



Summary

Judgment of the Appeals Chamber

in

The Prosecutor v. Bosco Ntaganda

Read by

Judge Marc Perrin de Brichambaut

Presiding

(12 September 2022)

A. Introduction

1. My name is Marc Perrin de Brichambaut. I am the Presiding Judge in the appeals arising from the case of the *Prosecutor v. Bosco Ntaganda*. My fellow judges comprising the full bench in this appeal are Judge Piotr Hofmański, Judge Luz del Carmen Ibáñez Carranza, Judge Solomy Balungi Bossa and Judge Gocha Lordkipanidze.

2. The Appeals Chamber is delivering today a judgment in relation to the appeals filed by the Defence and one of the two groups of victims in this case, against the reparations order issued by the Trial Chamber on 8 March 2021. I will refer to this order as the Impugned Decision.

3. Due to the interconnection of the grounds raised in both appeals, I shall address them together in the same manner they are addressed in the Judgment.

B. Background of the appeal proceedings

4. On 8 March 2021, the Trial Chamber issued the Impugned Decision assessing Mr Ntaganda liability for reparations at 30 million USD. The Impugned Decision was issued following Mr Ntaganda's conviction for his conduct, as a high level member of the *Union des Patriotes Congolais* and its military wing, the *Forces patriotiques pour la Libération du Congo*, in the events that took place in Ituri district of the Democratic Republic of the Congo from on or about 6 August 2002 to on or about 31 December 2003.

5. Today's judgment by the Appeals Chamber addresses the appeals against the Impugned Decision of both Mr Ntaganda and Victims Group 2. In its appeal, the

Defence raises thirteen grounds of appeal against the Impugned Decision, while Victims Group 2 raise seven. The various grounds of appeal allege errors as to specific evidentiary issues related to how applications for reparations should be assessed, in addition to those affecting broader issues challenging the very approach taken by the Trial Chamber to the reparations proceedings in this case. The appellants also argue that the Impugned Decision was premature, referring to matters that will be addressed under different grounds of appeal. The issues raised in the many grounds of appeal are both complex and contain extensive overlap, both internally, within the individual appeals, but also as between both appeals. Such issues include allegations that many of the Defence submissions were overlooked and the Impugned Decision was not sufficiently reasoned, that it did not have the opportunity to challenge the eligibility of victims to benefit from reparations, as it neither had access to the applications of potential beneficiaries nor the opportunity to make observations thereon. Other novel and complex issues raised include those relating to questions of whether transgenerational harm should be recognised at the Court, whether children born out of rape and sexual slavery are direct victims of the crimes of which Mr Ntaganda was convicted, and whether persons to whom a direct victims was of significant importance may qualify as indirect victims.

C. The Appeals Chamber's ruling

6. The Appeals Chamber's judgment, which I will now outline, is unanimous. As I shall set out in more detail later, the Appeals Chamber has found that the Trial Chamber committed the following errors in the issuance of the Impugned Decision.

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7. First, the Trial Chamber erred in failing to make any appropriate determination in relation to the number of potentially eligible or actual victims of the award and/or to provide a reasoned decision in relation to its conclusion about that number.

8. Second, the Trial Chamber erred in failing to provide an appropriate calculation, or set out sufficient reasoning, for the amount of the monetary award against Mr Ntaganda;

9. Third, the Trial Chamber erred in issuing the Impugned Decision without having assessed and ruled upon victims' applications for reparations, and that the Trial Chamber did not lay out a procedure for the TFV to carry out the eligibility assessment while it ought to have set out at least the most fundamental parameters of this procedure already in the Impugned Decision; and

10. Fourth, the Trial Chamber erred in failing to provide reasons in relation to the concept of transgenerational harm and the evidentiary guidance to establish such harm, the assessment of harm concerning the health centre in Sayo and the breaks in the chain of causation when establishing harm caused by the destruction of that health centre, and the presumption of physical harm for victims of the attacks.

11. The cumulative effect of these errors materially affects the Impugned Decision issued in this case. This reparations order was made without having any concrete estimate as to one of its fundamental parameters, namely the number of victims whose harm it was intended to repair, and without ruling upon any requests of victims for reparations. It is also not discernible from the reparations order how the monetary award of 30 million USD was arrived at and, therefore, whether it is capable of appropriately repairing the harms suffered by the victims or fairly establishing the liability of Mr

Ntaganda. Furthermore, the Trial Chamber did not provide sufficient reasoning for some evidentiary issues.

12. In light of that, the Appeals Chamber deems it appropriate to reverse the findings of the Trial Chamber on these matters and to remand them for the Trial Chamber to issue a new reparations order taking into account the terms of the judgment that will be notified at the close of this hearing. The remainder of the arguments of the Defence and Victims Group 2 are rejected.

13. I shall now turn to a more detailed summary of the findings of the Appeals Chamber.

D. The applicability of the requirement to provide a reasoned opinion at the reparations stage

14. The Defence, under its second ground of appeal, argues that the Trial Chamber failed to provide sufficient reasons to reach determinations on elements that were essential to the Impugned Decision and other matters contained within it.

15. The Appeals Chamber finds it appropriate to address that question together with the additional arguments that both the Defence and Victims Group 2 submit in the grounds of appeal in which they both impugn and challenge the corresponding findings as erroneous. This concerns: (i) the alleged lack of reasoning in relation to the Trial Chamber's determination not to rule on applications for reparations and the Defence's role in that process; (ii) the alleged lack of reasoning in relation to the number of beneficiaries; (iii) the alleged lack of reasoning concerning the amount of the

reparations award; and (iv) the alleged lack of reasoning in relation to additional categories of victims and further evidentiary matters.

E. Grounds of appeal relating to the number of potentially eligible beneficiaries of the award for reparations

16. The Defence, under the fourteenth ground of its appeal, argues that the Trial Chamber erred in the manner in which it determined the number of potentially eligible beneficiaries of reparations. Victims Group 2 address the same part of the Impugned Decision under the first, third and fourth grounds of their appeal. The Appeals Chamber will address the issues arising out of those grounds of appeal together.

17. The Appeals Chamber recalls its jurisprudence that: (i) *the number of victims will be an important parameter for determining what reparations are appropriate*; (ii) in its inquiry, a trial chamber must endeavour to obtain *an estimate that is as concrete as possible*; and (iii) if the trial chamber resorts to estimates as to the number of victims, such estimates must be based on a sufficiently strong evidential basis; any uncertainties must be resolved in favour of the convicted person. It is noted that Judge Ibáñez Carranza disagrees with the finding that any uncertainties must automatically be resolved in favour of the convicted person. In her view, this approach contradicts the fundamental rights of victims during the reparation process.

18. The Appeals Chamber finds that, in the circumstances of the present case, one of the most fundamental parameters for setting the amount of the reparations award is the number of victims that it is intended to compensate.

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19. The collective award for reparations that was made had “individualised components”. This was therefore not a “classic” case of collective reparations, in the sense of community-based reparations in relation to which the potential number of beneficiaries might, depending upon the circumstances, not be of as much significance to the setting of the amount of the award.

20. However, in the Impugned Decision, the Trial Chamber not only failed to particularise how many “thousands of victims” there may be, but it also at least gave the impression that the relevant figure might be anywhere between “at least” 1,100 to a “minimum of” 100,000. The Appeals Chamber cannot see that as forming a proper basis upon which to fix the monetary award for reparations in this case.

21. Accordingly, the Appeals Chamber finds that the Trial Chamber failed in its duty to establish an actual, or estimated, number of victims of the award that was as concrete as possible and based upon a sufficiently strong evidential basis.

22. The Appeals Chamber finds that what was required was a determination of the issue by the Trial Chamber. The Trial Chamber did not provide one. Accordingly, the Trial Chamber committed an error in this regard.

23. The Appeals Chamber further notes that the Trial Chamber did not rule, or provide any reasoning in relation to, the issue raised by the third ground of Victims Group 2’s appeal, namely whether and how the Trial Chamber considered that the number of actual victims likely to come forward to claim reparations would be the same, or less than, those potentially eligible to do so – and the effect that would have on any estimates upon which it relied. The Trial Chamber should have done so. Thus, it committed an error.

24. The Appeals Chamber further recalls that there is an additional requirement upon a trial chamber that resorts to estimates as to the number of victims, namely that any uncertainties must be resolved in favour of the convicted person. In the present case, the Trial Chamber stated that it had resolved “uncertainties in favour of the convicted person”. However, the Trial Chamber did not explain to which “uncertainties” it was referring; nor did it provide any reasoning in relation to how any such uncertainties had been resolved “in favour of the convicted person”.

25. The Appeals Chamber therefore finds that the Trial Chamber erred in failing: (i) to make any appropriate determination in relation to the number of potentially eligible or actual victims of the award; and/or (ii) to provide a reasoned decision in relation to its conclusion about that number; and (iii) to provide any reasoning in relation to the uncertainties that it stated it had resolved in favour of the convicted person.

26. The Appeals Chamber considers that the aforementioned errors had a material effect upon the Impugned Decision: the basis of one of its fundamental parameters, namely the number of victims who would benefit from the award for reparations, was either not appropriately determined or was insufficiently reasoned.

27. In light of the foregoing, the Appeals Chamber deems it appropriate to reverse the findings of the Trial Chamber on those matters and to remand to it the issue of how many victims are likely to come forward to benefit from reparations in the present case.

F. Grounds of appeal challenging the amount of the award for reparations

28. The Appeals Chamber notes that both the Defence (in its second and fifteenth grounds of appeal) and Victims Group 2 (in their second, fourth and fifth grounds of appeal) challenge the manner in which the Trial Chamber determined the amount of the reparations award.

29. The Defence argues that the Trial Chamber erred in ruling that ‘the number of potential beneficiaries is not a precondition to the issuance of the reparations order’ and thereby failed to establish an estimate of potential beneficiaries for the purpose of setting the amount of liability. The Appeals Chamber recalls that it has established that the Trial Chamber erred by not providing at least an estimate of the number of victims that was as concrete as possible and based upon a sufficiently strong evidential basis. In light of the fact that the number of victims is, in the circumstances of the present case, one of its fundamental parameters, it follows that setting the amount of the award without reference to any concrete estimate of the number of victims whose harm it was intended to repair constitutes an error. That error materially affected the Impugned Decision. Indeed, setting the amount of the award without even an appropriately estimated number of victims makes it impossible to know whether it will be both adequate to repair the harm of the victims affected by the crimes and fair for Mr Ntaganda in respect of his total liability.

30. The Appeals Chamber notes that both the Defence and Victims Group 2 raise the issue of lack of reasoning regarding the amount of the award for which the Trial

Chamber held Mr Ntaganda liable. The Appeals Chamber considers that aspects of the Impugned Decision in relation to the amount of the award were insufficiently reasoned.

31. The Appeals Chamber notes that the Trial Chamber did not provide any specific information, calculation or other reasoning as to how it reached the amount of 30 million USD. The Trial Chamber set out various costs to repair the harms of the victims. However, when it set the amount of the award, it did not make any concrete reference to the figures that it had earlier set out, nor did it provide any breakdown or other explanation of, or calculation for, the figure of 30 million USD.

32. The Appeals Chamber finds that the Trial Chamber needed to state more concretely whether it was appropriate to rely upon the estimates as to the cost to repair that it had received and the extent to which it had done so in arriving at its figure of 30 million USD.

33. Furthermore, it is not clear how the amount awarded was apportioned between the two groups of victims in this case.

34. In sum, it is neither discernible how the Trial Chamber arrived at the amount of 30 million USD that it awarded nor how it was intended to apportion that amount between the different groups of victims.

35. The Appeals Chamber further observes that the Trial Chamber stated that, in establishing the total reparations award at 30 million USD, it had set “an amount that it considers fair and appropriate [...] resolving uncertainties in favour of the convicted person and taking a conservative approach”.

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36. The Appeals Chamber finds that the Trial Chamber was required to elaborate upon why it considered the award of 30 million USD to be “fair” and in what way it was “appropriate” and took “a conservative approach”. Due to the Trial Chamber’s failure to do so, the victims cannot know whether the amount awarded is sufficient to repair the harm that they have suffered, nor can the Defence know whether the amount of the award in fact represents a sum for which the convicted person should be held liable.

37. Similarly, the Trial Chamber merely stated that it had resolved uncertainties in favour of the convicted person without explaining what those “uncertainties” were, nor how they had been resolved, nor how that resolution had been in favour of Mr Ntaganda. The Trial Chamber should have done so.

38. In light of the absence of reasoning in relation to the amount of the award, it is not clear whether the Trial Chamber intended to set the award on an *ex aequo et bono* basis, whether in whole or in part, nor the reasons therefor. The Appeals Chamber therefore cannot further consider whether that might have been appropriate. Yet what is clear is that purporting to set an award for reparations *ex aequo et bono* – or on any other basis – does not relieve a trial chamber from the requirement to provide the parties with clear reasons for reaching its decision, which means, in reparations proceedings, to provide an intelligible calculation or explanation of the award based upon the available body of facts and information before it. As just noted, the Trial Chamber did not provide any specific information, explanation or calculation allowing the parties, or the public for that matter, to understand how it reached the figure of 30 million USD. The Appeals Chamber considers that the Trial Chamber erred by proceeding in this manner.

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39. The cumulative errors that have just been identified materially affected the Impugned Decision. The part of the Impugned Decision setting the amount of the award is therefore reversed and remanded to the Trial Chamber to assess and explain fully what the appropriate award for reparations should be in the present case, taking into account all known circumstances at the date of that assessment.

40. Under the second and fifteenth grounds of appeal, the Defence argues in general that, despite the Defence's submissions on this matter, the Trial Chamber failed to indicate how Mr Lubanga's and Mr Ntaganda's joint liability for reparations affects the amount of financial liability.

41. The Appeals Chamber finds that the Trial Chamber correctly imposed joint and several liability. Furthermore, the Trial Chamber correctly found that in relation to the type of liability which it imposed on Mr Ntaganda, both he and Mr Lubanga "remain liable to reimburse the funds that the TFV may eventually use to complement the reparation awards for their shared victims".

42. However, the Appeals Chamber has already found that the Trial Chamber erred in its failure to specify the manner in which the award was arrived at and how it was to be apportioned. As such, the Trial Chamber should specifically set out the manner in which the imposition of joint liability impacts the overall amount and apportionment of the award as a part of its reconsideration of these issues.

G. Grounds of appeal relating to applications for reparations, the eligibility assessment and delegation of functions to the TFV

43. Under the first, second, tenth, eleventh and twelfth grounds of appeal, the Defence challenges (i) the Trial Chamber’s failure to examine applications for reparations, and (ii) the Trial Chamber’s failure to enable the Defence meaningfully to challenge such applications. Both the Defence, under the aforementioned grounds of appeal, and Victims Group 2, under the sixth ground of their appeal, also challenge the Trial Chamber’s delegation of powers to the TFV.

44. This is in relation to the Trial Chamber’s finding that, in light of the type of reparations awarded, it saw “no need to rule on the merits of individual applications for reparations, pursuant to rule 94 of the Rules”. The Trial Chamber found it appropriate to establish the eligibility criteria for reparations rather than identifying the victims eligible itself.

45. Regarding the Defence argument that the Trial Chamber did not assess any victims’ applications for reparations, the Appeals Chamber recalls that the Statute and the Rules attach significant weight to applications for reparations. While it held in the *Katanga* case that ruling on *all* applications for reparations is not necessary in cases involving a large number of such applications, its holding must be seen in light of the award for reparations made in that case. The Appeals Chamber finds that, in certain cases, it will be desirable for a trial chamber to rule on the information contained in the applications. They are an important source of information for the trial chamber’s determination of the award. In particular, information contained in applications for reparations “may be crucial to assess the types of harm alleged”, which, in turn, is

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relevant to a determination of “the appropriate modalities for repairing the harm caused with a view to, ultimately, assessing the costs of the identified remedy”.

46. Reparations proceedings are judicial proceedings, resulting in a judicial order fixing a monetary award for which the convicted person is held liable. The Appeals Chamber therefore underscores that, irrespective of whether a trial chamber makes individual findings on applications for reparations or not, the paramount consideration is that its determination of the award for reparations must be based on a sufficiently strong evidential basis.

47. In sum, while there may be instances where it is appropriate to proceed without ruling on any applications, there may be cases in which the evidential basis other than that contained in applications for reparations will be insufficient. In those latter circumstances, a trial chamber is *required* to rule upon applications for reparations to determine whether relevant alleged facts have been established to the applicable standard.

48. There may be circumstances in which, despite concrete efforts, it will not be possible to receive applications from all potential beneficiaries within a given period of time, but that they are likely to come forward in the future. In these circumstances, a trial chamber may elect instead to rule only on a sample of applications for reparations and then proceed to estimate how many more potential beneficiaries will come forward in the future. In such cases, the information contained in the sample of applications for reparations may be essential to a determination of the types of harm and the cost to repair the harm with respect to all beneficiaries, including those who come forward only at the implementation stage of the proceedings.

49. Turning to the present case, the Appeals Chamber is of the view that the Trial Chamber ought to have examined at least a sample of applications prior to arriving at its determinations of the number of potentially eligible victims for reparations and of the amount of the award, so as to have been able to base the award on a stronger evidential basis.

50. The Appeals Chamber therefore concludes that the Trial Chamber erred by failing to rule on at least a sample of applications and that this error necessarily materially affected the Impugned Decision.

51. Turning to the tenth ground of appeal, the Defence submits that the Trial Chamber erred by failing to give any role to the Defence in the process of assessing the eligibility of victims.

52. The Defence seems to challenge what was intended to be the future procedure for the assessment of eligibility of victims by the TFV at the implementation stage. The Defence's appeal is premature in this respect, as the Trial Chamber only instructed the TFV "to include in its draft implementation plan a detailed proposal as to the way in which it expects to conduct the administrative eligibility assessment".

53. The Defence further challenges the extent of the delegation of what it perceives to be judicial functions to the TFV in relation to the eligibility assessment of beneficiaries. The Appeals Chamber notes that, in light of regulation 62 of the Regulations of the TFV, the delegation of authority in this respect to the TFV does not, on its own, constitute an error.

54. The Defence arguments also concern the absence of a procedure for the TFV to carry out the eligibility assessment. The Trial Chamber did not lay out such a procedure and directed the TFV to include in the draft implementation plan “a detailed proposal as to the way in which it expects to conduct the administrative eligibility assessment”. The Appeals Chamber finds that the Trial Chamber ought already to have set out at least the most fundamental parameters of this procedure in the Impugned Decision. While an administrative screening of eligibility can be carried out by the TFV, the outcome of any such screening must be judicially approved by the Trial Chamber. Those whom the TFV finds not to be eligible should be able to challenge the TFV’s findings before the Trial Chamber. The Trial Chamber’s failure to indicate these parameters of the future procedure for the eligibility assessment amounts to an error.

55. The Defence also argues, in the context of delegation of authority to the TFV, that the Trial Chamber merely listed harms suffered by indirect victims, without linking them to the crimes that form part of the conviction. The Appeals Chamber notes that, although the Trial Chamber did not link the harms suffered by indirect victims to specific crimes of which Mr Ntaganda was convicted, the Trial Chamber made it clear that a link between the harms suffered by indirect victims and specific crimes of which Mr Ntaganda was convicted must be established with respect to the direct victims. The Appeals Chamber is thus not persuaded that the Trial Chamber failed to link the harm suffered by indirect victims to the crimes that form part of the conviction.

56. The Defence argues that the Trial Chamber merely listed available modalities of reparations, leaving the choice of options to the TFV. The Appeals Chamber recalls that “it is possible that not all the modalities will ultimately be reflected in the awards for reparations”. The Appeals Chamber is therefore satisfied that it was not an error for

the Trial Chamber to allow the TFV to design the implementation of the award for reparations on the basis of some, rather than all, modalities which the Trial Chamber found to be appropriate.

57. Turning to the issue of the cost of the programmes which the TFV is tasked to design, the Appeals Chamber notes Victims Group 2's argument that the Trial Chamber failed to provide guidance on the cost to repair the harm and on the allocation of resources between various groups of victims, leaving "unfettered discretion" to the TFV and leading to unequal treatment. Without prejudice to its findings on the calculation of the award, the Appeals Chamber notes that the Trial Chamber referred to the cost estimates for various programmes made by the TFV and directed the TFV to keep the costs at a minimum. The Appeals Chamber is therefore satisfied that, although the Trial Chamber did not set the specific amounts with respect to each reparations programme, its guidelines for the TFV, based on various cost estimates, are sufficiently clear in the circumstances.

58. The Defence argues that the Trial Chamber erred by failing to put in place a monitoring system over the TFV's decisions on victims' eligibility. Victims Group 2 contend that, as a result of the Trial Chamber's failure to set out the basic parameters, it will be nearly impossible for the parties to challenge the TFV's proposals.

59. The Appeals Chamber notes that the applicable regulations of the Regulations of the TFV require the TFV, in addition to submitting the draft implementation plan for the Trial Chamber's approval: (i) to consult the Trial Chamber "on any questions that arise in connection with the implementation of the award"; (ii) provide updates on progress; and (iii) submit a final narrative and financial report. The Appeals Chamber

finds that these requirements provide for a sufficient oversight by the Trial Chamber of the implementation process, including the design of reparations programmes by the TFV and their implementation.

60. For the foregoing reasons, the Appeals Chamber finds an error in the Trial Chamber's failure to set out the requirement of a judicial approval of the TFV's findings on eligibility. It rejects the remainder of the Defence's and Victims Group 2's grounds or sub-grounds of appeal concerning the extent of the Trial Chamber's delegation of authority to the TFV.

H. Grounds of appeal on evidentiary issues

61. The Defence's third ground of appeal alleges that the Trial Chamber "committed a mixed error of law and fact by adopting a new principle, *i.e.* 'do no harm', without taking into consideration the current security situation and the rising tensions among communities in Ituri". While it is not clear to the Appeals Chamber whether the Defence is also challenging the legality of the do no harm principle as such, as described by the Trial Chamber, the Appeals Chamber understands the Defence argument to be, broadly, that the Trial Chamber erred in failing to take into account the Defence's submissions as to the ongoing armed conflict in relation to the do no harm principle.

62. The Appeals Chamber notes that indeed the Trial Chamber did not refer to the Defence's submissions as to the protracted armed conflict, nor did it refer to the Registry reports, which are also relied upon by the Defence. The Trial Chamber did, however, refer in different footnotes to some submissions related to the concerns that victims should be equally treated during the reparations stage and the ongoing insecurity in Ituri.

63. Although not identified by the Trial Chamber as concerning the principle of do no harm, its language reflects the principle of do no harm, and, when specifically referring to the “unstable security situation on the ground”, the Trial Chamber referred in a footnote to submissions by Victims Group 1, Victims Group 2, and the First Experts Report as to insecurity in the region.

64. As a result, the Appeals Chamber finds that the Trial Chamber therefore clearly intended that the principle of do no harm required ongoing consideration by the Trial Chamber itself, and the TFV, during the implementation process, in the identification and assessment of victims’ applications, and in the decision as to particular reparation projects. Furthermore, the Appeals Chamber notes that, although the Trial Chamber could have expressly referred to the Defence’s submissions, the Defence has not indicated how the information it points to would have affected Mr Ntaganda’s liability for reparations, how it would have affected the Impugned Decision in general, and what the result would have been if it had. In particular, the Defence has not shown concretely how the Trial Chamber’s approach would harm other communities or victims of crimes for which Mr Ntaganda was not convicted.

65. Since the Defence has not demonstrated any error in Trial Chamber’s approach to the do no harm principle, the Appeals Chamber rejects the Defence’s third ground of appeal.

66. Under the fourth ground of appeal, the Defence challenges the Trial Chamber’s findings related to the issue of transgenerational harm and to documentary evidence to be presented together with future applications for reparations to the TFV. The Defence also presents arguments related to the health centre in Sayo.

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67. Regarding transgenerational harm, the Defence argues that the Trial Chamber erred in law in its interpretation of the concept of transgenerational harm. It also argues that the Trial Chamber erred in relation to the evidentiary criteria for transgenerational harm. In addition, under its second ground of appeal, the Defence states that the Trial Chamber failed to provide reasons regarding the Defence's submissions on, *inter alia*, transgenerational harm.

68. For the reasons that follow, the Appeals Chamber finds that the Trial Chamber indeed failed to provide sufficient reasoning regarding (i) the concept of transgenerational and (ii) the evidentiary criteria to prove it.

69. Although the Defence made these substantial submissions before the Trial Chamber, they were not addressed in the Impugned Decision and the Trial Chamber gave no indication of any caution the TFV would need to exercise in assessing applications claiming reparations as a result of transgenerational harm.

70. The Appeals Chamber also notes that the Impugned Decision lacks any substantial guidance to the TFV as to how it should assess an application for reparations based on transgenerational harm. Furthermore, as the Trial Chamber did not rule upon any application, it failed to address this issue on the basis of any applications that had been filed.

71. The Appeals Chamber observes that the Trial Chamber did not assess the reliability of two expert reports, nor did it address the Defence's arguments regarding that evidence.

72. The Appeals Chamber finds that, in a case such as this, where the concept of transgenerational harm is indeed novel and evolving, it was incumbent upon the Trial Chamber to demonstrate that it had properly and fairly taken the parties' submissions into account.

73. In the Appeals Chamber's view, the Trial Chamber's overall approach to the making of findings as to the existence and characteristics of transgenerational harm renders unclear the overall findings made by the Trial Chamber and amounts to an error. The Appeals Chamber finds that, by failing to properly assess the characteristics of this form of harm, and consider the Defence's submissions, the Trial Chamber failed to meet the requirement to provide a reasoned opinion on the matter.

74. In these circumstances, the Appeals Chamber considers it appropriate to reverse the Trial Chamber's findings in relation to transgenerational harm and to remand the matter to the Trial Chamber for it to assess and properly reason the matter based on submissions sought from the parties and having assessed the reliability and credibility of the expert evidence on the record and address the issue of evidentiary guidance on this issue.

75. The Defence's further argument is that the Trial Chamber failed to require documentary evidence in support of the applications for reparations. As noted earlier, the Trial Chamber did not rule on any applications for reparations. Its findings as to the documentary evidence required for applications were general in nature. The Trial Chamber intended its findings to be applied by the TFV in the future, when presented with applications for reparations. As discussed earlier, this matter will be remanded to the Trial Chamber for it to assess requests for reparations that are received.

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76. The Appeals Chamber emphasises that, when making a decision as to the eligibility of a victim for reparations, the enquiry is whether the relevant facts have been established to the applicable standard of proof. This standard of proof must be met, regardless of whether or not a victim has been in a position to provide supporting documentary evidence.

77. The Appeals Chamber notes that, in this case, the Trial Chamber required that victims “provide sufficient proof of the causal link between the crime and the harm suffered, based on the specific circumstances of the case”. The Trial Chamber clarified that “what is ‘sufficient’ for the purposes of a victim meeting the burden of proof, will depend upon the specific circumstances of the case, including any difficulties the victims may face in obtaining evidence”.

78. The Appeals Chamber considers that what the Trial Chamber stated was, in general terms, in keeping with the Appeals Chamber’s previous jurisprudence. However, the following aspects, not referred to by the Trial Chamber, require emphasis.

79. The Appeals Chamber emphasises that, indeed, “to allow the trial chamber to properly reach a conclusion, it is in the interest of the person who is unable to supply any documentation to explain his or her reasons for this inability”.

80. Although the Trial Chamber acknowledged that difficulties may exist for victims to produce documentary evidence, this cannot be understood as providing *carte blanche* to victims to come forward without supporting evidence.

81. In view of the foregoing, the Appeals Chamber finds that the Defence has not demonstrated an error.

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82. The Defence submits that “[t]he Trial Chamber erred by relying on unreliable evidence to meet the burden of proof in relation to the damage to the Sayo health centre”.

83. The Appeals Chamber notes that Mr Ntaganda was convicted, under count 17, of the crime of intentionally directing attacks against protected objects as a war crime, namely against the health centre in Sayo, in the context of the First Operation, and the Trial Chamber, in the Impugned Decision, found that reparations could be awarded for direct victims who showed they had suffered harm as a result of this crime. However, it did not rule, as noted earlier, on any applications seeking reparations, including any application regarding the harm to the health centre in Sayo.

84. The Trial Chamber relied on an expert report, to which the parties filed observations. However, neither the Conviction Judgment nor the Sentencing Judgment finds that, as a result of the crime of directing attacks against protected objects, physical damage was caused to the health centre.

85. The Trial Chamber did not address the issue of whether actual physical harm caused to the health centre in Sayo indeed falls within the scope of the conviction and sentencing judgments. The Trial Chamber should have done so.

86. Furthermore, the Trial Chamber erred in failing to properly assess the credibility and reliability of the expert report, relied upon for the Trial Chamber’s findings relating to the health centre in Sayo.

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87. The Appeals Chamber considers it appropriate to reverse the Trial Chamber's findings in relation to the health centre in Sayo and to remand the matter to the Trial Chamber for it to address the matter again.

88. On this point, Judge Ibáñez Carranza observes that, even if no individual applications for reparations for the harm to the health centre in Sayo have been submitted, the Trial Chamber should also consider that such harm affected the Sayo community, and the latter may be eligible for reparations as a collective victim.

89. The Defence submits that the Trial Chamber erred in relation to what it stated generally as to possible breaks in the chain of causation.

90. The Appeals Chamber notes that, in the Impugned Decision, the Trial Chamber observed that "it is required that the crimes for which a person was convicted were the 'proximate cause' of the harm for which reparations are sought".

91. The Appeals Chamber can find no error. Contrary to the Defence's submissions, it is also incorrect to state that the Trial Chamber failed to consider that the causal link may be broken by other incidents; the Trial Chamber referred to the Defence submissions that breaks in the chain of causation should be taken into account, and it stated clearly that this was indeed the case, and that they should be taken into account.

92. Turning to the submission that, "particularly in the context of a protracted armed conflict", the Trial Chamber failed to consider that "the causal link may be broken by other incidents", the Appeals Chamber notes that this submission is related to an argument the Defence raised under its third ground of appeal. As noted earlier, and found by the Trial Chamber, harm cannot be attributed to a convicted person if a break

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in the chain of causation is established in a particular case. If this break is shown, based on the circumstances of the protracted armed conflict, then causation will not have been established. The Trial Chamber and the TFV will be required to assess, when presented with claims for reparations, whether the chain of causation has been established, and whether specifically alleged events, as a result of the protracted armed conflict, break that chain; if it is not established to the requisite standard that the harm alleged by a victim has been caused by Mr Ntaganda, because of a break in the chain of causation related to, for example, the protracted armed conflict, or, in fact, for any other reason, then this claim would have to be rejected.

93. Under its sixth and seventh ground of appeal, the Defence argues that the Trial Chamber “erred in law when ruling on the status of certain victims”, raising arguments thereon within the sixth and seventh grounds of the Defence appeal. More specifically, under its sixth ground of appeal, the Defence argues that the Trial Chamber erred in law by holding that the harm suffered by children born out of rape and sexual slavery is a direct result of the commission of such crimes and that these children may thus qualify as direct victims. Under its seventh ground of appeal, the Defence argues that the Trial Chamber erred in law by finding that a person who did not have a close personal relationship with a direct victim, but was nevertheless “of significant importance in their lives”, may be an indirect victim.

94. As the definition of indirect victims pertains to both the sixth and seventh grounds of appeal, the Appeals Chamber shall first address the issue of indirect victims as pertains to the seventh ground of appeal and second, whether children born out of rape and sexual slavery qualify as direct or indirect victims.

95. In the Impugned Decision, the Trial Chamber found that those for whom the direct victim is of significant importance, but with whom they have no close personal relationship, may receive reparations as indirect victims. The Trial Chamber further stated that “[t]he indirect victim must nevertheless demonstrate to have suffered harm because of the commission of a crime against the direct victim”.

96. Although the Trial Chamber’s precise finding on this issue is not explained further, the Appeals Chamber considers that its references to the Appeals Chamber’s jurisprudence provides support to its conclusion. To the extent that the applicable law, including the jurisprudence to which the Trial Chamber referred, in all five paragraphs of this subsection of the Impugned Decision (regarding indirect victims), can show that the definition of “indirect victims” includes “other persons who suffered personal harm as a result of these offences”, this amounts to sufficient reasoning.

97. That notwithstanding, in the Appeals Chamber’s view, the TFV requires guidance as to what the concept of “person of significant importance, with whom the indirect victim did not have a close personal relationship” could encompass and where the limits lay. To provide further guidance on this concept, particularly whether the Trial Chamber’s approach was correct to make the challenged finding, the Appeals Chamber turns to address the rest of the arguments raised under this ground of appeal.

98. Although it is a matter of evidence as to whether a claimant satisfies the Trial Chamber, or the TFV under the Trial Chamber’s review, that he or she meets the requisite standard of proof to establish both his or her harm and relationship to the direct victim, the Appeals Chamber considers that, leaving the concept of “significant importance” undefined could result in the TFV having to define this legal concept,

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before it can carry out its administrative implementation task. Thus, the Appeals Chamber finds that, in determining whether a direct victim was of significant importance to an applicant requesting to be recognised as an indirect victim, the Trial Chamber and the TFV shall be guided by the “criterion of special bonds of affection or dependence connecting the applicant with the direct victim”, which “captures the essence of inter-personal relations, the destruction of which is conducive to an injury on the part of indirect victims”.

99. Turning to the remainder of the Defence’s arguments, the Appeals Chamber notes that the Defence goes on to argue that the confusion created by the Trial Chamber’s failure is illustrated by the Trial Chamber’s findings as to the disappearance of *Abbé Bwanalonga*. It submits that, although clearly his disappearance “may well be a great loss for the community, this will not necessarily cause deep emotional distress to everyone within his extended congregation.

100. The Appeals Chamber notes that the Trial Chamber did not make any conclusion linking its findings in relation to the *Abbé Bwanalonga* and its finding that indirect victims may include those to whom a direct victim represented a person of significant importance in their lives. Second, as to what it stated about the *Abbé Bwanalonga*, the Trial Chamber discussed the harm suffered by witnesses to crimes and referred in particular to the death of *Abbé Bwanalonga* in the subsequent paragraph. The Trial Chamber did not make a clear finding that persons could claim reparations based on harm suffered as a result of what happened to *Abbé Bwanalonga* because he was a person of significant importance to them. The Trial Chamber, as stated earlier, having found that those to whom a direct victim is of significant importance may receive reparations as indirect victims, stated that they “must nevertheless demonstrate to have

suffered harm because of the commission of a crime against the direct victim”. Therefore, it is not the case that the entire congregation of *Abbé Bwanalunga* would automatically qualify as indirect victims, or indeed any of the population – the Trial Chamber did not find this.

101. Turning to the next ground, the Defence argues that, contrary to the submissions of all the parties and the experts’ reports, the Trial Chamber nevertheless found, “without sufficient justification”, that children born out of rape and sexual slavery are direct rather than indirect victims.

102. Although the reasoning provided by the Trial Chamber in the Impugned Decision is sparse, the Appeals Chamber considers that the Trial Chamber nevertheless provided a reason for why it took the approach it did, which was contrary to the assumption put forward by the parties.

103. The Trial Chamber found that “children born out of rape and sexual slavery may qualify as direct victims”, *because* “the harm they suffered is a direct result of the commission of the crimes of rape and sexual slavery”. The Defence challenges this finding, arguing that, in light of the jurisprudence of this and other courts, “to be considered as a direct victim, the applicant must be the direct object of the crime which forms part of the conviction, and there must be a causal link to the harm alleged”.

104. The Appeals Chamber notes that this ground of appeal raises the issue of the determination of the extent of harm directly caused by the conduct for which the convicted person was found criminally liable. In particular, it raises the issue of whether, for purposes of reparations owed for a crime, persons who suffered harm as a

direct result of the crime, other than those against whom the convicted person committed the crime, can be considered as a direct victim.

105. In the case at hand, the Trial Chamber found that, “[f]or direct victims, a causal link must exist between the harm suffered and the crimes of which an accused is found guilty”, while “[i]ndirect victims must establish that, because of their relationship with the direct victim, the loss, injury, or damage suffered by the direct victim gives rise to their harm”. It went on to note that “*in light of the circumstances of the case, children born out of rape and sexual slavery may qualify as direct victims, as the harm they suffered is a direct result of the commission of the crimes of rape and sexual slavery*”. For the following reasons, the Appeals Chamber finds no error in this conclusion.

106. First, the Appeals Chamber finds that, as correctly noted by the Trial Chamber, the harm that children born out of rape and sexual slavery suffer – although emerging only after being born – is a *direct* result of the commission of the crimes of rape and sexual slavery. Such harm can include the children being psychologically affected as a result of learning about the violent circumstances surrounding his or her conception, and being socially stigmatised and rejected by the community, not knowing who their fathers were. He or she can also suffer materially through, for example loss of job prospects and social exclusion, and be physically injured, for example if he or she suffers from HIV/AIDS or another illness transmitted from the offender. The harm is both directly linked to the crime (as it would not have happened “but for” the crime) and was entirely foreseeable at the time the crime is committed. This type of victim – a child born out of rape/sexual slavery – is a unique type of victim, and also one that has suffered a unique type of harm that merits being recognised for what it is: direct harm inflicted on the child.

107. The Appeals Chamber considers that the *circumstances* surrounding the commission of the crimes of rape and sexual slavery in this case, in particular, the fact that the pregnancies were unwanted, creates a direct causal link with the harm that these children suffered after being born. Furthermore, it is noted that some victims of rape and sexual slavery were minor, constantly threatened and unable to flee, including at the times when they realised that they were pregnant, which provides for a causal link between the circumstances of the crimes of rape and sexual slavery, and the birth of the children.

108. For these reasons, the Appeals Chamber finds that the Trial Chamber did not err in finding that children born of rape and sexual violence can be classified as direct victims.

109. Turning to the eighth ground of the Defence’s appeal, the Appeals Chamber notes that the overarching argument of the Defence is that the Trial Chamber “erred in law when resorting to presumptions of specific harms in relation to certain categories of victims”. To challenge the Trial Chamber’s approach to adopt all presumptions in the case at hand, the Defence argues that, by adopting these presumptions, the Trial Chamber abused its discretion because, contrary to the relevant jurisprudence, it failed to counterbalance the victims’ difficulties against the right of due process of the convicted person.

110. The Appeals Chamber notes that the Trial Chamber made seven presumptions. It observes that the Trial Chamber specifically invited the parties and the TFV to make submissions on, *inter alia*, “whether any type of harm suffered by the victims of Mr Ntaganda’s crimes may be presumed”. The Appeals Chamber highlights that the

Defence had the opportunity to submit, and in fact submitted, its observations on the presumptions recommended by the experts and requested by the victims.

111. The Appeals Chamber further notes that the Trial Chamber did not expressly refer to the Defence's submissions. Although it would have been preferable for the Trial Chamber to have referred to those submissions expressly, the Appeals Chamber notes that the Trial Chamber duly referred to the information on which it relied to make the seven presumptions, *i.e.*: the Conviction Judgment, the Sentencing Judgment, the expert reports, submissions from the TFV and Victims Group 2, and jurisprudence from the Appeals Chamber as well as decisions from other chambers. Furthermore, the Defence was able to fully challenge the expert report and the victims' and TFV's submissions on which the Trial Chamber relied to make the presumptions in the case at hand. In these circumstances, the Appeals Chamber does not find an error in the way that the Trial Chamber adopted these presumptions.

112. In any event, considering that presumptions of fact are rebuttable, shifting the burden of proof to those who wish to challenge their applicability, it is expected that the Trial Chamber devises an avenue where the Defence is provided with a reasonable opportunity to rebut them in proceedings before the trial chamber, for example, by having access to at least a minimum amount of information contained in the applications for reparations, to make specific submissions and provide evidence to rebut presumptions that may not be applicable to such applications.

113. The Defence further raises arguments specifically addressing some presumptions. It argues that the Trial Chamber "erred in creating presumptions of physical harm for victims of the attacks who personally experienced the attacks". The Defence argues that

the war crimes of pillaging, attacking protected objects, seizing enemy's property and destroying or seizing enemy's property do not necessarily and automatically imply physical and psychological harm, as none of them require infliction of physical injury. It further argues that some of the underlying acts of persecution in this case, such as pillaging and destruction of property, do not involve physical harm.

114. Although the Defence seems to be restricting the concept of “physical harm” to that of “infliction of physical injury”, the Appeals Chamber considers that the scarce reasoning of the Trial Chamber allows for this interpretation. The Trial Chamber considered it “unquestionable that direct victims that personally experienced the crimes committed during the attacks endured physical suffering in connection with the very nature of the context of armed conflict and the attack against the civilian population within which the crimes were committed”. On its face, this finding appears to presume that all victims from the attacks were physically injured. Considering that not every victim of an attack necessarily suffers a bodily injury, and the Trial Chamber did not provide sufficient reasoning to support this conclusion, the Appeals Chamber is unable to assess whether no reasonable trier of fact would have reached the same conclusion.

115. In light of the foregoing, the Appeals Chamber remands the matter for the Trial Chamber to address the submissions of the Defence and provide sufficient reasoning to its findings.

116. The Defence further argues that the Trial Chamber “erred in creating a presumption of psychological harm for victims who lost their home or material assets with significant impact [on] their lives”. The Appeals Chamber notes that the Defence is challenging the Trial Chamber's presumption of “psychological harm” for, *inter*

alios, “victims who lost their home or material assets with a significant effect on their daily life”. The Appeals Chamber notes that the Trial Chamber recalled specific findings it made in its Sentencing Judgment, and it further relied on one of the expert reports and submissions from the TFV.

117. Contrary to the Defence’s assertion, the Appeals Chamber considers that the Trial Chamber was clear in indicating the information on which it relied to make the challenged presumption. Having found in the Sentencing Judgment the particularly distressing circumstances of victims who lost their homes or properties that are significant in their life, it was not unreasonable for the Trial Chamber to presume that they suffered psychological harm. Therefore, the Defence has not demonstrated that no reasonable trier of fact could have made the same presumption in the particular circumstances of this case.

I. Conclusion

118. For all the foregoing reasons, the Appeals Chamber decided to partially reverse the Impugned Decision and remand the matter to Trial Chamber II, which is directed to issue a new order for reparations, taking into account the terms of the Judgment, which shall be notified shortly.