



**Summary of the judgement on the appeals against the Order for
Reparations issued by Trial Chamber II in the case of the
Prosecutor v. Germain Katanga**

**Delivered by Judge Howard Morrison,
Presiding Judge in this appeal,**

8 March 2018

This summary is not part of the written judgment. Please note that only the written judgment is authoritative.

1. During the course of today's hearing, I will refer to Mr Germain Katanga as Mr Katanga, the Office of Public Counsel for Victims as the OPCV and the Legal Representative for Victims as the LRV
2. Today, the Appeals Chamber is delivering its judgment on three appeals filed, pursuant to article 82 (4) of the Statute by Mr Katanga, the OPCV, and the LRV against the Order for Reparations issued by Trial Chamber II on 24 March 2017. I will refer to this order as the Impugned Decision.
3. I shall now summarise the Appeals Chamber's judgment, which was taken unanimously. This summary is not part of the written judgment. Please note that only the written judgment is authoritative. It will be notified to the parties and participants shortly after this hearing.

4. Before I summarise the Appeals Chamber judgment, I recall that Mr Katanga was found guilty as an accessory to murder as a crime against humanity, four counts of war crimes of murder, attack against a civilian population as such or against individual civilians not taking direct part in hostilities, destruction of enemy property and pillaging. These crimes were committed on 24 February 2003 during the attack on Bogoro, a village in the Ituri District of the DRC. Mr Katanga was sentenced to a 12-year term of imprisonment. I will refer to the Judgment pursuant to Article 74 of the Statute, dated 7 March 2014, as the Judgment on Conviction and to the decision pursuant to article 76 of the Statute, rendered on 23 May 2014, as the Decision on Sentence.

5. The Appeals Chamber received the appeal briefs from Mr Katanga, the OPCV, and the LRV on 27 June 2017 and the responses to those appeal briefs on 28 August 2017. The LRV submitted his observations on the OPCV's appeal on 23 August 2017. Pursuant to the Appeals Chamber's direction, the Trust Fund filed its observations on 5 October 2017, to which the OPCV responded on 26 October 2017.

Mr Katanga's appeal

6. I first turn to the appeal filed by Mr Katanga in which he raises four grounds of appeal.

7. In his first ground of appeal, Mr Katanga challenges the reliance that the Trial Chamber placed on presumptions in order to enter findings of the existence of material harm resulting from the pillaging of livestock, destruction of fields and harvests and pillaging of harvests.

8. Mr Katanga's first ground of appeal raises the broader issue of the approach taken by the Trial Chamber in this case, including its presumptions to make findings of harm, both material and non-material, and to allocate a monetary value to that harm. Therefore, before turning to the substance of this ground of appeal, I would like to first

outline the Appeals Chamber's observations on the Trial Chamber's overall approach to reparations proceedings in the present case.

9. The legal frame work at the ICC leaves it for the trial chambers to decide on the best approach to take in reparations proceedings depending on the concrete circumstances of the case at hand. These proceedings, intended to compensate victims for the harm they suffered, often years ago, must be as expeditious and cost-effective as possible.

10. 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.

11. The Trial Chamber set out to identify and value the harm. The different types of harm for each applicant were identified. It then attached a monetary value to the respective kinds of harm found to exist for each applicant. On this basis, it assessed 341 applications and accepted 297 applicants as victims. The results of the individual analysis were set out in an annex to the Impugned Decision. The Trial Chamber decided to award symbolic individual reparations to those 297 applicants, in addition to collective reparations. This overall 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". The sum-total of the harm, as assessed by the Trial Chamber, amounted to USD 3 752 620 and Mr Katanga was then held liable to pay USD 1 000 000 of that sum.

12. The TFV has submitted a detailed draft implementation plan that categorises the 297 victims into five categories based on the findings of harm in the Annex II. It went through an equally detailed analysis of the applications for reparations and arrived at a different monetary value for the costs of repairing the harm caused. Therefore, while the

Trial Chamber's sum-total of the monetary value of harm i.e. the figure of USD 3 752 620 was used as a reference point to determine the amount of money that Mr Katanga is liable for, this monetary value of harm had no relationship to the reparations projects proposed by the TFV. The result of the overall approach by the Trial Chamber was time-consuming, resource-intensive, and, in the end, disproportionate to what was achieved.

13. 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. 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.

14. 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. 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 thereon. 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.

15. The Appeals Chamber thus has concerns about the Trial Chamber's approach. Nevertheless, it considers that the approach adopted by the Trial Chamber did not

amount to an error of law or abuse of discretion that would justify the reversal of the Impugned Decision.

16. Bearing this in mind, the Appeals Chamber now turns to Mr Katanga's first and second grounds of appeal, in which he challenges the trial chamber's reliance on presumptions.

17. 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. 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". While a trial chamber has discretion to freely evaluate the evidence of harm in a particular case, this discretion is not unlimited. A trial chamber must respect the rights of victims as well as the convicted person when resorting to presumptions.

18. The reasonableness of a factual presumption drawn by a trial chamber in reparation proceedings will depend upon the circumstances of the case. 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.

Ground 1: Mr Katanga

19. In his first ground of appeal, Mr Katanga challenges the Trial Chamber's presumption concerning the existence of material harm claimed by victims who alleged that they had lost cattle, fields and crops, but who did not provide sufficient evidence in support thereof. Having regard to the findings on pillaging of livestock and food as well as the agrarian nature of the society in Bogoro, the Trial Chamber had held that if these victims were able to demonstrate that their house was destroyed as a result of the attack

on Bogoro, it would be presumed that they also suffered material harm resulting from the loss of livestock, fields and harvest during the attack.

20. The Appeals Chamber finds that the presumption in question was based on the findings in the Judgment on Conviction, Decision on Sentence, the applications for reparations, and declarations of livestock ownership, where provided, as well as the Trial Chamber's assessment of the difficulties in obtaining evidence in support of the claims.

21. 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 not limited to inviting submissions on its formulation. The Appeals Chamber considers that the presumption in question could have benefited from further reference to other material on the record in support. However, despite this, and despite its concerns as to the Trial Chamber's general approach towards individual analysis, the Appeals Chamber finds that Mr Katanga has not demonstrated an error in the Trial Chamber's approach concerning this presumption.

Ground 2: Mr Katanga

22. In his second ground of appeal, Mr Katanga challenges the presumption relating to psychological harm resulting from the loss of distant family members, which was applied by the Trial Chamber in its determination that there were 284 occurrences of psychological harm.

23. 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. The definition of victims under rule 85 (a) of the Rules of Procedure and Evidence 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.

24. The Appeals Chamber considers that the primary evidential basis for the Trial Chamber's presumption was not very strong.

25. 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. The 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". In the reparations proceedings before the Trial Chamber, both the LRV and the TFV advocated for an assessment of psychological harm which takes into account the local societal characteristics. The Appeals Chamber also recalls that the attack itself was particularly intense.

26. 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. The Appeals Chamber rejects Mr Katanga's second ground of appeal.

Ground 3: Mr Katanga

27. In his third ground of appeal, Mr Katanga alleges that the Trial Chamber erred in ruling *ultra petita* by exceeding the claims of the applicants, on at least three occasions. Given the Court's framework, the Appeals Chamber considers that the principle does not apply in reparations proceedings before the Court.

28. The Appeals Chamber rejects Mr Katanga's third ground of appeal.

Ground 4: Mr Katanga

29. In his fourth ground of appeal, Mr Katanga submits that the award of one million US dollars made against him is excessive in light of his circumstances, responsibilities, and culpability. He argues that the Trial Chamber improperly weighed his participation in the crimes *vis-à-vis* others, that it failed to fully consider the relevant mode of liability, and that it improperly considered or failed to consider other findings in the Decision on Sentence and the Decision on Reduction of Sentence.

30. The Appeals Chamber recalls the principle set out in the *Lubanga* Reparations Appeal Judgment regarding the scope of a convicted person's liability for reparations. This principle stated, *inter alia*, that "[a] convicted person's liability for reparations must be proportionate to the harm caused and, *inter alia*, his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case".

31. The Appeals Chamber does not consider this to mean 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.

32. 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*. 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.

33. 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. 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 focus is on repairing the harm that has resulted from the crimes in question. The Appeals Chamber is not persuaded by Mr Katanga's argument that the Trial Chamber's approach was flawed in this regard.

34. Mr Katanga also challenges the Trial Chamber's reliance on factors taken into account in sentencing and in the subsequent reduction of sentence. 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".

35. The Appeals Chamber also rejects Mr Katanga's argument that he faces double punishment on account of the magnitude of the award against him. 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.

36. 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.

37. The Appeals Chamber also rejects Mr Katanga's separate argument that the Trial Chamber erred in not taking into account his inability to pay.

38. The fourth ground of appeal is rejected.

OPCV's appeal

39. The OPCV raises one ground of appeal on behalf of a group of victims, to whom I shall refer as the Concerned Victims.

40. The Concerned Victims were represented by a legal representative who withdrew during the course of the proceedings, and to whom I shall now refer as the Former LRV.

41. The OPCV alleges that the Trial Chamber made a procedural error by not appointing a new lawyer for victims immediately after authorising the Former LRV to terminate his mandate in respect of the Concerned Victims. The OPCV argues that victims must remain represented throughout the proceedings until the completion of the reparations phase.

42. The OPCV requests that the Concerned Victims should be granted reparations, after having been given an opportunity to present or supplement their applications for reparations.

43. 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. 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 and the Appeals Chamber therefore rejects the OPCV's argument that representation of victims must be continuous.

44. 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.

45. In the 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.

46. Therefore, the Appeals Chamber rejects the OPCV's appeal.

LRV's appeal

47. The LRV, acting on behalf of five applicants, filed an appeal raising two grounds of appeal. I will refer to these applicants collectively as the Five Applicants.

48. The Five Applicants were born after the attack on Bogoro. They submitted their applications for reparations in the present case for harm suffered on account of their parents' experience during the attack.

49. The grounds of appeal concern "transgenerational harm", a term that the Trial Chamber has described as a phenomenon whereby social violence is passed on from ascendants to descendants with traumatic consequences for the latter.

50. In the first ground of appeal, the LRV challenges the Trial Chamber's individual assessment of the applications submitted by the Five Applicants, in which the Trial Chamber had concluded that it was not in a position to determine on a balance of probabilities the causal nexus between the trauma suffered by the Five Applicants and the attack on Bogoro.

51. The Appeals Chamber recalls that the Trial Chamber found in relation to all Five Applicants, in Annex II to the Impugned Decision, that they suffered psychological harm.

52. 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 Decision, where the Trial Chamber assessed the individual applications. This finding cannot be reconciled with the Trial Chamber’s conclusion that all Five Applicants had suffered psychological harm and that the harm was “in all likelihood” transgenerational.

53. The Appeals Chamber finds, therefore, that 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.

54. In the circumstances of the present case, and bearing in mind that the number of applications alleging transgenerational harm is low, the Appeals Chamber considers it appropriate that these applications be assessed anew. 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.

55. The Appeals Chamber rejects the LRV’s second ground of appeal for reasons set out in the judgment.

Overall conclusion

56. For all the aforementioned reasons, the Appeals Chamber has thus decided as follows:

57. The Reparations Order is reversed to the extent that it rejected the applications for reparation of the Five Applicants. The Trial Chamber is directed to carry out a new assessment of these applications, providing sufficient reasons for its eventual conclusion thereon.

58. The remainder of the Reparations Order is confirmed.