosecutor v. Mathieu Ngudjolo Chui*, "Judgment pursuant to Article 74 of the Statute Concurring Opinion of Judge Christine Van den Wyngaert", 18 December 2012, ICC-01/04-02/12-4, paras. 22-27; Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 1386; J. D. Ohlin *et al.*, "Assessing the Control-Theory", *Leiden Journal of International Law*, vol. 26, 2013, pp. 743-746; L. N. Sadat and J. M. Jolly, "Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25's Rorschach Blot", 27 *Leiden Journal of International Law* (2014), pp. 782-783.



that participation, as determined by Trial Chamber II, sitting in its previous composition, in the Judgment Handing Down Conviction, so as to set the reparations award for which he is liable.

258. In that connection, The Chamber notes that Trial Chamber II, sitting in its previous composition, found that Mr Katanga

lent his assistance:

- by travelling to Beni, by forging, on behalf of the militia, alliances with the military authorities there and by taking part, as the figure of choice, in the definition of a military strategy in conjunction with such authorities;
- thereby helping the militia as a group, by making the case to the military authorities in Beni for its interest in the struggle against the “Hema” enemy, seen as synonymous with the UPC;
- by assuming, in Aveba, upon return from his first trip to Beni, and, by virtue of his position of authority, the role of facilitator so as to establish smooth communication between the local commanders, the authorities in Beni and the APC soldiers; by also settling any disputes between, amongst others, local commanders and the APC;
- by facilitating, and at times personally ensuring that the weapons and ammunition from Beni were received, securely stored and distributed in an organised manner among the various commanders of the *collectivité*, who came to take delivery of their allotted share in preparation for the attack on Bogoro.<sup>356</sup>

259. The Chamber observes that Trial Chamber II, sitting in its previous composition, found that the attack on Bogoro was aimed at “eliminating from the area the Hema civilian population”.<sup>357</sup> Said Bench, the Chamber notes, found beyond reasonable doubt that

[Mr] Katanga’s intentional contribution to the crimes of murder (as a war crime and as a crime against humanity), attack against civilians, destruction of property and pillaging (as war crimes) was significant and made in the knowledge of the intention of the group to commit the crimes.<sup>358</sup>

260. Of further note is that in its Decision on Sentence, Trial Chamber II, sitting in its previous composition, drew attention to the gravity of the crimes and the “particularly cruel conditions and [...] discriminatory manner” in which the crimes

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<sup>356</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 1671.

<sup>357</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 1671.

<sup>358</sup> Judgment Handing Down Conviction of 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 1691.

were committed.<sup>359</sup> In particular, it noted the violence and the magnitude of the crimes committed in Bogoro on 24 February 2003, “considering not only the very conditions in which the attack took place but also its dimension of clear discrimination against the predominantly Hema population who lived there”,<sup>360</sup> and underlined that “the attack on Bogoro was one of the most significant attacks in Ituri in 2003”.<sup>361</sup> It further commented that the scars of the attack on Bogoro are still visible to this day.<sup>362</sup>

261. That said, the Chamber notes that Mr Katanga made his contribution in the context of a criminal purpose harboured by many persons<sup>363</sup> and, whereas Mr Katanga was at the apex of the Ngiti militia of Walendu-Bindi *collectivité* in February 2003,<sup>364</sup> it is not established that at that point in time the militia was an organized apparatus of power and that he wielded control over the militia such as to exert control over the crimes for the purposes of article 25(3)(a) of the Statute.<sup>365</sup>

262. As aforementioned, Trial Chamber II, sitting in its previous composition, found that combatants other than the Ngiti took part in the attack on Bogoro.<sup>366</sup>

263. Before it reaches a determination, the Chamber must underscore that it is not bound by national practice and so takes the view that the justification advanced to order against the convicted person an award for reparations for the totality of the harm suffered by the victims – namely, the concern to shield victims from the insolvency of one of the co-offenders – cannot be imported into the particular context of cases before this Court. It is noteworthy that in cases coming before the Court, a

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<sup>359</sup> Decision on Sentence of 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr, para. 143.

<sup>360</sup> Decision on Sentence of 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr, para. 44. See also Decision on Sentence of 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr, paras. 46-54.

<sup>361</sup> Decision on Sentence of 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr, para. 143.

<sup>362</sup> Decision on Sentence of 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr, para. 44. See also Decision on Sentence of 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr, para. 52.

<sup>363</sup> Decision on Sentence of 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr, para. 143.

<sup>364</sup> Decision on Sentence of 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr, para. 66.

<sup>365</sup> Decision on Sentence of 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr, para. 63.

<sup>366</sup> See Section “VII. D. Causal nexus between the harm alleged and the crimes of which Mr Katanga was convicted”.

plurality of persons potentially bear responsibility for having contributed to the commission of the crimes which caused harm to victims. That said, it must be emphasized that the competence over such crimes of a chamber tasked with overseeing the conduct of a case is circumscribed by the charges confirmed against an accused person and the evidence tendered by the parties at trial, and so the bench is not in a position to determine the responsibility of every person who had a part in the crimes at issue. As regards the case at bar, to the Chamber's knowledge, no convictions have been returned against other persons for the attack on Bogoro in other fora.

### **3. Reparations award for which Mr Katanga is liable**

264. The scope of the convicted person's liability, it is recalled, must be proportionate to the harm caused and, *inter alia*, his or her participation in the commission of the crimes of which he or she was found guilty, in the specific circumstances of the case,<sup>367</sup> and, having regard to all of the factors aforementioned, the Chamber sets the sum-total of Mr Katanga's liability for reparation at USD 1 000 000.

## **XI. TYPES AND MODALITIES OF REPARATIONS**

### **A. Types of reparations**

#### **1. Introduction**

265. The Chamber recalls that under rule 97(1) of the Rules of Procedure and Evidence, it may award reparations on an individualized basis (rule 98(2)), a collective basis (rule 98(3)) or both. Individual and collective reparations are not mutually exclusive and may be awarded concurrently.<sup>368</sup>

266. In determination of the reparations most appropriate to the case, it is paramount, in the Chamber's view, to heed the expectations and needs voiced by the

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<sup>367</sup> *Lubanga*, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129, para. 118.

<sup>368</sup> *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 33.

victims in the various consultation exercises.<sup>369</sup> The Chamber also has regard to the factors set down in the Rules of Procedure and Evidence: the scope and extent of any damage, loss or injury;<sup>370</sup> the number of victims;<sup>371</sup> and the scope and the modalities of reparations foreseen.<sup>372</sup> Lastly, it takes account of the quantum for which it has determined Mr Katanga to be liable.

267. As the Appeals Chamber has laid down: “Victims should receive appropriate, adequate and prompt reparations”.<sup>373</sup> The Chamber also concurs that “[r]eparations [...] must - to the extent achievable - relieve the suffering caused by the serious crimes committed [and] afford justice to the victims by alleviating the consequences of the wrongful acts”.<sup>374</sup> Put otherwise, reparations seek to remedy, to the extent possible, the harm suffered by the victims as a consequence of the crimes of which Mr Katanga was convicted.<sup>375</sup>

268. What is more, the Chamber recalls, reparations should “be proportionate to the harm, injury, loss and damage as established by the Court” and aim at reconciling the convicted person with the victims of the crimes.<sup>376</sup> Wherever possible, “reparations should reflect local cultural and customary practices unless these are

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<sup>369</sup> See above, Section “II. INTRODUCTION”. See also article 75(3) of the Statute and rule 97(3) of the Rules of Procedure and Evidence. In this regard, see *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, paras. 14 and 79. See also Victims’ Observations of 15 May 2015, ICC-01/04-01/07-3555-tENG, paras. 94-97; in the same vein, TFV Observations of 13 May 2015, ICC-01/04-01/07-3548, para. 134; United Nations Submission of 14 May 2015, ICC-01/04-01/07-3550, paras. 23-29; “Redress Trust observations pursuant to Article 75 of the Statute”, 15 May 2015, ICC-01/04-01/06-3554, para. 35 (“Redress Trust Observations of 15 May 2015”); TFV Observations of 13 May 2015, ICC-01/04-01/07-3548, para. 39.

<sup>370</sup> Rule 97(1) of the Rules of Procedure and Evidence.

<sup>371</sup> Rule 98(3) of the Rules of Procedure and Evidence.

<sup>372</sup> Rule 98(3) of the Rules of Procedure and Evidence.

<sup>373</sup> *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 44. See also United Nations, 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, 16 December 2005, accessed 17 March 2017: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>.

<sup>374</sup> *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 71.

<sup>375</sup> See para. 15 of the present order.

<sup>376</sup> *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, paras. 46 and 71.

discriminatory, exclusive or deny victims equal access to their rights".<sup>377</sup> In that regard, the Chamber emphasizes that "reparations [...] should avoid replicating discriminatory practices or structures that predated the commission of the crimes".<sup>378</sup> It is also desirable that reparations support programmes that are self-sustaining to enable victims to benefit from these measures over an extended period of time.<sup>379</sup> Ultimately, the Chamber keeps in consideration that the utmost must be done to ensure that the victims themselves perceive the reparations as meaningful.<sup>380</sup>

269. The Chamber takes note of the TFV's stance on its own role in individual and collective reparations. The TFV is of the opinion that regulation 56 of the Regulations of the TFV binds it to manage its funds with a view to being able to complement reparations awarded on a collective basis, but casts no such duty as regards individual reparations. This issue, in the view of the Chamber, goes to how effect is to be given to the present order, and so will be pondered in the Section "XII. How effect is to be given to the present order for reparations".<sup>381</sup>

## 2. Conceptual analysis

270. The Chamber observes that the Statute and the Regulations of the TFV leave both types of reparations, individual and collective, undefined. The two types of reparations, as the Chamber sees them, form the subject of the conceptual analysis that follows.

### (a) Individual reparations

271. The Chamber regards reparations as individual in character where the ensuing benefit is afforded directly to an individual to repair the harm he or she

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<sup>377</sup> *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 47.

<sup>378</sup> *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 34. See also Prosecution's Observations of 30 April 2015, ICC-01/04-01/07-3544, para. 17.

<sup>379</sup> *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 48.

<sup>380</sup> *Report of the Bureau on the impact of the Rome Statute system on victims and affected communities*, ICC-ASP/9/25, Appendix III, 22 November 2010, para. 19.

<sup>381</sup> See Section "XII. HOW EFFECT IS TO BE GIVEN TO THE PRESENT ORDER FOR REPARATIONS".

suffered as a consequence of the crimes of which the person was convicted.<sup>382</sup> Individual reparations confer on a victim a benefit to which the person is exclusively entitled; put differently, the benefit received is particular to the victim. Compensation paid directly into the bank account of the victim concerned would be an example of individual reparations. Hence, the involvement of an organization or an intermediary group in the administration or apportionment of the reparations does not, in the view of the Chamber, detract from the individual character of the award.

### (b) Collective reparations

272. The Chamber begins by recalling the principle educed by the Appeals Chamber in *Lubanga*: “When collective reparations are awarded, these should address the harm the victims suffered on an individual and collective basis”.<sup>383</sup>

273. Of further note is the comment made by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence,<sup>384</sup> which the TFV<sup>385</sup> and the Legal Representative also cite,<sup>386</sup> that the concept of collective reparations refers to their nature (type of goods distributed or mode of their distribution) and their recipients (collectivities or groups). The Chamber sees that for the Defence, collective reparation is a measure which benefits a collectivity of victims or several groups of victims and is administered through a collective fund.<sup>387</sup> Also worthy of note are the observations of the International Center for Transnational Justice:

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<sup>382</sup> Similarly, see United Nations Submission of 14 May 2015, ICC-01/04-01/07-3550, para. 17.

<sup>383</sup> *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 33.

<sup>384</sup> OHCHR, *Report by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, 8 October 2014, A/69/518, para. 38.

<sup>385</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, The Trust Fund for Victims, “Filing on Reparations and Draft Implementation Plan”, ICC-01/04-01/06-3177-Conf, 3 November 2015, [French] translation registered on 29 January 2016, ICC-01/04-01/06-3177-Conf-tFRA, para. 165 (“*Lubanga*, TFV Document on Implementation Plan”).

<sup>386</sup> Victims’ Proposals of 8 December 2016, ICC-01/04-01/07-3720, para. 17.

<sup>387</sup> Defence Response of 30 December 2016, ICC-01/04-01/07-3722, para. 48.

Collective reparations are conceived from the perspective of who they are meant to benefit. They are focused on delivering a benefit to groups of victims that suffered from human rights violations. These groups may be bound by a common identity, experience, or form of violation. Collective reparations may address the gender-based aspects of individual violations, such as sexual violence committed against individual women. In other instances, they might address violations affecting the population of an area—such as those involving massacres of entire villages, the deliberate destruction or displacement of indigenous communities, or the targeting of civilian organizations seen as resisting a regime or opposing.<sup>388</sup>

274. The Chamber thus determines that to receive collective reparations, a group or category of persons may be bound by a shared identity or experience, but also by victimization by dint of the same violation or the same crime within the jurisdiction of the Court. Collective reparations may, therefore, benefit a group, including an ethnic, racial, social, political or religious group which predated the crime, but also any other group bound by collective harm and suffering as a consequence of the crimes of the convicted person.<sup>389</sup>

275. Accordingly, the Chamber holds that for reparations to be collective in character, they must benefit a group or category of persons who have suffered shared harm. It is noted that the crimes within the jurisdiction of the Court may victimize various categories of persons for different reasons. Each such person may have been the victim of different crimes. The crime per se cannot be the touchstone defining a group which may be awarded reparations. The crux of collective reparations lies in the perception of the members of the group who experienced shared harm. Accordingly, the Chamber determines that collective awards can be made only where the victims perceive themselves as having suffered shared harm.

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<sup>388</sup> International Center for Transnational Justice, *The Rabat Report: Concept and Challenges of Collective Reparations*, February 2009, p. 10; <https://www.ictj.org/sites/default/files/ICTJ-Morocco-Reparations-Report-2009-English.pdf>, accessed 17 March 2017. Also cited by the United Nations, see United Nations Submission of 14 May 2015, ICC-01/04-01/07-3550, para. 19.

<sup>389</sup> In this connection the Chamber takes note of the discussions held by the group of experts in Belfast, as outlined in the TFV's submissions in *Lubanga*. In seeking to define the concept of collective reparations, the experts in Belfast stated that the group of "collective beneficiaries" may include victims of collective harm. See *Lubanga*, TFV Document on Implementation Plan of 3 November 2015, ICC-01/04-01/06-3177-Conf, para. 174.

276. It also considers that to gain a collective award, the group need not be vested with a prior legal personality or a collective right.<sup>390</sup> The Chamber also takes the view that collective reparations may serve to benefit a group irrespective of how they are to be administered or distributed. Lastly, the Chamber notes that shared harm does not necessarily pre-suppose the violation of a collective right. Victims may be bound by harm resulting from the violation of a collective right which was vested in them prior to the crime, but also as a result of the violation of the individual rights of a large number of members of the group or the violation of individual rights with a collective impact.

277. What is more, collective reparations differ from individual reparations: the former confer on a group a benefit to which its individual members are not exclusively entitled, whereas in the case of the latter, the benefit belongs to each member of the group.<sup>391</sup> By way of example, collective reparations accorded in the form of rehabilitation projects are not put in place for the exclusive benefit of one victim, but aim to benefit all members of the group and the community.

278. In view of the remarks made by the group of experts in Belfast, as set out in the TFV's submissions made in *Lubanga*,<sup>392</sup> the Chamber is of the opinion that two categories of collective reparations may be differentiated: those aimed at benefiting the community as a whole and those focused on the individual members of the

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<sup>390</sup> Similarly, see F. Mégret, "The case for collective reparations before the International Criminal Court" in J.-A. Wemmers (ed.), *Reparations for victims of crimes against humanity* (Routledge Ltd. 2014), pp. 171-172; S. Aubry (University of Essex Transitional Justice Network) and M. I. Henao-Trip, "Collective Reparations and the International Criminal Court", Briefing paper No. 2, August 2011, para. 4.

<sup>391</sup> See also *The Prosecutor v. Thomas Lubanga Dyilo*, "Trust Fund for Victims' First Report on Reparations", 1 September 2011, ICC-01/04-01/06-2803-Red, para. 24: "In fact, in practice the difference between an 'individual' and 'collective' form of reparation may be quite subtle and manifest itself primarily in the role that the beneficiaries are to play in the design, implementation and oversight of their assistance".

<sup>392</sup> *Lubanga*, TFV Document on Implementation Plan of 3 November 2015, ICC-01/04-01/06-3177-Conf, paras. 167 *et seq.*



group. As a matter of fact, as the TFV states,<sup>393</sup> the concept of collective reparations is an open concept. Collective reparations addressing the community as a whole are, therefore, just one possible form within the much wider concept of collective reparations. The Chamber takes the view that this open concept of collective reparations, through various modalities, places the emphasis on the potential benefit of such reparations both to the community and to the individual.

279. The first category of collective reparations (“community reparations”), therefore, is intended to benefit the community as a whole and does not specifically address individual members of the group. For example, the building of a school or hospital may be of general help to the community. A facility of that ilk needs, however, to provide specialized services addressing the needs of the victims in the case *sub judice*. Of further note, as the TFV has pointed out,<sup>394</sup> is that some modalities of collective reparations, such as symbolic reparations in the form of a memorial, provide an inherently collective benefit of sharing memory and may not be conceived in individual terms.

280. Reparations in the second category may also be focused on the individual members of the group. The Chamber considers, and the TFV, the Legal Representative and the Defence have made clear, that some forms of collective reparations might result in individual benefits.<sup>395</sup> The Chamber underscores that such reparations, although collective in nature, respond to the needs and current situation of individual victims in the group. That could be said of healthcare which is provided to all members of the group but which is specialized and addresses each victim individually. Such collective reparations, framed as individualized, are provided to a group of victims, but allow for the benefit to be adjusted to the

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<sup>393</sup> *Lubanga*, TFV Document on Implementation Plan of 3 November 2015, ICC-01/04-01/06-3177-Conf, para. 171.

<sup>394</sup> *Lubanga*, TFV Document on Implementation Plan of 3 November 2015, ICC-01/04-01/06-3177-Conf, para. 169.

<sup>395</sup> *Lubanga*, TFV Document on Implementation Plan of 3 November 2015, ICC-01/04-01/06-3177-Conf, para. 169; Victims’ Proposals of 8 December 2016, ICC-01/04-01/07-3720, para. 17; Defence Response of 30 December 2016, ICC-01/04-01/07-3722, para. 48.

particular need of each victim. Put otherwise, this second category of collective reparations is focused on the individuals themselves.

### 3. Determination of the Chamber

281. The Chamber sees fit for the reasons that follow to award in the case reparations on an individual basis, in accordance with rules 97(1) and 98(2), and on a collective basis, in accordance with rules 97(1) and 98(3) of the Rules of Procedure and Evidence.

282. First and foremost, it is to be noted that the victims,<sup>396</sup> the Defence,<sup>397</sup> the Registry,<sup>398</sup> the Prosecution<sup>399</sup> and the organizations authorized to file observations,<sup>400</sup> but not the TFV,<sup>401</sup> consider it appropriate to award reparations on an individual and a collective basis. Of particular note is that the Legal Representative and the Defence are agreed on the award of four collective measures, and one individual measure in the form of a symbolic amount of one euro per victim.<sup>402</sup> The Legal Representative sets store upon the individual approach, as each victim has suffered individually. Nonetheless, he adds, there is nothing to rule out the putting in place of one or more reparations mechanisms operating on a collective basis.<sup>403</sup>

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<sup>396</sup> Victims' Observations of 15 May 2015, ICC-01/04-01/07-3555-tENG, paras. 94-95; Victims' Consolidated Response of 16 June 2015, ICC-01/04-01/07-3565, para. 62.

<sup>397</sup> Defence Observations of 14 May 2015, ICC-01/04-01/07-3549, para. 86; Defence Consolidated Response of 16 June 2015, ICC-01/04-01/07-3564, paras. 120-128.

<sup>398</sup> Registry Observations of 15 May 2015, ICC-01/04-01/07-3553, para. 13.

<sup>399</sup> Prosecution's Observations of 30 April 2015, ICC-01/04-01/07-3544, para. 22.

<sup>400</sup> United Nations Submission of 14 May 2015, ICC-01/04-01/07-3550, paras. 21-24; Defence Consolidated Response of 16 June 2015, ICC-01/04-01/07-3564, para. 17; Redress Trust Observations of 15 May 2015, ICC-01/04-01/06-3554, para. 35; HRC and TIJ Submission of 14 May 2015, ICC-01/04-01/07-3551, paras. 28-29.

<sup>401</sup> The TFV nonetheless acknowledges that "the types and modalities of reparations should be based on the assessment of the extent of harm experienced by victims, as expressed or exhibited during consultations and/or evaluations. Likewise, it should be based on the consultations with victims regarding their views and proposals of appropriate reparation awards" (TFV Observations of 13 May 2015, ICC-01/04-01/07-3548, para. 134).

<sup>402</sup> Victims' Proposals of 8 December 2016, ICC-01/04-01/07-3720, paras. 10-19; Defence Response of 30 December 2016, ICC-01/04-01/07-3722, paras. 4-6.

<sup>403</sup> Victims' Consolidated Response of 16 June 2015, ICC-01/04-01/07-3565, paras. 62-64.

283. The Chamber further notes that the Inter-American Court,<sup>404</sup> the African Commission on Human and Peoples' Rights<sup>405</sup> and the Court of Justice of the Economic Community of West African States<sup>406</sup> have, in similar circumstances, often ordered the simultaneous implementation of collective and individual reparations.<sup>407</sup>

284. Turning specifically to individual reparations, the Chamber takes note of the Redress Trust's submission that domestic courts and transitional justice mechanisms have ordered individual reparations, even where large numbers of victims were involved.<sup>408</sup> The Chamber also heeds the submissions of the United Nations and the Registry which argue that collective reparations may be in addition to, but not instead of individual reparations.<sup>409</sup> The Chamber further notes that in recommending a combination of individual and collective reparations, the Truth and Reconciliation Commission of South Africa stated:

The individual reparation grant is an acknowledgement of a person's suffering due to his/her experience of a gross human rights violation. It is based on the fact that survivors

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<sup>404</sup> The Chamber notes that where individual rights have been violated, the Inter-American Court orders individual reparations in the form of financial compensation and/or specific rehabilitation measures (See, *inter alia*, Inter-American Court, *Plan de Sánchez Massacre v. Guatemala (Reparations)*, para. 93; Inter-American Court, *Massacres of El Mozote and Nearby Places v. El Salvador*, 25 October 2012, paras. 180-181 and 208; Inter-American Court, *Rio Negro Massacres v. Guatemala*, 4 September 2012; Inter-American Court, *Moiwana Community v. Suriname (Preliminary Objections, Merits, Reparations and Costs)*, 15 June 2005, para. 194).

<sup>405</sup> See e.g. ACHPR, *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, Communication No 276/03, 11-25 November 2009; ACHPR, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*, Communications Nos. 279/03-296/05, 13-27 May 2009; ACHPR, *The Social and Economic Rights Action Center (SERAC) and the Centre for Economic and Social Rights (CESR) v. Nigeria*, Communication No. 155/96, 13-27 October 2001.

<sup>406</sup> See e.g. ECOWAS Community Court of Justice ("ECOWAS CCJ"), *Hadijatou Mani Koraou v. The Republic of Niger*, 27 October 2008; ECOWAS CCJ, *SERAP v. Nigeria*, ECW/CCJ/JUD/18/12, 14 December 2012.

<sup>407</sup> Redress Trust Observations of 15 May 2015, ICC-01/04-01/06-3554, paras. 17 and 29.

<sup>408</sup> See also Redress Trust Observations of 15 May 2015, ICC-01/04-01/06-3554, paras. 31-32.

<sup>409</sup> *Ex parte* Annex 1 to the "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, dated 16 December 2014, [French] translation registered on 6 February 2015, ICC-01/04-01/07-3512-Conf-Exp-Anx1, para. 94 ("Annex 1 to the Registry Report of 16 December 2014"); United Nations Submission of 14 May 2015, ICC-01/04-01/07-3550, para. 22. See also High Risk Tribunal A of Guatemala, *Sepur Zarco* case, 26 February 2016, Judgment C-01076-2012-00021 *Of. 2*, pp. 509-511. In its judgment, the Tribunal was desirous of the implementation of a comprehensive set of measures with an individual, community and institutional impact to benefit the victims of sexual violence and forced disappearance.

of human rights violations have a right to reparation and rehabilitation. The individual reparation grant provides resources to victims in an effort to restore their dignity.<sup>410</sup>

285. The Chamber takes the view and the United Nations has underscored that whereas collective reparations avoid stigmatization, individual reparations ensure that the victim does not feel excluded, marginalized or further stigmatized.<sup>411</sup> The Chamber is further of the opinion that individual reparations are important to the victims and may, in addition to compensation or relief, afford personal and symbolic acknowledgment of the harm suffered.<sup>412</sup> The Chamber also considers that individual reparations allow the victims to regain their self-sufficiency and to make decisions for themselves on the basis of their needs.<sup>413</sup>

286. The Chamber foresees, moreover, that access to collective reparations could prove difficult for those victims who no longer live in Bogoro.<sup>414</sup> Individual reparations could, therefore, resolve that conundrum.

287. Ultimately, the Chamber recalls its finding that 297 victims are eligible for reparations.<sup>415</sup> In its view, 297 is a figure which makes individual awards feasible.

288. Turning to collective reparations, the Chamber considers, per its definition laid down above, the victims in the case to be a group which suffered shared harm at the time of the attack on Bogoro.<sup>416</sup> It must be noted that the great majority of victims in the case lived in Bogoro in 2003. Moreover, from the applications which said victims submitted, the Chamber gathers that even though each individual did not

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<sup>410</sup> *Report of the South African Truth and Reconciliation Commission*, Cape Town, 1998, V, para. 68, <http://www.justice.gov.za/trc/report/finalreport/Volume5.pdf>, accessed 17 March 2017.

<sup>411</sup> United Nations Submission of 14 May 2015, ICC-01/04-01/07-3550, para. 19.

<sup>412</sup> Victims' Proposals of 8 December 2016, ICC-01/04-01/07-3720, para. 10 i.

<sup>413</sup> Annex 1 to the Registry Report of 16 December 2014, ICC-01/04-01/07-3512-Conf-Exp-Anx1, para. 68; HRC and TIJ Submission of 14 May 2015, ICC-01/04-01/07-3551, para. 29.

<sup>414</sup> Similarly, see Decision on Sentence, para. 52. See also TFV Observations of 13 May 2015, ICC-01/04-01/07-3548, para. 104.

<sup>415</sup> Of note in this regard is that in *Lubanga*, the Trial Chamber determined that collective reparations were more appropriate due to, *inter alia*, the limited number of individuals who had applied for reparations versus the total number of victims (*Lubanga*, Trial Chamber I, Decision on Reparations, ICC-01/04-01/06-2904).

<sup>416</sup> See, *inter alia*, paras. 274 and 275 of the present order.

suffer the same harm, they perceive themselves as part of a single group which was subjected to the attack on Bogoro. Accordingly, the Chamber determines that said persons may receive reparations on a collective basis.

289. The Chamber further regards collective reparations as appropriate to the case in that they would address shared needs and the complexity of the suffering of the various victims. Further still, in its view, collective reparations could foster reconciliation.<sup>417</sup>

290. In this connection, the Chamber heeds the Registry's comment that "[s]ubject to the concerns and risks identified by victims during the consultation, adequately framed collective measures provided to the victims' communities in addition to individual awards may have a positive impact on the general situation of the affected communities".<sup>418</sup>

291. Further, the Chamber takes account of the view of the United Nations that collective reparations may be considered as a way for the Court to fill the gap where individual reparations will not completely redress the harm suffered by all the victims of mass crimes or their community.<sup>419</sup>

292. It must, moreover, be noted that reparations on a collective basis maximize resources which are often limited.<sup>420</sup>

293. Having regard to the foregoing, the Chamber determines that in addition to individual reparations, collective reparations are appropriate in the instant case.

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<sup>417</sup> In this regard, see W. Buford and H. Van der Merwe, *Les réparations en Afrique Australe, Cahiers d'Etudes africaines* (2004) 263-322, para. 7, who point out the disadvantage of purely individual reparations mechanisms: they do not include any measures for societal reintegration or reconciliation. See also *Lubanga*, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04 01/06-3129, para. 71. The Chamber notes that there is a sense among the victims that reconciliation is the duty of the Congolese State (Victims' Observations of 8 January 2015, ICC-01/04-01/07-3514, para. 25).

<sup>418</sup> Annex 1 to the Registry Report of 16 December 2014, ICC-01/04-01/07-3512-Conf-Exp-Anx1, para. 94.

<sup>419</sup> United Nations Submission of 14 May 2015, ICC-01/04-01/07-3550, para. 22.

<sup>420</sup> HRC and TIJ Submission of 14 May 2015, ICC-01/04-01/07-3551, para. 36.

294. That said, the Chamber considers that collective reparations must, to the utmost, address the victims as individuals.<sup>421</sup> In that connection it is worth recalling that the concept of collective reparations is an open concept, which places the emphasis on the benefit both to the individual and to the community.<sup>422</sup> In that vein, the Chamber sees that the TFV underlined in its Annual Report Summary for 2016 that “reparations proceedings at all stages should be organized in such a manner that a victim’s participation therein has reparative value to that individual”.<sup>423</sup> Lastly, the Chamber takes note of the position of the Legal Representative that community reparations, *viz.* reparations solely of benefit to the community per se, would go only some way to meeting victims’ expectations.<sup>424</sup>

295. Accordingly, the Chamber determines that 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.

## **B. Modalities of reparations**

### **1. Introduction**

296. Having thus determined the types of reparations, the Chamber recalls that article 75(1) of the Statute mandates it to prescribe the most appropriate modalities of reparations on the basis of the specific circumstances of the case at hand.<sup>425</sup> The appropriateness of the modalities of reparations is determined by reference to the

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<sup>421</sup> Similarly, see HRC and TIJ Submission of 14 May 2015, ICC-01/04-01/07-3551, para. 36.

<sup>422</sup> See above, Section “XI. A. 2. Conceptual analysis”.

<sup>423</sup> TFV, Annual Report Summary 2016, p. 12 (“TFV Annual Report Summary 2016”). [http://www.trustfundforvictims.org/sites/default/files/imce/summary\\_EN\\_LR\\_ONLINE.pdf](http://www.trustfundforvictims.org/sites/default/files/imce/summary_EN_LR_ONLINE.pdf), accessed 17 March 2017.

<sup>424</sup> Victims’ Observations of 15 May 2015, ICC-01/04-01/07-3555-tENG, paras. 94-97. See also Victims’ Observations of 8 January 2015, ICC-01/04-01/07-3514, para. 27.

<sup>425</sup> *Lubanga*, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129, para. 200. See also TFV Observations of 13 May 2015, ICC-01/04-01/07-3548, para. 134.

harm caused which the reparations seek to remedy.<sup>426</sup> To that end, the Chamber is attentive to the victims' needs.<sup>427</sup>

297. The Chamber recalls that the modalities of reparations are not confined to those set down in article 75(1) of the Statute: restitution, compensation and rehabilitation. It may transpire that other modalities of reparations are appropriate, for instance, those of symbolic, preventative or transformative value.<sup>428</sup>

## 2. Ruling of the Chamber

### a. Modalities of individual reparations

298. The Chamber recalls that the Legal Representative<sup>429</sup> and the Defence<sup>430</sup> suggest the award of a symbolic amount of one euro to each of Mr Katanga's victims. The Chamber takes the view that the distribution of a symbolic amount by way of compensation gives acknowledgement, in a personal and symbolic sense, of the harm done and suffering occasioned.<sup>431</sup> In the case at bar, the Chamber considers that

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<sup>426</sup> *Lubanga*, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129, para. 200; See also UN General Assembly, *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, 16 December 2005, paras. 15-23. See also TFV Observations of 13 May 2015, ICC-01/04-01/07-3548, para. 134.

<sup>427</sup> See above, para. 266 of the present order.

<sup>428</sup> In this regard, see the principles enunciated by the Appeals Chamber in *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, paras. 34-43. See also the modalities ordered by the Appeals Chamber in *Lubanga*: *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, paras. 67-69. See also Prosecution's Observations of 30 April 2015, ICC-01/04-01/07-3544, para. 24.

<sup>429</sup> Victims' Proposals of 8 December 2016, ICC-01/04-01/07-3720, paras. 80-82.

<sup>430</sup> Defence Response of 30 December 2016, ICC-01/04-01/07-3722, paras. 4-6.

<sup>431</sup> See also "The individual reparation grant is an acknowledgement of a person's suffering due to his/her experience of a gross human rights violation" (South African Truth and Reconciliation Commission, Truth and Reconciliation Commission of South Africa. Report, Cape Town, 1998, V, para. 68, <http://www.justice.gov.za/trc/report/finalreport/Volume5.pdf>, accessed 17 March 2017); "Individual symbolic recognition emphasizes the importance of remembering that victims are not merely a statistic but actual people who often suffered intolerable cruelties" (Ernesto Verdeja, A Normative Theory of Reparations in Transitional Democracies, *Metaphilosophy* 37(3/4) (2006), p. 456); HRC and TIJ Submission of 14 May 2015, ICC-01/04-01/07-3551, paras. 30-33. See also *Report of the High Level Panel on Humanitarian Cash Transfers, "Doing cash differently – How cash transfers can transform humanitarian aid"*, Center for Global Development, September 2015, p. 7: "cash is often a highly effective way to reduce suffering".

such individual acknowledgement may be meaningful to Mr Katanga's victims,<sup>432</sup> given the atrocities to which they were subjected.

299. The Chamber concurs with the Legal Representative's proposal. It does, however, consider it appropriate to award a more substantial symbolic award as compensation so that it is meaningful to the victims, but not the source of tension within the community.<sup>433</sup>

300. From that standpoint, it 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.<sup>434</sup> 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.<sup>435</sup> That way, the victims would be able to take their own decisions on the basis of their needs.

#### **b. Modalities of collective reparations**

301. In the applications for personal compensation, the Chamber sees that the most requested modalities of reparations by the Applicants are framed as "economic development/financial" measures, such as support for housing, agriculture and education.<sup>436</sup> The Chamber notes, however, that on consultation, the victims specifically rejected certain modalities, such as commemorative events, broadcasts of the trial, the erection of monuments or the tracing of missing persons.<sup>437</sup> Their

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<sup>432</sup> Victims' Proposals of 8 December 2016, ICC-01/04-01/07-3720, para. 10.

<sup>433</sup> See *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 33. The Prosecution points out that that consideration applies also to collective reparations (Prosecution's Observations of 30 April 2015, ICC-01/04-01/07-3544, para. 22).

<sup>434</sup> See Resolution of 22 November 2010, ICC-ASP/9/25, para. 19.

<sup>435</sup> Similarly, see TFV Annual Report Summary 2016, pp. 10-11.

<sup>436</sup> Annex 1 to the Registry Report of 16 December 2014, ICC-01/04-01/07-3512-Conf-Exp-Anx1, pp. 24-32.

<sup>437</sup> Victims' Observations of 8 January 2015, ICC-01/04-01/07-3514, para. 24.



reasons for doing so are bound up with the socio-cultural context and a sense among them that some of the suggested measures are unsuitable<sup>438</sup> or pointless, or could cause fresh trauma or exacerbate social unrest.<sup>439</sup>

302. The Chamber notes that, in his most recent proposals, the Legal Representative specifically advances four types of collective modalities which, in his view, may provide an efficacious remedy for the harm suffered: (1) a housing support measure; (2) an income-generating activity support measure; (3) an education assistance measure; and (4) a measure designed to provide psychological support.<sup>440</sup> These measures, he submits, reflect the wishes voiced by the victims and are intended to duly involve them in and place them at the heart of the reparation process.<sup>441</sup> The Defence, it is noted, supports the Legal Representative's proposals.<sup>442</sup>

303. As explained above, it is the Chamber's view that the collective reparations must be designed to benefit each of Mr Katanga's victims it has identified.<sup>443</sup> Thus, to its mind, the four modalities of collective reparations put forward by the Legal Representative allow the individual needs of the victims in question to be addressed. What is more, in the Chamber's opinion, the four modalities could contribute in a meaningful manner to the reparation of the harm which the victims suffered, individually and collectively.

304. The set of four modalities of collective reparations, therefore, would appear appropriate to the case. The Chamber hereby rules that collective reparations designed to benefit each victim shall specifically take the form of support for

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<sup>438</sup> Victims' Observations of 8 January 2015, ICC-01/04-01/07-3514, para. 30.

<sup>439</sup> Victims' Observations of 8 January 2015, ICC-01/04-01/07-3514-Conf, para. 24.

<sup>440</sup> Victims' Proposals of 8 December 2016, ICC-01/04-01/07-3720, paras. 10-19. Of note is that in the DRC and Uganda the TFV has already implemented psychological and physical rehabilitation projects and material support projects, such as economic development projects and the creation of employment and education opportunities (Trust Fund for Victims, Programme Progress Report, September 2015).

<sup>441</sup> Victims' Proposals of 8 December 2016, ICC-01/04-01/07-3720, paras. 10-19.

<sup>442</sup> Defence Response of 30 December 2016, ICC-01/04-01/07-3722, paras. 4-6.

<sup>443</sup> Victims' Observations of 8 January 2015, ICC-01/04-01/07-3514, para. 28.

housing, support for an income-generating activity, support for education and psychological support.

305. The Chamber shares the view of the Legal Representative<sup>444</sup> that the modalities of reparations must retain some flexibility and ensure that the reparations are commensurate to the harm suffered by each of the victims.<sup>445</sup> Categorization of beneficiaries, for example, according to the head<sup>446</sup> or the extent of harm suffered, can achieve that end.<sup>447</sup>

### C. Conclusion

306. In sum, the Chamber awards individual reparations, that is, compensation in the form of a symbolic award of USD 250. In addition, the Chamber makes an award for collective reparations designed to benefit each victim, in the form of support for housing, support for an income-generating activity, support for education and psychological support. The Chamber wishes to make plain that the collective reparations designed to benefit each victim must include clear and sufficient explanations to inform the victims of and foster their trust in the measures.<sup>448</sup>

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<sup>444</sup> Victims' Proposals of 8 December 2016, ICC-01/04-01/07-3720, paras. 23-70. See also HRC and TIJ Submission of 14 May 2015, ICC-01/04-01/07-3551, para. 30.

<sup>445</sup> *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 45.

<sup>446</sup> The Defence envisages categorization of beneficiaries by head of harm – loss of a house, a relative, cattle or standard of living, etc. It could be envisaged that Applicants who lost a house could ask for housing support; those who lost cattle could ask for a “livestock farming kit”, etc. See Defence Response of 30 December 2016, ICC-01/04-01/07-3722, paras. 12-13.

<sup>447</sup> The Legal Representative puts forward four categories of victims in order of decreasing extent of harm suffered. For each such category, he suggests a maximum award, whereby the victims could combine support for housing, support for an income-generating activity and support for education. Nevertheless, for all categories he proposes that the measures be supplemented by two further measures: psychological support and disbursement of a symbolic amount of one euro. See Victims' Proposals of 8 December 2016, ICC-01/04-01/07-3720, paras. 23-70.

<sup>448</sup> See Victims' Observations of 8 January 2015, ICC-01/04-01/07-3514, para. 28.

## XII. HOW EFFECT IS TO BE GIVEN TO THE PRESENT ORDER FOR REPARATIONS

### A. Draft implementation plan

#### 1. Procedure for the adoption of the draft implementation plan

307. Acting pursuant to rule 98(2) and (3) of the Rules of Procedure and Evidence and rule 54 of the Regulations of the TFV, the Chamber directs the TFV to prepare a draft plan for the implementation of the present order for reparations (“Draft Plan”) to benefit those of Mr Katanga’s victims whom the Chamber has identified. The Draft Plan, the Chamber underscores, must comply with regulations 59, 66-68 and 69-72 of the Regulations of the TFV.

308. So as to discharge with the utmost efficacy its remit of monitoring and overseeing the implementation of the reparations so ordered, the Chamber hereby lays down the procedure for approval of the Draft Plan.

309. In the first instance, the TFV is directed to devise the Draft Plan, which must be put before the Chamber within three months of the date of the present order for reparations. The Draft Plan shall set out a programme, describing the reparations projects which the TFV intends to develop to give effect to the present order. The TFV shall, in crafting the Draft Plan, rely on the modalities determined by the Chamber.<sup>449</sup> The Chamber directs the TFV to impart to it concrete particulars of the projects, *inter alia*, a description of the projects, their costings, and the *modus operandi* for their adoption and implementation,<sup>450</sup> and for their oversight by the

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<sup>449</sup> See Section “XI. TYPES AND MODALITIES OF REPARATIONS”.

<sup>450</sup> It is suitable, in the view of the Chamber, for compensation in the form of a symbolic award to be provided as a cash transfer, either in the form of a plastic card or an electronic money transfer to a mobile telephone so as to give the victims a dedicated facility which is discreet and secure. On this subject, see, *inter alia*, *Report of the High Level Panel on Humanitarian Cash Transfers, “Doing cash differently – How cash transfers can transform humanitarian aid”*, Center for Global Development, September 2015, pp. 7-8: “in most contexts, humanitarian cash transfers can be provided to people safely, efficiently and accountably”.

Chamber.<sup>451</sup> The Chamber points out in this connection that the TFV must heed the victims' views and proposals regarding the projects which they see as the most appropriate.<sup>452</sup> The Chamber remains cognizant, however, that not all of the modalities might be adopted down to the last detail. So, where the TFV is of the view that it cannot incorporate some measures in the modalities, it shall account for that decision.<sup>453</sup>

310. Furthermore, the TFV shall foresee, within the Draft Plan, appropriate measures to ensure the safety, the physical and psychological well-being, and the privacy of the victims,<sup>454</sup> and shall proceed on a gender-inclusive basis, such that the reparations are accessible to all of the victims.<sup>455</sup> Moreover, priority may need to be given to certain victims, who are in a particularly vulnerable situation or who require urgent assistance.<sup>456</sup> The TFV may also take on board the views of experts, whom are to be consulted before submission of the Draft Plan.<sup>457</sup>

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<sup>451</sup> In this connection, the Chamber has mulled with some interest the TFV's remarks, albeit made in other cases before the Court. In *The Prosecutor v. Jean-Pierre Bemba Gombo*, the TFV said: "it falls within the Trial Chamber's discretionary authority under these provisions to determine that it is appropriate to order any combination of individual reparations, collective reparations, and reparations to a rule 98 (4) organization" ("Observations relevant to reparations", The Trust Fund for Victims, 31 October 2016, ICC-01/05-01/08-3457, para. 101). In *The Prosecutor v. Thomas Lubanga Dyilo*, the TFV set out some valuable considerations regarding *mutuelles de solidarité* [village savings and loans associations] in the context of collective reparations ("Information regarding Collective Reparations", 13 February 2017, ICC-01/04-01/06-3273, paras. 123-126). The Chamber heeds the remarks and draws on them on a *mutatis mutandis* basis.

<sup>452</sup> See Section "XI. TYPES AND MODALITIES OF REPARATIONS". See also *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, paras. 29-32 and 79; Regulation 55 of the Regulations of the TFV.

<sup>453</sup> *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 70.

<sup>454</sup> See Section "II. INTRODUCTION". See also *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 34. See also Prosecution's Observations of 30 April 2015, ICC-01/04-01/07-3544, para. 15.

<sup>455</sup> *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 34. See also Prosecution's Observations of 30 April 2015, ICC-01/04-01/07-3544, para. 18 and Victims' Proposals of 8 December 2016, ICC-01/04-01/07-3720, paras. 89-91.

<sup>456</sup> *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 34. See also Prosecution's Observations of 30 April 2015, ICC-01/04-01/07-3544, para. 18 and Victims' Proposals of 8 December 2016, ICC-01/04-01/07-3720, paras. 92-93.

<sup>457</sup> Regulation 55 of the Regulations of the TFV. See also *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 79.

311. Upon the Draft Plan being laid before the Chamber, the parties will be afforded one month in which to make observations on matters affecting their interests and rights.

312. The Chamber will then examine the Draft Plan forthwith, which it may amend as it sees fit. Specifically, it will consider whether it needs further particulars, and if so, it will direct the TFV to oblige. It may also address requests, if any, from the TFV regarding the Draft Plan.

313. The decision whereby the Chamber approves the Draft Plan will enjoin the TFV to carry it out in its every respect – individual and collective. The Chamber will require regular updates from the TFV in order to monitor and oversee the implementation of the Draft Plan.<sup>458</sup>

314. Lastly, it must be made clear that any matter of contention arising from the activities and decisions of the TFV may be brought before the Chamber at any point in the procedure.<sup>459</sup>

## **2. Mr Katanga's contribution to and/or cooperation in reparations**

315. The Chamber notes that an accused person may contribute to the reparations process by way of a voluntary apology to individual victims or to groups of victims, on a public or confidential basis.<sup>460</sup>

316. The Chamber observes that the Defence has said that Mr Katanga “is willing to assist, to his fullest capacity, in any rehabilitation program suggested by the Chamber or Trust Fund”.<sup>461</sup>

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<sup>458</sup> See e.g. *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 75. See regulation 57 of the Regulations of the TFV. See also regulation 69 of the Regulations of the TFV.

<sup>459</sup> *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 76. See also regulation 69 of the Regulations of the TFV.

<sup>460</sup> *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 67 viii.

<sup>461</sup> Defence Response of 30 December 2016, ICC-01/04-01/07-3722, para. 29.

317. The Chamber concurs with the holding of the erstwhile Trial Chamber I that, wherever possible, reparations should foster reconciliation between the convicted person, the victims of the crimes and the affected communities.<sup>462</sup>

318. Accordingly, the Defence is directed to approach the TFV so as to discuss the contribution of Mr Katanga, should that be his desire, to the modalities of reparations, which for instance, could be by way of a letter of apology, public apologies, or the holding of a ceremony of reconciliation once he has served his sentence.

### **3. Reparations or other benefits which the victims have already received from other bodies**

319. The Chamber recalls that, in selecting the projects, the TFV may take account of the awards or benefits received by victims from other bodies so as to guarantee that reparations are not applied unjustly or in a discriminatory manner.<sup>463</sup>

320. The Chamber is, however, alive to the difficulties involved in ascertaining every benefit the victims received from other organizations. It hereby invites the TFV to take account only of the most significant activities undertaken in Bogoro.

### **4. States and other stakeholders**

321. The Legal Representative maintains that the Government of the DRC should devote much effort to and take part in the implementation of reparations as it “[TRANSLATION] concerns its citizens” and its success “[TRANSLATION] will in part

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<sup>462</sup> *Lubanga*, Trial Chamber I, Decision on Reparations, ICC-01/04-01/06-2904, para. 193.

<sup>463</sup> *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 9; See e.g. “*Requête des victimes sollicitant par l’entremise de la Chambre l’intervention de la République Démocratique du Congo au processus des réparations*”, 24 March 2016, ICC-01/04-01/07-3674, paras. 20-2, (“Victims’ Request of 24 March 2016”); First Defence Observations, 24 February 2016, ICC-01/04-01/07-3660-Red, para. 20; Defence Observations of 14 May 2015, ICC-01/04-01/07-3549, para. 14 and Defence Consolidated Response of 16 June 2015, ICC-01/04-01/07-3564, paras. 93-97; See e.g. Victims’ Request of 24 March 2016, ICC-01/04-01/07-3674, paras. 20-21; “Defence Response to the *Requête des victimes sollicitant par l’entremise de la Chambre l’intervention de la République Démocratique du Congo au processus des réparations*”, dated 15 April 2016, [French] translation registered on 25 April 2016, ICC-01/04-01/07-3683, para. 5, (“Defence Response of 15 April 2016”).

depend on the involvement of the [Government of the] DRC".<sup>464</sup> Furthermore, the Legal Representative underlines that the present process does not absolve the Government of the DRC of its responsibility to award reparations to its citizens under other treaties and domestic legislation<sup>465</sup> and the Government has hitherto cooperated to a considerable extent with the Court.<sup>466</sup> The Defence supports the Legal Representative's submission.<sup>467</sup>

322. The Legal Representative further maintains that the present order for reparations should foresee from the outset a mechanism for disbursing awards to the victims out of the convicted person's salaries, remunerations and gains.<sup>468</sup>

323. It must be pointed out that article 75(6) of the Statute lays down: "Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law."<sup>469</sup> An order for reparations does not, therefore, relieve States Parties of the responsibility to award reparations to victims pursuant to other treaties or domestic legislation.<sup>470</sup>

324. The Chamber would further recall that a duty of full cooperation with the Court is cast on States Parties,<sup>471</sup> which are invited to facilitate the enforcement of orders for reparations and the implementation of reparations.

325. The Chamber recalls that on 28 September 2016, the Government of the DRC made known its interest in participating in the present proceedings.<sup>472</sup>

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<sup>464</sup> Victims' Request of 24 March 2016, ICC-01/04-01/07-3674, para. 12. The Legal Representative would like to see the DRC's involvement take the following forms: (1) measures connected to reconciliation between the local communities, specifically to resolve land disputes (paras. 16-17. See also Victims' Observations of 8 January 2015, ICC-01/04-01/07-3514-Conf, paras. 25 and 49); (2) schooling for the victims' children and children orphaned by the attack on Bogoro (paras. 18-20); (3) the building of suitable housing (para. 21); (4) monetary contribution to the TFV (para. 23. See also Victims' Observations of 8 January 2015, ICC-01/04-01/07-3514-Conf, para. 49). See also HRC and TIJ Submission of 14 May 2015, ICC-01/04-01/07-3551, paras. 35 and 40.

<sup>465</sup> Victims' Request of 24 March 2016, ICC-01/04-01/07-3674, para. 23.

<sup>466</sup> Victims' Request of 24 March 2016, ICC-01/04-01/07-3674, para. 24.

<sup>467</sup> Defence Response of 15 April 2016, ICC-01/04-01/07-3683.

<sup>468</sup> Victims' Observations of 8 January 2015, ICC-01/04-01/07-3514-Conf, para. 38.

<sup>469</sup> See also *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 9.

<sup>470</sup> See articles 25(4) and 75(6) of the Statute.

<sup>471</sup> See Parts 9 and 10 of the Statute.

Accordingly, the Chamber directs the TFV to give consideration to the Legal Representative's submission and to contact the Government of the DRC with a view to establishing how it may contribute to the reparations process.

## **B. Funding of reparations**

### **1. Mr Katanga's current financial situation**

326. The Chamber recalls that it has set Mr Katanga's liability for reparations at USD 1 000 000.<sup>473</sup>

327. The Chamber sees, however, that Mr Katanga was found indigent for the purposes of the proceedings instituted against him.<sup>474</sup> Of further note is that the Registry found that Mr Katanga does not appear currently to own any property or asset which may be used for reparations.<sup>475</sup>

328. Accordingly, the Chamber finds Mr Katanga indigent for the purposes of reparations at the time of the present order.

329. In that connection, the Chamber directs the Presidency, with the assistance of the Registrar, to monitor Mr Katanga's financial situation on an ongoing basis in accordance with regulation 117 of the Regulations of the Court. The Chamber would recall in this regard that a duty of full cooperation with the Court is cast on States Parties.<sup>476</sup> The Chamber will in due course consider whether it need seek the

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<sup>472</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Annex 8 to the "Rapport du Greffier sur l'exécution de la Décision ICC-01/04-01/06-3217", dated 28 September 2016, registered on 4 October 2016, ICC-01/04-01/06-3240-Anx8 (a redacted version was filed that same day).

<sup>473</sup> See Section "X. MR KATANGA'S LIABILITY FOR REPARATIONS".

<sup>474</sup> "Decision of the Registrar on the applications for legal assistance paid by the Court filed by Mr Germain Katanga", 22 November 2007, ICC-01/04-01/07-79-tENG. See also "Observations du Greffe relatives à la solvabilité, l'indemnisation des victimes et au comportement en détention de Germain Katanga", dated 4 April 2014 and reclassified as public on 10 April 2014, ICC-01/04-01/07-3453-Conf, paras. 1-2, and one confidential annex. See also Resolution ICC-ASP/13/Res.4, adopted at the 12th plenary meeting on 17 December 2014 by consensus, para. 11 ("Resolution of 17 December 2014").

<sup>475</sup> "Registry's report on the financial situation of Germain Katanga", 14 October 2016, ICC-01/04-01/07-3717-Conf-Exp and two confidential annexes.

<sup>476</sup> See Parts 9 and 10 of the Statute.



assistance of States Parties to give effect to the present order for reparations pursuant to article 75(4) of the Statute.

## 2. Funding of reparations where a convicted person is indigent

330. The Chamber notes that where on account of indigence the convicted person is not in a position to comply with an order for reparations forthwith, the TFV may complement the resources collected through awards for reparations by disbursing the necessary amount from its “other resources”, as foreseen by regulation 56 of the Regulations of the TFV.<sup>477</sup>

331. In that connection, the Chamber notes the TFV’s contention that the absence of reference in regulation 56 of the Regulations of the TFV to rule 98(2) of the Rules of Procedure and Evidence, and hence the provision’s silence on individual reparations awards, means that the “other resources” of the TFV are not intended to complement individual reparations, such as financial compensation.<sup>478</sup> In the view of the TFV, regulation 56 of said Regulations binds it to manage its resources such that it is in a position to complement collective awards. By contrast, the regulation casts no such obligation regarding individual awards. The TFV sees rule 98(2) of the Rules of Procedure and Evidence<sup>479</sup> as requiring that individual reparations be funded by the convicted person. Therein, in the TFV’s view, lies a deliberate decision on the part of the States Parties which adopted the Regulations not to bind the TFV to managing

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<sup>477</sup> Regulations of the Trust Fund for Victims, Resolution ICC-ASP/4/Res.3, Adopted at the 4th plenary meeting on 3 December 2005 by consensus; see also rule 98(5) of the Rules of Procedure and Evidence; *Lubanga*, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129, para. 115. See also TFV Observations of 13 May 2015, ICC-01/04-01/07-3548, para. 127; Victims’ Observations of 8 January 2015, ICC-01/04-01/07-3514-Conf, para. 39. The Chamber, however, underlines that the involvement of the TFV does not absolve the convicted person of his or her liability and that said person remains liable and must reimburse the TFV (*Lubanga*, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129, para. 115; See also *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA).

<sup>478</sup> TFV Observations of 13 May 2015, ICC-01/04-01/07-3548, para. 139.

<sup>479</sup> Rule 98(2) of the Rules of Procedure and Evidence provides: “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”.

its resources for the purpose of complementing individual reparations.<sup>480</sup> Lastly, the Chamber notes that, in deciding whether to complement the reparations awarded in a case, the TFV Board of Directors has to juggle the reparations with competing tasks, such as TFV activities undertaken pursuant to its assistance mandate set down at regulation 50(a) of the Regulations of the TFV, and with the other ongoing proceedings before the Court which may give rise to an order for reparations.<sup>481</sup>

332. The Chamber must emphasize that article 75(1) of the Statute provides that reparations may be by way of compensation and, in that regard, the Appeals Chamber in *Lubanga* said that compensation could be envisaged as a modality of reparation for collective awards, which would not rule out its use in individual reparations too.<sup>482</sup>

333. The Chamber recalls further that rule 97(1) of the Rules of Procedure and Evidence makes express provision for the award of two types of reparations – collective and individual. What is more, the Appeals Chamber affirmed that the two types may be awarded concurrently.<sup>483</sup>

334. Accordingly, the Chamber considers that where it lies with a Trial Chamber to examine the issue of the type of reparations to be awarded, it is open to that bench to decide, in view of the specific circumstances of the case, whether to award individual reparations, collective reparations, or both, and to determine the appropriate modalities of reparations.<sup>484</sup> In the circumstances of the case, and having acknowledged that it will do the utmost to ensure that the reparations are

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<sup>480</sup> *Lubanga*, TFV Document on Implementation Plan of 3 November 2015, ICC-01/04-01/06-3177-Conf, para. 205.

<sup>481</sup> *Lubanga*, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129, para. 113.

<sup>482</sup> *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 67.

<sup>483</sup> *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 33.

<sup>484</sup> It is noted that the TFV acknowledged the discretion of the Bench in *Lubanga* and *Katanga* (*The Prosecutor v. Thomas Lubanga Dyilo*, “Observations of the Trust Fund for Victims on the appeals against Trial Chamber I’s ‘Decision establishing the principles and procedures to be applied to reparations’”, 8 April 2013, ICC-01/04-01/06-3009, para. 118 and TFV Observations of 13 May 2015, ICC-01/04-01/07-3548, para. 49).

meaningful to the victims,<sup>485</sup> the Chamber has, in addition to dedicated collective reparations, seen fit to make a symbolic award of USD 250 compensation to the victims in the case.<sup>486</sup>

335. In the view of the Chamber, the discretion to award individual reparations, where the conditions are met, applies irrespective of the financial situation of the person held liable for reparations. Furthermore, to the Chamber's mind, the 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.

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.<sup>487</sup> 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".<sup>488</sup>

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.

338. The Chamber points out that the figure to be potentially earmarked for individual reparations comes to around 7% of the sum-total of the reparations awarded and so is a modest amount. As aforementioned, this modality of individual

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<sup>485</sup> See para. 265 of the present order. *Report of the Bureau on the impact of the Rome Statute system on victims and affected communities*, ICC-ASP/9/25, Appendix III, 22 November 2010, para. 19.

<sup>486</sup> See Section "XI. TYPES AND MODALITIES OF REPARATIONS".

<sup>487</sup> *Lubanga*, Appeals Chamber, Appeals Judgment on Reparations, ICC-01/04-01/06-3129, paras. 4-5, paras. 111-114.

<sup>488</sup> See also Resolution of 17 December 2014, ICC-ASP/13/Res.4, para. 16; Resolution ICC-ASP/12/Res.5, adopted at the 12th plenary meeting on 23 November 2013 by consensus, para. 15; Resolution ICC-ASP/11/Res.7, adopted at the 8th plenary meeting on 21 November 2012 by consensus, para. 15.

reparation is of symbolic value and the figure which the Chamber has determined reflects its desire to give the victims individual acknowledgement of the harm they suffered.<sup>489</sup>

339. It is, moreover, this Chamber's firm view that the 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,<sup>490</sup> by awarding only collective reparations.

340. Finally, the Chamber recalls that the resources of the TFV are to be used to benefit the victims of crimes within the jurisdiction of the Court, who are defined at rule 85 of the Rules of Procedure and Evidence.

341. So, were the Board of Directors of the TFV to decide to use the TFV's "other resources" to fund and implement the collective reparations awarded in the case, the Chamber is of the view that the "other resources" could also be used for the individual reparations it has awarded.

342. Having regard to the foregoing, the Chamber directs the Board of Directors of the TFV to advise the Bench whether it 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,<sup>491</sup> and to agree to providing resources to complement the individual reparations.

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<sup>489</sup> See paras. 298-300 of the present order.

<sup>490</sup> See para. 298 of the present order.

<sup>491</sup> Similarly see, *Lubanga*, Appeals Chamber, Order for Reparations, para. 67 ii.

### C. Assistance mandate of the TFV

343. The Chamber reiterates its ruling that, for the purposes of reparations in the case, it could not act upon the physical and psychological harm resulting from rape or sexual slavery, and the transgenerational harm. Further, it has ruled that the former child soldiers are ineligible for an award in the present reparation proceedings.<sup>492</sup>

344. That being so, the Chamber invites the TFV to give consideration as part of its assistance mandate,<sup>493</sup> wherever possible, to the harm suffered by the Applicants in the attack on Bogoro upon which the Chamber has not been in a position to act in the case.

### D. Publication of the present order for reparations

345. The Chamber directs the Registrar to take all the necessary measures to give adequate publicity to the present order for reparations, including outreach activities aimed at the national authorities, the local communities and the affected populations, and measures to afford the victims detailed and timely notice and access to any awards.<sup>494</sup>

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<sup>492</sup> See above, Section “VII. INDIVIDUAL ANALYSIS OF THE APPLICATIONS FOR REPARATIONS”, paras. 132-134, 146-152 and 157-161.

<sup>493</sup> TFV Observations of 13 May 2015, ICC-01/04-01/07-3548, para. 130. See also Victims’ Observations of 15 May 2015, ICC-01/04-01/07-3555-tENG, para. 44; Prosecution’s Observations of 30 April 2015, ICC-01/04-01/07-3544, footnote 17.

<sup>494</sup> *Lubanga*, Appeals Chamber, Order for Reparations, ICC-01/04-01/06-3129-AnxA, paras. 51-52.

**FOR THESE REASONS, the Chamber**

**HANDS DOWN**, unanimously, an order for reparations against Mr Katanga;

**FINDS** that 297 of the 341 Applicants have shown to the standard of proof of a balance of probabilities that they are victims of the crimes of which Mr Katanga was convicted;

**DECIDES**, accordingly, to award reparations in the case to the 297 victims;

**ASSESES** the total monetary value of the extent of the harm suffered by the 297 victims to be USD 3 752 620;

**SETS** the reparations award for which Mr Katanga is liable at USD 1 000 000;

**FINDS** Mr Katanga indigent for the purposes of reparations at the time of the present order for reparations;

**AWARDS** individual reparations, namely compensation in the form of a symbolic award of USD 250, and collective reparations designed to benefit each victim, in the form of support for housing, support for an income-generating activity, support for education and psychological support;

**DIRECTS** the TFV to prepare, with due consideration for the Chamber's rulings on the types and modalities of reparations, a draft implementation plan to be filed by 27 June 2017, which sets out a programme describing the projects the TFV intends to develop;

**DIRECTS** observations from the Legal Representative and the Defence regarding the Draft Plan by 28 July 2017;

**DIRECTS** the Defence to contact the TFV so as to discuss the contribution of Mr Katanga, should that be his desire, to the modalities of reparations;

**DIRECTS** the TFV to contact the Government of the DRC regarding how it may cooperate in giving effect to and implementing the reparations;

**DIRECTS** the Presidency, with the assistance of the Registrar, to monitor Mr Katanga's financial situation on an ongoing basis in accordance with regulation 117 of the Regulations of the Court;

**DIRECTS**, with due consideration for Mr Katanga's current financial situation, the Board of Directors of the TFV to advise the Bench whether it is minded to use its "other resources" for the funding and implementation of individual and collective reparations, and to apprise it in the Draft Plan of the monetary amount;

**INVITES** the TFV to afford consideration as part of its assistance mandate, wherever possible, to the harm suffered by the Applicants as a result of violence of a sexual nature or as a result of transgenerational psychological trauma and to the harm suffered by the former child soldiers, which the Chamber has not been in a position to entertain in the case; and

**DIRECTS** the Registrar to take all the necessary measures to give adequate publicity to the present order for reparations.

Done in both English and French, the French version being authoritative.

[signed]

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**Judge Marc Perrin de Brichambaut**

**Presiding Judge**

[signed]

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**Judge Olga Herrera Carbuccion**

[signed]

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**Judge Péter Kovács**

Dated this 24 March 2017

At The Hague, Netherlands