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**No. ICC-01/04-01/07 A3 A4 A5**

**Date: 8 March 2018**

**THE APPEALS CHAMBER**

**Before:**

**Judge Howard Morrison, Presiding Judge  
Judge Silvia Fernández de Gurmendi  
Judge Sanji Mmasenono Monageng  
Judge Christine Van den Wyngaert  
Judge Piotr Hofmański**

**SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO**

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

**Public redacted**

**Judgment**

**on the appeals against the order of Trial Chamber II of 24 March 2017 entitled  
“Order for Reparations pursuant to Article 75 of the Statute”**

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

**Legal Representatives of Victims**

Mr Fidel Nsita Luvengika

**Counsel for the Defence**

Mr David Hooper

Ms Caroline Buisman

**The Office of Public Counsel for Victims**

Ms Paolina Massidda

**Trust Fund for Victims**

Mr Pieter de Baan

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Other**

Trial Chamber II

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The Appeals Chamber of the International Criminal Court,

In the appeals filed by Mr Germain Katanga on 26 April 2017 (ICC-01/04-01/07-3738), the Office of Public Counsel for victims, on 26 April 2017, on behalf of a group of victims (ICC-01/04-01/07-3739), and a legal representative of victims, on 25 April 2017, on behalf of another group of victims (ICC-01/04-01/07-3737-tENG), against the order of Trial Chamber II entitled “Order for Reparations pursuant to Article 75 of the Statute” of 24 March 2017 (ICC-01/04-01/07-3728-tENG),

After deliberation,

Unanimously,

*Delivers* the following

## JUDGMENT

- 1) The “Order for Reparations pursuant to Article 75 of the Statute” is reversed to the extent that it rejected the applications for reparation of applicants a/25094/16, a/25096/16, a/25097/16, a/25098/16 and a/25099/16. The Trial Chamber is directed to carry out a new assessment of these applications, providing sufficient reasons for its eventual conclusion thereon.
- 2) The remainder of the “Order for Reparations pursuant to Article 75 of the Statute” is confirmed.

## REASONS

### I. KEY FINDINGS

1. The Appeals Chamber is not persuaded that the approach chosen by the Trial Chamber for the reparations proceedings in this case, which was based on an individual assessment of each application by the Trial Chamber, was the most appropriate in this regard as it has led to unnecessary delays in the award of

reparations. However, the Appeals Chamber considers that the Trial Chamber's approach did not amount to an error of law or an abuse of discretion that would justify the reversal of the Impugned Decision.

2. Rather than attempting to determine the "sum-total" of the monetary value of the harm caused, trial chambers should seek to define the harms and to determine the appropriate modalities for repairing the harm caused with a view to, ultimately, assessing the costs of the identified remedy. The Appeals Chamber considers that focusing on the cost to repair is appropriate, in light of the overall purpose of reparations, which is indeed to repair.

3. There may be circumstances where a trial chamber finds it necessary to individually set out findings in respect of all applications in order to identify the harms in question (for example, if there is a very small number of victims to whom the chamber intends to award individual and personalised reparations). However, when there are more than a very small number of victims, this is neither necessary nor desirable. This is not to say that trial chambers should not consider those applications – indeed the information therein may be crucial to assess the types of harm alleged and it can assist a chamber in making findings as to that harm. However, setting out an analysis for each individual, in particular in circumstances where a subsequent individual award bears no relation to that detailed analysis, appears to be contrary to the need for fair and expeditious proceedings.

4. Resort to factual presumptions in reparations proceedings is within a trial chamber's discretion. However, this discretion is not unlimited and a trial chamber must respect the rights of victims as well as the convicted person when resorting to presumptions.

5. The definition of 'victims' in rule 85 (a) of the Rules as "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court" emphasises the requirement of the existence of harm rather than whether the indirect victim was a close or distant family member of the direct victim.

6. In principle, the question of whether other individuals may also have contributed to the harm resulting from the crimes for which the person has been convicted is irrelevant to the convicted person's liability to repair that harm. While a

reparations order must not exceed the overall cost to repair the harm caused, it is not, *per se*, inappropriate to hold the person liable for the full amount necessary to repair the harm.

## II. PROCEDURAL HISTORY

### A. Proceedings before the Trial Chamber

7. On 7 March 2014, Trial Chamber II, as composed at that time,<sup>1</sup> issued the “Judgment pursuant to article 74 of the Statute”<sup>2</sup> (“Judgment on Conviction”). On 23 May 2014, the same trial chamber, in the same composition, issued the “Decision on Sentence pursuant to article 76 of the Statute”<sup>3</sup> (“Decision on Sentence”).

8. On 21 August 2014, the Legal Representative of Victims (“LRV”) requested Trial Chamber II, as it was then composed,<sup>4</sup> to fix a schedule for hearing the parties in relation to “the principles that may be applied to reparations in the instant case, as well as the procedure that should be followed”.<sup>5</sup>

9. On 27 August 2014, Trial Chamber II instructed the Registry to report on the applications for reparations, noting that “there is limited information as to the harm suffered [...] and the reparations measures sought” and given that “the large majority of these applications were received before April 2009”<sup>6</sup> (“Order of 27 August 2014”). It ordered the Registry to file a report, by 1 December 2014, later extended to 15 December 2014,<sup>7</sup> setting out detailed information with regard to the victims who

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<sup>1</sup> Constituted by Judge Bruno Cotte (Presiding Judge), Judge Fatoumata Dembele Diarra and Judge Christine Van den Wyngaert.

<sup>2</sup> [ICC-01/04-01/07-3436-tENG](#).

<sup>3</sup> [ICC-01/04-01/07-3484-tENG-Corr](#).

<sup>4</sup> See “Decision replacing two judges in Trial Chamber II”, 16 April 2014, [ICC-01/04-01/07-3468](#). The Trial Chamber was reconstituted with Judge Christine Van den Wyngaert, Judge Silvia Fernández de Gurmendi and Judge Olga Herrera Carbuca.

<sup>5</sup> “Request to fix a schedule for victims to submit their observations on reparations (Articles 68, 75 and 76 of the Statute)”, [ICC-01/04-01/07-3507-tENG](#), p. 8.

<sup>6</sup> “Order instructing the Registry to report on applications for reparations”, [ICC-01/04-01/07-3508](#), para. 7.

<sup>7</sup> “Order on the ‘Request for an Extension of Time to Report on Applications for Reparations Pursuant to Regulation 35 of the Regulations of the Court’”, 24 November 2014, [ICC-01/04-01/07-3511](#).

had sought reparations, including as to the crimes from which they suffered harm, the harm suffered and the type and modalities of reparations requested.<sup>8</sup>

10. On 15 December 2014, the Registry submitted its report that included the results of individual consultations with victims during a mission to the region between 25 September and 17 November 2014.<sup>9</sup> On 8 January 2015, the LRV submitted, *proprio motu*, observations in relation to reparations.<sup>10</sup>

11. A newly composed Trial Chamber II<sup>11</sup> (“Trial Chamber”) issued an order, on 1 April 2015, instructing the parties and participants to file observations in respect of the proceedings on reparations.<sup>12</sup> The Chamber also, on the same day, granted leave to various organisations to file representations in the proceedings pursuant to article 75 (3) of the Statute.<sup>13</sup>

12. On 8 May 2015, the Trial Chamber, in response to a request for clarification by the LRV, issued a decision requiring the LRV to, *inter alia*, update the applications for reparations<sup>14</sup> (“Decision of 8 May 2015”). The Trial Chamber stated:

With regard to the 305 applicants whom the Registry was able to interview in the presence of their Legal Representative, the Chamber notes that it possesses the necessary information, as set forth in rule 94 of the Rules, for these requests to be considered. The Chamber emphasises, however, that – where possible – it is up to the [Former LRV], in consultation with the Registry, to append to the request for reparations initially presented [...], any supporting documentation

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<sup>8</sup> [Order of 27 August 2014](#), para. 8.

<sup>9</sup> “Registry Report on Applications for Reparations in accordance with Trial Chamber II’s Order of 27 August 2014”, [ICC-01/04-01/07-3512](#) with three confidential annexes *ex parte* LRV, TFV and the Registry only. A public redacted version of Annex I was filed on 20 January 2015 ([ICC-01/04-01/07-3512-Anx1-Red2](#)).

<sup>10</sup> “Observations des victimes sur les réparations (Articles 68(3) et 75 du Statut; Règles 89 à 93 et 97 du Règlement de procédure et de preuve)”, ICC-01/04-01/07-3514-Conf; a public redacted version was registered on the same day ([ICC-01/04-01/07-3514-Red](#)).

<sup>11</sup> See “Decision replacing two judges in Trial Chamber II”, 17 March 2015, registered on 18 March 2015, [ICC-01/04-01/07-3530](#). The Trial Chamber was recomposed with Judge Olga Herrera Carbuccion, Judge Marc Perrin de Brichambaut and Judge Péter Kovács.

<sup>12</sup> “Order instructing the parties and participants to file observations in respect of the reparations proceedings”, [ICC-01/04-01/07-3532-tENG](#).

<sup>13</sup> “Order granting leave to file representations pursuant to article 75(3) of the Statute”, [ICC-01/04-01/07-3533-tENG](#).

<sup>14</sup> “Decision on the ‘Demande de clarification concernant la mise en oeuvre de la Règle 94 du Règlement de procédure et de preuve’ and future stages of the proceedings”, [ICC-01/04-01/07-3546-tENG](#).

within the meaning of rule (94)(1)(g) of the Rules, attesting, in particular, to the extent of the harm suffered and the causal link between the alleged harm and the crime committed. In order to facilitate the consideration of information provided by victims requesting reparations, the Chamber invites the Registry to file the consolidated documents, as proposed in its observations.<sup>15</sup>

13. The Trial Chamber “propose[d] that the Registry and the [LRV] take every opportunity to contact the [relevant victims] to assist them in presenting the documents needed to make their request for reparations before the Chamber”<sup>16</sup> and concluded by stating:

On the basis of all the documents submitted, and after considering, *inter alia*, the observations of the Defence, the Chamber will consider, on a case-by-case basis, whether the requests, within the meaning of rule 94 of the Rules, justify the awarding of reparations on an individual and/or collective basis.<sup>17</sup>

14. The Trial Chamber ordered that the relevant documents be filed by 1 October 2015,<sup>18</sup> later extending this time limit to 1 December 2015,<sup>19</sup> and then 29 February 2016.<sup>20</sup>

15. On 30 April 2015, the Prosecutor filed observations in respect of the procedure for reparations.<sup>21</sup> On 13 May 2015, the Trust Fund for Victims (“TFV”) submitted its observations.<sup>22</sup> On 14 May 2015, Mr Germain Katanga (“Mr Katanga”) submitted his observations.<sup>23</sup> The Registry<sup>24</sup> and the LRV<sup>25</sup> submitted their observations on 15 May

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<sup>15</sup> [Decision of 8 May 2015](#), para. 17.

<sup>16</sup> [Decision of 8 May 2015](#), para. 20.

<sup>17</sup> [Decision of 8 May 2015](#), para. 21.

<sup>18</sup> [Decision of 8 May 2015](#).

<sup>19</sup> “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](#).

<sup>20</sup> “Decision granting a further extension of time to the Common Legal Representative of Victims for submitting applications for reparations”, 8 December 2015, [ICC-01/04-01/07-3628-tENG](#).

<sup>21</sup> See “Prosecution’s Observations on the Procedure for Reparations”, [ICC-01/04-01/07-3544](#).

<sup>22</sup> “Observations on Reparations Procedure”, [ICC-01/04-01/07-3548](#) (“Trust Fund’s Observations on Reparations”).

<sup>23</sup> “Defence Observations on Reparations”, [ICC-01/04-01/07-3549](#), 14 May 2015 (“Mr Katanga’s Observations on Reparations”).

<sup>24</sup> “Registry’s Observations pursuant to Order ICC-01/04-01/07-3532”, [ICC-01/04-01/07-3553](#).

<sup>25</sup> “Observations of the victims on the principles and procedures to be applied to reparations”, [ICC-01/04-01/07-3555-tENG](#) (“LRV’s Observations on Reparations Procedure”) with public annex ([ICC-01/04-01/07-3555-Anx](#)).



2015. On 16 June 2015, the LRV<sup>26</sup> and Mr Katanga<sup>27</sup> filed their respective consolidated responses to the observations on the procedure for reparations.

16. On 7 September 2015, the LRV sought assistance from the Victims and Witnesses Unit, stating, *inter alia*, that it “could be of valuable assistance in addressing the issue of the victims affected by the transgenerational impact of the harm and could help to establish, as necessary, the criteria for determining their status as victims with respect to the conditions defined by the Chamber”.<sup>28</sup> On 9 October 2015, the Trial Chamber rejected the LRV’s request for assistance by the Victims and Witnesses Unit and invited him to file an application seeking support of a professional.<sup>29</sup> In the same decision, it recalled that “any new application for reparations must be accompanied – where possible – by supporting documents attesting to the extent of the harm suffered by the victim and the causal link between the alleged harm and the crimes of which Germain Katanga has been convicted” (footnote omitted).<sup>30</sup>

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<sup>26</sup> “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”, [ICC-01/04-01/07-3565](#) (“LRV’s Consolidated Response on the Reparations Procedure”).

<sup>27</sup> “Defence Consolidated Response to the Parties, Participants and Other Interested Persons’ Observations on Reparation”, [ICC-01/04-01/07-3564](#) (“Mr Katanga’s Response to Observations on Reparations”).

<sup>28</sup> “Request by the Legal Representative for the Chambers to instruct the Victims and Witnesses Unit to assist with the identification of traumatised children so that their requests for reparations can be collected”, ICC-01/04-01/07-3585-Conf-tENG (“LRV Request for assistance”), para. 35. A public redacted version of the French original was filed on 18 September 2015 ([ICC-01/04-01/07-3585-Red](#)). On 11 September 2015, the Trial Chamber issued an order inviting the Registry and Mr Katanga to file their observations on the LRV’s request for assistance. *See* “Order relating to the request of the common Legal Representative of Victims for the assistance of the Victims and Witnesses Unit”, ICC-01/04-01/07-3593-Conf-tENG. On 25 September 2015, the Registry filed its observations. *See* “Observations of the Registry on the ‘Requête du Représentant légal sollicitant de la Chambre d’enjoindre à l’Unité d’aide aux victimes et aux témoins’ (ICC-01/04-01/07-3585-Conf)”, 25 September 2015, reclassified as public on 14 October 2015 ([ICC-01/04-01/07-3601-tENG](#)). On 2 October 2015, Mr Katanga filed a consolidated response to the LRV’s request and the Registry’s observations. *See* “Defence Consolidated Response to the Legal Representative of Victims’ Request and the Registry’s Observations”, 2 October 2015, reclassified as public on 14 October 2015, [ICC-01/04-01/07-3605](#).

<sup>29</sup> “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](#), para. 10.

<sup>30</sup> “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](#), para. 11.

17. Between 12 November 2015 and 29 February 2016, the Registry transmitted applications for reparations to the Trial Chamber,<sup>31</sup> followed by reports on these applications.<sup>32</sup>

18. On 24 February 2016 and 11 April 2016, Mr Katanga filed two sets of observations on the individual applications for reparations.<sup>33</sup>

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<sup>31</sup> See “Transmission de demandes en réparation”, 12 November 2015, registered on 13 November 2015, [ICC-01/04-01/07-3614](#) with 43 confidential annexes *ex parte* Registry and LRV; on 24 November 2015, confidential redacted versions were transmitted to Mr Katanga (see [ICC-01/04-01/07-3619](#)). “Seconde transmission de demandes en réparation”, 20 November 2015, [ICC-01/04-01/07-3617](#) with 19 confidential annexes *ex parte* Registry and LRV; on 27 November 2015, confidential redacted versions were transmitted to Mr Katanga (see [ICC-01/04-01/07-3622](#)). “Troisième transmission de demandes en réparation”, 27 November 2015, [ICC-01/04-01/07-3621](#) with 33 confidential annexes *ex parte* Registry and LRV; on the same day, confidential redacted versions were transmitted to Mr Katanga (see [ICC-01/04-01/07-3624](#)). “Quatrième Transmission de Demandes en réparation”, 2 February 2016, [ICC-01/04-01/07-3646](#) with 35 confidential annexes *ex parte* Registry and LRV; on the same day, confidential redacted versions were transmitted to Mr Katanga (see [ICC-01/04-01/07-3648](#)). “Cinquième Transmission de Demandes en réparation”, 17 February 2016, [ICC-01/04-01/07-3656](#) with 85 confidential annexes *ex parte* Registry and LRV; on 18 February 2016, confidential redacted versions were transmitted to Mr Katanga (see [ICC-01/04-01/07-3659](#)). “Sixième Transmission de Demandes en réparation”, 26 February 2016, [ICC-01/04-01/07-3661](#) with 80 confidential annexes *ex parte* Registry and LRV; on the same day, confidential redacted versions were transmitted to Mr Katanga (see [ICC-01/04-01/07-3663](#)); “Septième Transmission de Demandes en réparation”, 29 February 2016, [ICC-01/04-01/07-3664](#) with 15 confidential annexes *ex parte* Registry and LRV; on the same day, confidential redacted versions were transmitted to Mr Katanga (see [ICC-01/04-01/07-3665](#)).

<sup>32</sup> See “Transmission du Rapport sur les demandes en réparation”, 16 November 2015, [ICC-01/04-01/07-3616](#) with two confidential annexes. “Transmission du Rapport concernant la Seconde Transmission des Demandes en Réparation”, 24 November 2015, [ICC-01/04-01/07-3618](#) with a confidential annex. “Transmission du Rapport concernant la Troisième Transmission des Demandes en Réparation”, 26 January 2016, [ICC-01/04-01/07-3639](#) with a confidential annex *ex parte* LRV and Registry; a redacted version of the report and the annex was transmitted to Mr Katanga on 29 January 2016; see “Transmission à la Défense du Rapport concernant la Troisième Transmission des Demandes en Réparation”, 29 January 2016, registered on 1 February 2016, [ICC-01/04-01/07-3644](#). “Transmission du Rapport concernant la Quatrième Transmission des Demandes en Réparation”, 17 February 2016, [ICC-01/04-01/07-3657](#) with a confidential *ex parte* annex; a redacted confidential version of the annex was filed on 18 February 2016 and a corrected version of the annex was registered on 10 March 2016 (ICC-01/04-01/07-3657-Conf-Anx-Red-Corr); see also “Transmission à la Défense du Rapport concernant la Quatrième Transmission des Demandes en Réparation”, 18 February 2016, [ICC-01/04-01/07-3658](#). “Transmission du Rapport concernant les Cinquième, Sixième et Septième Transmissions de Demandes en Réparation”, 30 March 2016, [ICC-01/04-01/07-3677](#) with a confidential *ex parte* annex and a confidential redacted annex.

<sup>33</sup> “Defence Observations on the Victims Applications for Reparation”, 24 February 2016, ICC-01/04-01/07-3660-Conf (“First Defence Observations”) with confidential *ex parte* annex (ICC-01/04-01/07-3660-Conf-Exp-AnxA). This document was originally filed publicly and was reclassified as confidential on 3 March 2016; a public redacted version was filed on 8 March 2016 ([ICC-01/04-01/07-3660-Red](#)). “Second Defence Observations on the Victims Applications for Reparation”, 11 April 2016, ICC-01/04-01/07-3681-Conf-Exp (“Second Defence Observations”) with one confidential *ex parte* annex (ICC-01/04-01/07-3681-Conf-Exp-AnxA) and public annex (ICC-01/04-01/07-3681-AnxB). This document was reclassified as confidential, *ex parte* to the Registry, LRV, Mr Katanga, and the TFV by Trial Chamber order on 23 August 2016 (ICC-01/04-01/07-3705-tENG).

19. On 16 March 2016, the LRV requested leave to withdraw as legal representative of 93 victims<sup>34</sup> (“First Request for Leave to Withdraw as LRV”). On 13 May 2016, the LRV submitted a report, pursuant to the Decision of 8 May 2015, detailing information as to the applications submitted by the victims he represented<sup>35</sup> (“LRV’s Report of 13 May 2016”). On 18 May 2016, the Trial Chamber issued a decision on the First Request for Leave to Withdraw as LRV, granting it in part<sup>36</sup> (“First Decision on Request for Leave to Withdraw as LRV”).

20. On 26 May 2016, the LRV filed an expert report in relation to the issue of transgenerational harm<sup>37</sup> (“Expert Report”).

21. On 27 May 2016, in response to the First Decision on Request for Leave to Withdraw as LRV, the LRV submitted further observations and a second request for leave to withdraw as LRV<sup>38</sup> (“Second Request for Leave to Withdraw as LRV”). On 31 May 2016, the Registrar, in response to the First Decision on Request for Leave to Withdraw as LRV, provided the files of the relevant victims to the Trial Chamber.<sup>39</sup>

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<sup>34</sup> “Corrigendum: Request of the Legal Representative to Withdraw from Representation of Certain Victims Authorized to Participate in the Proceedings”, original version registered on 16 March 2016 and corrigendum registered on 24 March 2016, ICC-01/04-01/07-3670-Conf-Corr-tENG, with a confidential *ex parte* annex (ICC-01/04-01/07-3670-Conf-Exp-Anx-tENG).

<sup>35</sup> “Report on the implementation of Decision No. 3546, including the identification of harm suffered by victims as a result of crimes committed by Germain Katanga (article 75(1) of the Statute and regulation 38(1)(f) of the Regulations of the Court)”, [ICC-01/04-01/07-3687-tENG](#).

<sup>36</sup> “Decision on the request by the Legal Representative of Victims to withdraw from the representation agreement”, ICC-01/04-01/07-3689-Conf-tENG.

<sup>37</sup> “Annex 1 to the Transmission of the ‘Expert Report on the evaluation of the mental health of child victims of the attack on Bogoro of 24 February 2003’”, ICC-01/04-01/07-3692-Conf-Exp-Anx1-tENG. *See also* “Transmission of the ‘Expert Report on the evaluation of the mental health of child victims of the attack on Bogoro of 24 February 2003’”, 26 May 2016, ICC-01/04-01/07-3692-Conf-Exp-tENG (“LRV Submission on the Expert Report”) with one confidential annex, *ex parte* LRV and one public annex ([ICC-01/04-01/07-3692-Anx2](#)). A public redacted version of the submission was also filed on 31 May 2016 ([ICC-01/04-01/07-3692-Red2](#)).

<sup>38</sup> “Observations on Decision No. 3689 on the request by the Legal Representative to withdraw from the Representation Agreement”, ICC-01/04-01/07-3694-Conf-tENG.

<sup>39</sup> “Transmission à la Chambre des dossiers relatifs à 39 victimes participantes et 3 demandeurs à la réparation en application de la Décision du 18 mai 2016 (ICC-01/04-01/07-3689-Conf)”, ICC-01/04-01/07-3695-Conf.

22. On 10 June 2016, the LRV filed an addendum to the Expert Report, annexing testimony of an expert in the *Bemba* case<sup>40</sup> (“LRV’s Addendum to the Expert Report”). On 22 June 2016, Mr Katanga submitted his observations on the Expert Report and the addendum.<sup>41</sup>

23. On 6 July 2016, the LRV submitted a summary table of harm alleged by the applicants for reparations.<sup>42</sup> On 15 July 2016, the Trial Chamber issued an order requiring observations on the monetary value considered fair for each type of harm alleged, “be it material, physical or psychological”<sup>43</sup> appending to that order a list of the types of harm. On 14 September 2016, this deadline was extended to 30 September 2016, as was the deadline for the filing of responses.<sup>44</sup>

24. On 6 September 2016, the Trial Chamber granted the Second Request for Leave to Withdraw as LRV<sup>45</sup> (“Decision on Withdrawal of Representation of 6 September 2016”).

25. On 20 September 2016, Mr Katanga submitted observations in relation to the victims in respect of whom leave to withdraw as counsel was granted.<sup>46</sup>

26. On 30 September 2016, the LRV,<sup>47</sup> Mr Katanga,<sup>48</sup> and the TFV<sup>49</sup> submitted their observations on the monetary value of harm to victims. On 14 October 2016, Mr

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<sup>40</sup> “Addendum to the document entitled ‘*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)”, ICC-01/04-01/07-3698-Conf-tENG, with two public annexes.

<sup>41</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”, ICC-01/04-01/07-3699-Conf (“Mr Katanga’s Observations on the Expert Report and its Addendum”).

<sup>42</sup> “Transmission des tableaux récapitulatifs des préjudices des demandeurs en réparation”, [ICC-01/04-01/07-3701](#) with confidential annex *ex parte* LRV.

<sup>43</sup> “Order instructing the parties and the Trust Fund for Victims to file observations on the monetary value of the alleged harm”, [ICC-01/04-01/07-3702-tENG](#), para. 9.

<sup>44</sup> “Decision according further time for observations on the monetary value of the harm alleged”, [ICC-01/04-01/07-3708-tENG](#).

<sup>45</sup> “Second Decision on the Legal Representative of the Victims’ request for termination of the representation agreement”, ICC-01/04-01/07-3706-Conf-tENG.

<sup>46</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*”, ICC-01/04-01/07-3709-Conf.

<sup>47</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)”, [ICC-01/04-01/07-3713](#) with seven public annexes.

Katanga's response to the observations filed by the LRV and the TFV on the monetary value of the alleged harm was registered.<sup>50</sup> On 14 October 2016, the LRV filed his response to Mr Katanga's observations on the monetary value of the alleged harm.<sup>51</sup> On 14 October 2016, the Registrar submitted a report on Mr Katanga's financial situation.<sup>52</sup>

27. On 8 December 2016, the LRV submitted observations on the modalities of reparations in the case, in addition to a request for a hearing.<sup>53</sup> On 30 December 2016, Mr Katanga submitted his response to the LRV's proposals on the modalities of reparations.<sup>54</sup> On 22 February 2017, the Trial Chamber dismissed the LRV's request for a hearing on the modalities for reparations in the case.<sup>55</sup>

28. On 15 March 2017, the Trial Chamber issued the "Decision on the Application made by the Common Legal Representative of Victims on 2 March 2017", in which it, *inter alia*, appointed the Office of Public Counsel for Victims ("OPCV") as legal representative of the victims in respect of whom the LRV had been granted leave to withdraw as legal representative<sup>56</sup> ("Decision appointing the OPCV").

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<sup>48</sup> "Defence Observations on the Monetary Value of the Alleged Harm", [ICC-01/04-01/07-3711](#) with two public annexes.

<sup>49</sup> "Observations in response to the Trial Chamber's order of 15 July 2016", ICC-01/04-01/07-3714-Conf-Exp with one confidential *ex parte* index of annexes available only to the TFV, one confidential *ex parte* annex available only to the TFV, 13 public annexes. A public redacted version of the submission and the index of annexes were registered on the same day ([ICC-01/04-01/07-3714-Red](#) and [ICC-01/04-01/07-3714-AnxA-Red](#)).

<sup>50</sup> "Defence Response to the Legal Representative of Victims and the Trust Fund for Victims' Submissions on the Monetary Value of the Alleged Harm", [ICC-01/04-01/07-3715](#), 13 October 2016.

<sup>51</sup> "Réponse aux observations de la Défense et du Fonds au profit des victimes sur l'évaluation monétaire du préjudice subi par les victimes (ICC-01/04-01/07-3711 et ICC-01/04-01/07-3714-Red)", [ICC-01/04-01/07-3716](#).

<sup>52</sup> "Registry's report on the financial situation of Germain Katanga", ICC-01/04-01/07-3717-Conf-Exp with two confidential annexes *ex parte* Registry and the Prosecutor.

<sup>53</sup> "Propositions des victimes sur des modalités de réparation dans la présente affaire (Article 75 du Statut et norme 38-1 du Règlement de la Cour", [ICC-01/04-01/07-3720](#) with one public annex ([ICC-01/04-01/07-3720-Anx1](#)).

<sup>54</sup> "Defence Response to the Propositions des victimes sur des modalités de réparation dans la présente affaire", [ICC-01/04-01/07-3722](#).

<sup>55</sup> "Décision relative à la requête du représentant légal commun des victimes sollicitant la tenue d'une audience", [ICC-01/04-01/07-3723](#).

<sup>56</sup> [ICC-01/04-01/07-3727-tENG](#).

29. On 24 March 2017, the Trial Chamber issued the “Order for Reparations pursuant to Article 75 of the Statute”,<sup>57</sup> (“Impugned Decision”) with two annexes, the second of which contains an individual analysis of the victims’ requests for reparations.

## **B. Proceedings before the Appeals Chamber**

30. On 25 April 2017, the LRV, on behalf of a group of victims, filed a notice of appeal.<sup>58</sup> On 26 April 2017, appeals were also filed by Mr Katanga<sup>59</sup> and the OPCV,<sup>60</sup> on behalf of another group of victims.

31. On 27 June 2017, appeal briefs were filed by the OPCV<sup>61</sup> (“OPCV’s Appeal Brief”), the LRV<sup>62</sup> (“Legal Representative’s Appeal Brief”) and Mr Katanga<sup>63</sup> (“Mr Katanga’s Appeal Brief”).

32. On 7 August 2017, the Appeals Chamber issued “Directions on the conduct of the appeal proceedings”<sup>64</sup> (“Directions of 7 August 2017”), in which it directed that the TFV should indicate to the Appeals Chamber whether it sought to submit observations on the appeals, and on which particular issues, by 25 August 2017.<sup>65</sup> It also directed that any other request under rule 103 of the Rules of Procedure and

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<sup>57</sup> [ICC-01/04-01/07-3728-tENG](#) with one public annex ([ICC-01/04-01/07-3728-AnxI-tENG](#)) (“Annex I to the Impugned Decision”) and one confidential *ex parte* annex (ICC-01/04-01/07-3728-Conf-Exp-AnxII) (“Annex II to the Impugned Decision”).

<sup>58</sup> “Notice of Appeal against the ‘Ordonnance de réparation en vertu de l’article 75 du Statut’ and its Annex II”, [ICC-01/04-01/07-3737-tENG](#).

<sup>59</sup> “Defence Notice of Appeal against the Ordonnance de réparation en vertu de l’article 75 du Statut”, [ICC-01/04-01/07-3738](#).

<sup>60</sup> “Notice of Appeal against the Reparations Order and its Annex II issued in accordance with article 75 of the Statute on 24 March 2017”, [ICC-01/04-01/07-3739](#).

<sup>61</sup> “Document in Support of the Appeal against Trial Chamber II’s ‘Ordonnance de réparation en vertu de l’article 75 du Statut’”, ICC-01/04-01/07-3746-Conf; the public redacted version was registered on 28 June 2017 ([ICC-01/04-01/07-3746-Red](#)).

<sup>62</sup> “Document in Support of the Appeal against the Order for Reparations under Article 75 of the Statute with its Annex II”, [ICC-01/04-01/07-3745-tENG](#).

<sup>63</sup> “Defence Document in Support of Appeal against the Reparations Order”, ICC-01/04-01/07-3747-Conf-Exp; a public redacted version was registered on 29 June 2017 ([ICC-01/04-01/07-3747-Red](#)).

<sup>64</sup> [ICC-01/04-01/07-3752](#).

<sup>65</sup> [Directions of 7 August 2017](#), para. 1.

Evidence (“Rules”) should be filed by the same date, stipulating the specific issues to be addressed on the basis of the appeal briefs.<sup>66</sup>

33. On 23 August 2017, the LRV filed the “Submissions on the Document Filed by the Office of Public Counsel for Victims in Support of its Appeal (ICC-01/04-01/07-3746-Conf)”<sup>67</sup> (“LRV’s Submissions on OPCV’s appeal”).

34. On 25 August 2017, the TFV submitted the “Request for leave to file observations”.<sup>68</sup>

35. On 28 August 2017, Mr Katanga<sup>69</sup> (“Mr Katanga’s Response”), the LRV<sup>70</sup> (“LRV’s Response”) and the OPCV<sup>71</sup> (“OPCV’s Response”) filed responses to the various appeal briefs.

36. On 14 September 2017, the Appeals Chamber issued the “Decision on the Trust Fund’s request for leave to file observations”,<sup>72</sup> in which it granted leave to the TFV to file observations, as requested by it, by 5 October 2017. Responses by the parties were ordered to be filed by 26 October 2017.

37. On 5 October 2017, observations were filed by the TFV.<sup>73</sup> A response thereto was filed by the OPCV on 26 October 2017.<sup>74</sup> No responses were filed by the LRV or Mr Katanga.

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<sup>66</sup> [Directions of 7 August 2017](#), para. 2.

<sup>67</sup> ICC-01/04-01/07-3753-Conf-tENG; a public redacted version was registered on 26 February 2018 ([ICC-01/04-01/07-3753-Red](#)).

<sup>68</sup> [ICC-01/04-01/07-3755](#).

<sup>69</sup> “Defence Response to the OPCV and Legal Representative of Victims’ Documents in Support of Appeal Against the Reparation Order”, ICC-01/04-01/07-3758-Conf-Exp; a confidential redacted version was filed on the same day (ICC-01/04-01/07-3758-Conf-Red) and a public redacted version was filed on 5 September 2017 ([ICC-01/04-01/07-3758-Red2](#)).

<sup>70</sup> “Observations on the ‘Defence Document in Support of Appeal against the Reparations Order’ (ICC-01/04-01/07-3747-Conf-Exp and ICC-01/04-01/07-3747-Red)”, [ICC-01/04-01/07-3756-tENG](#).

<sup>71</sup> “Consolidated Response to the Common Legal Representative’s and the Defence’s Documents in Support of the Appeal against Trial Chamber II’s ‘Ordonnance de réparation en vertu de l’article 75 du Statut’”, [ICC-01/04-01/07-3757](#).

<sup>72</sup> [ICC-01/04-01/07-3765](#).

<sup>73</sup> “Observations pursuant to rule 103 of the Rules of Procedure and Evidence”, [ICC-01/04-01/07-3766](#).

<sup>74</sup> “Response to the ‘Observations pursuant to rule 103 of the Rules of Procedure and Evidence’ filed by the Trust Fund for Victims”, [ICC-01/04-01/07-3769](#).

### III. MERITS

#### A. Standard of review

38. As seen above, appeals in this case have been filed by Mr Katanga, the OPCV and the LRV. The appeals filed allege errors of law, fact and procedure and errors in the exercise of the Trial Chamber's discretion.

39. The standard of review for alleged legal errors is the following:

[T]he Appeals Chamber will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision.

[An Impugned Decision] is "materially affected by an error of law" if the Trial Chamber "would have rendered a [decision] that is substantially different from the decision that was affected by the error, if it had not made the error". [Footnotes omitted.]<sup>75</sup>

40. With respect to alleged procedural errors, the Appeals Chamber held that

such errors may occur in the proceedings leading up to an impugned decision. [...] However, as with errors of law, the Appeals Chamber will only reverse [the Impugned Decision] if it is materially affected by the procedural error. In that respect, the appellant needs to demonstrate that, in the absence of the procedural error, the [Impugned Decision] would have substantially differed from the one rendered.<sup>76</sup>

41. With respect to alleged errors of fact, the Appeals Chamber has held that

it will not interfere with factual findings of the first-instance Chamber unless it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts, or failed to take into account relevant facts. As to the "misappreciation of facts", the Appeals Chamber has also stated that it "will not disturb a Pre-Trial or Trial Chamber's evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It

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<sup>75</sup> *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction", 1 December 2014, ICC-01/04-01/06-3121-Conf (A 5) with a public redacted version, [ICC-01/04-01/06-3121-Red](#) (A5) ("*Lubanga A5 Judgment*"), paras 18-19.

<sup>76</sup> [Lubanga A5 Judgment](#), para. 20 referring to *Prosecutor v. Joseph Kony et al*, "Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009", 16 September 2009, [ICC-02/04-01/05-408](#) (OA 3) ("*Kony et al. OA 3 Judgment*"), paras 46-47.



will interfere only in the case where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it".<sup>77</sup>

42. The Appeals Chamber notes that, in reparations proceedings, the standard applicable is generally the balance of probabilities. Therefore, on appeal, the standard of review by the Appeals Chamber will be applied with this in mind.

43. With respect to alleged errors in discretionary decisions, the Appeals Chamber set out the relevant standard of review for a decision involving the exercise of discretion in a judgment in the case of *the Prosecutor v. Uhuru Muigai Kenyatta*.<sup>78</sup>

22. The Appeals Chamber recalls that it will not interfere with a Chamber's exercise of discretion merely because the Appeals Chamber, if it had the power, might have made a different ruling.<sup>79</sup> The Appeals Chamber will only disturb the exercise of a Chamber's discretion where it is shown that an error of law, fact or procedure was made.<sup>80</sup> In this context, the Appeals Chamber has held that it will interfere with a discretionary decision only under limited conditions and has referred to standards of other courts to further elaborate that it will correct an exercise of discretion in the following broad circumstances, namely where (i) it is based upon an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abuse of discretion.<sup>81</sup> Furthermore, once it is established that the discretion was erroneously exercised, the Appeals Chamber has to be satisfied that the improper exercise of discretion materially affected the impugned decision.<sup>82</sup>

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<sup>77</sup> See [Lubanga A5 Judgment](#), para. 21; *Prosecutor v. Mathieu Ngudjolo Chui*, "Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled 'Judgment pursuant to article 74 of the Statute'", 27 February 2015, [ICC-01/04-02/12-271](#) (A) ("*Ngudjolo A Judgment*"), para. 22.

<sup>78</sup> *Prosecutor v. Uhuru Muigai Kenyatta*, "Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute'", 19 August 2015, [ICC-01/09-02/11-1032](#) (OA 5) ("*Kenyatta OA5 Judgment*"), paras 22-25.

<sup>79</sup> [Kenyatta OA 5 Judgment](#), referring to [Kony et al. OA 3 Judgment](#), para. 79; *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the 'Decision on Sentence pursuant to Article 76 of the Statute'", 1 December 2014, [ICC-01/04-01/06-3122](#) (A4 A6) ("*Lubanga A 4 A 6 Judgment*"), para. 41; see also [Ngudjolo A Judgment](#), para. 21.

<sup>80</sup> [Kenyatta OA 5 Judgment](#), referring to [Kony et al. OA 3 Judgment](#), para. 80; *Prosecutor v. Abdallah Banda Abakaer Nourain*, "Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain against Trial Chamber IV's issuance of a warrant of arrest", 3 March 2015, [ICC-02/05-03/09-632-Red \(OA 5\)](#) ("*Banda OA 5 Judgment*"), para. 30; *Prosecutor v. Dominic Ongwen*, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters'", 17 June 2015, [ICC-02/04-01/15-251](#) (OA 3) ("*Ongwen OA 3 Judgment*"), para. 35.

<sup>81</sup> [Kenyatta OA 5 Judgment](#), referring to [Kony et al. OA 3 Judgment](#), paras 80-81; [Banda OA 5 Judgment](#), para. 30; [Ongwen OA 3 Judgment](#), para. 35.

<sup>82</sup> [Kenyatta OA 5 Judgment](#), referring to [Kony et al. OA 3 Judgment](#), para. 80; [Banda OA 5 Judgment](#), para. 30; [Ongwen OA 3 Judgment](#), para. 35.

44. The standard of review for errors of law and fact has been set out above. In respect of the abuse of discretion, the Appeals Chamber stated:

25. [...] [T]he Appeals Chamber may interfere with a discretionary decision [when it] amounts to an abuse of discretion. Even if an error of law or of fact has not been identified, an abuse of discretion will occur when the decision is so unfair or unreasonable<sup>83</sup> as to “force the conclusion that the Chamber failed to exercise its discretion judiciously”.<sup>84</sup> The Appeals Chamber will also consider whether the first instance Chamber gave weight to extraneous or irrelevant considerations or failed to give weight or sufficient weight to relevant considerations in exercising its discretion.<sup>85</sup> The degree of discretion afforded to a Chamber may depend upon the nature of the decision in question.

45. The above standard of review will guide the analysis of the Appeals Chamber.

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<sup>83</sup> See [Kony et al. OA3 Judgment](#), para. 81, referring to International Criminal Tribunal for the former Yugoslavia (“ICTY”), Appeals Chamber, *Slobodan Milošević v. Prosecutor*, “Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defence Counsel”, 1 November 2004, [IT-02-54-AR73.7](#) (“*Milošević Decision*”); [Ongwen OA3 Judgment](#), para. 35. The Appeals Chamber notes that the part of the paragraph of the [Milošević Decision](#) that was cited in the [Kony et al. OA3 Judgment](#) referred to a decision that was “so unreasonable or plainly unjust” (emphasis added). The Appeals Chamber finds the use of the alternative to be preferable and more consistent with case-law of the ICTY, the International Criminal Tribunal for Rwanda (“ICTR”) and the Special Court for Sierra Leone (“SCSL”). See e.g. ICTY, Appeals Chamber, *Prosecutor v. Slobodan Milošević*, “Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder”, 18 April 2002, [IT-01-50-AR73](#), para. 6; [Milošević Decision](#), para. 10; *Prosecutor v. Radovan Karadžić*, “Decision on appeal from decision on duration of Defence case”, 29 January 2013, [IT-95-5/18-AR73.10](#) (“*Karadžić Decision*”), para. 7; *Prosecutor v. Vojislav Šešelj*, “Decision on appeal against decision on continuation of proceedings”, 6 June 2014, [IT-03-67-AR15bis](#) (“*Šešelj Decision*”), para. 34; ICTR, Appeals Chamber, *The Prosecutor v. Édouard Karemera et al.*, “Decision on Interlocutory Appeal Regarding Witness Proofing”, 11 May 2007, [ICTR-98-44-AR73.8](#), para. 3; SCSL, Appeals Chamber, *Prosecutor v. Samuel Hinga Norman et al.*, “Fofana – Appeal against decision refusing bail”, 11 March 2005, [SCSL-04-14-T-371](#), para. 20. The Appeals Chamber therefore uses the formulation in the alternative in the above text, in place of the conjunctive that the Appeals Chamber has previously used in referring to a decision being “so unfair and unreasonable” (emphasis added).

<sup>84</sup> See [Milošević Decision](#), para. 10.

<sup>85</sup> See [Lubanga A4 A6 Judgment](#), para. 43; [Kony et al. OA3 Judgment](#), para. 81, citing [Milošević Decision](#), para. 10. See also ICTY, [Karadžić Decision](#), para. 7; [Šešelj Decision](#), para. 34.

## B. Mr Katanga's appeal

### 1. *Mr Katanga's first ground of appeal: use of presumptions in finding material harm for loss of livestock, fields and harvest*

46. Mr Katanga's first ground of appeal is that "[t]he Trial Chamber erred in ordering compensation in respect of material harm relating to loss which was insufficiently proven".<sup>86</sup>

#### (a) **Relevant part of the Impugned Decision**

47. The Trial Chamber recalled that the burden of proof for a claim for reparations rests on the applicant who must 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>87</sup> In adopting the standard of proof of balance of probabilities,<sup>88</sup> the Trial Chamber considered the particularities of the present case, namely the difficulties "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> and the number of years that have passed since the attack on Bogoro.<sup>90</sup>

48. The Trial Chamber took note of the LRV's observations regarding the fact that, in Bogoro, "proof of ownership of property or farm land does not exist"<sup>91</sup> as well as Mr Katanga's submission that requiring victims to provide sufficient and credible evidence in support of their claims does not place an "onerous burden" on them.<sup>92</sup> The Trial Chamber had regard to rule 94 (1) (g) of the Rules that requires victims to furnish documentation in support of their claim for reparations "[t]o the extent possible", thereby making allowance for the difficulties faced in gathering evidence.<sup>93</sup>

49. The Trial Chamber analysed the victims' applications "on an individual basis, as a whole, and vis-à-vis the Defence submissions"<sup>94</sup> in order to determine whether

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<sup>86</sup> [Mr Katanga's Appeal Brief](#), p. 7.

<sup>87</sup> [Impugned Decision](#), para. 45. *See also* para. 163.

<sup>88</sup> [Impugned Decision](#), para. 50. *See also* para. 51.

<sup>89</sup> [Impugned Decision](#), para. 47.

<sup>90</sup> [Impugned Decision](#), para. 53.

<sup>91</sup> [Impugned Decision](#), para. 53.

<sup>92</sup> [Impugned Decision](#), para. 54.

<sup>93</sup> [Impugned Decision](#), para. 60.

<sup>94</sup> [Impugned Decision](#), para. 62.

the applications were able to demonstrate, on the balance of probabilities, the existence of harm alleged and the causal nexus between the harm and the crimes for which Mr Katanga was convicted.<sup>95</sup> The Trial Chamber looked, *inter alia*, at the credibility of various pieces of evidence in light of the minor discrepancies<sup>96</sup> and evaluated them to substantiate the harm alleged in the applications,<sup>97</sup> and whether it resulted from one or more of the crimes of which Mr Katanga was convicted.<sup>98</sup> In determining the latter, the Trial Chamber considered that “the standard of causation is a but-for relationship between the harm and the crime” and that the crimes for which a person is convicted must be a “proximate cause” of the harms for which reparations are sought.<sup>99</sup> The Trial Chamber also recalled that causal nexus must be determined in view of the particular characteristics of each case.<sup>100</sup> For the foregoing reasons, the Trial Chamber determined that the requisite causal nexus for the purposes of the reparation proceedings in the present case could be established if the applicant could “[establish] that the harm was a consequence of the attack on Bogoro”.<sup>101</sup>

50. In particular, when making findings relevant to pillaging of movable property,<sup>102</sup> the Trial Chamber found that “[i]t is reasonable to presume that the great majority of the persons living in Bogoro owned property essential to daily life and that by reason of the destruction of houses, outbuildings and business premises in the attack on Bogoro, the property within was destroyed or pillaged”.<sup>103</sup> Similarly, the Trial Chamber found that “where an Applicant establishes that he or she suffered material harm as a result of the destruction of a house, an outbuilding or a business premises, the material harm as a result of the destruction or pillaging of furniture, personal effects or wares is presumed to be established, absent any specific piece of evidence”.<sup>104</sup> In relation to applicants that alleged solely the destruction or pillaging

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<sup>95</sup> [Impugned Decision](#), para. 63.

<sup>96</sup> [Impugned Decision](#), paras 66-70.

<sup>97</sup> [Impugned Decision](#), paras 75, 76-107 (material harm), 108-111 (physical harm), 112-135 (psychological harm), 136-139 (*sui generis* harm)

<sup>98</sup> Cf. [Impugned Decision](#), paras 140-161.

<sup>99</sup> [Impugned Decision](#), para. 162.

<sup>100</sup> [Impugned Decision](#), para. 166. *See also* paras 164-165.

<sup>101</sup> [Impugned Decision](#), para. 166.

<sup>102</sup> [Impugned Decision](#), paras 87-94.

<sup>103</sup> [Impugned Decision](#), para. 90.

<sup>104</sup> [Impugned Decision](#), para. 91.

of personal effects essential to daily life, the Trial Chamber found that the harm was 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>105</sup> In respect of pillaging of livestock, fields and harvest,<sup>106</sup> the Trial Chamber considered that it was “reasonable to presume that the great majority of Bogoro’s population owned livestock and/or fields to meet their daily needs”.<sup>107</sup> It further found 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”.<sup>108</sup> It concluded that “where an Applicant establishes harm resulting from the destruction of a house, 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, absent any specific evidence” (footnotes omitted).<sup>109</sup> The Trial Chamber determined that “the material harm resulting from the pillaging of livestock and the destruction of fields and harvests or the pillaging of harvests [was] presumed to be established 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”.<sup>110</sup> Similarly, the Trial Chamber found that material harm resulting from the destruction and pillage of property had also been demonstrated.<sup>111</sup> Whilst it noted that it was not in a position to ascertain in most cases the type and quantity of harvests destroyed or pillaged, it considered “the harm sustained, in general, to be equivalent to consumption per capita”.<sup>112</sup>

51. In respect of the totality of the material harm, the Trial Chamber found, *inter alia*, that 130 applicants had “established that they suffered harm as a result of the pillaging of livestock”.<sup>113</sup> In situations where the Trial Chamber was not in a position to rule on the type and quantity of livestock lost in respect of certain victims, it

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<sup>105</sup> [Impugned Decision](#), para. 93.

<sup>106</sup> [Impugned Decision](#), paras 95-105.

<sup>107</sup> [Impugned Decision](#), para. 98.

<sup>108</sup> [Impugned Decision](#), para. 98.

<sup>109</sup> [Impugned Decision](#), para. 99.

<sup>110</sup> [Impugned Decision](#), para. 100.

<sup>111</sup> [Impugned Decision](#), para. 170. *See also* paras 168-171.

<sup>112</sup> [Impugned Decision](#), para. 101.

<sup>113</sup> [Impugned Decision](#), para. 171.

determined that loss to be the “average total livestock kept”,<sup>114</sup> which it defined to be “one cow, two goats and three hens”.<sup>115</sup> The Trial Chamber further found that 109 applicants had demonstrated 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”.<sup>116</sup>

(b) **Submissions of the parties**

(i) *Mr Katanga’s submissions*

52. Mr Katanga alleges an error in the Trial Chamber’s application of the standard of balance of probabilities in reaching conclusions as to material harm resulting from “loss of fields and crops and loss of cattle” in respect of which “no sufficient evidence was adduced” by the applicants.<sup>117</sup> Mr Katanga avers that, in the absence of such evidence, the Trial Chamber placed inappropriate reliance on “presumptions and circumstantial evidence”.<sup>118</sup> Mr Katanga concedes that it may be reasonable, in the circumstances of the present case, to assume that individuals who suffered a “loss of home or business premises” during the attack on Bogoro also suffered a loss of their contents.<sup>119</sup> However, he takes issue with the assumption that a loss of those premises necessarily entailed a “loss of cattle, fields and crops”.<sup>120</sup> Mr Katanga argues that such an assumption is “unreasonable and unfair to the appellant”<sup>121</sup> as it does not have a basis in “sufficient or any proof of loss” and runs counter to the evidence before the Trial Chamber.<sup>122</sup> In support of his argument, Mr Katanga points to trial testimony suggesting that Bogoro had been the object of several attacks and pillaging before 24 February 2003, including an attack a “few weeks before” and that “most of the cattle in the area had already been sent away to prevent their theft”.<sup>123</sup>

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<sup>114</sup> [Impugned Decision](#), para. 171.

<sup>115</sup> [Impugned Decision](#), para. 101.

<sup>116</sup> [Impugned Decision](#), para. 171.

<sup>117</sup> [Mr Katanga’s Appeal Brief](#), para. 16.

<sup>118</sup> [Mr Katanga’s Appeal Brief](#), paras 16, 20.

<sup>119</sup> [Mr Katanga’s Appeal Brief](#), para. 18.

<sup>120</sup> [Mr Katanga’s Appeal Brief](#), para. 18.

<sup>121</sup> [Mr Katanga’s Appeal Brief](#), para. 18.

<sup>122</sup> [Mr Katanga’s Appeal Brief](#), para. 19.

<sup>123</sup> [Mr Katanga’s Appeal Brief](#), para. 19.

53. Mr Katanga argues that the Trial Chamber did not demonstrate the existence of the “sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact”<sup>124</sup> that would make for a reliable presumption in the present case. Mr Katanga argues further that by relying on these “presumptions and circumstantial evidence” to the extent that it did, the Trial Chamber ultimately relied on “evidence insufficient to meet the requisite standard of proof on a balance of probabilities”, an approach that was “too arbitrary”.<sup>125</sup> He argues that this violates the requirement of fairness of proceedings and his right not to be subject to a reversal of burden of proof.<sup>126</sup>

54. Mr Katanga also challenges the basis of such reliance, namely, the manner in which the Trial Chamber treated the issue of difficulties faced by victims in gathering documentary evidence in support of their allegations several years after the crime.<sup>127</sup> He points to instances where the Trial Chamber considered these difficulties and was able to balance them with “providing some protection for the appellant from false claims”, noting that those difficulties were “sufficiently taken into account by the Trial Chamber’s [...] decision to admit as evidence, instead of official certificates, statements signed by two witnesses”.<sup>128</sup> However, in respect of loss of cattle, fields, and crops, he avers that the Trial Chamber failed to do so, especially given that the first legal representative of victims was appointed in the beginning of 2008 and therefore would have had “ample time” to gather the appropriate evidence.<sup>129</sup>

55. For these reasons, Mr Katanga requests that the Appeals Chamber reverse the Impugned Decision in respect of 109 applicants for loss of fields/crops and 130 applicants for loss of cattle.<sup>130</sup>

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<sup>124</sup> [Mr Katanga’s Appeal Brief](#), para. 23 quoting jurisprudence of the European Court of Human Rights (“ECtHR”).

<sup>125</sup> [Mr Katanga’s Appeal Brief](#), para. 20. *See also* para. 23.

<sup>126</sup> [Mr Katanga’s Appeal Brief](#), para. 20.

<sup>127</sup> [Mr Katanga’s Appeal Brief](#), para. 22.

<sup>128</sup> [Mr Katanga’s Appeal Brief](#), para. 22.

<sup>129</sup> [Mr Katanga’s Appeal Brief](#), para. 22.

<sup>130</sup> [Mr Katanga’s Appeal Brief](#), para. 24.

(ii) *The OPCV's response*

56. At the outset, the OPCV opposes this ground of appeal “in whole”<sup>131</sup> noting that Mr Katanga does not identify whether the error alleged in his first ground of appeal constitutes an error of law or error of fact or a mixed error of law and fact.<sup>132</sup> The OPCV notes further that the general context of Mr Katanga’s arguments suggest that he may be alleging an error of fact in which case the Appeals Chamber may only “overturn the factual findings” when it can be shown that the Trial Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts or failed to take into account relevant facts.<sup>133</sup>

57. The OPCV submits that Mr Katanga failed to show any clear error in the Trial Chamber’s findings on the loss of fields, crops, and cattle<sup>134</sup> and failed to demonstrate how the Trial Chamber’s reliance on circumstantial evidence and presumptions was unreasonable in the context of the case.<sup>135</sup> The OPCV argues that the Trial Chamber’s reliance on circumstantial evidence and presumptions was “permissible” when they lead to conclusions consistent with the facts of the case.<sup>136</sup> The OPCV adds that this is especially the case when applying the standard of balance of probabilities.<sup>137</sup> In relation to presumptions, the OPCV responds that the Trial Chamber’s presumptions were “nothing but reasonable” since they were based on the consideration by the Trial Chamber of the average personal consumption of the victims and their usual subsistence needs within an agrarian economic structure, the existence of which was proven by “evidence of the case”.<sup>138</sup>

58. With regard to consideration of evidence, the OPCV states that the Trial Chamber gave due consideration to “the specific features of the case, namely the substantive obstacles the victims encounter in obtaining evidence in support of their

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<sup>131</sup> [OPCV's Response](#), para. 20.

<sup>132</sup> [OPCV's Response](#), para. 20.

<sup>133</sup> [OPCV's Response](#), para. 20.

<sup>134</sup> [OPCV's Response](#), para. 21.

<sup>135</sup> [OPCV's Response](#), para. 23.

<sup>136</sup> [OPCV's Response](#), para. 22 quoting jurisprudence of the Inter-American Court of Human Rights (“IACtHR”).

<sup>137</sup> [OPCV's Response](#), para. 22.

<sup>138</sup> [OPCV's Response](#), para. 21.



claims, such as the destruction or the unavailability of evidence concerning the Bogoro attack which occurred fourteen years ago”.<sup>139</sup>

(iii) *The LRV’s Response*

59. The LRV responds that the Trial Chamber correctly determined the standard of proof to be applied in reparation proceedings, in light of the specific characteristics of the case, including the difficulties faced by the victims in obtaining evidence in support of their claim.<sup>140</sup>

60. The LRV further responds that the Trial Chamber relied primarily on the findings contained in the Judgment on Conviction when “establish[ing]” the presumption in question.<sup>141</sup> The LRV points to evidence at trial that was considered by the Trial Chamber when making factual findings on the significance of agriculture and livestock to the inhabitants of Bogoro.<sup>142</sup> The LRV notes that it is “important to recall all evidence on which the Chamber relie[d] to arrive at the conclusions it does regarding proof of material harm in connection with the loss of livestock and harvests”.<sup>143</sup>

61. The LRV avers that the evidence considered by the Trial Chamber was discussed during the proceedings where Mr Katanga had the opportunity to “freely contest the statements” that were relied upon in the Impugned Decision.<sup>144</sup> The LRV adds that the Trial Chamber also took into account its decision on sentencing and the statements of applicants who had provided documents in support of their claims.<sup>145</sup> In conclusion, the LRV submits that the Trial Chamber relied on the “coexistence of strong, clear and concordant evidence, specifically on conclusions drawn from a judgment and based on factual elements that have been freely debated among the parties and participants during proceedings” (emphasis omitted),<sup>146</sup> and, in so doing,

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<sup>139</sup> [OPCV’s Response](#), para. 22.

<sup>140</sup> [LRV’s Response](#), para. 16. *See also* para. 17.

<sup>141</sup> [LRV’s Response](#), para. 24.

<sup>142</sup> [LRV’s Response](#), paras 22-25. *See*, in particular, para. 24 referring to statements of witnesses P-166 and V-2. *See also* para. 22 referring to [Impugned Decision](#), para. 98.

<sup>143</sup> [LRV’s Response](#), para. 21.

<sup>144</sup> [LRV’s Response](#), para. 26.

<sup>145</sup> [LRV’s Response](#), para. 26.

<sup>146</sup> [LRV’s Response](#), para. 27.

did not put Mr Katanga in “an unfair position by making it impossible to contest its conclusions”.<sup>147</sup>

(c) **Determination by the Appeals Chamber**

62. The Appeals Chamber notes that Mr Katanga is challenging the reliance that the Trial Chamber placed on a presumption drawn, *inter alia*, on the basis of the findings made in the Judgment on Conviction and the Decision on Sentence. Mr Katanga is not challenging the Trial Chamber’s resort *per se* to “presumptions and circumstantial evidence”, and “accepts” that there may be particular circumstances where it is fair and reasonable to rely on presumptions and indirect evidence but that this was “not appropriate in respect of” the loss at issue here.<sup>148</sup> Although he takes issue with the Trial Chamber’s reliance on the presumption in question and its application of the burden of proof, the Appeals Chamber understands Mr Katanga to be primarily raising an error of fact.

(i) *The general approach to reparations proceedings*

63. This ground of appeal, which challenges how the Trial Chamber reached a particular finding of harm, calls into question the broader issue of the overall approach taken by the Trial Chamber in this case, including its use of presumptions to make findings of harm, both material and non-material, and allocate a monetary value to that harm.

64. The legal framework leaves it for chambers to decide the best approach to take in reparations proceedings before the Court. Chambers have thus ample margin to determine how best to deal with the matter before them, depending on the concrete circumstances at hand. However, in the exercise of their discretion, it is clear that proceedings intended to compensate victims for the harm they suffered, often years ago, must be as expeditious and cost effective as possible and thus avoid unnecessarily protracted, complex and expensive litigation.

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<sup>147</sup> [LRV’s Response](#), para. 27.

<sup>148</sup> [Mr Katanga’s Appeal Brief](#), para. 16.

65. For the reasons further developed below, the Appeals Chamber is not persuaded that the approach chosen by the Trial Chamber for the reparations proceedings before it, which was based on an individual assessment of each application by the Trial Chamber, was the most appropriate in this regard as it has led to unnecessary delays in the award of reparations. The view of the Appeals Chamber on the general approach has informed the reasoning and findings below. However, the Appeals Chamber considers that the Trial Chamber's approach did not amount to an error of law or an abuse of discretion that would justify the reversal of the Impugned Decision.

66. The Appeals Chamber recalls that the Trial Chamber adopted the presumption challenged in this ground of appeal in order to determine the existence of a type of harm that had been incurred by particular applicants – the loss of cattle, fields and crops – and to value that harm, allocating a fixed amount, even if applicants claimed loss of a lower value. The same exercise, in terms of identification and valuation of harm, was carried out in respect of each other type of harm alleged by applicants: the different types of harm for each applicant were identified and a monetary value was attached to that harm for all applicants. In relation to some types of harm, the Trial Chamber assessed the value “*ex aequo et bono*”, a concept, in the view of the Appeals Chamber, not necessarily applicable in this context.<sup>149</sup> In carrying out this exercise, the Trial Chamber relied on several presumptions and assessed each of the 341 applications for reparations.<sup>150</sup> The results of its assessment were set out in a voluminous annex to the Impugned Decision of over 1,000 pages (Annex II to the Impugned Decision). This approach was based on the Trial Chamber's view “that the extent of the harm suffered by the victims for the purposes of reparations in the case [...] is the sum-total of the harm which the Chamber has found established”, stating that it would “undertake an assessment of the monetary value of each head of harm it has identified [...] so as then to set the size of the reparations award for which Mr Katanga is liable”.<sup>151</sup> The sum-total of the harm, as assessed by the Trial Chamber,

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<sup>149</sup> [Impugned Decision](#), para. 191.

<sup>150</sup> [Impugned Decision](#), para. 32.

<sup>151</sup> [Impugned Decision](#), para. 181.

amounted to USD 3 752 620 and Mr Katanga was then held liable to pay USD 1 000 000 of that sum.

67. On that basis, the Trial Chamber decided to award symbolic individual reparations of USD 250 to all 297 applicants whom the Trial Chamber had accepted as victims, in addition to collective reparations, and requested the TFV to submit an implementation plan in that regard. Since the issuance of the Impugned Decision, the TFV has submitted a detailed draft implementation plan<sup>152</sup> (“Draft Implementation Plan”) which, in relation to the collective reparations, categorises each of the 297 victims, into five categories, based on the findings of harm in Annex II to the Impugned Decision.

68. Thus, the Trial Chamber went through the individual applications of victims for reparations and entered findings on them with a view to assessing the “sum-total” of the “monetary value” of the harm established, employing presumptions, including the one challenged by Mr Katanga under this ground of appeal, and determining, in relation to some types of harm, the value “*ex aequo et bono*”.<sup>153</sup> However, the monetary value of the harm that the Trial Chamber assessed in relation to each type of harm, totalling USD 3 752 620, was *not* used as a basis for determining what each of the identified victims should receive. Rather, it was merely a reference point to determine the amount of money for which Mr Katanga was liable (namely USD 1 000 000). The TFV used the latter figure for what it proposed in the Draft Implementation Plan. There is no relationship between the monetary values of harm, as assessed by the Trial Chamber, and the reparations projects proposed by the TFV.

69. The Appeals Chamber has concerns as to the Trial Chamber’s approach in identifying the “monetary value” of the harm in the way it did. This approach required

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<sup>152</sup> “Draft implementation plan relevant to Trial Chamber II’s order for reparations of 24 March 2017 (ICC-01/04-01/07-3728)”, 25 July 2017, [ICC-01/04-01/07-3751-Red](#), with one confidential annex (ICC-01/04-01/07-3751-Conf-Anx1), three confidential *ex parte* annexes (ICC-01/04-01/07-3751-Conf-Exp-Anx3, ICC-01/04-01/07-3751-Conf-Exp-Anx4, ICC-01/04-01/07-3751-Conf-Exp-Anx5), and one public annex ([ICC-01/04-01/07-3751-Anx2](#)), para.84. *See also* para. 81 stating that the TFV has used the proposal from the LRV in this regard and relied extensively on Annex II of the Impugned Decision for the purposes of matching the victims with the appropriate category corresponding to the degree and types of harm suffered by each individual found to have suffered harm.

<sup>153</sup> [Impugned Decision](#), para. 191.

it to analyse all individual applications in detail, only to then put a monetary value to the harm which did not reflect the reparations eventually awarded to the victims. The Appeals Chamber also notes that both the LRV and Mr Katanga had agreed that reparations should be awarded through four initiatives on a collective basis, and one individual measure in the form of a symbolic amount of EUR 1 per victim.<sup>154</sup> The Trial Chamber's approach also required the TFV to go through an equally detailed analysis for the purposes of the Draft Implementation Plan, only to arrive at different monetary values for the costs of repairing the harms identified. The Appeals Chamber considers that the result of this approach was incompatible with the overall goals of this part of the proceedings. The approach taken was time consuming, resource intensive and, in the end, disproportionate to what was achieved.

70. The Appeals Chamber notes that article 75 (1) of the Statute requires a trial chamber to “determine the scope and extent of any damage, loss and injury to, or in respect of victims”.<sup>155</sup> The Appeals Chamber considers that, in doing so, a trial chamber should, generally speaking, establish the types or categories of harm caused by the crimes for which the convicted person was convicted, based on all relevant information before it, including the decision on conviction, sentencing decision, submissions by the parties or *amici curiae*, expert reports and the applications by the victims for reparations.

71. The Appeals Chamber notes that there may be circumstances where a trial chamber finds it necessary to individually set out findings in respect of all applications in order to identify the harms in question (for example, if there is a very small number of victims to whom the chamber intends to award individual and personalised reparations). However, when there are more than a very small number of victims, this is neither necessary nor desirable.<sup>156</sup> This is not to say that trial chambers

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<sup>154</sup> [Impugned Decision](#), para. 282.

<sup>155</sup> See also rule 97 (1) of the Rules.

<sup>156</sup> See “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](#) (“*Lubanga* Reparations Appeal Judgment”), para. 205 requiring only that a reparations order “either identify the victims eligible from reparations, or *set out the criteria of their eligibility for reparations*” (emphasis added). The Appeals Chamber would note that, in the case of *Lubanga*, it decided that, if a trial chamber intends to award collective

should not consider those applications – indeed the information therein may be crucial to assess the types of harm alleged and it can assist a chamber in making findings as to that harm. However, setting out an analysis for each individual, in particular in circumstances where a subsequent individual award bears no relation to that detailed analysis, appears to be contrary to the need for fair and expeditious proceedings.<sup>157</sup>

72. In the view of the Appeals Chamber, rather than attempting to determine the “sum-total” of the monetary value of the harm caused, trial chambers should seek to define the harms and to determine the appropriate modalities for repairing the harm caused with a view to, ultimately, assessing the costs of the identified remedy.<sup>158</sup> The Appeals Chamber considers that focusing on the cost to repair is appropriate, in light of the overall purpose of reparations, which is indeed to repair. This approach is also appropriate in light of the need to ensure that reparations proceedings advance efficiently. In assessing the cost of repair, the Trial Chamber may seek the assistance of experts and other bodies, including the TFV, before making a final ruling

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reparations, there is no need for it to rule on each victim’s application individually. The Appeals Chamber left open the issue as to whether this would be necessary in the event that a trial chamber awards individual reparations. See [Lubanga Reparations Appeal Judgment](#), para. 152.

<sup>157</sup> See article 64 (2) of the Statute; see also [ICC-ASP/10/Res.3](#) adopted on 20 December 2011, preamble recognising that “[...] reparations to the victims of the most serious international crimes are critical components of the Rome Statute and that it is therefore essential that the relevant provisions of the Rome Statute are efficiently and effectively implemented” and, in para. 4, that “[...] evidence concerning reparations may be taken during trial hearings so as to ensure that the judicial phase of reparations is streamlined and does not result in any delay thereof”. See also, in the context of victim participation in general, [ICC-ASP/11/Res.7](#) adopted on 21 November 2012, recognising “victims’ rights to equal, expeditious and effective access to justice” in the preamble and para. 3 referring to “reports from the Court on the persistent backlogs the Court has had in processing applications from victims seeking to participate in the proceedings”, [ICC-ASP/12/Res.5](#) adopted on 27 November 2013, para. 3 referring to “the need to review the system for victims to apply to participate in proceedings, in order to ensure the sustainability, effectiveness and efficiency of the system”, [ICC-ASP/13/Res.4](#) adopted on 17 December 2014, para. 4 referring to “[...] all the efforts to enhance the efficiency and effectiveness of victim participation, and, further noting more [*sic*] collective approach”.

<sup>158</sup> See e.g. [Lubanga Reparations Appeal Judgment](#), para. 200: “The Appeals Chamber also considers that a Trial Chamber must identify the most appropriate modalities of reparations, based on the specific circumstances of the case at hand, in the order for reparations. Indeed, the Appeals Chamber considers that identifying the harm caused to direct and indirect victims as a result of the crimes for which a person was convicted [...] is inter-linked with identifying the appropriate modalities of reparations in that specific case”; see also para. 184: “the Appeals Chamber therefore holds that, in order to protect the rights of the convicted person and ensure that reparations are not awarded to remedy harms that are not the result of the crimes for which he or she was convicted and to also protect the right of the victims to appeal the exclusion of any harms that the consider have been shown to be caused by these crimes, the Trial Chamber must clearly *define* the harms that result from the crimes for which the person was convicted, the extent of which may then be *assessed* by the Trust Fund for purposes of determining the size and nature of reparation awards”.

thereon.<sup>159</sup> This ruling on the cost of repairing the harm is to be taken by the trial chamber, in the exercise of its judicial functions under the Statute.

73. While the Appeals Chamber thus has concerns about the Trial Chamber's approach, it nevertheless does not consider that the Trial Chamber erred in law or abused its discretion. Therefore, the Appeals Chamber will now consider the substance of Mr Katanga's first ground of appeal.

(ii) *The Trial Chamber's approach to the presumption being challenged*

74. In the first ground of appeal, Mr Katanga challenges the presumption drawn in respect of loss of cattle, fields and crops related to the Trial Chamber's addition of a sum of money, to its overall total, in respect of the loss to 109 applicants for fields and crops and 130 applicants for cattle.

75. As regards presumptions generally, the Appeals Chamber notes that the present appeal concerns factual presumptions or presumptions of fact, which have been referred to by other courts as "discretionary presumptions",<sup>160</sup> "judicial presumptions",<sup>161</sup> or simply "presumptions".<sup>162</sup> As opposed to presumptions that are explicitly provided for in the legal text, for example, the presumption of innocence,<sup>163</sup>

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<sup>159</sup> See e.g. [Lubanga Reparations Appeal Judgment](#), para. 184.

<sup>160</sup> See e.g. ECCC, Appeals Chamber, "Appeal Judgement", 3 February 2012, [F28](#), ("Case 001 Appeal Judgment"), para. 426 that used the term "discretionary presumptions" to refer to the presumptions drawn by the court and described as a "reasonable conjecture concerning something doubtful that is drawn from arguments and appearances, which by the force of circumstances can be accepted as proven".

<sup>161</sup> See also ICJ, *Legality of Use of Force, (Serbia and Montenegro v. Portugal)*, 15 December 2004, I.C.J. Reports 2004, p. 1160 at p. 1249, [Separate Opinion of Judge Kreca](#), para. 10 that refers to "judicial presumptions" and describes them as "a certain fact or state of affairs, even though it has not been proved, is taken by an international tribunal as truthful"; see also IACtHR, *Godinez-Cruz v. Honduras*, "Judgment (Merits)", 20 January 1989, [Series C no. 5](#), paras 154-155 (where the term "judicial presumptions" has been used), para. 130 (where the presumption has been formulated), para. 136 (where the term used is "presumptions"), and para. 137 (where the term used is "presumptive evidence"); see also ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Serbia and Montenegro)*, "Judgment", 26 February 2007, I.C.J. Reports 2007, p. 43 at p. 457, [Separate Opinion of Judge Kreca](#), paras 45-46.

<sup>162</sup> See IACtHR, *Velásquez-Rodríguez v. Honduras*, "Judgment (Merits)", 29 July 1988, [Series C no. 4](#), para. 130 where the term used is presumptions and is stated to be one of the means by which a court can reach conclusions in the absence of direct evidence in a particular case.

<sup>163</sup> See article 66 of the Statute. In addition to this, chambers at the Court have previously interpreted provisions within the legal framework to give rise to certain presumptions. For example presumption in favour of joinder of persons accused jointly (Pre-Trial Chamber I, *Prosecutor v. Germain Katanga and*

factual presumptions permit a trial chamber to presume a given fact to be established to the requisite standard of proof in the absence of direct evidence. The Appeals Chamber recalls that, in reparations proceedings, a standard “less exacting” than that for trial applies.<sup>164</sup> This is, in part, due to the difficulties victims may face in obtaining evidence in support of their claims.<sup>165</sup> The Appeals Chamber considers that, in the absence of direct evidence in certain circumstances, for example, owing to difficulties in obtaining evidence, a trial chamber may resort to factual presumptions in its identification of the heads of harm. The Appeals Chamber considers that resort to factual presumptions in reparations proceedings is within a trial chamber’s discretion in determining “what is ‘sufficient’ for purposes of an applicant meeting the burden of proof”.<sup>166</sup> However, the Appeals Chamber emphasises that, while a trial chamber has discretion to freely evaluate the evidence of harm in a particular case,<sup>167</sup> this discretion is not unlimited. A trial chamber must respect the rights of victims as well as the convicted person when resorting to presumptions.<sup>168</sup>

76. In light of the above, the Appeals Chamber emphasises that the reasonableness of a factual presumption drawn by a trial chamber in reparation proceedings will depend upon the circumstances of the case. In this regard, the Appeals Chamber does not consider Mr Katanga’s reference to the jurisprudence from the ECtHR in support

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*Mathieu Ngudjolo Chui*, “Decision on the Joinder of the Cases against Germain Katanga and Mathieu”, [ICC-01/04-01/07-257](#), 10 March 2008, pp. 7, 9 interpreting article 64 (5) of the Statute and rule 136 of the Rules); presumption in favour of oral testimony (Trial Chamber III, *Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision on the admission into evidence of items deferred in the Chamber’s ‘First decision on the prosecution and defence requests for the admission of evidence’ (ICC-01/05-01/08-2012)”, [ICC-01/05-01/08-2793](#), 3 September 2013, paras 10, 17, 25 when looking at the scope of article 69(2)); presumption in favour of publicity of proceedings in the context of public hearings provided for in article 67(1) (Trial Chamber V(A), *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, “Decision on Common Legal Representative for Victims’ Request to Participate in Hearings and Examine Witnesses”, [ICC-01/09-01/11-1107](#), 20 November 2013, para. 12); presumption in favour of LRV’s neutral form of questioning (Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims”, [ICC-01/04-01/06-2127](#), 16 September 2009, para. 29).

<sup>164</sup> Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, “Amended Order for Reparations” annexed to “Judgment on the appeals against the ‘Decision establishing the principles and procedures to be applied to reparations’ of 7 August 2012”, 3 March 2015, [ICC-01/04-01/06-3129-AnxA](#) (“*Lubanga Amended Order for Reparations*”), para. 22.

<sup>165</sup> [Lubanga Amended Order for Reparations](#), para. 22.

<sup>166</sup> [Lubanga Reparations Appeal Judgment](#), para. 81.

<sup>167</sup> See article 75 of the Statute; see also rule 97 of the Rules.

<sup>168</sup> Rule 97 (3) of the Rules.



of “stricter” preconditions on how presumptions are reached<sup>169</sup> to be contrary to its approach, in that the Appeals Chamber notes that in the case *Nachova and others*, the ECtHR also found that “the level of persuasion necessary for reaching a particular conclusion [is] intrinsically linked to the specificities of the facts, the nature of the allegations made and the Convention right at stake”.<sup>170</sup>

77. On appeal, bearing in mind the standard of review, a party challenging a factual presumption must demonstrate that no reasonable trier of fact could have formulated the presumption in question in light of the particular set of circumstances in that case.

78. The Appeals Chamber notes that the presumption being challenged under this ground of appeal concerns victims who alleged that they had lost cattle, fields and crops, but who did not provide sufficient evidence in support thereof. In formulating this presumption, the Trial Chamber first addressed the existence of the harm itself and the causal nexus of the attack on Bogoro to this harm. In this regard, the Trial Chamber recalled that Mr Katanga was convicted of pillaging of livestock and domestic animals (cows, goats and hens) and pillaging of food belonging to the civilian population of Bogoro.<sup>171</sup> It also noted that the Judgment on Conviction had found that “keeping livestock was a significant activity in Bogoro and its population farmed the land”.<sup>172</sup> Having regard to those specific findings, the Trial Chamber concluded that “the material harm alleged [...] ensued from the crimes of which Mr

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<sup>169</sup> [Mr Katanga’s Appeal Brief](#), para. 23.

<sup>170</sup> ECtHR, Grand Chamber, *Nachova and others v. Bulgaria*, “Judgment”, 6 July 2005, application nos. [43577/98 and 43579/98](#), para. 147. The Appeals Chamber also notes that the ECtHR, in more recent cases, has relied on the approach taken in *Nachova and others* with regard to the significance of the specificities of a case when dealing with factual presumptions. See e.g. ECtHR, *D.H. and others v. Czech Republic*, “Judgment”, 13 November 2007, application no. [57325/00](#), paras 178, 189, 195. The Appeals Chamber also notes that the ECtHR has resorted to factual presumptions in relation to certain violations under article 3 of the European Convention on Human Rights. In the case of *Muršić v. Croatia*, the Grand Chamber of the ECtHR stated: “having analysed its case-law and in view of the importance attaching to the space factor in the overall assessment of prison conditions, the Court considers that a strong presumption of a violation of Article 3 arises when the personal space available to a detainee falls below 3 sq. m in multi-occupancy accommodation” (ECtHR, Grand Chamber, *Muršić v. Croatia*, “Judgment”, 20 October 2016, application no. [7334/13](#), paras 124-127).

<sup>171</sup> [Impugned Decision](#), para. 96 citing to [Judgment on Conviction](#), paras 928, 932, 953, 956 and [Decision on Sentence](#), para. 52.

<sup>172</sup> [Impugned Decision](#), para. 96 citing to [Judgment on Conviction](#), paras 724, 730.

Katanga was convicted [...] insofar as the existence of said harm and the causal nexus with the crimes are established on a balance of probabilities”.<sup>173</sup>

79. Turning then to the presumption, the Trial Chamber “reiterat[ed] its observation that the population of Bogoro’s livelihood came in part from keeping livestock and farming the land”, and referred in a footnote to the fact that Bogoro had a livestock market<sup>174</sup> as well as the finding that “[t]he keeping of grazing animals was a significant part of the Bogoro economy, especially among the Hema, who are herders by tradition”.<sup>175</sup>

80. It then recalled again the finding of pillaging from trial and referred in a footnote to, *inter alia*, the following findings in the Judgment on Conviction:<sup>176</sup>

[...] during the attack on Bogoro on 24 February 2003, after the village was overrun, property belonging to the predominantly Hema civilian population of Bogoro, which was essential to its daily life, including roofing sheets, furniture and various other personal effects, food, and livestock and animals, was taken away by the attackers and by women and children, some armed, who had come to assist.<sup>177</sup>

[...]

Whereas there is a great disparity in the value of the pillaged property - kitchenware and furniture but also livestock, goats and chickens, as the case may be - the property represented the bulk of the owners’ possessions. To the extent that the civilians were deprived of their personal houseware and even their livestock, property essential to their daily life, the Chamber is of the view that the property was in fact of great value to them. In the view of the Chamber, its appropriation had significant consequences for the people from whom it was taken.<sup>178</sup>

81. Having regard to the above-mentioned findings and conclusions, the Trial Chamber stated:

Given the importance to the local society of agriculture and keeping livestock, the Chamber considers that it is reasonable to presume that the great majority of Bogoro’s population owned livestock and/or fields to meet their daily needs. It

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<sup>173</sup> [Impugned Decision](#), para. 97.

<sup>174</sup> [Impugned Decision](#), footnote 165 referring to, *inter alia*, [Judgment on Conviction](#), para. 730.

<sup>175</sup> [Impugned Decision](#), footnote 165 referring to, *inter alia*, [Judgment on Conviction](#), para. 724.

<sup>176</sup> [Impugned Decision](#), para. 98 footnote 166.

<sup>177</sup> [Judgment on Conviction](#), para. 932.

<sup>178</sup> [Judgment on Conviction](#), para. 953.

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.<sup>179</sup>

82. The Trial Chamber then formulated the presumption as follows:

[W]here an Applicant establishes harm resulting from the destruction of a house, 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, absent any specific evidence.<sup>180</sup>

In reaching this presumption, it also mentioned in a footnote that it took into account the applicants' statements, the Judgment on Conviction, and the Decision on Sentence, noting that some applicants had furnished declarations of livestock ownership.<sup>181</sup>

83. In challenging the Trial Chamber's presumption, Mr Katanga points to evidence that, in his submission, is contrary to the impugned presumption and evidence that suggests that the harm could have been a result of the general conditions of life in Bogoro. He also reiterates his submissions made at trial in support of his argument that there was insufficient evidence in support of the presumption and claims that there was no justification for resorting to a presumption and that it caused unfairness to him. The Appeals Chamber shall address these arguments in turn.

84. As to the purported contrary evidence, Mr Katanga reproduces his previous submissions from the Defence Consolidated Response to the Parties<sup>182</sup> and Second Defence Observations.<sup>183</sup> The Appeals Chamber notes that he relies on these submissions to indicate that there was trial testimony that Bogoro had been the object of several attacks and pillaging before the 24 February 2003 attack, including an attack just a few weeks before the 24<sup>th</sup>.<sup>184</sup> He adds that most of the cattle in the area

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<sup>179</sup> [Impugned Decision](#), para. 98.

<sup>180</sup> [Impugned Decision](#), para. 99.

<sup>181</sup> See [Impugned Decision](#), para. 99 footnote 170.

<sup>182</sup> [Mr Katanga's Appeal Brief](#), para. 19 citing to, *inter alia*, [Mr Katanga's Response to Observations on Reparations](#), para. 29.

<sup>183</sup> [Mr Katanga's Appeal Brief](#), para. 19 citing to, *inter alia*, Second Defence Observations, para. 32.

<sup>184</sup> [Mr Katanga's Appeal Brief](#), para. 19.

had been sent away before the attack on Bogoro in order to prevent their theft.<sup>185</sup> He argues that these submissions “tend to refute the applicants’ assertions”, as well as the Trial Chamber’s presumptions.<sup>186</sup>

85. The Appeals Chamber finds that Mr Katanga does not demonstrate how the Trial Chamber erred in not considering the evidence cited therein. As outlined above, the Appeals Chamber recalls generally that the Trial Chamber’s findings in the Impugned Decision resulted, *inter alia*, from conclusions in the Judgment on Conviction. With regard to pillaging, the Appeals Chamber notes that the Judgment on Conviction had addressed Mr Katanga’s assertion that “there was no livestock in Bogoro on 24 February 2003”.<sup>187</sup> In this regard, the Judgment on Conviction had discussed “contradictory testimonies”<sup>188</sup> before concluding that during the attack on Bogoro “property belonging to the predominantly Hema civilian population of Bogoro, which was essential to its daily life, including [...] food, and livestock and animals” was taken away.<sup>189</sup> These contradictory testimonies also included the one that Mr Katanga points to by reference to Defence Consolidated Response to the Parties in support of his argument that the cattle was sent away before the attack on Bogoro took place.<sup>190</sup> The Appeals Chamber further notes that the evidentiary discussion addressing contrary evidence appears in the Judgment on Conviction and it does not reappear in the Impugned Decision; it has however, been included by reference.<sup>191</sup> Furthermore, the Appeals Chamber notes that the submission reproduced by Mr Katanga on appeal in support of this argument was specifically referred to by the Trial Chamber in the Impugned Decision<sup>192</sup> before it recalled the finding on pillaging in the Judgment on Conviction.<sup>193</sup>

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<sup>185</sup> [Mr Katanga’s Appeal Brief](#), para. 19.

<sup>186</sup> [Mr Katanga’s Appeal Brief](#), para. 19.

<sup>187</sup> [Judgment on Conviction](#), para. 928; *see also* footnote 2180 referring to testimony of Mathieu Ngudjolo and Germain Katanga during trial.

<sup>188</sup> *See* [Judgment on Conviction](#), para. 928; *see also* paras 929-931.

<sup>189</sup> [Judgment on Conviction](#), para. 932.

<sup>190</sup> [Mr Katanga’s Appeal Brief](#), para. 19 citing to, *inter alia*, [Mr Katanga’s Response to Observations on Reparations](#), para. 29 pointing to the testimony of witness D2-176.

<sup>191</sup> *See* [Impugned Decision](#), 98 referring to, *inter alia*, [Judgment on Conviction](#), para. 928.

<sup>192</sup> *See* [Impugned Decision](#), footnote 159 citing to [Mr Katanga’s Response to Observations on Reparations](#), para. 29.

<sup>193</sup> [Impugned Decision](#), para. 96 citing to, *inter alia*, [Judgment on Conviction](#), paras 928, 932.

86. Furthermore, the Appeals Chamber is not persuaded by Mr Katanga's argument that he makes by reproducing submissions from the Second Defence Observations (also submitted before the Trial Chamber).<sup>194</sup> The Appeals Chamber notes that this submission was also before the Trial Chamber and Annex II to the Impugned Decision contains references to the observations submitted by Mr Katanga as part of this submission in response, *inter alia*, to the claims of material harm resulting from the loss of cattle, fields and crops contained in the individual applications.<sup>195</sup> Without further demonstration as to how the Trial Chamber erred in its consideration of this argument contained in this submission, the Appeals Chamber finds that Mr Katanga has not demonstrated an error.

87. Turning to the argument that the evidence relied upon was insufficient, Mr Katanga merely refers to his submissions at trial in which he had raised the issue of affidavits that the applicants for reparations had submitted in support of their claims as regards loss of cattle.<sup>196</sup> However, he does not point to any error of the Trial Chamber in the assessment of these arguments or otherwise substantiate his submission. It is, therefore, rejected.

88. With regard to Mr Katanga's argument concerning the fairness of using presumptions in the proceedings against him, wherein he argues that the Trial Chamber's approach was "too arbitrary",<sup>197</sup> the Appeals Chamber understands Mr Katanga's argument to be twofold: first, that the basis of drawing the impugned presumption on grounds that the victims had difficulties in obtaining evidence was unreasonable;<sup>198</sup> second, that he was unable to meaningfully challenge the presumption.<sup>199</sup>

89. Turning to the first issue, the Appeals Chamber finds that the Trial Chamber, in its general section on the evidentiary criteria, applied the appropriate standard when it

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<sup>194</sup> [Mr Katanga's Appeal Brief](#), para. 19 quoting, *inter alia*, Second Defence Observations, paras 32, 39.

<sup>195</sup> See *e.g.* Annex II to the Impugned Decision, paras 45, 468, 692, 906, 925, 949, 979.

<sup>196</sup> See [Mr Katanga's Appeal Brief](#), para. 19.

<sup>197</sup> [Mr Katanga's Appeal Brief](#), para. 20.

<sup>198</sup> [Mr Katanga's Appeal Brief](#), para. 22.

<sup>199</sup> [Mr Katanga's Appeal Brief](#), para. 23.

took into account the difficulties faced by the applicants in the present case.<sup>200</sup> Whilst the Trial Chamber considered itself at liberty to “act on circumstantial evidence to satisfy itself of certain facts in the case”,<sup>201</sup> it clarified that it will “afford consideration to all of the evidence put before it” and the reliance on presumptions will be limited to situations where “it sees fit” in light of the circumstances.<sup>202</sup> The Appeals Chamber notes that the Trial Chamber first addressed in more general terms the evidentiary criteria it would apply.<sup>203</sup> In its determination of the applicable standard of proof, the Trial Chamber had regard to the “features of the case” and “specifically” had regard to 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>204</sup> The Appeals Chamber notes that the Trial Chamber interpreted rule 94 (1) (g) of the Rules in order to make “allowance for the difficulties the victims encountered in gathering evidence, including for the passage of time since the crimes”.<sup>205</sup> In particular, the Trial Chamber took into account “the local context the victims face, including the fact that proof of ownership of property or farm land does not exist”.<sup>206</sup> When examining the use of presumptions and circumstantial evidence in general, the Trial Chamber also noted that in other compensation programs established for mass claims following human rights violations, factual presumptions were employed to overcome the difficulties inherent in showing a causal nexus between the concerned crimes and the resulting harm.<sup>207</sup> In light of all of the above, the Appeals Chamber considers that Mr Katanga has not demonstrated that it was unreasonable for the Trial Chamber to have considered the difficulties in obtaining evidence in formulating the impugned presumption. The Appeals Chamber also rejects Mr Katanga’s arguments concerning the burden of proof, which he makes

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<sup>200</sup> [Impugned Decision](#), para. 45 referring to [Lubanga Reparations Appeal Judgment](#), para. 81.

<sup>201</sup> [Impugned Decision](#), para. 61.

<sup>202</sup> [Impugned Decision](#), para. 84.

<sup>203</sup> [Impugned Decision](#), paras 45-63.

<sup>204</sup> [Impugned Decision](#), para. 47.

<sup>205</sup> [Impugned Decision](#), para. 60.

<sup>206</sup> [Impugned Decision](#), para. 53.

<sup>207</sup> [Impugned Decision](#), para. 57, referring to Heike Niebergall, “Overcoming Evidentiary Weaknesses in Reparations Claims Programmes”, in Clara Ferstman *et al* (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity* (Brill, 2009), p. 160 and 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.

by reference to his previous submissions without demonstrating how they arise on appeal.

90. Turning to Mr Katanga’s argument concerning his ability to meaningfully challenge evidence adduced in support of the claims, the Appeals Chamber notes that the individual analysis in Annex II to the Impugned Decision contains references to Mr Katanga’s observations on the individual applications. The Appeals Chamber notes that these observations included challenges to the contents and validity of the certificates required to prove the destruction of a house – proof of destruction of a house was the trigger to allow for the impugned presumption to apply in this ground of appeal.<sup>208</sup> The Appeals Chamber also notes that Mr Katanga had the opportunity to submit his observations in relation to the supporting material concerning the ownership of cattle attached to the individual applications.<sup>209</sup> This also included Mr Katanga individually challenging the material harm resulting from the loss of fields and crops.<sup>210</sup>

91. The Appeals Chamber finds that, while the applicants had not requested that the impugned presumption be formulated to address the specific difficulties faced by the applicants in support of their claims concerning material harm resulting from loss of cattle, fields and crops, the parties and participants to the proceedings were aware of the difficulties faced by the applicants in obtaining evidence in the support of their claims. Notably, the LRV had made submissions on the specifics of obtaining a certificate of livestock ownership.<sup>211</sup> In this regard, the Appeals Chamber notes that it may have been advisable for the Trial Chamber to have indicated to the parties and the participants that it was intending to draw the impugned presumption, including but

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<sup>208</sup> See e.g. Annex II to the Impugned Decision, paras 2841-2842, 2848-2849, 2855-2856, 2875-2876, 2884-2885, 2899-2900, 2908-2909, 2920-2921, 2944-2945, 2951-2952, 2958-2959.

<sup>209</sup> [First Defence Observations](#), para. 14; see also para. 18. Second Defence Observations, para. 32.

<sup>210</sup> See e.g. “Annex A to Defence Observations on the Victims Applications for Reparation”, 24 February 2016, ICC-01/04-01/07-3660-Conf-Exp-AnxA, pp. 2-6, 8-10, 12-13, 26-28, 31; “Annex A to the Second Defence Observations on the Victims Applications for Reparation”, 11 April 2016, ICC-01/04-01/07-3681-Conf-Exp-AnxA, pp. 37, 86, 167, 182-187.

<sup>211</sup> See “Report on the implementation of Decision No. 3546, including the identification of harm suffered by victims as a result of crimes committed by Germain Katanga (article 75(1) of the Statute and regulation 38(1)(f) of the Regulations of the Court)”, 13 May 2016, [ICC-01/04-01/07-3687-tENG](#), paras 56-63.

not limited to inviting submissions on its formulation. Nonetheless, the Appeals Chamber notes that, in this case, the LRV had argued for an average number of livestock per family to be presumed in respect of harm resulting from the loss of cattle, fields and crops.<sup>212</sup> The Appeals Chamber considers that Mr Katanga was able to individually challenge the claims as to the material harm in question. The Appeals Chamber also notes that he could challenge the findings on which the impugned presumption is based. In light of all of this, the Appeals Chamber finds no merit in Mr Katanga's argument that he was unable to meaningfully challenge the impugned presumption.

92. In sum, while the impugned presumption could have benefited from further reference, *inter alia*, to other submissions by the parties and the participants, the individual applications by the victims, or pieces of evidence discussed in the Judgment on Conviction that could have corroborated the Trial Chamber's conclusions further in this regard,<sup>213</sup> and despite its concerns as to the general approach taken in respect of the individual analysis of the claims, the Appeals Chamber finds that Mr Katanga has not demonstrated that the Trial Chamber erred in adopting the presumption challenged in this ground of appeal. Accordingly, this ground of appeal is rejected.

2. *Mr Katanga's second ground of appeal: use of presumptions in finding psychological harm in certain family members*

93. In his second ground of appeal, Mr Katanga argues that "[t]he Trial Chamber erred in giving too broad an interpretation of a parent whose death warrants reparations to the remaining children".<sup>214</sup>

(a) **Relevant part of the Impugned Decision**

94. Having set out the definition of "victim" in rule 85 of the Rules, the Trial Chamber "note[d]" that to accord the status of victim participating at the trial stage

<sup>212</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](#), paras 32-36.

<sup>213</sup> See e.g. [Judgment on Conviction](#), para. 444 citing evidence as to the interests of cattle herders and traders of Ituri province; see also para. 712 citing to testimony by Mr Katanga as regards the herding nature of the Hema community.

<sup>214</sup> [Mr Katanga's Appeal Brief](#), p. 12.



[...], the Chambers have relied on the four conditions defined by the Appeals Chamber in *Lubanga*, 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>215</sup> The Trial Chamber then held that those conditions find application at the reparations phase, but that also the crime which caused the harm must fall within the jurisdiction of the Court and must be one of which the person in question was convicted.<sup>216</sup> It found that the question of whether a person qualifies as a victim “must be determined in the light of the particular circumstances of the case at bar”.<sup>217</sup> It stated that it would individually analyse the 341 applications to decide as to whether the applicants qualified as victims for the purposes of reparations.<sup>218</sup>

95. In looking at the Trial Chamber’s use of presumptions and circumstantial evidence in general, the Trial Chamber noted that “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>219</sup>

96. When addressing the issue of whether psychological harm connected to the death of a relative had been incurred, the Trial Chamber noted that, according to “consistent” previous jurisprudence, “indirect victims are eligible for reparations”.<sup>220</sup> However, the Trial Chamber reiterated that in order to be classified as an indirect victim, the applicant must establish that he or she personally suffered harm as a result of the death of the direct victim, which includes psychological harm.<sup>221</sup> In determining whether such personal injury is established, relying on the standard set

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<sup>215</sup> [Impugned Decision](#), para. 36.

<sup>216</sup> [Impugned Decision](#), para. 37.

<sup>217</sup> [Impugned Decision](#), para. 38.

<sup>218</sup> [Impugned Decision](#), para. 43.

<sup>219</sup> [Impugned Decision](#), para. 57 referring to IACtHR, *Aloeboetoe et al. v Suriname (Reparations and Costs)*, 10 September 1993, [Series C, no. 15](#) (“*Aloeboetoe et al. v. Suriname*”), para. 76.

<sup>220</sup> [Impugned Decision](#), para. 113. *See also* para. 39.

<sup>221</sup> [Impugned Decision](#), paras 39, 113. *See also* [Impugned Decision](#), para. 74, defining the concept of “harm” within the meaning of rule 85 (a) of the Rules, and citing, *inter alia*, [Lubanga Amended Order for Reparations](#), para. 57.

out in *Lubanga*,<sup>222</sup> the Trial Chamber stated that the applicant must demonstrate that “he or she had a close personal relationship with the direct victim”.<sup>223</sup> The Trial Chamber affirmed that it must be established that the psychological harm resulted from one or more of the crimes of which Mr Katanga was convicted, that the death of the direct victim at Bogoro is confirmed, and that the applicant had a “close personal relationship with the direct victim”.<sup>224</sup>

97. Having set out findings from the Judgment on Conviction, in particular as to the death toll in the attack on Bogoro, the Trial Chamber “determine[d] that psychological harm resulting from the death of a relative alleged by the Applicants ensued from the crimes of which Mr Katanga was convicted [...] insofar as the criteria [which it proceeded to set out] are established on a balance of probabilities”.<sup>225</sup>

98. The Trial Chamber referred to the requirement to prove the death of a direct victim,<sup>226</sup> and then turned to the issue of a “close personal relationship”.<sup>227</sup> The Trial Chamber then stated:

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. In that connection, the Chamber recalls that the concept of “family” must be understood in relation to the relevant family and social structures. In *Lubanga*, the Appeals Chamber adverted to the widely accepted presumption “that an individual is succeeded by his or her family and children”. 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. The issue to which the Chamber must turn its attention is whether “as a result of [the applicant’s] relationship with the direct victim, the loss, injury, or damage suffered by the latter gives rise to harm to them”. In the specific circumstances of the attack on

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<sup>222</sup> [Impugned Decision](#), para. 113 referring to *Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008”, 11 July 2008, [ICC-01/04-01/06-1432](#) (OA9 OA10) (“*Lubanga* OA9 OA10 Judgment”), para. 32.

<sup>223</sup> [Impugned Decision](#), para. 113.

<sup>224</sup> [Impugned Decision](#), para. 114.

<sup>225</sup> [Impugned Decision](#), para. 116.

<sup>226</sup> [Impugned Decision](#), paras 117-119.

<sup>227</sup> [Impugned Decision](#), paras 120-121.

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.

[Determination of the Chamber] 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>228</sup>

99. Later in the judgment, when assessing the monetary value of “[p]sychological harm as a result of the death of a relative”, the Trial Chamber recalled that the LRV had put forward three categories of victims: very near relatives, near relatives and other more distant relatives, suggesting different sums of money for each.<sup>229</sup> Mr Katanga suggested lower sums for the same categories.<sup>230</sup> Having considered, *inter alia*, *Plan de Sánchez Massacre v. Guatemala* and *Pueblo Bello Massacre v. Colombia* at the IACtHR,<sup>231</sup> the Trial Chamber “[a]id] 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)”, and determined that “[p]sychological 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”.<sup>232</sup> The Trial Chamber “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”.<sup>233</sup> The Trial Chamber’s reasoning with respect to each claim is contained within Annex II to the Impugned Decision.

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<sup>228</sup> [Impugned Decision](#), paras 121-122.

<sup>229</sup> [Impugned Decision](#), para. 227.

<sup>230</sup> [Impugned Decision](#), para. 228.

<sup>231</sup> [Impugned Decision](#), para. 231 referring to IACtHR, *Plan de Sánchez Massacre v. Guatemala*, “Reparations”, 19 November 2004, [Series C, no. 105](#), paras 77 *et seq.*; IACtHR, *Pueblo Bello Massacre v. Colombia*, “Merits, Reparations and Costs”, 31 January 2006, [Series C, no. 140](#), paras 254-257.

<sup>232</sup> [Impugned Decision](#), para. 232.

<sup>233</sup> [Impugned Decision](#), para. 174.

(b) **Submissions of the parties**

(i) *Mr Katanga's submissions*

100. Mr Katanga avers that the Trial Chamber “erred in providing too broad an interpretation of a parent to include any family member, be it a close or more distant family member”,<sup>234</sup> thus allowing “compensation to any individual victim for the death of any remote family member who died at Bogoro”.<sup>235</sup> He contends that the Trial Chamber did not require “evidence of a particular proximate relationship between the family member and the deceased”, as “proximity is assumed by virtue of the family connection, no matter how remote”.<sup>236</sup> Mr Katanga argues this definition is too wide as it “goes beyond the generally accepted definition of the immediate family”, which he understands “to mean the nuclear family consisting of spouses, their children and siblings” but excludes grandparents and grandchildren.<sup>237</sup> Mr Katanga further argues that the Trial Chamber did not define remote family members, but rather referred to them as “other parents”, which “could include any relative who is not covered by the definition of a close family member” and thus “significantly broadened the category of indirect victims who are eligible for compensation”.<sup>238</sup>

101. Mr Katanga avers that “the definition of a ‘parent’ should not extend beyond close family members, including only the actual parents, and other family members, provided a dependency or parent-child-like relationship with the deceased has been established”.<sup>239</sup> He claims that the Trial Chamber erred in extending this definition to “any remote family member, irrespective of any shown proximity to the deceased”.<sup>240</sup> Mr Katanga argues that the Trial Chamber’s definition was not only inconsistent with national<sup>241</sup> and international<sup>242</sup> definitions of an “indirect victim”, but also expanded

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<sup>234</sup> [Mr Katanga's Appeal Brief](#), para. 25.

<sup>235</sup> [Mr Katanga's Appeal Brief](#), para. 25.

<sup>236</sup> [Mr Katanga's Appeal Brief](#), para. 25.

<sup>237</sup> [Mr Katanga's Appeal Brief](#), para. 26.

<sup>238</sup> [Mr Katanga's Appeal Brief](#), paras 26-27.

<sup>239</sup> [Mr Katanga's Appeal Brief](#), para. 54.

<sup>240</sup> [Mr Katanga's Appeal Brief](#), para. 54.

<sup>241</sup> [Mr Katanga's Appeal Brief](#), paras 28, 34-41.

<sup>242</sup> [Mr Katanga's Appeal Brief](#), paras 28, 43-47.

the definitions set out in various decisions in the *Lubanga*<sup>243</sup> and *Ntaganda*<sup>244</sup> cases before the ICC.

102. Additionally, Mr Katanga highlights that in referencing the social and family structures of the DRC and Ituri, the Trial Chamber “was not more specific in what, in its view, these local social and family structures entail, but simply held that the loss of any family member, in the context of the Bogoro attack, should lead to compensation”.<sup>245</sup> Mr Katanga concedes that in some cultures the concept of family may go beyond the narrow parent/child relationship, but submits that “the broader ‘parent/child relationship’ must be clearly defined” and kept tight.<sup>246</sup> He further acknowledges that there may be situations where a child is raised not by a biological parent, but by an aunt or a grandparent, but argues that if that is the case, “sufficient evidence” must be provided “to prove the proximity between the family member and the deceased” before “such a family member may be included in the definition of a ‘parent’”.<sup>247</sup> In this regard, Mr Katanga agrees with the approach of the trial chamber in Case 001 before the Extraordinary Chambers in the Courts Cambodia (“ECCC”) requiring extended family members “to prove both the alleged kinship and the existence of circumstances giving rise to special bonds of affection or dependence on the deceased”.<sup>248</sup>

103. Mr Katanga argues that the Trial Chamber erred in not requiring “evidence of the existence of circumstances giving rise to special bonds of affection or dependence on the deceased” and in not imposing “any ‘dependency’ or shared household requirement”.<sup>249</sup> According to Mr Katanga, this failure to impose “appropriate control mechanisms” led to the result that “any remote family member could receive

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<sup>243</sup> [Mr Katanga’s Appeal Brief](#), paras 28, 31.

<sup>244</sup> [Mr Katanga’s Appeal Brief](#), paras 32-33.

<sup>245</sup> [Mr Katanga’s Appeal Brief](#), para. 48.

<sup>246</sup> [Mr Katanga’s Appeal Brief](#), para. 49.

<sup>247</sup> [Mr Katanga’s Appeal Brief](#), para. 50.

<sup>248</sup> [Mr Katanga’s Appeal Brief](#), para. 51 quoting ECCC, Trial Chamber, Case 001, “Judgment”, 26 July 2010, [E188](#), para. 643. The Appeals Chamber notes that Mr Katanga incorrectly cites the Case 001 Appeal Judgment as the source of this quotation. ([Mr Katanga’s Appeal Brief](#), footnote 60.)

<sup>249</sup> [Mr Katanga’s Appeal Brief](#), para. 52.

reparation for the loss of a family member even if they never lived together, or had any contact at all”, and thus affected the overall amount of reparations awarded.<sup>250</sup>

104. For these reasons, Mr Katanga requests that the Appeals Chamber limit compensation to close relatives.<sup>251</sup>

(ii) *The OPCV’s response*

105. The OPCV opposes in whole Mr Katanga’s second ground of appeal.<sup>252</sup> It responds that Mr Katanga fails to identify the nature of the alleged error. However, the OPCV proceeds on the basis that Mr Katanga alleges an error of law that is based on the Trial Chamber’s supposed “misinterpretation of the definition of ‘family’ and ‘family member’ or ‘parent’”.<sup>253</sup>

106. The OPCV recalls, however, that the Appeals Chamber has ruled that, under rule 85 of the Rules, reparations may be granted to, *inter alia*, “indirect victims, including [...] the family members of direct victims’ and ‘the concept of “family” may have many cultural variations, and the Court ought to have regard to the applicable social and familial structures’”.<sup>254</sup> The OPCV therefore asserts that “there is no error in the Chamber’s interpretation of the term ‘family’ which was made after having properly examined the culture and structures of the society in which the victims were born and live”.<sup>255</sup> It claims that “the Defence’s arguments merely express a disagreeing opinion which lacks evidentiary support”.<sup>256</sup>

107. The OPCV emphasises that the Appeals Chamber has held that “[t]he issue for determination is whether the harm suffered is personal to the individual. If it is, it can attach to both direct and indirect victims” (emphasis omitted).<sup>257</sup> The OPCV responds that there was no legal error here because the Trial Chamber did make such a finding of personal harm to the indirect victims, “conclud[ing] that the loss of a family

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<sup>250</sup> [Mr Katanga’s Appeal Brief](#), para. 52.

<sup>251</sup> [Mr Katanga’s Appeal Brief](#), p. 36.

<sup>252</sup> [OPCV’s Response](#), para. 25.

<sup>253</sup> [OPCV’s Response](#), para. 25.

<sup>254</sup> [OPCV’s Response](#), para. 26 referring to [Lubanga Amended Order for Reparations](#), paras 6-7.

<sup>255</sup> [OPCV’s Response](#), para. 26.

<sup>256</sup> [OPCV’s Response](#), para. 26.

<sup>257</sup> [OPCV’s Response](#), para. 27 referring to [Lubanga OA9 OA10 Judgment](#), para. 32.

member is regarded as a traumatic experience entailing psychological suffering for the indirect victims, regardless of the dependency or intensity of their family relationship”.<sup>258</sup> According to the OPCV, “the Defence fails to demonstrate why the psychological suffering endured by the indirect victims (or, in this case, a family member of a deceased direct victim) is not ‘*personal to the individual*’”.<sup>259</sup> Moreover, it asserts that the Impugned Decision is not materially affected by the alleged error of law because, “with respect to the indirect victims, the Chamber could not possibly have made a substantively different ruling from the Impugned Decision as long as the harm that the victims suffered from the death of their family members remains ‘personal’, irrespective of their familial dependency or closeness” (emphasis omitted).<sup>260</sup>

108. Finally, the OPCV contends that “other examples of the definition of ‘family’ offered by the Defence are wholly unresponsive of its contentions”.<sup>261</sup> In relation to the definitions in the decisions of the other chambers of the Court, the OPCV highlights that these decisions are non-binding on the Trial Chamber and that they “are made in the parameters of specific cases in light of their own unique cultural and local contexts for different purposes”.<sup>262</sup> It argues that the examples from national jurisdictions are even less persuasive “since they are too inconsistent and varied in degree amongst themselves and thus do in fact demonstrate the opposite of what the Defence attempts to prove”.<sup>263</sup> As for the definitions of “family” taken from international courts and organisations, the OPCV asserts that “[t]he practice of said institutions is not directly importable to the specific legal and factual circumstance dealt with in the Impugned Decision” because “these *fora* deal with the concept of family within the framework of their unique mandates [...] and their own constitutive

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<sup>258</sup> [OPCV’s Response](#), para. 27 referring to [Impugned Decision](#), para. 121.

<sup>259</sup> [OPCV’s Response](#), para. 27.

<sup>260</sup> [OPCV’s Response](#), para. 27.

<sup>261</sup> [OPCV’s Response](#), paras 28-29.

<sup>262</sup> [OPCV’s Response](#), para. 28.

<sup>263</sup> [OPCV’s Response](#), para. 28.

legal documents which are very different from the statutory instruments of the Court governing reparations proceedings”.<sup>264</sup>

(iii) *The LRV’s response*

109. The LRV notes that the Trial Chamber “called for the demonstration of the existence of a close personal relationship between the direct and indirect victims” and that this demonstration was necessary for the establishment of personal harm.<sup>265</sup> He asserts that the Trial Chamber’s reasoning – which he says “revolves around the demonstration of harm personally suffered owing to an emotional bond with the deceased”<sup>266</sup> – “is in accordance with the principles laid down by the Appeals Chamber” in the *Lubanga* case and is similar to the approach followed by the majority of domestic judicial systems.<sup>267</sup>

110. According to the LRV, “[t]his harm is presumed to exist if the deceased is a close family member”, which “includes grandparents and others beyond the nuclear family unit” in some legal traditions.<sup>268</sup> Where more distant family is concerned, “it is a matter of demonstrating the harm suffered personally which is not automatically presumed given the family relationship but which can be inferred from the circumstances which illustrate the existence of an emotional bond”.<sup>269</sup> The LRV responds that the jurisprudence cited by Mr Katanga “even recognizes the possibility of someone non-related claiming harm if that person establishes that such harm was suffered”.<sup>270</sup>

111. The LRV considers that the Trial Chamber rightly held that “the situation in Bogoro was such that the presence of family relationships justifying the existence of harm could be inferred, even in cases involving the death of a direct victim who was not a close family member [...] of the indirect victim”.<sup>271</sup> He states that “[w]ithin the context of life in a place that is limited geographically, such as Bogoro, and a

<sup>264</sup> [OPCV’s Response](#), para. 29.

<sup>265</sup> [LRV’s Response](#), para. 30 referring to [Impugned Decision](#), para. 113.

<sup>266</sup> [LRV’s Response](#), para. 33.

<sup>267</sup> [LRV’s Response](#), para. 32.

<sup>268</sup> [LRV’s Response](#), para. 33.

<sup>269</sup> [LRV’s Response](#), para. 34.

<sup>270</sup> [LRV’s Response](#), para. 35.

<sup>271</sup> [LRV’s Response](#), para. 36.



community where family plays a central role in society, the existence of a familial proximity extends to all members of a family, whether we refer to them as ‘close’ or ‘distant’<sup>272</sup>. The LRV observes that

[a]ll deaths concern persons killed in Bogoro and are referred to by people residing in Bogoro at the time of death or, for a very small minority, people not permanently residing there but who had established their family life and social life there and whose main interests were in Bogoro. The deceased and survivors who lived in Bogoro were necessarily in regular contact and, therefore, had inevitably developed an emotional bond, which illustrates the existence of harm personally suffered, especially for people within the same family.<sup>273</sup> [Emphasis omitted.]

112. The LRV asserts that Mr Katanga’s argument that the Trial Chamber’s reasoning would lead to the recognition of harm even in the case of family members who had never met speculates about a scenario that is inapplicable to this case and indeed impossible in the context of Bogoro.<sup>274</sup> He responds that the Trial Chamber “took into account the specific context of the case in its reasoning and clearly defined – albeit implicitly – the boundaries within which it considers that harm connected to the death of a family member could be admitted if kinship is established”.<sup>275</sup>

### (c) **Determination by the Appeals Chamber**

#### (i) *Indirect victims entitled to reparations*

113. The Trial Chamber found that, in the context of the DRC and particularly Ituri Province, all family members, whether close or distant, were entitled to reparations for psychological harm from the loss of another family member.<sup>276</sup> In doing so, the Trial Chamber presumed psychological harm in respect of all family members of direct victims of the attack on Bogoro. Thus, an applicant who had lost a family member during the attack on Bogoro did not have to specifically prove the existence of the claimed psychological harm, even if that family member was distant; rather the Trial Chamber presumed that the nature of the relationship was such that psychological harm must have resulted from the loss.

<sup>272</sup> [LRV’s Response](#), para. 37.

<sup>273</sup> [LRV’s Response](#), para. 39. *See also* para. 38.

<sup>274</sup> [LRV’s Response](#), para. 39.

<sup>275</sup> [LRV’s Response](#), para. 40.

<sup>276</sup> [Impugned Decision](#), paras 120-122.

114. Many of the arguments raised by Mr Katanga under his second ground of appeal do not directly challenge the manner in which the Trial Chamber reached the factual presumption in question. Rather, Mr Katanga approaches the matter generally from a legal perspective, raising two issues which ostensibly challenge the Trial Chamber’s ‘definition’ of indirect victims in this case: first, he claims that the definition of ‘close’ family members is too broad because it goes beyond the nuclear family (which, he argues, consists of spouses, their children, and siblings) and includes grandparents and grandchildren; second, he asserts that the Trial Chamber failed to define the more distant relatives who would be eligible for reparations, thus including any family member, however remote, in the definition of indirect victims.<sup>277</sup> Mr Katanga argues that “family members of direct victims” may be considered indirect victims “only when sufficiently close, as in parent/child or a demonstrated similar relationship”.<sup>278</sup> He submits that the Court’s jurisprudence on victim participation holds that “other persons who suffered personal harm as a result of the crimes for which Mr. Katanga has been convicted should be limited to their ‘dependents’” and that this should apply to reparations proceedings.<sup>279</sup>

115. To the extent that Mr Katanga argues in favour of a limited interpretation of the term ‘indirect victim’, the Appeals Chamber finds that the definition of ‘victims’ entitled to reparations under article 75 of the Statute, whether direct or indirect, is not restricted to any specific class of persons. ‘Victims’ are, pursuant to rule 85 (a) of the Rules, “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court”. The Appeals Chamber observes that this definition emphasises the requirement of the existence of harm rather than whether the indirect victim was a close or distant family member of the direct victim.

116. The Appeals Chamber has recognised that, pursuant to rule 85 of the Rules, reparations may be granted to indirect victims, including “family members of direct

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<sup>277</sup> [Mr Katanga’s Appeal Brief](#), paras 25-28.

<sup>278</sup> [Mr Katanga’s Appeal Brief](#), para. 29.

<sup>279</sup> [Mr Katanga’s Appeal Brief](#), paras 29, 31 referring to *Prosecutor v. Thomas Lubanga Dyilo*, “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.

victims”.<sup>280</sup> It has also stated, in relation to the concept of ‘harm’, that “harm does not necessarily need to have been direct, but it must have been personal to the victim” and it may be psychological.<sup>281</sup> In the *Lubanga* case, the Appeals Chamber found that one of the heads of harm caused to indirect victims in that case was “[p]sychological suffering experienced as a result of the sudden loss of a family member”.<sup>282</sup> Therefore, individuals may claim reparations for psychological harm from the loss of a family member as a result of the crimes for which a conviction has been entered. In such cases, they must demonstrate both the existence of the psychological harm and that the harm resulted from the loss of the family member – and therefore, indirectly, from the commission of the relevant crimes. One way in which an indirect victim may satisfy these requirements is by demonstrating a ‘close personal relationship’ with the direct victim, supported by evidence and established on a balance of probabilities.<sup>283</sup> Establishing a close personal relationship may prove both the harm and that the harm resulted from the crimes committed.

117. Mr Katanga makes submissions interpreting the term ‘indirect victim’ on the basis of other sources of law, including international soft-law instruments and the law of domestic jurisdictions. The Appeals Chamber considers these submissions to be of little relevance, given the Appeals Chamber’s determination that victim status

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<sup>280</sup> [Lubanga Amended Order for Reparations](#), para. 6.

<sup>281</sup> [Lubanga Amended Order for Reparations](#), para. 10.

<sup>282</sup> [Lubanga Amended Order for Reparations](#), para. 58; *see also* regulation 46 of the Regulations of the Trust Fund, ICC-ASP/4/Res.3 as amended by [ICC-ASP/6/Res.3](#) on 14 December 2007: “Resources collected through awards for reparations may only benefit victims as defined in rule 85 of the Rules of Procedure and Evidence, and, where natural persons are concerned, their families, affected directly or indirectly by the crimes committed by the convicted person”.

<sup>283</sup> [Lubanga Amended Order for Reparations](#), para. 63; *see also* in the context of victim participation, [Lubanga OA9 OA10 Judgment](#), para. 32; Pre-Trial Chamber, *Prosecutor v. Bosco Ntaganda*, “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. 49, holding that “in order to claim victim status within the meaning of rule 85(a) of the Rules, the victim applicant must establish that at the time of the victimization, a sufficient proximity existed between him- or herself and the family member(s) who directly suffered harm as a result of one or more crimes with which the suspect is charged. The Single Judge is of the view that such proximity necessarily depends on the particular circumstances of each case [...]”; [Case 001 Appeal Judgment](#), para. 447, “[...] the criterion of special bonds of affection or dependence connecting the applicant with the direct victim captures the essence of inter-personal relations, the destruction of which is conducive to an injury on the part of indirect victims. This criterion applies to all persons who claim to be indirect victims, whether family or not, because without prior bonds tying the claimants emotionally, physically or economically to the direct victim, no injury would have resulted to them from the commission of the crime”.

depends, as a matter of fact, on whether a person can show that he or she suffered harm as a result of the commission of a crime under the jurisdiction of the Court.

118. Mr Katanga also presents examples from mass claims proceedings and jurisprudence of the IACtHR which – he suggests – stand for the principle that only dependents and next of kin are “indirect victims” who may claim compensation following the wrongful death of a family member.<sup>284</sup> In this regard, the Appeals Chamber observes that the IACtHR has interpreted which parties are eligible for reparations following gross human rights violations in the context of the American Convention on Human Rights. A review of the jurisprudence reveals that it has been the practice of the IACtHR to employ a presumption of moral harm in respect of some members of the next of kin of direct victims. In the case of *Aloeboetoe et al. v. Suriname*, as argued by Mr Katanga, this presumption was applied to parents,<sup>285</sup> but in other cases it was also applied to children, partners, and spouses.<sup>286</sup> The Appeals Chamber also observes that, in a limited number of cases, this presumption has been extended to siblings.<sup>287</sup> In contrast, in some cases, siblings of direct victims have not benefitted from a presumption of harm, *per se*, but have nevertheless been permitted to prove harm in order to be eligible for potential reparations.<sup>288</sup> In any event, the Appeals Chamber observes that a determination of psychological harm to certain family members of a direct victim must still correspond to the specific circumstances of the case.<sup>289</sup> Furthermore, indirect victims not benefitting from a presumption of harm have been assessed on a case-by-case basis, having regard to whether there is a particularly close relationship between them and the direct victims.<sup>290</sup> Therefore, the

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<sup>284</sup> [Mr Katanga’s Appeal Brief](#), para. 47.

<sup>285</sup> [Aloeboetoe et al. v. Suriname](#), para. 76.

<sup>286</sup> IACtHR, *Kawas-Fernández v. Honduras*, “Judgment (Merits, Reparations and Costs)”, 3 April 2009, [Series C, no. 196](#) (“*Kawas-Fernández v. Honduras*”), para. 128; IACtHR, *Chitay Nech et al. v. Guatemala*, “Judgment (Preliminary Objections, Merits, Reparations, and Costs)”, 25 May 2010, [Series C, no. 212](#), para. 276.

<sup>287</sup> IACtHR, *Loayza-Tamayo v. Peru*, “Judgment”, 27 November 1998, [Series C, no. 42](#), para. 143; IACtHR, *Blake v. Guatemala*, “Judgment (Reparations and Costs)”, 22 January 1999, [Series C, no. 27](#), (“*Blake v. Guatemala*”), paras 35-38.

<sup>288</sup> IACtHR, *La Cantuta v. Perú*, “Judgment (Merits, Reparations and Costs)”, 29 November 2006, [Series C, no. 162](#), para. 128.

<sup>289</sup> [Kawas-Fernández v. Honduras](#), para. 128.

<sup>290</sup> [Kawas-Fernández v. Honduras](#), para. 129; [Blake v. Guatemala](#), paras 54-56; IACtHR, *Caracazo v. Venezuela*, “Judgment (Reparations and Costs)”, 29 August 2002, [Series C, no. 95](#), paras 105, 108.

Appeals Chamber observes that the term ‘indirect victim’ is not strictly defined in the jurisprudence of the IACtHR to include or to exclude particular categories of family members who will be able to recover reparations in all cases. Furthermore, although there is a general trend in the jurisprudence of the IACtHR that a person is presumed to suffer psychological harm after the loss of an immediate family member, the Appeals Chamber finds this presumption to be discretionary.<sup>291</sup>

119. The Appeals Chamber notes that the ECtHR follows a similar approach in preferring eligibility based upon the demonstration of harm rather than the demonstration that the indirect victim falls within a specified class of persons.<sup>292</sup>

120. Thus, the approach of human rights courts does not create a principle that would constrain a trial chamber’s discretion in its assessment of harm under article 75 (1) of the Statute. Rather, the approach is case-specific and focuses on the existence of harm.

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<sup>291</sup> See also [Case 001 Appeal Judgment](#), para. 439 (“A review of the jurisprudence of the ACHR demonstrates that presumptions applied by the Inter-American Court are, for the most part, discretionary. That is, they are tailored for particular cases while the conjectures reflect factual relations generally accepted as true”); [Case 001 Appeal Judgment](#), para. 444 (“[...] the jurisprudence under the ACHR serves to demonstrate that while there is a standard practice of applying presumptions regarding the scope of the notion of victim, the concrete inferences are not treated as law but as factual statements drawn in consideration of the circumstances of the case”).

<sup>292</sup> See e.g. the following jurisprudence of the ECtHR on the interpretation of an ‘indirect victim’: “[t]he word ‘victim’, in the context of Article 34 of the Convention, denotes the person or persons directly or indirectly affected by the alleged violation. Hence, Article 34 concerns not just the direct victim or victims of the alleged violation, but also any indirect victims to whom the violation would cause harm or who would have a valid and personal interest in seeing it brought to an end” (footnotes omitted) (ECtHR, Grand Chamber, *Vallianatos and others v. Greece*, “Judgment”, 7 November 2013, application nos. [29381/09 and 32684/09](#), para. 47); “in order for an applicant to be able to claim to be a victim of a violation of the Convention, there must be a sufficiently direct link between the applicant and the harm which they consider they have sustained on account of the alleged violation” (ECtHR, *Gorraiz Lizarraga and others v. Spain*, “Judgment”, 27 April 2004, application no. [62543/00](#), para. 35). See also, in the context of article 3 of the European Convention on Human Rights: “Whether a family member is such a victim will depend on the existence of special factors which gives the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation. Relevant elements will include the proximity of the family tie – in that context, a certain weight will attach to the parent-child bond –, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries” (ECtHR, Grand Chamber, *Çakıcı v. Turkey*, “Judgment”, 8 July 1999, application no. [23657/94](#), para. 98).

121. In light of the above, the Appeals Chamber finds Mr Katanga’s arguments in support of a limited definition of ‘indirect victim’ based upon national and international law to be inapposite. Mr Katanga himself concedes that even remote family members can, in certain circumstances, claim reparations upon demonstrating a degree of proximity with the direct victim.<sup>293</sup> The more apposite question raised under Mr Katanga’s second ground of appeal is not whether the Trial Chamber employed the correct definition, *per se*, but whether it properly drew conclusions as to the existence of psychological harm to indirect victims, based upon the individual applications and in light of the specific circumstances of the case. In this respect, the Trial Chamber presumed that, in the context of this case, all family members of a victim killed during the attack on Bogoro would have experienced resulting psychological harm.<sup>294</sup> It stated that “it is of little consequence whether the relative was near or distant”.<sup>295</sup> The question arises as to whether this presumption was, in the circumstances of this case, reasonably drawn.

(ii) *Reasonableness of the Trial Chamber’s presumption that all family members suffered personal psychological harm*

122. The presumption in question here, relating to psychological harm resulting from the loss of distant family members, was applied by the Trial Chamber in its determination that there were 284 occurrences of psychological harm.<sup>296</sup> The Trial Chamber relied on general arguments from the parties about the relationships among family members in Ituri Province in order to draw the presumption of psychological harm resulting from the death of *all* deceased relatives, both near and distant. Prior to drawing this presumption, the Trial Chamber stated that, in the instant case, it “has treated the concept of ‘family’ with due regard for family and social structures in the

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<sup>293</sup> In that regard, the Appeals Chamber notes Mr Katanga’s arguments as to the requirement for “proximity with the victim” ([Mr Katanga’s Appeal Brief](#), paras 32-33) and for “sufficient evidence” and “special bonds of affection” to prove the proximity between the family member and the deceased ([Mr Katanga’s Appeal Brief](#), paras 50-52); *see also* Mr Katanga’s explanation of the French approach: “More remote family members can, in certain circumstances, equally claim compensation in a wrongful death case. However, French criminal courts usually require ‘*un lien spécifique*’ or ‘*des liens affectifs réguliers*’ to allocate compensation for the death of a remote relative [...] (footnotes omitted)”. ([Mr Katanga’s Appeal Brief](#), paras 36, 41).

<sup>294</sup> [Impugned Decision](#), para. 122.

<sup>295</sup> [Impugned Decision](#), para. 121.

<sup>296</sup> [Impugned Decision](#), p. 81.

DRC and in Ituri in particular”.<sup>297</sup> In support of the latter statement, the Trial Chamber referred to documents submitted by the parties and participants on the principles relating to reparations.<sup>298</sup> It relied primarily on the LRV’s Consolidated Response on the Reparation Procedure of 16 June 2015, in which the LRV argued for conceptions of ‘close family’ and ‘household’ which take consideration of the community concerned, not limited only to spouses and children.<sup>299</sup> The Appeals Chamber notes that neither this,<sup>300</sup> nor the other documents relied on, engaged in an analysis of the social and cultural contours of the notion of ‘family’ in Ituri.

123. The Appeals Chamber therefore considers that the primary evidential basis for the Trial Chamber’s presumption was not very strong. The Appeals Chamber notes, however, that, as established in the Judgment on Conviction, at the time of the attack the village of Bogoro was a small community of at least 800 civilians.<sup>301</sup> The

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<sup>297</sup> [Impugned Decision](#), para. 121.

<sup>298</sup> In footnote 202 of the [Impugned Decision](#), the Trial Chamber referred to the [LRV’s Consolidated Response on the Reparation Procedure](#), paras 8-10; the Trial Chamber also referred to the [Trust Fund’s Observations on Reparations](#), paras 21, 129, in which the TFV submitted, in pertinent part, “With regard to indirect victims, the [TFV] stresses that the local cultural customs should guide the decision on the understanding of family concept, which may be larger than the narrow parent/child relationship. An important factor to consider should be the financial or other strong bonds between persons living in a family structure and carrying together the burden to support the (broader) family”. Other than the submissions of the LRV and TFV, the Trial Chamber referred to a document filed by Mr Katanga. *See Mr Katanga’s Response to Observations on Reparations*, paras 10-11.

<sup>299</sup> [LRV’s Consolidated Response on the Reparation Procedure](#), paras 8-10.

<sup>300</sup> In the [LRV’s Consolidated Response on the Reparation Procedure](#), para. 8, the LRV refers to *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, “Corrigendum to the ‘Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of the Congo by a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 to a/0110/06, a/0188/06, a/0128/06 to a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06, a/0227/06 to a/0230/06, a/0234/06 to a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06 and a/0241/06 to a/0250/06”, 31 January 2008, [ICC-01/04-423-Corr-t-ENG](#), paras 63, 69, 71, 101, and *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, “Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of Congo by Applicants a/0189/06 to a/0198/06, a/0200/06 to a/0202/06, a/0204/06 to a/0208/06, a/0210/06 to a/0213/06, a/0215/06 to a/0218/06, a/0219/06, a/0223/06, a/0332/07, a/0334/07 to a/0337/07, a/0001/08, a/0030/08 and a/0031/08”, 4 November 2008, [ICC-01/04-545](#), para. 46. The Appeals Chamber observes that in each of those decisions, the Single Judge was careful to explain that the findings as to causation and the existence of harm in respect of the indirect victims in question were only preliminary, made on a *prima facie* basis where there was sufficient evidence to establish grounds to believe that the harm suffered results from the commission of a crime falling within the jurisdiction of the Court. Furthermore, the decisions granted the victims in question procedural status during the investigation, and in no way engaged in an analysis of the social and cultural contours of the notion of ‘family’ in Ituri.

<sup>301</sup> [Judgment on Conviction](#), para. 730.

testimonies of witnesses at trial further “allowed the Chamber to measure the very specific significance of local customs and the role of family relationships in Ituri”.<sup>302</sup> Subsequently, in the reparations proceedings, both the LRV and the TFV advocated for an assessment of psychological harm which takes into account the local societal characteristics.<sup>303</sup>

124. The Appeals Chamber also recalls that the attack itself was particularly intense:

[...] The witnesses present in Bogoro, ordinary inhabitants of Bogoro, UPC soldiers on duty there and a Ngitu combatant from Walendu-Bindi *collectivité* who participated in the attack, all stated that there were a great many attackers, armed with guns and machetes, that they came from all directions, thus surrounding the village, and that the attack was particularly intense, with considerable gunfire.

[811] As fighting broke out and the combatants entered Bogoro, many of its inhabitants – men, women, children and elderly persons – fled their homes to hide in the bush or at the Bogoro Institute, where UPC was encamped and where refuge was usually sought in the event of an attack. The attackers, armed with guns and machetes, then set about pursuing those who had fled.<sup>304</sup>

125. The findings from trial further illustrate that, while taking flight, villagers saw corpses on the ground of women, children, and elderly persons who had been cut to pieces.<sup>305</sup> The battle claimed many victims, and the “village was littered with corpses”.<sup>306</sup> The use of machetes “caused serious and persistent trauma” to people who witnessed the suffering of their relatives.<sup>307</sup> The attack was intentionally directed against the civilian population,<sup>308</sup> designed to “wipe out” the Hema civilian population of Bogoro,<sup>309</sup> and the Ngitu combatants were driven by vengefulness.<sup>310</sup> After the attack – as recalled by the Trial Chamber in the Impugned Decision –

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<sup>302</sup> [Judgment on Conviction](#), para. 66.

<sup>303</sup> [Trust Fund’s Observations on Reparations](#), para. 129; [LRV’s Observations on Reparations Procedure](#), para. 93.

<sup>304</sup> [Judgment on Conviction](#), paras 810-811. *See also* paras 819-820.

<sup>305</sup> [Judgment on Conviction](#), paras 814-816.

<sup>306</sup> [Judgment on Conviction](#), para. 836.

<sup>307</sup> [Decision on Sentence](#), para. 49; [Judgment on Conviction](#), para. 836.

<sup>308</sup> [Judgment on Conviction](#), paras 879, 1138, 1150.

<sup>309</sup> [Judgment on Conviction](#), paras 1151. *See also* paras 718, 850-855.

<sup>310</sup> [Judgment on Conviction](#), para. 1144; *see also* [Decision on Sentence](#), para. 54: “It should be noted that Ngitu combatants were driven by an anti-Hema sentiment, and that, as noted by the Chamber in its Judgment [on Conviction], the Hema were the people targeted in Bogoro”.



families were separated, corpses disappeared, and there was a “fear of returning home harboured by some civilians due to the traumatic memories connected to the attack on Bogoro”.<sup>311</sup>

126. Bearing in mind also that the Trial Chamber had the benefit of reviewing applications for reparations, which in many cases detailed the relationships among villagers, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to presume that psychological harm was experienced by the inhabitants of Bogoro resulting from the loss of their family members, near or distant. Consequently, and bearing in mind the standard of review, the Appeals Chamber defers to the Trial Chamber’s presumption of psychological harm – both to close and distant family members of deceased victims of the attack.

127. Accordingly, the Appeals Chamber rejects Mr Katanga’s second ground of appeal.

3. *Mr Katanga’s third ground of appeal: error in ruling ultra petita*

128. Mr Katanga submits that the Trial Chamber erred in ruling *ultra petita* in allocating compensation exceeding the claims of the applicants, at least on three occasions.<sup>312</sup>

(a) **Relevant part of the Impugned Decision**

129. The Trial Chamber decided that, to determine reparations in this case, the 341 applications for reparations had to be analysed individually.<sup>313</sup> Considering that the extent of the harm suffered by the victims for the purposes of reparations in this case was the sum-total of the harm established by the Trial Chamber, it undertook an assessment of the harm suffered by each victim and of the monetary value of each head of harm.<sup>314</sup>

130. In its individual analysis of the applications for reparations, the Trial Chamber undertook an assessment of the material harm alleged and, as regards the pillaging of

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<sup>311</sup> [Impugned Decision](#), para. 115 referring to [Decision on Sentence](#), paras 47-48, 50, 58.

<sup>312</sup> [Mr Katanga’s Appeal Brief](#), paras 57, 63. *See also* paras 58-62, 66.

<sup>313</sup> [Impugned Decision](#), para. 33.

<sup>314</sup> [Impugned Decision](#), para. 181.

livestock, the destruction of fields and harvests, and the pillaging of harvests, it considered that it was not in a position to rule on the type and quantity of the alleged loss.<sup>315</sup> For that reason, it determined that the harm sustained, in general, was equivalent to consumption *per capita*,<sup>316</sup> including for those applicants who claimed a lower quantity of livestock.<sup>317</sup>

131. As regards psychological harm “connected to the experience of the attack on Bogoro”, and considering that by their nature, the circumstances of the attack on Bogoro inflicted trauma of every sort on the victims of the attacks, the Trial Chamber established psychological harm connected to the experience of the attack regarding 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”,<sup>318</sup> including those applicants who made no explicit allegation of psychological harm.<sup>319</sup>

132. When ruling on the modalities of individual reparations, and after noting Mr Katanga’s and the LRV’s proposal to award a symbolic amount of EUR 1 to each of Mr Katanga’s victims, the Trial Chamber decided, however, “to award a more substantial symbolic award as compensation”, namely USD 250 to each victim.<sup>320</sup>

**(b) Submissions by the parties**

*(i) Mr Katanga’s submissions*

133. In relation to this ground of appeal, Mr Katanga first argues that “the Trial Chamber erred in allocating a minimum amount to all the applicants who claimed the loss of cattle and demonstrated the loss of a house, even if the applicants alleged a loss of cattle whose value was inferior to the minimum defined by the Trial Chamber”.<sup>321</sup>

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<sup>315</sup> [Impugned Decision](#), paras 101, 171.

<sup>316</sup> [Impugned Decision](#), paras 101, 171.

<sup>317</sup> [Impugned Decision](#), para. 105.

<sup>318</sup> [Impugned Decision](#), para. 175. *See also* para. 129.

<sup>319</sup> [Impugned Decision](#), para. 129.

<sup>320</sup> [Impugned Decision](#), paras 298-300.

<sup>321</sup> [Mr Katanga’s Appeal Brief](#), para. 58 referring to [Impugned Decision](#), paras 101-105.

134. Second, Mr Katanga contends that the Trial Chamber erred in allocating compensation for a specific moral harm “*lié au vécu de l’attaque de Bogoro*”<sup>322</sup> to all the applicants having demonstrated moral or material harm, including applicants who: (i) did not claim any such particular harm; and (ii) were not present during the attack.<sup>323</sup> He points to an example of one applicant who was not present during the attack, but for whom “*le préjudice psychologique général lié au vécu de l’Attaque*” (in French in the text) was nonetheless established by the Chamber.<sup>324</sup> Mr Katanga contends that only applicants who both were found to have been present in Bogoro during the attack and have claimed such moral harm should be awarded compensation.<sup>325</sup> Mr Katanga argues that such moral harm is linked to the presence of the applicants themselves during the Bogoro attack and that the Trial Chamber itself initially connected this type of harm with the victim being present during the attack.<sup>326</sup>

135. Third, Mr Katanga avers that the Trial Chamber erred in allocating USD 250 to each applicant, while the LRV asked for symbolic reparation of EUR 1 for each applicant.<sup>327</sup>

136. Mr Katanga submits that the Trial Chamber, on each occasion, “allocated compensation to victims who had not asked for it or allocated an amount exceeding their claims” and that it therefore ruled *ultra petita*.<sup>328</sup> He “submits that an *ultra petita* decision is incorrect in law and is typically and successfully appealed on that ground”,<sup>329</sup> arguing that the *ultra petita* rule is significant in international law.<sup>330</sup>

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<sup>322</sup> The Appeals Chamber notes that those words appear in French in Mr Katanga’s submission. See [Mr Katanga’s Appeal Brief](#), para. 59. It has been officially translated in English as follows: “connected to the experience of the attack on Bogoro”. See [Impugned Decision](#), para. 129.

<sup>323</sup> [Mr Katanga’s Appeal Brief](#), para. 59 quoting [Impugned Decision](#), para. 129.

<sup>324</sup> [Mr Katanga’s Appeal Brief](#), para. 60 referring to Annex II to Impugned Decision, para. 19.

<sup>325</sup> [Mr Katanga’s Appeal Brief](#), para. 61.

<sup>326</sup> [Mr Katanga’s Appeal Brief](#), para. 61 quoting [Impugned Decision](#), para. 125.

<sup>327</sup> [Mr Katanga’s Appeal Brief](#), para. 62 quoting [Impugned Decision](#), paras 298, 300.

<sup>328</sup> [Mr Katanga’s Appeal Brief](#), para. 63.

<sup>329</sup> [Mr Katanga’s Appeal Brief](#), para. 63.

<sup>330</sup> [Mr Katanga’s Appeal Brief](#), paras 63–65 referring to, *inter alia*, ICJ, *Request for Interpretation of the Judgment of November 20<sup>th</sup>, 1950, in the Asylum Case (Colombia v. Peru)*, “Judgment”, 27 November 1950, [I.C.J. Reports 1950, p. 395](#) (“*Colombia v. Peru: asylum case interpretation*”) at p. 402, ICJ, *The Corfu Channel Case (Assessment of the amount of compensation due from the People’s Republic of Albania to the United Kingdom of Great Britain and Northern Ireland)*, “Judgment”, 15 December 1949, [I.C.J. Reports 1949, p. 244](#) (“*Case of the Corfu Channel*”) at p. 249, and D.W. Prager,

137. For these reasons, Mr Katanga requests the Appeals Chamber to determine that “a Trial Chamber cannot rule *ultra petita*”<sup>331</sup> and to reverse the Impugned Decision in respect of each of the three instances identified under this ground of appeal.<sup>332</sup>

(ii) *The OPCV’s response*

138. The OPCV opposes this ground of appeal in full and submits that it should be dismissed by the Appeals Chamber, recalling that the Appeals Chamber may invalidate discretionary decisions only under limited conditions.<sup>333</sup>

139. It argues that, while the *non ultra petita* rule is a well-established principle in international law, its reach is not unlimited,<sup>334</sup> and that in ICC reparations proceedings in particular, it has limited applicability.<sup>335</sup> In its view, the way the *ultra petita* rule applies before the International Court of Justice (“ICJ”) illustrates the consensual nature of the jurisdiction of this Court, based on the specific types of legal disputes submitted to it, while the power of the ICC to adjudicate serious crimes falling under its jurisdiction and to order reparations is not consensual, as the ICC does not require the consent of the parties involved.<sup>336</sup>

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“Procedural Developments at the International Court of Justice”, in P. Bodeau-Livinec (ed.), *The Law and Practice of International Courts and Tribunals*, Vol. I (Martinus Nijhoff Publishers, 2002), p. 414. The Appeals Chamber notes that Mr Katanga quotes from a case before the International Court of Justice wherein the court considered that it was its “duty [...] not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions” ([Mr Katanga’s Appeal Brief](#), para. 63 citing to [Colombia v. Peru: asylum case interpretation](#), p. 402).

<sup>331</sup> [Mr Katanga’s Appeal Brief](#), para. 66.

<sup>332</sup> [Mr Katanga’s Appeal Brief](#), paras 66, 87.

<sup>333</sup> [OPCV’s Response](#), paras 31, 37.

<sup>334</sup> [OPCV’s Response](#), para. 31; see in particular para. 35, quoting ICJ, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, “Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal”, [I.C.J. Reports 2002, p. 63](#), (“Arrest Warrant case: joint separate opinion), para. 12, appended to “Judgment”, 14 February 2002, I.C.J. Reports 2002, p. 3; see also paras 32-33.

<sup>335</sup> [OPCV’s Response](#), para. 31. See also paras 34-36.

<sup>336</sup> See [OPCV’s Response](#), para. 32 quoting ICJ, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, “Judgment”, 14 February 2002, [I.C.J. Reports 2002, p. 3](#) (“Case of the Arrest Warrant”), para. 43; see also [OPCV’s Response](#), para. 33 quoting ICJ, *Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, “Separate Opinion of Judge Buergenthal”, [I.C.J. Reports 2003, p. 270](#), paras 3, 8 appended to “Judgment”, 6 November 2003, I.C.J. Reports 2003, p. 161 and referring to ICJ, *Frontier Dispute (Burkina Faso/Niger)*, “Judgment”, 16 April 2013, [I.C.J. Reports 2013, p. 443](#), para. 74, ICJ, *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning Temple of Preah Vihear (Cambodia v. Thailand)*, “Judgment”, 11 November 2013, [I.C.J. Reports 2013, p. 281](#) (“Request for interpretation of the Temple

140. The OPCV adds that Mr Katanga “fails to show that the [Trial] Chamber’s exercise of discretion in allocating compensation was either based on an erroneous legal interpretation and on incorrect conclusion of fact”, or that such exercise of discretion was so unfair and unreasonable so as to constitute an abuse of discretion.<sup>337</sup> The OPCV emphasizes the discretionary nature of ICC trial chambers’ decisions on the modalities of reparations, recognized by the Appeals Chamber, in particular as regards the scope and amount of compensation to be allocated to victims.<sup>338</sup> The OPCV concludes that even if the Trial Chamber properly exercised its discretion.<sup>339</sup>

(iii) *The LRV’s response*

141. As regards Mr Katanga’s first argument, the LRV responds that the question at issue is the Trial Chamber’s assessment of the criteria that it “could apply when ruling on the extent of harm claimed and, specifically, on the application of the concept of fairness”.<sup>340</sup> In this respect, the LRV argues that application of fairness is particularly justified when it is difficult to put a specific figure on the harm, or as a corrective measure to more fairly balance out the strict application of rules for assessing them, adding that it applies to both material and non-material harm, and that the IACtHR regularly uses this criteria in assessing certain financial loss.<sup>341</sup>

142. As regards the two other arguments raised by Mr Katanga, namely that the Trial Chamber erred in awarding reparations for mental harm connected to the experience of the attack on Bogoro to all applicants who demonstrated the existence of another harm, and in awarding compensation for an amount of USD 250 to all applicants despite the LRV’s request for a symbolic award of EUR 1, the LRV responds that, in his submissions on reparations before the Trial Chamber, he had pointed to the “extremely severe trauma” experienced not just by individuals but by the community

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of Preah Vihear case”), para. 71, and Shabtai Rosenne, *The Law and Practice of the International Court 1920-2005* (Martinus Nijhoff Publishers, 2006), p. 578.

<sup>337</sup> [OPCV’s Response](#), para. 37.

<sup>338</sup> [OPCV’s Response](#), para. 36 referring to [Lubanga Reparations Appeal Judgment](#), para. 43; [Impugned Decision](#), para. 334 and footnote 484.

<sup>339</sup> [OPCV’s Response](#), para. 37.

<sup>340</sup> [LRV’s Response](#), para. 42.

<sup>341</sup> [LRV’s Response](#), para. 42 referring to IACtHR, *Vélez Loor v. Panama*, “Judgment”, 23 November 2010, [Series C, no. 218](#).

as a whole.<sup>342</sup> He adds that, in his recommendations on the modalities of reparations, he had “repeated that all victims suffered mental harm to one degree or another as a result of the attack”.<sup>343</sup> The LRV contends that in so doing he was defending the existence of harm shared by all the victims of the attack “regardless of how it is formulated in the reparations applications”.<sup>344</sup> Therefore, in his view, the Trial Chamber cannot be said to have ruled *ultra petita*, since it is the case only when a chamber rules on a request which was not submitted to it.<sup>345</sup>

143. The LRV also submits that the Trial Chamber recognized the existence of mental harm not only for those present during the atrocities, but also for those who were not present in Bogoro, but whose life and family had always been there, and who also suffered trauma caused by the deaths and destructions.<sup>346</sup> The LRV further contends that the Trial Chamber ruled on the types and modalities of reparations, applying the principles on reparations defined by the Appeals Chamber in the *Lubanga* Amended Order for Reparations, in making its own assessment of the amount it considered appropriate for reparations for this harm.<sup>347</sup> The LRV adds that the Trial Chamber ruled *ex aequo et bono* based on the proposed amount by the LRV, which in the absence of a fixed and objective base for calculating the harm could have only been a lump-sum amount.<sup>348</sup> The LRV avers that “the [Trial] Chamber enjoyed full liberty to set this amount in a fair way given the circumstances of the present case”.<sup>349</sup>

### (c) Determination by the Appeals Chamber

144. Mr Katanga’s arguments raised under his third ground of appeal aim to show that the Trial Chamber violated the *ultra petita* principle on three occasions, by overreaching the claims made by the applicants and the LRV, both in its assessment

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<sup>342</sup> [LRV’s Response](#), para. 44.

<sup>343</sup> [LRV’s Response](#), para. 44.

<sup>344</sup> [LRV’s Response](#), para. 45.

<sup>345</sup> [LRV’s Response](#), para. 47. *See also* para. 53.

<sup>346</sup> [LRV’s Response](#), para. 46.

<sup>347</sup> [LRV’s Response](#), para. 49 referring to [Lubanga Amended Order for Reparations](#); *see also* para. 51.

<sup>348</sup> [LRV’s Response](#), paras 49, 51-53.

<sup>349</sup> [LRV’s Response](#), para. 51. *See also* para. 53.

of the harm and in its determination of the modalities of reparations.<sup>350</sup> He contends that the Trial Chamber erred *ultra petita* in: (i) allocating a minimum amount to all applicants even if they alleged a loss of cattle whose value was inferior to the minimum defined by the Trial Chamber;<sup>351</sup> (ii) allocating compensation for moral harm “connected to the experience of the attack of Bogoro” to applicants even where some of them did not claim harm, and even where some of them were not present during the attack;<sup>352</sup> and (iii) allocating USD 250 to each applicant, while the LRV asked for symbolic reparations of EUR 1 for each applicant.<sup>353</sup>

145. The Appeals Chamber observes that the *ultra petita* principle has been interpreted as preventing a court from exceeding parties’ claims in two different ways: (i) by ruling on matters not raised by the parties; and (ii) by granting more than was requested by the parties.<sup>354</sup> Mr Katanga’s claim relates to the latter. He argues that the *ultra petita* principle applies before the ICJ,<sup>355</sup> which has stated that the principle “is well established in the jurisprudence of the Court”.<sup>356</sup> He also refers to its application in domestic civil claims proceedings in, for example, France,<sup>357</sup> where the Appeals Chamber notes that article 5 of the French Code of Civil Procedure circumscribes a judge’s ruling to what is asked by the parties.<sup>358</sup> The Appeals Chamber further notes

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<sup>350</sup> [Mr Katanga’s Appeal Brief](#), paras 57-66.

<sup>351</sup> [Mr Katanga’s Appeal Brief](#), para. 58.

<sup>352</sup> [Mr Katanga’s Appeal Brief](#), paras 59-61.

<sup>353</sup> [Mr Katanga’s Appeal Brief](#), para. 62.

<sup>354</sup> See e.g.: “A judgment or decision is said to be *ultra petita* when it awards more than was sought or sued for in the petition or summons” (J. Trayner, “Trayner’s Latin Maxims” quoted in B. A. Garner (ed.), *Black’s Law Dictionary*, (Thomson Reuters, 10<sup>th</sup> ed., 2014), p. 1755); see also [Colombia v. Peru: asylum case interpretation](#), p. 402; [Case of the Arrest Warrant](#), para. 43.

<sup>355</sup> The Appeals Chamber notes that the ICJ has considered this principle in respect of both the subject-matter of claims (see [Colombia v. Peru: asylum case interpretation](#), p. 402; see also [Case of the Arrest Warrant](#), pp. 18-19, para. 43) and awards (see [Request for interpretation of the Temple of Preah Vihear case](#), para. 71 p. 402; see also [Case of the Arrest Warrant](#), pp. 18-19, para. 43). As regards awards claims, in the *Corfu Channel* case for example, the ICJ ruled that it could not “award more than the amount claimed in the submissions of the United Kingdom Government” despite the fact that experts gave an estimation of the damage higher than the amount claimed by the United Kingdom Government in its submissions ([Case of the Corfu Channel](#), pp. 248-249).

<sup>356</sup> [Request for interpretation of the Temple of Preah Vihear case](#), p. 402, referring to [Colombia v. Peru: asylum case interpretation](#), p.71, [Case of the Arrest Warrant](#), pp. 18-19, para. 43, and [Case of the Corfu Channel](#), p. 249.

<sup>357</sup> [Mr Katanga’s Appeal Brief](#), footnote 73.

<sup>358</sup> “Le juge doit se prononcer sur tout ce qui est demandé et seulement sur ce qui est demandé”. France, Article 5 of the Code of Civil Procedure, last amended on 9 December 1975.

that the African Court on Human and Peoples' Rights,<sup>359</sup> the ECtHR<sup>360</sup> and the IACtHR<sup>361</sup> have also either referred to the principle in the proceedings before them, or applied it *de facto*. However, there have also been cases where the same courts have departed from this principle when awarding reparations.<sup>362</sup>

146. The Appeals Chamber recalls that reparations proceedings are governed by article 75 of the Statute, which vests a trial chamber with the power to “determine the

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<sup>359</sup> See e.g. African Court of Human and People's Rights, *Lohe Issa Konate v. Burkina Faso*, “Judgment on Reparations”, application no. [004/2013](#), para. 50. In this case the Court noted that because it could not “rule *ultra petita*, it [would] limit itself to the amount claimed” by the applicant for reparation of material damage, despite the fact that the evidence provided in support of the claims showed a slightly higher amount.

<sup>360</sup> See e.g. cases where the ECtHR denied just satisfaction awards on the basis that no valid claim for just satisfaction was made: *Mancini v. Italy*, “Judgment”, 2 August 2001, application no. [44955/98](#), paras 28-29; *Miltayev and Meltayeva v. Russia*, “Judgment”, 15 January 2013, application no. [8455/06](#), para. 62; *Anđelković v. Serbia*, “Judgment”, 9 April 2013, application no. [1401/08](#), para. 33.

<sup>361</sup> See e.g. IACtHR, *Velazquez Rodriguez v. Honduras*, “Judgment (Reparations and Costs)”, 21 July 1989, [Series C, no. 7](#), para. 42.

<sup>362</sup> In this respect, the ECtHR departs from the general and more common rule of not granting just satisfaction to an applicant who did not submit any claim in this respect, or did not comply with the corresponding procedural requirements to do so, especially when the case concerns violations of rights of “absolute character” (the right to life or the prohibition of torture for example, respectively enshrined in articles 2 and 3 of the ECHR). For examples where the ECtHR rejected claims of just satisfaction based on the inadmissibility of the application or discordance between the content of the application and claims made at a later stage, see *Beshiri and others v. Albania*, “Judgment”, 22 August 2006, application no. [7352/03](#), para. 107; *Qufaj Co. Sh.p.k. v. Albania*, “Judgment”, 18 November 2004, application no. [54268/00](#), para. 53; *Gürtaş Yapi Ticaret Ve Pazarlama A. Ş. v. Turquie*, “Judgment”, 7 July 2015, application no. [40896/05](#), para. 73; *Rummi v. Estonia*, “Judgment”, 15 January 2015, application no. [63362/09](#), para. 139. Compare with examples of cases involving the violations of rights of “absolute character” where the ECtHR ruled otherwise: *Davtian v. Georgia*, “Judgment”, 27 July 2006, application no. [73241/01](#), paras 69-70; *Borodin v. Russia*, “Judgment”, 6 November 2012, application no. [41867/04](#), paras 164-166; *X v. Croatia*, “Judgment”, 17 July 2008, application no. [11223/04](#), paras 61-63. In a recent judgment, the Grand Chamber of the ECtHR allocated reparations not requested by the applicant by stating that “the present case disclose[d] exceptional circumstances which call for a just-satisfaction award in respect of non-pecuniary damage, notwithstanding the absence of a properly made ‘claim’”. Grand Chamber, *Nagmetov v. Russia*, “Judgment”, 30 March 2017, application no. [35589/08](#), para. 92; see also paras 75-78. In addition, the Appeals Chamber notes that the IACtHR, in at least one case, has awarded reparations not requested by either party when it deemed that it was necessary to fulfil the requirement of “full and adequate reparations”. See e.g. *Rochela Massacre v. Colombia*, “Judgment (Merits, Reparations, and Costs)”, 11 May 2007, [Series C, no. 163](#), para. 286. In this case, the court went beyond what was requested by the victims, and established “four additional measures of satisfaction and guarantees of non-repetition [...] as it deem[ed] them necessary to adequately repair the consequences of the violations established in this judgment, in accordance with Article 63 (1) of the Convention”. The Appeals Chamber also notes that a similar approach has been taken at the domestic level. In Colombia, Consejo de Estado, State Council, *María Delfa Castañeda y Otros*, 20 February 2008, 76001-23-25-000-1996-04058-01(16996), the State Council of Colombia, which is the highest Colombian court dealing with cases against State agencies, held that a court should rule *extra* and *ultra petita* when it is faced with a conflict of norm opposing, on the one hand, the principle of full reparations for human rights violations, as recognized by international law, which should prevail, and on the other hand, the prohibition of *extra/ultra petita* awards (“*principio de congruencia*”) and the *reformatio in pejus* rule, which apply in domestic law.



scope and extent of any damage”,<sup>363</sup> stipulating that, before making an order for reparations, it “may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States”.<sup>364</sup> Article 75 (1) of the Statute also grants the possibility, albeit in exceptional circumstances, for a trial chamber to determine the scope and extent of any damage for the purposes of reparations *proprio motu*. Rule 97 (1) of the Rules provides that, “[t]aking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both”.

147. The Appeals Chamber considers that, together, these provisions illustrate that a trial chamber, in making an award for reparations, has the discretion to depart from an applicant’s claim for reparations, if it considers it to be appropriate. In this respect, the Appeals Chamber notes that a trial chamber is permitted to issue a decision on reparations *without* being seized by any party and this, by definition, entails making an award to victims which has not been sought. This precludes the strict applicability of the *ultra petita* principle to reparations proceedings before the Court. Similarly, article 75 (3) of the Statute, stating that a trial chamber “*may* invite and shall *take account* of representations from or on behalf of the convicted person, victims, other interested persons or interested States” (emphasis added), suggests that a trial chamber is not strictly bound by these representations. The Appeals Chamber notes that the same provision requires a trial chamber to take account of representations of the convicted person and victims, as well as of “other interested persons or interested States”. The inclusion of stakeholders other than the convicted person and the victims represents a departure from the *ultra petita* principle, as it assumes that trial chambers are not strictly bound by the parties’ submissions. In this respect, in reparations proceedings, trial chambers may consult different stakeholders, but enjoy discretion in ruling on reparations, based on the different input they receive, and in line with “the scope and extent of any damage, loss and injury to, or in respect of, victims” pursuant to article 75 (1) of the Statute. The Appeals Chamber also notes that, as stated above,

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<sup>363</sup> Article 75 (1) of the Statute.

<sup>364</sup> Article 75 (3) of the Statute.

the individual assessment of individual claims should only be done when there are very few applications, and the intention is to personalise the award. In all other circumstances, albeit very important in order to understand the nature of the harm alleged, the applications for reparations are not the only basis for an award. Indeed, faced with hundreds or thousands of applications, it would be impracticable to tailor reparations to each claim. In such circumstances, the issue of *ultra petita* does not arise.

148. The Appeals Chamber recalls that, pursuant to article 21 (1) (c) of the Statute, the Court may apply “general principles of law derived by the Court from national laws of legal systems of the world”. Nevertheless, even if the *ultra petita* principle could be considered such a general principle of law, the same provision requires the Court to apply, in the first place, its own Statute, Rules and Elements of Crimes.<sup>365</sup> Given the Court’s framework as set out above, the principle does not apply in reparations proceedings before the Court.

149. As Mr Katanga does not support his contention that the Trial Chamber erred in the three respects pointed to by any other legal or factual argument, the Appeals Chamber dismisses his third ground of appeal. Nevertheless, the Appeals Chamber would note that if, in the future, trial chambers were to presume psychological harm associated with the experience of an attack for all applicants who have proved material harm, but have not personally experienced the attack, they should carefully approach this issue, providing clear reasons as to the basis on which such a presumption is made. Furthermore, while the Trial Chamber awarded USD 250 to each victim in this case, this should not be viewed as a precedent or indication of quantum when it comes to the determination of awards in future cases.

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<sup>365</sup> *Situation in the Democratic Republic of the Congo*, “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, [ICC-01/04-168 \(OA3\)](#), para. 23.

4. *Mr Katanga's fourth ground of appeal: link between culpability and the monetary liability of the convicted person*

150. Mr Katanga alleges that the Trial Chamber erred in issuing an order for reparations of USD 1 000 000 against Mr Katanga because it is not proportionate to, and does not fairly reflect, the part he played in the crimes in question.<sup>366</sup>

(a) **Relevant part of the Impugned Decision**

151. As set out in more detail above,<sup>367</sup> the Trial Chamber first carried out an individual analysis of the victims' applications for reparations and made findings, as a result, as to harm, determining that the harm alleged by the victims who submitted applications for reparations may attract an award for reparations.<sup>368</sup> The Trial Chamber then went on to establish the monetary value per head of harm.<sup>369</sup> It set out its findings as to the total monetary value of the extent of harm suffered in a table, indicating that the total monetary value was USD 3 752 620.<sup>370</sup>

152. In the next section of the Impugned Decision, entitled "Mr Katanga's Liability for Reparations", the Trial Chamber addressed Mr Katanga's liability. It first addressed his argument that his indigence should be given consideration, and that a reparations award should be set which reflects his means and capacity to pay.<sup>371</sup> In this regard, the Trial Chamber recalled that, in the *Lubanga* Reparations Appeal Judgment, the Appeals Chamber had 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>372</sup> The Trial Chamber found no reason to depart from this finding and it determined, therefore, that "Mr Katanga's current financial situation [could not] be regarded as material to the determination of the size of the reparations award for which he is liable".<sup>373</sup>

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<sup>366</sup> [Mr Katanga's Appeal Brief](#), p. 28.

<sup>367</sup> See above, paras 47 *et seq.*

<sup>368</sup> [Impugned Decision](#), para. 167.

<sup>369</sup> [Impugned Decision](#), paras 181-239.

<sup>370</sup> [Impugned Decision](#), paras 237-239, p. 81.

<sup>371</sup> [Impugned Decision](#), para. 241.

<sup>372</sup> [Impugned Decision](#), para. 245 referring to [Lubanga Reparations Appeal Judgment](#), paras 102-105.

<sup>373</sup> [Impugned Decision](#), para. 246.

153. The Trial Chamber proceeded to determine the scope of Mr Katanga’s liability for reparations and to set the size of the award for which he was liable. Having summarised the parties’ submissions, it first stated that the Appeals Chamber, in the *Lubanga Reparations Appeal Judgment*, had “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>374</sup> With reference to rule 145 of the Rules and article 78 of the Statute, the Trial Chamber emphasised that there is an “intrinsic link” between the penal proceedings and the reparation proceedings.<sup>375</sup>

154. The Trial Chamber went on to refer to some of the principles which it stated had been enunciated by the Appeals Chamber in the *Lubanga Reparations Appeal Judgment*. It stated:

It must be further underlined that, in said case, the Appeals Chamber made the point that the scope of liability for reparations may differ depending on the mode of individual criminal responsibility established vis-à-vis the convicted person and on the specific elements of that responsibility. In sum, the Appeals Chamber enunciated the principle applicable to the determination of the scope of the liability for reparations as follows: “a convicted person’s liability for reparations must be proportionate to the harm caused and, *inter alia*, his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case”. [Footnotes omitted.]<sup>376</sup>

155. The Trial Chamber then recalled Mr Katanga’s argument that he had been “convicted on the basis of a mode of criminal responsibility other than that of which he initially stood charged”.<sup>377</sup> It recalled that Mr Katanga 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>378</sup> On the various modes of liability in article 25 of the Statute, the Trial Chamber noted the Judgment on Conviction “made plain that ‘[...] article 25 of the Statute merely identifies various forms of unlawful conduct and, in that sense, the

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<sup>374</sup> [Impugned Decision](#), para. 251 referring to [Lubanga Reparations Appeal Judgment](#), para. 65.

<sup>375</sup> [Impugned Decision](#), footnote 348.

<sup>376</sup> [Impugned Decision](#), para. 252 referring to [Lubanga Reparations Appeal Judgment](#), para. 118 and [Lubanga Amended Order for Reparations](#), para. 25.

<sup>377</sup> [Impugned Decision](#), para. 253.

<sup>378</sup> [Impugned Decision](#), para. 254 referring to [Judgment on Conviction](#), pp. 658-659.

distinction between the liability of a perpetrator of and accessory to a crime does not under any circumstances constitute a “hierarchy of blameworthiness” [...].<sup>379</sup> However, the Trial Chamber then noted, equally, that

in *Lubanga*, the Appeals Chamber, after stating that the Statute differentiates between two main forms of criminal responsibility, *viz.* principal and accessorial, 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.’ [Footnotes omitted.]<sup>380</sup>

The Trial Chamber then stated:

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 that participation, as determined by [the Trial Chamber] in the Judgment Handing Down Conviction, so as to set the reparations award for his he is liable.<sup>381</sup>

156. The Trial Chamber noted the findings in the Judgment on Conviction as to how Mr Katanga “lent his assistance”,<sup>382</sup> that it “found that the attack on Bogoro was aimed at ‘eliminating from the area the Hema civilian population’”, and that that Chamber found beyond a 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>383</sup>

157. It then turned to the Decision on Sentence and noted that that decision “drew attention to the gravity of the crimes and the ‘particularly cruel conditions and [...] discriminatory manner’ in which the crimes were committed”.<sup>384</sup> The Trial Chamber further recalled that that decision also “noted the violence and the magnitude of the

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<sup>379</sup> [Impugned Decision](#), para. 255 referring to [Judgment on Conviction](#), para. 1386.

<sup>380</sup> [Impugned Decision](#), para. 256 referring to [Lubanga A5 Judgment](#), para. 462.

<sup>381</sup> [Impugned Decision](#), para. 257.

<sup>382</sup> [Impugned Decision](#), para. 258 referring to [Judgment on Conviction](#), para. 1671.

<sup>383</sup> [Impugned Decision](#), para. 259 referring to [Judgment on Conviction](#), para. 1691.

<sup>384</sup> [Impugned Decision](#), para. 260 referring to [Decision on Sentence](#), para. 143.

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’, and underlined that ‘the attack on Bogoro was one of the most significant attacks in Ituri in 2003’” (footnotes omitted).<sup>385</sup>

158. However, the Trial Chamber also weighed the fact that

Mr Katanga made his contribution in the context of a criminal purpose harboured by many persons and, whereas Mr Katanga was at the apex of the Ngiti militia of Walendu-Bindi collectivité in February 2003, 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. [Footnotes omitted.]<sup>386</sup>

159. It recalled that the Trial Chamber “found that combatants other than the Ngiti took part in the attack on Bogoro”.<sup>387</sup> It then stated that before it reached a determination, it “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 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”.<sup>388</sup> In that regard, it emphasised that “the bench is not in a position to determine the responsibility of every person who had a part in the crime at issue” and that, in the instant case, “to the Chamber’s knowledge, no convictions have been returned against other persons for the attack on Bogoro in other fora”.<sup>389</sup>

160. The Trial Chamber concluded by recalling that

[t]he scope of the convicted person’s liability [...] 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

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<sup>385</sup> [Impugned Decision](#), para. 260 referring to [Decision on Sentence](#), paras 44, 46-54, 143.

<sup>386</sup> [Impugned Decision](#), para. 261 referring to [Decision on Sentence](#), paras 63, 66, 143.

<sup>387</sup> [Impugned Decision](#), para. 262.

<sup>388</sup> [Impugned Decision](#), para. 263.

<sup>389</sup> [Impugned Decision](#), para. 263.

case, 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.<sup>390</sup>

(b) **Submissions of the parties**

(i) *Mr Katanga's submissions*

161. Mr Katanga submits that the amount awarded in reparations (USD 1 000 000) "is excessive in light of [his] circumstances, responsibilities and culpability".<sup>391</sup>

162. Mr Katanga refers to the *Lubanga* Reparations Appeal Judgment, where the Appeals Chamber stated that the reparations imposed on a convicted person must be proportionate to the harm they have caused, and that reparations should be remedial and not punitive in nature.<sup>392</sup> This, he argues, comports with the intent of the drafters when comparing Part 6 ('The Trial') with Part 7 ('Penalties') of the Statute.<sup>393</sup> He states that, although the Trial Chamber adopted these principles, "it failed to do justice to those principles in calculating the amount which must, at least theoretically, be paid by" Mr Katanga.<sup>394</sup>

163. Mr Katanga argues that the order is excessive in light of his culpability.<sup>395</sup> He points to mitigating factors referred to by the judges in the Decision on Sentence and the Appeals Chamber in the "Decision on the review concerning reduction of sentence of Mr Germain Katanga"<sup>396</sup> of 13 November 2015 ("Decision on Reduction of Sentence") and submits that these factors should also be given weight at the reparations stage.<sup>397</sup>

164. In terms of his level of involvement, Mr Katanga argues that the Trial Chamber erred in considering portions of the Judgment on Conviction and Decision on Sentence out of context, and attributed greater criminal responsibility to Mr Katanga than did the sentencing chamber.<sup>398</sup> Mr Katanga also submits that the Trial Chamber

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<sup>390</sup> [Impugned Decision](#), para. 264.

<sup>391</sup> [Mr Katanga's Appeal Brief](#), para. 74.

<sup>392</sup> [Mr Katanga's Appeal Brief](#), paras 68-70.

<sup>393</sup> [Mr Katanga's Appeal Brief](#), paras 71-73.

<sup>394</sup> [Mr Katanga's Appeal Brief](#), para. 73.

<sup>395</sup> [Mr Katanga's Appeal Brief](#), para. 74.

<sup>396</sup> [ICC-01/04-01/07-3615](#).

<sup>397</sup> [Mr Katanga's Appeal Brief](#), paras 76-77.

<sup>398</sup> [Mr Katanga's Appeal Brief](#), para. 79.

did not give sufficient weight to the following factors: i) he was convicted under article 25 (3) (d) of the Statute, which involves reduced moral culpability than the original charge under article 25 (3) (a) of the Statute; ii) the attack was an attack on one day, and only 30 deaths occurred at the hands of the Ngiti combatants; and iii) Mr Katanga did not participate directly in the crimes, and the fact that the crimes were committed with a particular cruelty should have no bearing on Katanga's personal culpability.<sup>399</sup>

165. Mr Katanga submits that he cannot be held more responsible simply because he is the sole person convicted of the crimes resulting from this particular attack.<sup>400</sup> In disregarding the role of others, Mr Katanga states that the Trial Chamber effectively applied the principle of joint and several liability, even though the Trial Chamber stated that this was not applicable before the Court.<sup>401</sup>

166. Finally, Mr Katanga argues that he has “neither the means nor any prospect of having sufficient means to pay” such reparations.<sup>402</sup> He refers to his earlier submissions where he had argued that “domestic criminal justice systems do not impose compensation orders where there is no reasonable prospect of it being met”.<sup>403</sup> Mr Katanga asserts that this approach is not inconsistent with the *Lubanga* Reparations Appeal Judgment, and the “proposed approach would merely alter the proportionate relationship between Mr Katanga's share of the reparation burden on the one hand, and the share of the Trust Fund on the other [...]”.<sup>404</sup>

167. In sum, Mr Katanga submits that the Trial Chamber erred by failing to accord proper weight to his personal circumstances and reduced role in the commission of the crimes, resulting in a reparation award that is “unreasonably high” and

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<sup>399</sup> [Mr Katanga's Appeal Brief](#), para. 80.

<sup>400</sup> [Mr Katanga's Appeal Brief](#), para. 81.

<sup>401</sup> [Mr Katanga's Appeal Brief](#), para. 81.

<sup>402</sup> [Mr Katanga's Appeal Brief](#), para. 83.

<sup>403</sup> [Mr Katanga's Appeal Brief](#), para. 84.

<sup>404</sup> [Mr Katanga's Appeal Brief](#), para. 85.



“disproportionate”.<sup>405</sup> For these reasons, he requests that the Appeals Chamber reduce his financial liability.<sup>406</sup>

(ii) *The LRV’s response*

168. Regarding the legal and factual elements supporting Mr Katanga’s responsibility for reparations, the LRV shares the analysis of Mr Katanga according to which reparations should be strictly based on the individual criminal responsibility of the convicted person.<sup>407</sup> However, the LRV argues that Mr Katanga’s suggestion that there should be an analysis in the Impugned Decision of mitigating circumstances found in the Decision on Sentence would open the door to taking account of the behaviour of the convicted person and would pervert the reparations procedure.<sup>408</sup>

169. The LRV argues that the reasoning of the Trial Chamber should be supported by criteria unique to the reparations procedure.<sup>409</sup> In this case, the LRV argues that the Trial Chamber objectively analysed the factual and legal elements concerning Mr Katanga’s participation as they were noted in the Decision on Sentence.<sup>410</sup> This reasoning, the LRV argues, is all the more objective given that the Trial Chamber giving the Impugned Decision had a distinct composition from the trial chamber giving the Decision on Sentence.<sup>411</sup> In the present case, therefore, the LRV argues that Mr Katanga “does not demonstrate that the [Trial] Chamber exercised its discretionary power in an inappropriate way”.<sup>412</sup>

170. Furthermore, the LRV argues that the Trial Chamber expressly excluded a system of joint and several liability.<sup>413</sup> Finally, the LRV argues that Mr Katanga provides no reason why the Trial Chamber should have diverged from the Appeals Chamber’s prior reasoning regarding the indigence of a convicted person.<sup>414</sup>

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<sup>405</sup> [Mr Katanga’s Appeal Brief](#), para. 86.

<sup>406</sup> [Mr Katanga’s Appeal Brief](#), para. 87.

<sup>407</sup> [LRV’s Response](#), para. 60.

<sup>408</sup> [LRV’s Response](#), para. 60.

<sup>409</sup> [LRV’s Response](#), para. 61.

<sup>410</sup> [LRV’s Response](#), para. 63.

<sup>411</sup> [LRV’s Response](#), para. 63.

<sup>412</sup> [LRV’s Response](#), para. 64.

<sup>413</sup> [LRV’s Response](#), paras 66-67.

<sup>414</sup> [LRV’s Response](#), paras 68-69.

(iii) *The OPCV's response*

171. The OPCV argues that Mr Katanga fails to demonstrate an abuse of discretion.<sup>415</sup> The OPCV further argues that the Trial Chamber properly recalled the fact that Mr Katanga was convicted as an accessory and examined the level of participation in order to set the amount for which he is liable.<sup>416</sup>

172. The OPCV argues that the proceedings for sentencing and for review concerning reduction of sentence are distinct from reparations proceedings and serve different purposes.<sup>417</sup> The OPCV also argues that the Trial Chamber correctly examined Mr Katanga's personal participation in the commission of the crimes.<sup>418</sup>

173. Finally, the OPCV refers to the Appeals Chamber's previous determination that indigence is not an obstacle to the imposition of liability for reparations on the convicted person.<sup>419</sup> The OPCV argues that the Trial Chamber correctly followed this principle, and that Mr Katanga has not demonstrated an error.<sup>420</sup>

(c) **Determination by the Appeals Chamber**

(i) *Scope of Liability for Reparations*

174. Under his fourth ground of appeal, Mr Katanga raises the question of the scope of his liability for reparations in this case. In general, aside from his inability to pay (which is dealt with in the section below), he argues that the Trial Chamber improperly weighed his participation in the crimes *vis-à-vis* others,<sup>421</sup> that it failed to fully consider the relevant mode of liability,<sup>422</sup> and that it improperly considered or

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<sup>415</sup> [OPCV's Response](#), para. 39.

<sup>416</sup> [OPCV's Response](#), para. 40.

<sup>417</sup> [OPCV's Response](#), para. 41.

<sup>418</sup> [OPCV's Response](#), para. 42.

<sup>419</sup> [OPCV's Response](#), para. 44.

<sup>420</sup> [OPCV's Response](#), para. 44. The Appeals Chamber notes that the OPCV refers incorrectly here to "Annex A to the Lubanga Appeals Judgment on Reparations, [...], paras. 102-104"; however, the discussion of indigence of a convicted person is in the [Lubanga Reparations Appeal Judgment](#), paras 102-104.

<sup>421</sup> [Mr Katanga's Appeal Brief](#), para. 81.

<sup>422</sup> [Mr Katanga's Appeal Brief](#), paras 75, 80.

failed to consider other findings in the Decision on Sentence and the Decision on Reduction of Sentence.<sup>423</sup>

175. The Appeals Chamber recalls that, in the *Lubanga* Reparations Appeal Judgment, the Appeals Chamber set down principles regarding the scope of a convicted person's liability for reparations:

[...] the scope of a convicted person's liability for reparations may differ depending on, for example, the mode of individual criminal responsibility established with respect to that person and on the specific elements of that responsibility. Accordingly, [...] [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>424</sup>

This does not mean, however, that the amount of reparations for which a convicted person is held liable must reflect his or her relative responsibility for the harm in question *vis-à-vis* others who may also have contributed to that harm.

176. Article 75 (2) of the Statute provides that “[t]he Court may make an order directly against a convicted person specifying *appropriate* reparations to, or in respect of, victims, including restitution, compensation, and rehabilitation” (emphasis added). Also relevant is rule 97 (1) of the Rules, under the heading “Assessment of reparations”, which reads as follows:

Taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both.

177. The Appeals Chamber notes that human rights treaties provide guidance as to the scope of reparations in general, following the finding of a violation. The Protocol to the African Charter on Human and Peoples' Rights states that, “if the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or

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<sup>423</sup> [Mr Katanga's Appeal Brief](#), paras 75-78.

<sup>424</sup> [Lubanga Reparations Appeal Judgment](#), para. 118; *see also* [Lubanga Amended Order for Reparations](#), para. 45, “The awards ought to be proportionate to the harm, injury, loss and damage as established by the Court”.

reparation”.<sup>425</sup> The IACtHR will also order “fair compensation” within the framework of the American Convention on Human Rights.<sup>426</sup> Furthermore, the Appeals Chamber observes that the monetary reparations order under both human rights treaties is compensatory.<sup>427</sup>

178. Importantly, as noted above under Mr Katanga’s first ground of appeal, the purpose of reparations is to repair the harm that was inflicted on the victims. This corresponds to the general principle of public international law that reparations should, where possible, attempt to restore the *status quo ante*.<sup>428</sup> For these reasons, the Appeals Chamber finds that, in principle, the question of whether other individuals may also have contributed to the harm resulting from the crimes for which the person has been convicted is irrelevant to the convicted person’s liability to repair that harm. While a reparations order must not exceed the overall cost to repair the harm caused, it is not, *per se*, inappropriate to hold the person liable for the full amount necessary to repair the harm.

179. As to whether the mode of liability should be taken into account, the Appeals Chamber recalls that the responsibility to repair harm under article 75 of the Statute arises from a criminal conviction.<sup>429</sup> The modes of individual criminal responsibility which may underpin such a conviction are, in the view of the Appeals Chamber, relevant for capturing criminal responsibility. However, at the reparations stage, the

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<sup>425</sup> Protocol to the African Charter on Human and People’s Rights, 21 October 1986, [OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58](#), article 27(1).

<sup>426</sup> American Convention on Human Rights, 22 November 1969, [1144 United Nations Treaty Series 17955](#), article 63(1); *see also* European Convention on Human Rights, 4 November 1950, as amended by Protocols No. 11 and No. 14, [213 United Nations Treaty Series 2889](#), article 41, “If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparations to be made, the Court shall, if necessary, afford just satisfaction to the injured party”.

<sup>427</sup> IACtHR, *Velásquez Rodríguez v. Honduras*, “Judgment (Reparations and Costs)”, 21 July 1989, [Series C. no. 7](#), paras 38-39; IACtHR, *Castillo Páez v. Peru*, “Judgment (Reparations and Costs)”, 27 November 1998, [Series C. no. 34](#), para. 51.

<sup>428</sup> PCIJ, *Case concerning the Factory at Chorzów (Germany v. Poland)*, “Judgment (Merits)”, 13 September 1928, [Series A. No. 17](#), p.47; IACtHR, *Velásquez Rodríguez v. Honduras*, “Judgment (Merits)”, 29 July 1988, [Series C. no. 4](#), para. 26.

<sup>429</sup> *See* article 75 (2) of the Statute, which provides: “The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims [...]” (emphasis added).

focus is, as set out above, on repairing the harm that has resulted from the crimes in question.

180. The Appeals Chamber notes that, in some cases it may be appropriate for a trial chamber to take into account the role of the convicted person *vis-à-vis* others in the commission of the crimes when deciding on a reparations order against that person. For example, if more than one person is convicted by the Court for the same crimes at the same time, it may be appropriate to apportion liability for the costs to repair. Nevertheless, the focus in all cases should be the extent of the harm and cost to repair such harm, rather than the role of the convicted person.

181. Turning to the case at hand, the Trial Chamber recalled in this regard that, in *Lubanga*, “the Appeals Chamber made the point that the scope of liability for reparations may differ depending on the mode of individual criminal responsibility established *vis-à-vis* the convicted person and on the specific elements of that responsibility”.<sup>430</sup> After discussing Mr Katanga’s individual contribution to the crimes as determined at trial, the Trial Chamber noted that “Mr Katanga made his contribution in the context of a criminal purpose harboured by many persons”<sup>431</sup> and that, at trial, there had been a finding that “combatants other than the Ngiti took part in the attack on Bogoro”.<sup>432</sup> The Trial Chamber then alluded to its limited competence in making conclusive findings as to the proportionate liability of persons for reparations under the Statute,<sup>433</sup> and it observed that, “to the Chamber’s knowledge, no convictions have been returned against other persons for the attack on Bogoro in other fora”.<sup>434</sup> It then set Mr Katanga’s liability for reparations at USD 1 000 000.<sup>435</sup>

182. The Appeals Chamber is not persuaded by Mr Katanga’s argument that the Trial Chamber’s approach was flawed because it “fail[ed] to take fully into account the fact that others, more culpable than Mr Katanga, were responsible for the crimes

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<sup>430</sup> [Impugned Decision](#), para. 252, referring to [Lubanga Reparations Appeal Judgment](#), para. 118.

<sup>431</sup> [Impugned Decision](#), para. 261.

<sup>432</sup> [Impugned Decision](#), para. 262.

<sup>433</sup> [Impugned Decision](#), para. 263.

<sup>434</sup> [Impugned Decision](#), para. 263.

<sup>435</sup> [Impugned Decision](#), para. 263.

committed”<sup>436</sup> and because it “failed to give sufficient weight to the fact that Mr Katanga was initially charged under article 25(3)(a) but, after the Trial Chamber invoked Regulation 55, convicted on the basis of article 25(3)(d)”.<sup>437</sup> As noted above, when determining liability for reparations, the focus is on the repair of the harm and not on the mode of liability.

183. Turning to Mr Katanga’s arguments challenging the Trial Chamber’s reliance on factors taken into account in sentencing and in the subsequent reduction of sentence, the Appeals Chamber recalls that he challenges first the findings in the Decision on Sentence concerning “the gravity of the crimes and the ‘particularly cruel conditions and [...] discriminatory manner’ in which the crimes were committed”.<sup>438</sup> In particular, Mr Katanga says that these circumstances were improperly considered as “aggravating, while the same circumstances were considered and found not to be aggravating” in the Decision on Sentence.<sup>439</sup> Second, Mr Katanga argues<sup>440</sup> that the Trial Chamber should have considered at the reparations stage certain factors considered in the Decision on Sentence and the Decision on Reduction of Sentence.

184. As noted above, when determining the amount a convicted person is liable to pay for reparations, the primary consideration is the extent of the harm and cost it takes to repair that harm. Criteria such as the gravity of the crimes or mitigating factors such as characteristics personal to the convicted person are not relevant to this question. The goal of reparations is not to punish the person but indeed to repair the harm caused to others. Thus, the Appeals Chamber does not agree that the factors set out by Mr Katanga in his Appeal Brief, which do not relate to the goal of reparations, should have been “given weight at the reparations stage”.<sup>441</sup>

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<sup>436</sup> [Mr Katanga’s Appeal Brief](#), para. 81.

<sup>437</sup> [Mr Katanga’s Appeal Brief](#), para. 80.

<sup>438</sup> [Impugned Decision](#), para. 260 quoting [Decision on Sentence](#), para. 143.

<sup>439</sup> [Mr Katanga’s Appeal Brief](#), paras 75-76 referring to [Decision on Sentence](#), paras 70-75.

<sup>440</sup> [Mr Katanga’s Appeal Brief](#), paras 76-78.

<sup>441</sup> [Mr Katanga’s Appeal Brief](#), para. 78.

185. For the reasons already given above, the Appeals Chamber finds Mr Katanga’s argument that he faces double punishment to be of no merit.<sup>442</sup> As said, the Appeals Chamber acknowledges that, as argued by Mr Katanga,<sup>443</sup> the objective of reparations proceedings is remedial and not punitive. This remedial character is inherent in the modalities of reparations available to victims under article 75 (2) of the Statute – restitution, compensation, and rehabilitation – and the other forms of reparations that have been recognised by the Appeals Chamber which may be appropriate on an *ad hoc* basis.<sup>444</sup> Accordingly, to the extent that Mr Katanga argues that a reparations award must not, due to its magnitude, be punitive in nature, the Appeals Chamber agrees. However, as long as a convicted person is held liable for the costs that it takes to repair the harm caused, there is no punitive element. That this amount may be high is simply a result of the extent of the harm caused by the crimes for which the person was convicted.

186. As already indicated, the Appeals Chamber considers that the Trial Chamber’s approach to the calculation of the monetary ‘value’ of the harm was unnecessary, leading to a lengthy and costly process. This having been said, the Appeals Chamber has found no error in respect of the presumptions dealt with above that the Trial Chamber used to arrive at the overall value of harm and notes that Mr Katanga was held liable for only a portion thereof, namely USD 1 000 000. The Appeals Chamber shall not address whether the Trial Chamber should have found Mr Katanga liable for the entire cost or for more than the USD 1 000 000 figure because Mr Katanga has appealed the Trial Chamber’s finding as to his liability, with a view to reducing it, and it would therefore be inappropriate to amend this finding to his detriment.<sup>445</sup> However, for all of the foregoing reasons, the Appeals Chamber rejects Mr Katanga’s

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<sup>442</sup> [Mr Katanga’s Appeal Brief](#), paras 72-73; *see also* [Mr Katanga’s Appeal Brief](#), para. 83, “Any award should be careful not to be punitive”.

<sup>443</sup> [Mr Katanga’s Appeal Brief](#), paras 67-72.

<sup>444</sup> [Lubanga Amended Order for Reparations](#), paras 34-43.

<sup>445</sup> Prohibition of *reformatio in peius*; this principle is expressly recognised for appeals against the conviction or sentence brought only by, or on behalf of, the convicted person (*see* article 83 (2), last sentence, of the Statute).

arguments that the reparations order is “excessive”, “unreasonably high”, “disproportionate”, or assigns to him “too much responsibility for the crimes”.<sup>446</sup>

(ii) *Indigence and role of the TFV*

187. Mr Katanga makes a separate argument under the fourth ground of appeal that the Trial Chamber erred in not taking into account his inability to pay.<sup>447</sup> He reiterates his arguments submitted prior to the Impugned Decision, in which he, *inter alia*, claimed that

[i]t would be unfair and unjust to place a financial burden on someone who lacks the means to be able to meet it. Mr Katanga was still at school at the time of the offences. He has been in prison for the past ten years. He is officially indigent in the eyes of the Registry. There is no suggestion that he has hidden assets. He comes from one of the poorest communities in the world. Any reparations order should limit the amount he has to pay to a reasonable, indeed nominal, figure.<sup>448</sup>

188. Mr Katanga then raises the argument that “domestic criminal justice systems do not impose compensation orders where there is no reasonable prospect of it [*sic*] being met, and where it may even encourage future criminality to do so”.<sup>449</sup>

189. The issue of whether a convicted person’s indigence should affect the monetary amount of the reparations order was squarely before the Appeals Chamber in the *Lubanga* case. The Appeals Chamber in that case decided that Trial Chamber I “erred by considering Mr Lubanga’s indigence to be relevant to whether he should be liable for any reparations awarded”.<sup>450</sup> In so deciding, the Appeals Chamber relied on the procedures for the identification and freezing of property and assets under article 75 (4) of the Statute, and interpreted this to mean that “indigence is not an obstacle to the imposition of liability for reparations on the convicted person”.<sup>451</sup> The Appeals Chamber also relied on the procedures for monitoring the “financial situation of the sentenced person on an ongoing basis [...] to enforce fines, forfeiture orders or

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<sup>446</sup> [Mr Katanga’s Appeal Brief](#), paras 74, 81, 86.

<sup>447</sup> [Mr Katanga’s Appeal Brief](#), paras 84-86.

<sup>448</sup> [Mr Katanga’s Appeal Brief](#), para. 84.

<sup>449</sup> [Mr Katanga’s Appeal Brief](#), para. 84.

<sup>450</sup> [Lubanga Reparations Appeal Judgment](#), para. 102.

<sup>451</sup> [Lubanga Reparations Appeal Judgment](#), para. 103.



reparation orders”, under regulation 117 of the Regulations of the Court.<sup>452</sup> This, according to the Appeals Chamber, indicated that “indigence at the time when the Trial Chamber issues an order for reparations is not an obstacle to imposing liability because the order may be implemented when the monitoring of the financial situation of the person sentenced reveals that he or she has the means to comply with the order”.<sup>453</sup> Finally, the Appeals Chamber in *Lubanga* referred to the fact that, during the drafting of the Statute, a provision empowering the Court to make a reparations order against a State in the event that the convicted person is unable fulfil the order him or herself was eventually not included in the Statute.<sup>454</sup>

190. It is noted that the Trial Chamber found that Mr Katanga had not presented any reason why it should have departed from the principles enunciated in the *Lubanga* case,<sup>455</sup> and the Appeals Chamber finds that Mr Katanga has not presented any such reason on appeal. Although, in its assessment of reparations, a trial chamber must in all cases “respect the rights of [...] the convicted person”,<sup>456</sup> under the circumstances the Appeals Chamber does not find that Mr Katanga has any concrete right to have the benefit of reduced liability on account of his present indigence. Contrary to Mr Katanga’s arguments,<sup>457</sup> the Appeals Chamber does not find this to be “unfair” or “unjust”. In these circumstances, there is no reason to address Mr Katanga’s argument that taking into account his indigence would not adversely affect the victims because the TFV could simply pay a higher share.<sup>458</sup> At the same time, the Appeals Chamber notes that Mr Katanga’s personal circumstances may affect how a reparations order is enforced. Such a consideration is under the authority of the Presidency and has no impact on the reasonableness of the reparations order itself. The Appeals Chamber also notes in this respect that the Trial Chamber stated that it was for the Presidency, with the assistance of the Registrar to monitor Mr Katanga’s financial situation

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<sup>452</sup> [Lubanga Reparations Appeal Judgment](#), para. 104.

<sup>453</sup> [Lubanga Reparations Appeal Judgment](#), para. 104.

<sup>454</sup> [Lubanga Reparations Appeal Judgment](#), para. 105.

<sup>455</sup> [Impugned Decision](#), para. 246.

<sup>456</sup> Rule 97 (3) of the Rules.

<sup>457</sup> See [Mr Katanga’s Appeal Brief](#), para. 84.

<sup>458</sup> [Mr Katanga’s Appeal Brief](#), para. 85.

pursuant to regulation 117 of the Regulations of the Court on an ongoing basis.<sup>459</sup> However, the Appeals Chamber observes that the Trial Chamber also noted that it would “in due course consider whether it need seek the assistance of States Parties to give effect to the present order for reparations pursuant to article 75(4) of the Statute”.<sup>460</sup> The Appeals Chamber recalls that, in accordance with rule 217 of the Rules, it is also for the Presidency, and not a trial chamber, to seek the assistance of States Parties in respect of cooperation matters.<sup>461</sup>

191. Accordingly, the Appeals Chamber rejects Mr Katanga’s fourth ground of appeal.

### **C. The OPCV’s Appeal**

192. The OPCV raises one ground of appeal:

The Trial Chamber made a procedural error by not appointing a new lawyer for victims immediately after authorising the Former Legal Representative to terminate his mandate in respect of the Concerned Victims.<sup>462</sup>

193. The former legal representative of the 32 victims who have brought this appeal<sup>463</sup> (“Concerned Victims”) is the LRV who has filed a separate appeal in these proceedings on behalf of another group of victims. For the purposes of consideration of the OPCV’s appeal, he is, in this part of this judgment, referred to as the “Former LRV”.

#### *1. Relevant additional background before the Trial Chamber*

194. Details as to the procedure that took place in relation to the submission of victims’ applications for reparations, which also related to the Concerned Victims, can be found above in the procedural history section of this judgment. Additional procedural background, relevant to the OPCV’s appeal, is the following.

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<sup>459</sup> [Impugned Decision](#), para. 329.

<sup>460</sup> [Impugned Decision](#), para. 329.

<sup>461</sup> See also regulation 116 of the Regulations of the Court.

<sup>462</sup> [OPCV’s Appeal Brief](#), p. 10.

<sup>463</sup> [OPCV’s Appeal Brief](#), para. 1: [REDACTED]

195. On 22 September 2009, the Former LRV was designated by the Registrar to act as common legal representative for, *inter alia*, the Concerned Victims.<sup>464</sup>

196. On 16 March 2016, the Former LRV, in the First Request for Leave to Withdraw as LRV, requested leave to withdraw as legal representative of [REDACTED] victims, including the Concerned Victims, submitting that [REDACTED]

[REDACTED]<sup>465</sup> [REDACTED]  
[REDACTED]  
[REDACTED]<sup>466</sup> In respect of others, he submitted that [REDACTED]

[REDACTED]  
[REDACTED]<sup>467</sup> [REDACTED]

[REDACTED]  
[REDACTED]

[REDACTED]<sup>468</sup> .

197. On 13 May 2016, the Former LRV submitted the LRV's Report of 13 May 2016, detailing information as to the applications for reparations submitted by the victims he represented.

198. On 18 May 2016, the Trial Chamber issued the First Decision on Request for Leave to Withdraw as LRV, rejecting the Former LRV's request and stating, *inter alia*, that it "[REDACTED]

[REDACTED]  
[REDACTED]

[REDACTED] . [REDACTED]

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<sup>464</sup> "Désignation définitive de Me Fidel Nsita Luvengika comme représentant légal commun du groupe principal de victimes et affectation des victimes aux différentes équipes", [ICC-01/04-01/07-1488](#).

<sup>465</sup> [REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] .

<sup>467</sup> [REDACTED] .  
<sup>468</sup> [REDACTED] .

[REDACTED].<sup>469</sup> It ordered the VPRS to submit the files of all of the Concerned Victims to it as they stood, by 31 May 2016.<sup>470</sup>

199. On 27 May 2016, in response to the First Decision on Request for Leave to Withdraw as LRV, the Former LRV submitted further observations and a second request for leave to withdraw as LRV for the Concerned Victims.<sup>471</sup> He submitted, *inter alia*, that, [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] p. 472 [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>473</sup>

200. On 31 May 2016, the relevant applications were provided to the Trial Chamber.<sup>474</sup> On 6 September 2016, the Trial Chamber granted leave to the Former LRV to withdraw as legal representative of the Concerned Victims.<sup>475</sup> The Trial Chamber stated that, “[REDACTED]

[REDACTED]  
[REDACTED]

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<sup>469</sup> [REDACTED]

<sup>470</sup> First Decision on Request for Leave to Withdraw as LRV, para. 21.

<sup>471</sup> Second Request for Leave to Withdraw as LRV.

<sup>472</sup> [REDACTED]

<sup>473</sup> [REDACTED]

<sup>474</sup> “Transmission à la Chambre des dossiers relatifs à 39 victimes participantes et 3 demandeurs à la réparation en application de la Décision du 18 mai 2016 (ICC-01/04-01/07-3689-Conf)”, ICC-01/04-01/07-3695-Conf.

<sup>475</sup> Decision on Withdrawal of Representation of 6 September 2016.

[REDACTED].<sup>476</sup> It continued: “[REDACTED]  
[REDACTED]”,<sup>477</sup>

201. On 15 March 2017, in the Decision Appointing the OPCV, the Trial Chamber, *inter alia*, noted that it had fixed the date for issuance of the Impugned Decision, “recall[ed] that, under article 82(4) of the Statute, the Legal Representative may appeal against the [Impugned Decision]” and stated that, “given that [the Concerned Victims] currently have no legal representation, the Chamber deems it opportune to appoint, under regulations 80 and 81 of the Regulations of the Court, the [OPCV] as the Legal Representative in the appeals phase, if the need arises” (footnote omitted).<sup>478</sup>

202. In the Impugned Decision, and its Annex II, the Trial Chamber considered the applications for reparations by the Concerned Victims. [REDACTED]

[REDACTED]  
[REDACTED]<sup>479</sup> [REDACTED]<sup>480</sup>

## 2. *Submissions of the parties*

### (a) **The OPCV’s submissions**

203. The OPCV submits that the Trial Chamber committed a “procedural error by not appointing a lawyer for” the Concerned Victims “immediately after having granted the request by the [Former LRV] to terminate his mandate in respect of the above mentioned individuals”.<sup>481</sup> It submits:

Said procedural error or the Chamber’s failure to ensure continuous legal representation deprived the Concerned Victims of their right to effectively participate in the reparations proceedings leading to the issuance of the Impugned Decision, through their legal representative, in accordance with article 68(3) of the Rome Statute [...] and resulted in unfairness towards them at

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<sup>476</sup> [REDACTED]

<sup>477</sup> [REDACTED]

<sup>478</sup> [Decision appointing the OPCV](#), paras 13-14.

<sup>479</sup> [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

<sup>480</sup> [OPCV’s Appeal Brief](#), para. 1.

a highly critical stage of the proceedings. The cumulative effects of said procedural error materially affected the Chamber's factual findings and had a significant impact upon the outcome of the Impugned Decision relating to the Concerned Victims' claims for reparations.<sup>482</sup>

204. The OPCV "challenges the final outcome of the Impugned Decision which resulted in the total or partial rejection of the applications for reparations of the Concerned Victims, due, principally, to the lack of sufficient evidence to substantiate their claims".<sup>483</sup> It claims that the Trial Chamber's error "was not retrospectively rectified by the designation of the [OPCV] whose appointment was made at a late stage in the proceedings where the submission of evidence to substantiate the applications for reparations was not possible anymore".<sup>484</sup> Emphasising the importance and need for legal representation of victims, the OPCV also argues that there is a right to continuous representation, stating that "the Appeals Chamber already ruled that there should be 'no gaps' in the legal representation of victims as they must remain represented throughout the proceedings" (footnote omitted, emphasis in original).<sup>485</sup>

205. The OPCV argues that, during the gap in representation, "the Concerned Victims were unaware of the progress of the reparations proceedings and the procedural decisions affecting their personal interests" and "most importantly in the context of this appeal, [they] were not able to meet with a counsel, to explain their situation and be advised on how eventually to provide sufficient evidence to support their applications for reparations".<sup>486</sup> It refers to the time period preceding the Impugned Decision, when the Concerned Victims were not represented, as "particularly significant because during said period they could have still been in a position to complete their applications for reparations".<sup>487</sup> The OPCV notes that, during this time, the Trial Chamber "was aware of and acknowledged the fact that it was not in possession of adequate evidence supporting the claims for reparations of the Concerned Victims and therefore it should have immediately appointed a new

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<sup>482</sup> [OPCV's Appeal Brief](#), para. 2.

<sup>483</sup> [OPCV's Appeal Brief](#), para. 29.

<sup>484</sup> [OPCV's Appeal Brief](#), para. 30.

<sup>485</sup> [OPCV's Appeal Brief](#), para. 32.

<sup>486</sup> [OPCV's Appeal Brief](#), para. 33.

<sup>487</sup> [OPCV's Appeal Brief](#), para. 34.

lawyer in order to allow them to complete their applications for reparation with sufficient evidence” (footnote omitted).<sup>488</sup>

206. The OPCV states that the Former LRV had advised the Trial Chamber, in both his requests to withdraw as counsel, “[REDACTED]

[REDACTED]”.<sup>489</sup> Therefore, it submits that the Concerned Victims were in fact unrepresented since the first request for withdrawal in March 2016.<sup>490</sup> In addition, it submits that the Former LRV had informed the Trial Chamber, in the second request to withdraw, “[REDACTED]

[REDACTED]”.<sup>491</sup> Consequently, it submits that “the Chamber should have been even more inclined to instantly appoint a new counsel in order for the Concerned Victims to be able to exercise their rights throughout the reparations proceedings”.<sup>492</sup>

207. The OPCV refers to difficulties victims may have in providing proof and submits that chambers must take this into account.<sup>493</sup> It also notes that the time period between its appointment and issuance of the Impugned Decision was too short for it “to even contact [its] clients, given that all of them filed their applications for reparations in 2008 and 2009, and that some forms were even lacking contact details. Consequently, the Concerned Victims were given no real opportunity to defend their interests at a critical stage of the reparations proceedings”.<sup>494</sup> It submits that had it been appointed immediately after withdrawal of the Former LRV, it would “have easily focused on the analysis of the adequacy of their applications for reparations and would have concentrated [its] efforts to submit sufficient evidence of their identities, the harm suffered from and the causal link between the harm and the crime for which

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<sup>488</sup> [OPCV’s Appeal Brief](#), para. 34.

<sup>489</sup> [REDACTED]

<sup>490</sup> [OPCV’s Appeal Brief](#), para. 35.

<sup>491</sup> [REDACTED]

<sup>492</sup> [OPCV’s Appeal Brief](#), para. 35.

<sup>493</sup> [OPCV’s Appeal Brief](#), para. 36.

<sup>494</sup> [OPCV’s Appeal Brief](#), para. 39.

the accused was convicted. In other words, the outcome of the Impugned Decision would have been substantially different”.<sup>495</sup> The OPCV submits:

In this regard, the Legal Representative, having been able to contact her clients and to consult with them, is in the position to indicate – without pronouncing herself on the final outcome of the reparation claims – that the Concerned Victims shall be able to complete the majority, if not all, of their applications for reparations with sufficient evidence in a relatively short period of time. This fact also supports the contention that the Chamber’s error materially affected the outcome of the Impugned Decision.<sup>496</sup>

208. The OPCV refers to the jurisprudence which “held that belated appointment of counsel constitutes a violation of fair trial rights”.<sup>497</sup> It submits that the Concerned Victims “were placed in a disadvantageous position compared to the other victims”.<sup>498</sup>

It submits:

Therefore, had the Chamber assigned the Legal Representative immediately after the withdrawal of the previous counsel, the Concerned Victims will have been able to take part, through their lawyer, in many important litigations, as mentioned *supra*, leading to the issuance of the Impugned Decision - such as observations and responses on the monetary value for each type of harm, on the modalities of reparations, on the request to hold a hearing on reparations related matters - on an equal footing with the victims represented by the Former Legal Representative. Moreover, a timely appointed counsel will have had ample opportunity to supplement and complete the applications for reparations of the Concerned Victims and will have taken any other procedural steps necessary to represent the best interest of his/her clients.<sup>499</sup> [Footnote omitted.]

209. The OPCV submits that the Concerned Victims “should be granted appropriate reparations, after having been given a genuine opportunity to present or supplement anew their applications for reparations”.<sup>500</sup>

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<sup>495</sup> [OPCV’s Appeal Brief](#), para. 40.

<sup>496</sup> [OPCV’s Appeal Brief](#), para. 41.

<sup>497</sup> [OPCV’s Appeal Brief](#), para. 42.

<sup>498</sup> [OPCV’s Appeal Brief](#), para. 43.

<sup>499</sup> [OPCV’s Appeal Brief](#), para. 45.

<sup>500</sup> [OPCV’s Appeal Brief](#), para. 49: “[...] the Appeals Chamber should implement the reparations proceedings, in particular, by (i) allowing the Concerned Victims to present additional evidence in support of their applications for reparations within a set period of time; (ii) examining anew the applications for reparations submitted by the Concerned Victims and issuing a decision on their merit in light of the additional evidence presented; and (iii) taking any other necessary measures in order to fully give effect to the Concerned Victims’ right to reparations, pursuant to article 75 of the Statute”. See also para. 47 and p. 23.



(b) **The LRV's submissions**

210. The Former LRV submits that the OPCV misrepresents the facts on this issue and that the error raised is “in particular a misrepresentation of the [Former LRV’s] discharge of his representation agreement” in relation to the Concerned Victims before he withdrew.<sup>501</sup> He therefore “considers it his duty to respond”.<sup>502</sup> He submits that the OPCV has effectively asked the Appeals Chamber to institute new reparations proceedings, before it, for the Concerned Victims, “without objective justification and to the disadvantage of the [current] victims represented by the” Former LRV, stating that the Trial Chamber had “already examined and ruled on their applications, applying a similar process for all the applicants”.<sup>503</sup> The Former LRV alleges “two serious flaws” in relation to the facts recounted by the OPCV, being the way in which he took steps to file the relevant applications for reparations and the procedure instituted by the Chamber to allow them to be filed by 29 February 2016.<sup>504</sup>

211. The Former LRV states that the same process was carried out for all victims, and that “his analysis of some dossiers – and the individual interviews that followed – led him to conclude that certain individuals’ situations did not meet the criteria for claiming harm in connection with the crimes of which Germain Katanga was convicted” (footnote omitted).<sup>505</sup> He submits that “[t]hat conclusion was confirmed when it proved impossible to obtain documents to demonstrate the harm (death certificates and certificates of residence, in particular)”.<sup>506</sup> [REDACTED]

[REDACTED].<sup>507</sup> He submits that, contrary to what the OPCV stated, the Trial Chamber did not ask him to submit more information for those victims, as it intended to rule on the relevant applications [REDACTED]

[REDACTED].<sup>508</sup> He submits that the Concerned Victims “had the opportunity to complete their applications in the same conditions

<sup>501</sup> [LRV's Submissions on OPCV's appeal](#), para. 1.

<sup>502</sup> [LRV's Submissions on OPCV's appeal](#), para. 1.

<sup>503</sup> [LRV's Submissions on OPCV's appeal](#), para. 2.

<sup>504</sup> [LRV's Submissions on OPCV's appeal](#), para. 24.

<sup>505</sup> [LRV's Submissions on OPCV's appeal](#), para. 30.

<sup>506</sup> [LRV's Submissions on OPCV's appeal](#), para. 30.

<sup>507</sup> [REDACTED]

<sup>508</sup> [LRV's Submissions on OPCV's appeal](#), para. 32.

and with the same support from the [Former LRV] as the other applicants. No distinction was made in the procedure followed”.<sup>509</sup> He submits that other applications were also not supplemented by additional documents and this was not unique to these victims.<sup>510</sup> In relation to the OPCV’s allegations, he submits that it “disregards the process undertaken by the [Former LRV] and the steps he took to discharge his representation agreement in respect of those victims”.<sup>511</sup> He also disputes the “claim that the Concerned Victims were not informed about the progress of the reparations proceedings”.<sup>512</sup> He submits that “[o]nce his withdrawal from the representation agreement was authorized, the [Former LRV] personally informed all the victims concerned of the decision” (footnote omitted).<sup>513</sup>

212. He also submits that restarting the process for the Concerned Victims would be discriminatory in relation to the other victims “whose claims were partly or wholly rejected in the same conditions”.<sup>514</sup>

(c) **Mr Katanga’s response**

213. Mr Katanga submits that the OPCV’s appeal should be dismissed in its entirety.<sup>515</sup> He states that three years had passed since Mr Katanga’s conviction when the Former LRV sought leave to withdraw as counsel and that “[a]ccordingly, these victims had been granted ample time to submit evidence in support of their reparation claims”.<sup>516</sup> He submits that the Former LRV “had made all efforts to collect identifying and other relevant information about the applicants and their claims” and that there is “no reason to assume that the applications concerned were treated differently from any of the other applications”.<sup>517</sup> Mr Katanga submits that it seemed, contrary to the Concerned Victims’ claims, that [REDACTED]

[REDACTED]

[REDACTED]

<sup>509</sup> [LRV’s Submissions on OPCV’s appeal](#), para. 33.

<sup>510</sup> [LRV’s Submissions on OPCV’s appeal](#), para. 34.

<sup>511</sup> [LRV’s Submissions on OPCV’s appeal](#), para. 36.

<sup>512</sup> [LRV’s Submissions on OPCV’s appeal](#), para. 38.

<sup>513</sup> [LRV’s Submissions on OPCV’s appeal](#), para. 38.

<sup>514</sup> [LRV’s Submissions on OPCV’s appeal](#), para. 42.

<sup>515</sup> [Mr Katanga’s Response](#), para. 54.

<sup>516</sup> [Mr Katanga’s Response](#), para. 55.

<sup>517</sup> [Mr Katanga’s Response](#), para. 56.

[REDACTED]<sup>518</sup> He submits that, based on the Former LRV's submissions, [REDACTED]

[REDACTED]<sup>519</sup> He submits:

It is difficult to imagine how the Office of Public Council for Victims would have been able to find credible evidence within half a year, which the LRV did not manage to find throughout all these years [REDACTED]

214. Mr Katanga points to issues he had raised in the past which go to show that “it appears there are legitimate reasons to doubt the eligibility of the victim applicants concerned” and that “[e]arlier appointment of legal representation would not have altered this fact”.<sup>521</sup> He submits that “[t]he absence of supporting evidence in respect of some of their claims has not been caused by the lack of legal representation for over a year” and the ground should be dismissed.<sup>522</sup>

### 3. *Determination by the Appeals Chamber*

215. The question raised by the OPCV's appeal is whether the Trial Chamber erred procedurally when allowing the Former LRV to withdraw as legal representative of the Concerned Victims without immediately appointing a new legal representative. The OPCV argues that victims must remain represented throughout the proceedings until the completion of the reparations phase.<sup>523</sup>

216. The Appeals Chamber notes that, generally, it is not only in the interests of victims, but also in the interests of the efficient conduct of the proceedings, that victims are legally represented during the reparations phase. Indeed, rule 90 of the Rules concerns the legal representation of victims, with sub-rules 2 to 5 providing for

<sup>518</sup> [REDACTED]

<sup>519</sup> [REDACTED]

<sup>520</sup> [Mr Katanga's Response](#), para. 57.

<sup>521</sup> [Mr Katanga's Response](#), para. 59.

<sup>522</sup> [Mr Katanga's Response](#), para. 59.

<sup>523</sup> [OPCV's Appeal Brief](#), paras 31-32.

the appointment of a common legal representative “[f]or the purposes of ensuring the effectiveness of the proceedings”.<sup>524</sup> In addition, regulation 80 (1) of the Regulations of the Court provides that “[a] Chamber, following consultation with the Registrar and, when appropriate, after hearing from the victim or victims concerned, may appoint a legal representative of victims where the interests of justice so require”. In the view of the Appeals Chamber, legal representation of victims is a means to make their participation substantive and effective and to ensure that they have adequate support.<sup>525</sup> The Appeals Chamber notes, however, that the Court’s legal texts do not expressly provide that victims must be represented by counsel at all times before a trial chamber<sup>526</sup> and the Appeals Chamber therefore rejects the OPCV’s argument that representation of victims must be continuous.<sup>527</sup>

217. The question arises in this case as to whether the Trial Chamber abused its discretion by *not* appointing counsel immediately after the Former LRV was granted leave to withdraw as counsel, in the circumstances of this case, when the proceedings had, at that point, been ongoing for some time. The Appeals Chamber finds that the Trial Chamber did not err.

218. The Appeals Chamber recalls that the Concerned Victims had been legally represented by the Former LRV since 2009, when the Trial Chamber appointed him as their common legal representative.<sup>528</sup> The reparations proceedings in this case had been ongoing since 2014 (see the procedural history above). In relation to withdrawal of the Former LRV, the Appeals Chamber notes that the Former LRV, in both applications to withdraw as LRV, [REDACTED]

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<sup>524</sup> Rule 90 (2) of the Rules.

<sup>525</sup> See [Lubanga Amended Order for Reparations](#), para. 29.

<sup>526</sup> The jurisprudence cited by the OPCV, including an Appeals Chamber decision, does not support the proposition that legal representation must be continuous in the sense that there can never be periods during which an unrepresented victim may participate in the proceedings. Rather, the decisions referred to concerned materially different issues pertaining to representation by a *particular* counsel, such as the duration of a representation agreement of a particular counsel or the preference for the continuity of representation by a particular counsel – they were not decisions on the issue of whether unrepresented victims must have counsel at all times. See [OPCV’s Appeal Brief](#), paras 31-32.

<sup>527</sup> [OPCV’s Appeal Brief](#), paras 31-32.

<sup>528</sup> See [Order of 22 July 2009](#), para. 10.

[REDACTED]  
[REDACTED] The Trial Chamber granted leave to him to withdraw on 6 September 2016. The Former LRV, on appeal, is adamant that he provided the same level of representation to the Concerned Victims as to any of the other victims he was representing and that the Concerned Victims had every opportunity to substantiate their applications for reparations. The Appeals Chamber does not question the veracity of the Former LRV's submissions.

219. The Appeals Chamber notes that the OPCV advances the argument that the Trial Chamber should have appointed new counsel to allow the Concerned Victims to provide sufficient evidence to support their applications.<sup>529</sup> As stated, the reparations proceedings in this case had been ongoing since 2014, with deadlines having been fixed for the purposes of submission of the victims' applications for reparations. The Trial Chamber ordered the submission of the Concerned Victims' files to the Trial Chamber in the First Decision on Request for Leave to Withdraw, by 31 May 2016. The period following withdrawal of the Former LRV as their legal representative was not dedicated to receipt of evidence in relation to specific applications for reparations.

220. In these circumstances, the Appeals Chamber finds that the Trial Chamber did not abuse its discretion in failing to appoint new counsel for the purpose of assisting the Concerned Victims in completing their applications. Therefore, the Appeals Chamber rejects the OPCV's appeal.

#### **D. The LRV's Appeal**

221. The LRV's appeal relates to the findings by the Trial Chamber that it could not establish a causal link between the attack on Bogoro and the "transgenerational psychological harm"<sup>530</sup> in relation to five applicants for reparations, namely [REDACTED], [REDACTED], [REDACTED] and [REDACTED]<sup>531</sup> (for the purposes of the LRV's appeal, these applicants are known as the "Five Applicants" and their respective applications together have been referred to as the "Five Applications"). The

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<sup>529</sup> [OPCV's Appeal Brief](#), paras 34, 36, 42-43.

<sup>530</sup> [Impugned Decision](#), para. 132.

<sup>531</sup> [Legal Representative's Appeal Brief](#), para. 1 referring to [Impugned Decision](#), paras 132-134.

LRV alleges that the Trial Chamber erred in two ways. First, the Trial Chamber erred in not applying the relevant standard of proof to the Five Applications. Second, the Trial Chamber failed to take into account the totality of the evidence in respect of findings of harm attributed to the Five Applicants and failed to provide reasons for rejecting a report that was relevant to findings on “transgenerational psychological harm” in connection with the attack on Bogoro.

*1. LRV’s first ground of appeal: findings of causal nexus in relation to Five Applicants*

222. In his first ground of appeal, he challenges the Trial Chamber’s assessment of the Five Applications.

**(a) Relevant part of the Impugned Decision**

223. In the Impugned Decision, the Trial Chamber held that a natural person may be a direct victim or an indirect victim but that in both cases, the harm must have been personally suffered.<sup>532</sup> In relation to the particular situation of the Five Applicants, the Trial Chamber recalled that they had alleged transgenerational psychological harm which it found that the Expert Report had “describe[d] as a phenomenon, whereby social violence is passed on from ascendants to descendants with traumatic consequences for the latter”.<sup>533</sup> The Trial Chamber noted the findings of the Expert Report, “which speaks of the transgenerational psychological trauma that presents in many children whose parents experienced the attack on Bogoro first hand”.<sup>534</sup> It also recalled the observations made by Mr Katanga, *inter alia*, that “[t]he report remains extremely vague and hypothetical” and is “insufficient to establish a sufficient close link between the crimes [...] and any eventual harm which would be endured by the children born after the Bogoro attack”.<sup>535</sup> It found:

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

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<sup>532</sup> [Impugned Decision](#), para. 39.

<sup>533</sup> [Impugned Decision](#), para. 132.

<sup>534</sup> [Impugned Decision](#), para. 133.

<sup>535</sup> [Impugned Decision](#), para. 133.

The Chamber nonetheless recommends that the children in question be monitored and afforded particular attention. [Footnotes omitted.]

224. In a footnote, the Trial Chamber noted that, since it had decided that the Expert Report did not set forth any information allowing it to determine that a causal nexus between the attack on Bogoro and the trauma suffered has been established, it “need not entertain” Mr Katanga’s arguments further.<sup>536</sup> Later in the Impugned Decision, when setting out its findings as to its individual analysis of the victims’ applications for reparations, the Trial Chamber stated:

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.<sup>537</sup>

225. On this basis, and as set out in Annex II to the Impugned Decision, the Trial Chamber did not grant the Five Applicants’ requests for reparations for psychological harm that was transgenerational in nature.<sup>538</sup>

**(b) Submissions of the parties**

*(i) The LRV’s submissions*

226. The LRV submits that the Trial Chamber: (i) erred in law “in its application of the relevant standard of proof to the applications claiming transgenerational harm”;<sup>539</sup> and (ii) “failed to take into account all of the evidence pertaining to those applications and to sufficiently reason its decision”.<sup>540</sup> The LRV requests that the Appeals Chamber amend the Impugned Decision and its Annex II with regard only to the points raised in its appeal.<sup>541</sup> The LRV requests that the Appeals Chamber correctly apply the standard of proof to the Five Applications, by proceeding on a balance of probabilities in a manner that takes into account the harm suffered by one or more

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<sup>536</sup> [Impugned Decision](#), footnote 216.

<sup>537</sup> [Impugned Decision](#), para. 176.

<sup>538</sup> See Annex II to the Impugned Decision, [REDACTED]

[Legal Representative’s Appeal Brief](#), para. 3; see also para. 60 where the LRV states that the blanket rejection of the causal nexus amounted to errors of both law and fact.

<sup>540</sup> [Legal Representative’s Appeal Brief](#), para. 3.

<sup>541</sup> [Legal Representative’s Appeal Brief](#), para. 5.

parents when determining the causal nexus between the attack on Bogoro and the harm claimed by the applicant.<sup>542</sup>

227. In respect of the first ground of appeal – misapplication of the standard of proof regarding the existence of transgenerational harm – the LRV argues that, had the Trial Chamber correctly applied the balance of probabilities test in its reasoning, it would have established the link between the attack on Bogoro and the harm suffered by the Five Applicants.<sup>543</sup> In his view, the Trial Chamber erred in not taking into account, in its assessment of the existence of a causal link between the crimes committed during the attack and the harm suffered by the Five Applicants, its own findings establishing the existence of a causal link between the said crimes and the harm suffered by their parents.<sup>544</sup> He contends that the Trial Chamber should have applied, in this case, the same reasoning, “predominantly accepted at the Court”, that “the death of a close person to the indirect victim causes the victim harm provided a close relationship is established with the direct victim – whose death has been proven. Suffering is presumed to be established by virtue of such relationship”.<sup>545</sup> He notes that the Trial Chamber did “not dismiss the transgenerational nature of the personal harm which it considers to be established in the case of each of the five young applicants, although it considers that there is no evidence of a nexus between it and the attack”.<sup>546</sup> However, he submits that “the admission of the transgenerational nature of the trauma itself is sufficient to establish such a nexus where the harm to the parent is considered to be linked to the attack”.<sup>547</sup>

228. The LRV points out that, with respect to three of the Five Applicants, a finding of emotional harm caused by the attack was made by the Trial Chamber in the case of at least one parent.<sup>548</sup> With respect to the fourth applicant, the LRV states that the Trial Chamber “ought to have taken into account the mother’s trauma and the link

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<sup>542</sup> [Legal Representative’s Appeal Brief](#), para. 88.

<sup>543</sup> [Legal Representative’s Appeal Brief](#), para. 50.

<sup>544</sup> [Legal Representative’s Appeal Brief](#), paras 39-60.

<sup>545</sup> [Legal Representative’s Appeal Brief](#), para. 47.

<sup>546</sup> [Legal Representative’s Appeal Brief](#), para. 56.

<sup>547</sup> [Legal Representative’s Appeal Brief](#), para. 57.

<sup>548</sup> [Legal Representative’s Appeal Brief](#), para. 39.



between it and the child's trauma".<sup>549</sup> Lastly, as regards the fifth applicant, the LRV submits that the Trial Chamber should have taken into account a medical certificate which mentions the mother's trauma.<sup>550</sup>

229. The LRV alleges that "the Chamber should, on a balance of probabilities, have ascertained whether transgenerational harm linked to the attack could be established in the event that harm to one or more parents was itself established and found to be linked to the attack".<sup>551</sup> However, the LRV argues that when the Trial Chamber stated that "no evidence [was] laid before [it] to establish on a balance of probabilities the causal nexus between the trauma suffered and the attack on Bogoro",<sup>552</sup> it failed to "take into account the key element of harm to one or more parents".<sup>553</sup>

230. The LRV believes that "the Chamber should have ascertained whether, on a balance of probabilities, it could be established that the harm suffered by the children could have been caused by the harm suffered by the parents [...] hence qualifying the children as indirect victims of the attack".<sup>554</sup> The LRV notes that "the Chamber does not dismiss the transgenerational nature of the personal harm which it considers to be established in the case of each of the five young applicants, although it considers that there is no evidence of a nexus between it and the attack".<sup>555</sup> As such, the LRV argues that, although the Trial Chamber made a finding of "personal psychological harm to the children, the same harm to the parents and the causal nexus between it and the attack, the Trial Chamber nonetheless refrain[ed] from applying its own standard of proof to its findings".<sup>556</sup>

231. Ultimately, the LRV asserts that by misapplying the standard of proof on a balance of probabilities, this led to "a blanket rejection of any causal nexus between the transgenerational harm and the attack" which is both an error in law and error in

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<sup>549</sup> [Legal Representative's Appeal Brief](#), para. 41.

<sup>550</sup> [Legal Representative's Appeal Brief](#), para. 43.

<sup>551</sup> [Legal Representative's Appeal Brief](#), para. 46.

<sup>552</sup> [Legal Representative's Appeal Brief](#), para. 46.

<sup>553</sup> [Legal Representative's Appeal Brief](#), para. 46.

<sup>554</sup> [Legal Representative's Appeal Brief](#), para. 48.

<sup>555</sup> [Legal Representative's Appeal Brief](#), para. 56.

<sup>556</sup> [Legal Representative's Appeal Brief](#), para. 58.

fact.<sup>557</sup> Upon proper application, the LRV believes that the Impugned Decision “would have led to other conclusions”.<sup>558</sup> The LRV requests that the Appeals Chamber “correctly apply the standard of proof to the applications which raise the issue of transgenerational harm”<sup>559</sup> and that the Trial Chamber’s findings be amended “to the extent that the correct application of the standard of proof requires”.<sup>560</sup>

(ii) *The OPCV’s response*

232. The OPCV responds that it supports in whole both grounds of appeal raised by the LRV and agrees that these grounds show that the Trial Chamber committed errors of law and fact in the Impugned Decision.<sup>561</sup> The OPCV adds that the “absence of sufficient reasoning for the rejection of reparations claims based on transgenerational harm also affects ‘*the fairness or reliability of the proceedings or decision*’ under Article 81(1)(b)(iv)”.<sup>562</sup> The OPCV stresses that the Trial Chamber implicitly acknowledged the potential existence of transgenerational harm.<sup>563</sup> The OPCV argues that since the Trial Chamber nevertheless simply and erroneously concluded to reject the reparations claims based on transgenerational harm without properly explaining the reasons underpinning the conclusion, the Trial Chamber indeed failed to provide sufficient reasoning for its rejection.<sup>564</sup> The OPCV adds that the Trial Chamber’s inadequate reasoning not only infringed the fundamental right of the victims to a reasoned decision but also precludes a fair and comprehensive appellate review by the Appeals Chamber.<sup>565</sup> The OPCV also responds that the Trial Chamber should have provided adequate reasoning in order for the concerned victims to clearly appreciate the reasons for the rejection of their reparation claims.<sup>566</sup> Additionally, The OPCV argues that ensuring the Five Applicants’ exercise of their right to a reasoned decision was even more critical in this instance since the Trial Chamber had the opportunity to

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<sup>557</sup> [Legal Representative’s Appeal Brief](#), para. 60.

<sup>558</sup> [Legal Representative’s Appeal Brief](#), para. 60.

<sup>559</sup> [Legal Representative’s Appeal Brief](#), para. 88.

<sup>560</sup> [Legal Representative’s Appeal Brief](#), para. 88.

<sup>561</sup> [OPCV’s Response](#), para. 12.

<sup>562</sup> [OPCV’s Response](#), para. 12.

<sup>563</sup> [OPCV’s Response](#), para. 13.

<sup>564</sup> [OPCV’s Response](#), para. 14.

<sup>565</sup> [OPCV’s Response](#), para. 14.

<sup>566</sup> [OPCV’s Response](#), para. 16.

address the issue of transgenerational harm for the first time in the history of the Court.<sup>567</sup>

(iii) *Mr Katanga's response*

233. Mr Katanga opposes both grounds of appeal raised by the LRV.<sup>568</sup> Mr Katanga submits that the LRV's first ground of appeal should be dismissed in its entirety and the Impugned Decision should be confirmed in respect of the exclusion of a finding of transgenerational harm for applicants born after 24 February 2003.<sup>569</sup> As Mr Katanga submits, this is because "[t]he prejudice alleged is not sufficiently proximate or personal, and not sufficiently linked to the crimes for which the accused was convicted".<sup>570</sup> Mr Katanga also notes that "the concept of transgenerational harm is neither clearly defined nor accepted before [the Court]".<sup>571</sup>

234. Mr Katanga responds that the LRV's argument relies mainly on the Expert Report, which "should not be relied on or at least [...] should be approached with caution".<sup>572</sup> He elaborates that the Expert Report "is not signed, stamped or dated; therefore its provenance and content cannot be authenticated", and that it has been submitted by the LRV himself without giving Mr Katanga the opportunity to cross-examine its author.<sup>573</sup> Lastly, Mr Katanga submits that the Expert Report "remains extremely vague and hypothetical", making it "insufficient to establish a sufficiently close link between the crimes for which Mr Katanga was convicted and any eventual harm".<sup>574</sup> In particular, Mr Katanga submits that the Expert Report "does not draw any clear conclusions as to the transgenerational harm of the children born after the 2003 Bogoro attack" but merely mentions some weak probabilities.<sup>575</sup> Therefore, Mr Katanga agrees that the Trial Chamber "applied the proper standard of proof and took into account all the relevant information available"<sup>576</sup> and correctly concluded that the

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<sup>567</sup> [OPCV's Response](#), para. 17.

<sup>568</sup> [Mr Katanga's Response](#), para. 28.

<sup>569</sup> [Mr Katanga's Response](#), para. 30.

<sup>570</sup> [Mr Katanga's Response](#), para. 31.

<sup>571</sup> [Mr Katanga's Response](#), para. 32.

<sup>572</sup> [Mr Katanga's Response](#), paras 33-34.

<sup>573</sup> [Mr Katanga's Response](#), para. 34.

<sup>574</sup> [Mr Katanga's Response](#), para. 34.

<sup>575</sup> [Mr Katanga's Response](#), para. 35.

<sup>576</sup> [Mr Katanga's Response](#), para. 38.

evidence was “insufficient to demonstrate the existence of transgenerational harm for the five applicants”.<sup>577</sup>

(c) **Determination by the Appeals Chamber**

235. In relation to the first ground of appeal, although stating that he is raising errors of “both law and fact”,<sup>578</sup> the LRV appears to be raising an error of fact. The LRV argues, first, that the Trial Chamber “should, on a balance of probabilities, have ascertained whether transgenerational harm linked to the attack could be established in the event that harm to one or more parents was itself established and found to be linked to the attack”.<sup>579</sup> Drawing a parallel with harm resulting from death of a close person, he submits that the Trial Chamber should have presumed harm to exist in this circumstance by virtue of the “same reasoning”, in that suffering is presumed to be established by virtue of such relationship,<sup>580</sup> which the Trial Chamber did not do in the present case.<sup>581</sup> In addition, he appears to argue that the Trial Chamber’s decision on the Five Applications was wrong.<sup>582</sup>

236. In relation to the LRV’s argument that a finding of harm concerning a parent should, without more, necessarily result in a finding of harm for the children based on its transgenerational nature, i.e. that the Trial Chamber should have presumed a causal nexus between the crimes for which Mr Katanga was convicted and the applicants’ alleged harm, the Appeals Chamber is unconvinced. In order to succeed with his argument on appeal, and in light of the applicable standard of review, the LRV would have had to demonstrate that, based on the evidence before the Trial Chamber, no reasonable trier of fact could have refused to draw such a presumption. The Appeals Chamber notes that the LRV had not argued for such a presumption to be drawn before the Trial Chamber. Rather, the LRV’s submission concerning the existence of the causal link in the case of the Five Applicants, [REDACTED] concerned the possibility of establishing a link “once trauma *and* the conditions for its

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<sup>577</sup> [Mr Katanga’s Response](#), para. 39.

<sup>578</sup> [Legal Representative’s Appeal Brief](#), para. 60.

<sup>579</sup> [Legal Representative’s Appeal Brief](#), para. 46.

<sup>580</sup> [Legal Representative’s Appeal Brief](#), para. 47.

<sup>581</sup> [Legal Representative’s Appeal Brief](#), para. 46 citing to [Impugned Decision](#), para. 134.

<sup>582</sup> See [Legal Representative’s Appeal Brief](#), paras 39-43.

transmission have been established in a parent” (emphasis added).<sup>583</sup> [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED].<sup>584</sup> The Expert Report before the Trial Chamber examined [REDACTED]

[REDACTED].<sup>585</sup> This report, however, focussed on [REDACTED]

[REDACTED]. It also concluded that it was [REDACTED]

[REDACTED].<sup>586</sup> The Expert Report indicated a “ [REDACTED]

[REDACTED].<sup>587</sup> The Appeals Chamber notes that the LRV did not point to any other material on the record that could have provided the basis to draw a presumption as to the causal nexus between the attack on Bogoro and the harm suffered. In these circumstances, the Appeals Chamber considers that the LRV has not established that no reasonable trier of fact could have failed to presume that there was a causal nexus between the crimes for which Mr Katanga was convicted and the concerned harm. Accordingly, the Appeals Chamber rejects the LRV’s argument. The Appeals Chamber underlines that this must not be understood as a definite conclusion by the Appeals Chamber that it would have been *wrong* for the Trial Chamber to make such a presumption: the question before the Appeals Chamber was *only* whether it was wrong for the Trial Chamber not to have done so.

237. Turning to the LRV’s remaining arguments, which challenge the findings on the causal nexus in respect of the individual applications, the Appeals Chamber recalls that the Trial Chamber found in relation to all Five Applicants, [REDACTED]

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<sup>583</sup> [LRV Submission on the Expert Report](#), para. 36.

<sup>584</sup> [REDACTED]

<sup>585</sup> [REDACTED]

<sup>586</sup> [REDACTED]

<sup>587</sup> [REDACTED]

[REDACTED]<sup>588</sup> [REDACTED]  
 [REDACTED]<sup>589</sup> and  
 [REDACTED]  
 [REDACTED]<sup>590</sup> [REDACTED]  
 [REDACTED]  
 [REDACTED]<sup>591</sup> The Trial Chamber, in the Impugned Decision, having briefly addressed the issue of transgenerational harm, concluded that:

Even where [the Five Applicants] are, in all likelihood, suffering from transgenerational harm, the point must be made, as the Defence has, 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>592</sup>

The Trial Chamber referred in a footnote to the Expert Report and noted that it did not need to rule on Mr Katanga’s submissions regarding its admissibility, given that it did not contain information regarding the causal nexus.<sup>593</sup>

238. In the view of the Appeals Chamber, and in the absence of any further explanation by the Trial Chamber, the Trial Chamber’s conclusion that the causal nexus had not been established was contradictory to the Trial Chamber’s statement that the Five Applicants were “in all likelihood” suffering from transgenerational harm. The finding in the Impugned Decision that the causal nexus had not been established was repeated, but not further elaborated upon in Annex II to the Impugned

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<sup>588</sup> See [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]

See [REDACTED]  
 [REDACTED]  
 [REDACTED]

<sup>591</sup> [REDACTED]  
 [REDACTED]

<sup>592</sup> [Impugned Decision](#), para. 134.

<sup>593</sup> [Impugned Decision](#), footnote 216. The Appeals Chamber understands the reference to the “Expert Report of 26 May 2016” in this footnote to relate to the Expert Report. See also [Impugned Decision](#), footnote 212.

Decision, where the Trial Chamber assessed the individual applications.<sup>594</sup> This finding cannot be reconciled with the Trial Chamber’s conclusion that all Five Applicants had suffered psychological harm<sup>595</sup> and that the harm was “in all likelihood” transgenerational.<sup>596</sup> [REDACTED]

239. Thus, the Trial Chamber erred in failing to properly reason its decision in relation to the causal nexus between the attack on Bogoro and the harm suffered by the Five Applicants. This makes it impossible for the Appeals Chamber to assess the reasonableness of the Trial Chamber’s finding that the causal nexus had not been established to a balance of probabilities.

2. *LRV’s second ground of appeal: procedural errors*

240. In his second ground of appeal, the LRV raises procedural errors in respect of the Trial Chamber’s failure to consider all the evidence and in failing to provide reasons for it.

(a) **Relevant procedural background**

241. On 7 September 2015, the LRV sought the assistance of an expert in order to assess, *inter alia*, the incidence of a “traumatic phenomenon within the Bogoro community, identify victims of the phenomenon among both the young children [...] and adults (mapping), evaluate their situation from a psychological standpoint”.<sup>597</sup> A neuropsychiatrist was appointed by the Registrar and the Expert Report was filed by the LRV on 26 May 2016 containing an evaluation of the mental health of child victims of the attack on Bogoro on 24 February 2003 . The Expert Report sought to

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<sup>594</sup> [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[Impugned Decision](#), para. 134.

<sup>597</sup> LRV Request for assistance, para. 7. This request was rejected and the Trial Chamber invited the LRV to file an application with the Registry in accordance with regulation 83 (3) of the Regulations of the Court to seek the appointment of an expert.

[REDACTED] 598 [REDACTED]

[REDACTED]

[REDACTED] 599 In respect of the latter group, who are relevant to this ground of appeal, the Expert Report describes this group as “ [REDACTED]

[REDACTED] 600 [REDACTED]

[REDACTED]

[REDACTED] 601 As stated by the LRV, the expert “identified the type of psychological disorder from which each individual was suffering and assessed the probability of a link between the disorder and the 2003 attack”. 602 In relation to children born after the attack on Bogoro, the expert reached the following conclusions:

[REDACTED]

[REDACTED]

242. [REDACTED]

\_\_\_\_\_

598 [REDACTED]

599 [REDACTED]

600 [REDACTED]

601 [REDACTED]

[REDACTED]

602 “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, para. 14.

603 [REDACTED]



██████████<sup>604</sup>.

243. On 10 June 2016, the LRV filed the LRV’s Addendum to the Expert Report; in this filing, the LRV requested the admission of the transcripts of a hearing on 16 and 17 May 2016 containing the testimony of an expert witness in the *Bemba* case (“*Bemba* Expert Testimony”),<sup>605</sup> as well as the disclosure of the expert report (“*Bemba* Expert Report”).<sup>606</sup> On 22 June 2016, Mr Katanga submitted his observations on the *Bemba* Expert Report.<sup>607</sup> The Impugned Decision refers to the LRV’s Addendum to the Expert Report in a footnote.<sup>608</sup>

(b) **Submissions of the parties**

(i) *The LRV’s submissions*

244. In respect of the second ground of appeal – failure to take into account all of the evidence and failure to provide reasoning – the LRV alleges that “[t]he Chamber failed [...] to consider all of the evidence in its reasoning on the assessment of transgenerational harm”.<sup>609</sup> In particular, he points to a “highly reliable” expert testimony relating to transgenerational trauma that was admitted into the record in the *Bemba* case as well as the report authored by the expert.<sup>610</sup> The LRV argues that it had requested the Trial Chamber to add the testimony of this expert witness as evidence into the casefile, and to be granted access to the said report,<sup>611</sup> but that the Trial Chamber did not consider his request.<sup>612</sup> In his opinion, this testimony and the report was “of direct interest to the instant case as the expert witness’s analysis and

<sup>604</sup> ██████████.

<sup>605</sup> See “Annex 1 to the 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)”, ICC-01/04-01/07-3698-Anx1, 10 June 2016; “Annex 2 to the 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)”, ICC-01/04-01/07-3698-Anx2, 10 June 2016.

<sup>606</sup> “Annex 3 to the Prosecution’s Submission of Additional Information regarding its Proposed Expert Witness”, 15 April 2016, ICC-01/05-01/08-3368-Conf-Anx3.

<sup>607</sup> Mr Katanga’s Observations on the Expert Report and its Addendum, para. 16.

<sup>608</sup> [Impugned Decision](#), footnote 212.

<sup>609</sup> [Legal Representative’s Appeal Brief](#), para. 64.

<sup>610</sup> [Legal Representative’s Appeal Brief](#), paras 66, 74.

<sup>611</sup> [Legal Representative’s Appeal Brief](#), para. 66.

<sup>612</sup> [Legal Representative’s Appeal Brief](#), para. 71.

conclusions are rooted in exactly the same methodology as that outlined by the expert appointed” by the LRV<sup>613</sup> and are relevant “irrespective of whether the causal event is mass rape or a one-off attack of the level of gravity of the Bogoro attack in 2003”.<sup>614</sup> The LRV avers that the Trial Chamber erred by not ruling on his request which was “central to the assessment of the transgenerational harm” in respect of the Five Applicants.<sup>615</sup>

245. The LRV argues that this information corroborated the Five Applications and the Expert Report,<sup>616</sup> which, in his view, was the only evidence the Trial Chamber referred to in assessing the psychological state of the child victims of the Bogoro attack.<sup>617</sup> The LRV alleges that “[t]he Chamber did not state why, in its view, the evidence cited by the Legal Representative in his Addendum to the Expert Report was irrelevant and by failing to do so it gave insufficient reasons why it did not make a finding of transgenerational harm in connection with the attack”.<sup>618</sup> The LRV relies on jurisprudence stating that a Chamber “must as a minimum provide reasoning to support their findings regarding the evidence or substantive considerations relevant to their decisions”.<sup>619</sup> He asserts that the Trial Chamber, in its reasoning, made no reference to the Addendum to the Expert Report and to the arguments the LRV raised in it, which amounts to a failure to provide a reasoned opinion.<sup>620</sup>

246. In his view, this demonstrates that the Chamber failed to consider the evidence as a whole, as it is requested to do, and as a result made findings of facts which a reasonable trier of fact would not have made.<sup>621</sup>

*(ii) Mr Katanga’s response*

247. In response to the second ground of appeal, Mr Katanga states that the LRV’s Addendum was not properly formulated and therefore “did not justify any answer

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<sup>613</sup> [Legal Representative’s Appeal Brief](#), para. 69.

<sup>614</sup> [Legal Representative’s Appeal Brief](#), footnote 57.

<sup>615</sup> [Legal Representative’s Appeal Brief](#), para. 71.

<sup>616</sup> [Legal Representative’s Appeal Brief](#), paras 65-68.

<sup>617</sup> [Legal Representative’s Appeal Brief](#), paras 29, 65.

<sup>618</sup> [Legal Representative’s Appeal Brief](#), para. 82.

<sup>619</sup> [Legal Representative’s Appeal Brief](#), para. 83.

<sup>620</sup> [Legal Representative’s Appeal Brief](#), paras 72, 82-87.

<sup>621</sup> [Legal Representative’s Appeal Brief](#), paras 64, 79-81.

from the Chamber”.<sup>622</sup> He adds that the LRV neither specified that he wanted those documents admitted as evidence nor submitted any legal basis for his request.<sup>623</sup> He further responds that the Trial Chamber did not have to “issue any formal decision” in this regard; neither did it “need to comment upon each annex filed”.<sup>624</sup> As submitted by Mr Katanga, the Trial Chamber was not bound to refer to the transcripts in the *Bemba* case,<sup>625</sup> but rather “the reference [...] to the Addendum, was sufficient to indicate that the Trial Chamber was aware of the [LRV’s] submissions and annexes”.<sup>626</sup>

248. In respect of the *Bemba* Expert Report, Mr Katanga responds that the LRV did not request its disclosure formally as required.<sup>627</sup> Pointing to his previous submissions concerning this issue during trial, Mr Katanga adds that “such material was neither appropriate nor relevant” for the Trial Chamber’s findings relating to transgenerational harm alleged by the applicants.<sup>628</sup>

### (c) Determination by the Appeals Chamber

249. In the second ground of appeal, the LRV argues that the Trial Chamber failed to take into account all of the evidence, in particular referring to the Trial Chamber’s treatment of his request for the admission of the *Bemba* Expert Testimony and the disclosure of the *Bemba* Expert Report.<sup>629</sup> In this respect, the Appeals Chamber notes that the LRV states that, in the LRV’s Addendum to the Expert Report, “he [had] requested the witness’s testimony to be entered into the record”.<sup>630</sup> This addendum contained, in its annexes, the two-day transcript of the expert witness’ public testimony in the *Bemba* case.<sup>631</sup> The LRV argues that he had also requested “for leave

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<sup>622</sup> [Mr Katanga’s Response](#), para. 47.

<sup>623</sup> [Mr Katanga’s Response](#), para. 47.

<sup>624</sup> [Mr Katanga’s Response](#), para. 48.

<sup>625</sup> [Mr Katanga’s Response](#), para. 48.

<sup>626</sup> [Mr Katanga’s Response](#), para. 48.

<sup>627</sup> [Mr Katanga’s Response](#), para. 49.

<sup>628</sup> [Mr Katanga’s Response](#), para. 50.

<sup>629</sup> [Legal Representative’s Appeal Brief](#), para. 71.

<sup>630</sup> [Legal Representative’s Appeal Brief](#), para. 66; *see also* Addendum to the Expert Report, para. 4.

<sup>631</sup> *See* Annex I [ICC-01/04-01/07-3698-Anx1] and Annex 2 [ICC-01/04-01/07-3698-Anx2] to the Addendum to the Expert Report.

to have access to the expert’s report” on the basis of which the examination of the expert had proceeded in the *Bemba* case.<sup>632</sup>

250. In respect of the *Bemba* Expert Report, the LRV submits that it is “yet to be disclosed” to him and that he is “yet to receive an answer to his request”.<sup>633</sup> He argues that the *Bemba* Expert Report is “not mentioned” in the Trial Chamber’s reasoning in the Impugned Decision.<sup>634</sup> He alleges that this amounts to failure to take all evidence into account “seriously vitiating the Chamber’s findings as to the existence of transgenerational harm linked to the attack” and that this amounts to a “*de facto* unreasoned refusal to take into account the [LRV’s] arguments and to grant his request for the expert witness’s report to be disclosed to him”.<sup>635</sup> Mr Katanga responds that the LRV “should have requested its disclosure through an application before the *Bemba* Trial Chamber”.<sup>636</sup>

251. In respect of the *Bemba* Expert Report, the Appeals Chamber notes that the LRV’s Addendum to the Expert Report requests generally that “[REDACTED]  
[REDACTED]”.<sup>637</sup> [REDACTED]  
[REDACTED].<sup>638</sup> In the opinion of the Appeals Chamber, the formulation of the Addendum to the Expert Report with regard to the *Bemba* Expert Report does not suggest that the LRV requested the Trial Chamber for its disclosure in the present case. The Appeals Chamber notes that the LRV also does not point to any submissions made before the Trial Chamber in the *Bemba* case seeking the disclosure of said report. [REDACTED]  
[REDACTED],<sup>639</sup> the Appeals Chamber does not consider this to be a request to seek disclosure of the

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<sup>632</sup> [Legal Representative’s Appeal Brief](#), para. 66; *see also* Addendum to the Expert Report, para. 4.

<sup>633</sup> [Legal Representative’s Appeal Brief](#), para. 72.

<sup>634</sup> [Legal Representative’s Appeal Brief](#), para. 72.

<sup>635</sup> [Legal Representative’s Appeal Brief](#), para. 73.

<sup>636</sup> [Mr Katanga’s Response](#), para. 49.

<sup>637</sup> [REDACTED]

<sup>638</sup> [REDACTED]

<sup>639</sup> *See* [REDACTED]

*Bemba* Expert Report. For this reason, the issue of whether the Trial Chamber erred in its purported non-disclosure and non-consideration or not, does not arise.

252. As regards the transcripts of expert testimony in the *Bemba* case, the LRV argues that the request made in the Addendum to the Expert Report was “central to the assessment of the transgenerational harm”.<sup>640</sup> He argues that it (along with the *Bemba* Expert Report) would have been of “direct interest” in the instant case because “the expert witness’s analysis and conclusions are rooted in exactly the same methodology” as that in the Expert Report.<sup>641</sup> Similar to the arguments raised in respect of the *Bemba* Expert Report, the LRV also argues that “neither the arguments drawn from the expert witness’s testimony nor reference to them appear in the Chamber’s reasons”.<sup>642</sup> He alleges an error in the Trial Chamber’s “failure to take into account documents (transcripts and a confidential report) whose relevance was highlighted and extensively reasoned” as well as the failure to take into account the submissions made in the Addendum to the Expert Report.<sup>643</sup>

253. As regards the LRV’s argument that the Trial Chamber failed to take into account the testimony in question,<sup>644</sup> Mr Katanga’s responds that the testimony was “neither appropriate nor relevant for Trial Chamber II’s findings regarding the transgenerational harm [...] in the Katanga case” for it would “not bring any new or significant information”.<sup>645</sup>

254. The Appeals Chamber notes that the Trial Chamber referenced, in a footnote, the Addendum to the Expert Report as well as its “two public annexes” when entering conclusions as to how its own Expert Report described the “phenomenon” of “transgenerational psychological harm”.<sup>646</sup> The Appeals Chamber also notes that, in Annex I, the Trial Chamber referred to the Addendum to the Expert Report as the

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<sup>640</sup> [Legal Representative’s Appeal Brief](#), para. 71.

<sup>641</sup> [Legal Representative’s Appeal Brief](#), para. 69.

<sup>642</sup> [Legal Representative’s Appeal Brief](#), para. 72.

<sup>643</sup> [Legal Representative’s Appeal Brief](#), para. 79.

<sup>644</sup> [Legal Representative’s Appeal Brief](#), para. 79.

<sup>645</sup> [Mr Katanga’s Response](#), para. 50.

<sup>646</sup> [Impugned Decision](#), para. 132; *see also* footnote 212.

LRV having “filed additional information on the Expert Report”.<sup>647</sup> It is, therefore, not the case that it was unaware of this submission.

255. The Appeals Chamber also considers relevant that the Trial Chamber acknowledged the existence of the “phenomenon” of the harm resulting from transgenerational trauma<sup>648</sup> and further recalls that the Five Applicants were not granted reparations because of want of causal nexus with the attack on Bogoro, rather than the failure to establish the existence of harm resulting from transgenerational trauma. The Appeals Chamber notes that, barring its arguments as to the presumption (addressed in the first ground of appeal), the LRV has not argued that the concerned testimony could have otherwise enabled or aided the Trial Chamber’s determination of causal nexus between the attack on Bogoro and the harm suffered. The same is true of the methodology adopted in the Expert Report. Therefore, the Appeals Chamber finds that the LRV has not demonstrated that the Trial Chamber erred in not taking into account the testimony in question.

256. As a result of the above, the Appeals Chamber also rejects the LRV’s arguments concerning “lack of reasoning for discarding relevant evidence”.<sup>649</sup>

257. For these reasons, the Appeals Chamber rejects the LRV’s second ground of appeal.

#### IV. APPROPRIATE RELIEF

258. On an appeal pursuant to article 82 (4) of the Statute against a reparations order, the Appeals Chamber may confirm, reverse or amend the reparation order appealed (rule 153 (1) of the Rules).

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

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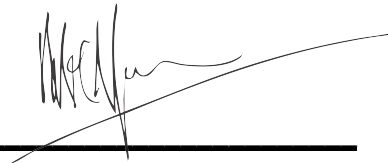
<sup>647</sup> [Annex I to the Impugned Decision](#), para. 83.

<sup>648</sup> [Impugned Decision](#), para. 132.

<sup>649</sup> See [Legal Representative’s Appeal Brief](#), paras 82-87.

260. The Appeals Chamber recalls that, in this case, the Trial Chamber assessed all applications for reparations individually with a view to determining whether the applicants were victims and the harm suffered. These determinations were then the basis for awarding symbolic individual as well as collective reparations. While the Appeals Chamber has expressed concerns about this approach in this case, it has not found that it amounted to an error of law or an abuse of discretion. In these circumstances, and bearing in mind that the number of applications alleging transgenerational harm is low, the Appeals Chamber considers it appropriate that these applications be reassessed. Thus, the Appeals Chamber considers it appropriate to reverse the Trial Chamber's findings in relation to the Five Applicants and to remand the matter to the Trial Chamber, which has detailed knowledge of the case, for it to reassess the question of the causal nexus between the crimes for which Mr Katanga was convicted and their psychological harm and whether they should be awarded reparations.

Done in both English and French, the English version being authoritative.



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**Judge Howard Morrison**  
**Presiding Judge**

Dated this 8th day of March 2018

At The Hague, The Netherlands