

**Cour
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**International
Criminal
Court**

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No.: **ICC-01/12-01/18**
Date: **2 October 2026**

THE APPEALS CHAMBER

Before: Judge Luz del Carmen Ibáñez Carranza, Presiding Judge
Judge Tomoko Akane
Judge Solomy Balungi Bossa
Judge Gocha Lordkipanidze
Judge Erdenebalsuren Damdin

SITUATION IN THE REPUBLIC OF MALI

IN THE CASE OF
THE PROSECUTOR v. AL HASSAN AG ABDOUL AZIZ AG MOHAMED AG
MAHMOUD

Public Redacted
With public Annexes A and B

**Public Redacted Version of “Defence Joint Response to OPCV Appeal Brief against the
Reparations Order (ICC-01/12-01/18-2796) and LRVs Mémoire d'appel des
Représentants légaux des victimes contre l'Ordonnance de réparations rendue par la
Chambre de première instance X (ICC-01/12-01/18-2782) (ICC-01/12-01/18-2795)”, 28
September 2026, ICC-01/12-01/18-2799-Conf**

Source: Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud

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(Participation/Reparation)

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I- INTRODUCTION

1. The Defence for Mr Al Hassan (“the Defence”) hereby submits its Response to the Office of the Public Counsel for Victims (“OPCV”) and Legal Representatives of Victims (“LRVs”) appeals against the Reparations Order.¹ Several grounds of appeal are common to the OPCV and the LRVs, and the Defence will address them together.

2. The Defence does not dispute the serious and multifaceted harm suffered by the victims of the crimes Mr Al Hassan was convicted of, and has supported reparative measures directed to repair that suffering.² That said, both the OPCV and LRV appeals clearly seek to broaden the pool of eligible victims for reparations, which would have the effect of impermissibly expanding Mr Al Hassan’s personal liability outside the scope of his conviction.³ Reparations orders must remain faithful to the individual criminal responsibility as established in the conviction – this is a fundamental principle of reparations which bears repeating. Doing otherwise would be highly prejudicial to the convicted person and produce other undesirable consequences, including potentially impeding the meaningful delivery of reparations to victims, as explained in the Defence’s Appeal Brief against the Reparations Order.⁴

3. The OPCV and LRV otherwise fail to meet the appellate standards of review in asserting other errors committed by the Reparations Chamber. OPCV’s Grounds 2 to 4 focus on alleged factual and procedural errors committed by the Reparations Chamber in relation to its conclusions of material and physical harm, which are mere disagreements with the Chamber’s determinations. The LRV’s Ground 3 otherwise fails to substantiate any factual or legal error with respect to the Chamber’s reliance on the Registry’s estimate of physical harm, and fails to illustrate the material impact on the Reparations Order.

4. Both the OPCV and LRVs also challenge the Reparations Order on the basis of failing to recognise transgenerational harm.⁵ The Defence remains unopposed to the recognition of such harm should the Reparations Chamber consider it appropriate and that evidence supports such a finding. However, the Defence submits that neither the LRVs nor the OPCV have

¹ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#); LRVs Appeal Brief, [ICC-01/12-01/18-2795](#).

² Defence Response to Observations on Reparations, [ICC-01/12-01/18-2741-Red](#), paras 7-15; see also Defence Observations on Reparations, [ICC-01/12-01/18-2729](#), paras 6, 32-56.

³ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), paras 28-63; LRVs Appeal Brief, [ICC-01/12-01/18-2795](#), paras 19-40.

⁴ Defence Appeal Brief, [ICC-01/12-01/18-2797-Red](#), Ground 1, particularly, paras 60-61, 77-80.

⁵ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), Ground 5, paras 95-109; LRVs Appeal Brief, [ICC-01/12-01/18-2795](#), deuxième motif, paras 41-87.

demonstrated any error on the part of the Reparations Chamber that warrants appellate intervention as a result of the Chamber declining to recognise transgenerational harm.

5. These submissions are intended to assist the adjudication of both appeals, while building on the principles already set out in the Defence's own appeal against the Reparations Order. This response also seeks to contribute to the design of a fair and effective reparations order that fully respects both the rights of the victims and those of the convicted person.

6. The Reparations Chamber ultimately adopted a Reparations Order that sought to accommodate elements of the respective positions advanced by the Defence and the LRVs. In the Defence's respectful submission, however, that approach resulted in factual, legal and procedural errors. The Defence had proposed a means of repairing the harm suffered by the community of Timbuktu and providing redress for the collective harm suffered by its population, as well as the 49 direct victims. The Defence remains of the view that such an approach would provide a meaningful form of repair and justice to the victims of the crimes for which Mr Al Hassan was convicted, and give effect to their right to reparations, while at the same time remaining within the limits of his conviction and the harm for which he may properly be held liable.

7. Consequently, the Defence submits that the challenges brought by the OPCV and the LRVs should be dismissed and that the Appeals Chamber should issue a new or substantially amended Reparations Order – or, in the alternative, remand the matter to the Reparation Chamber for amendment – in light of the Defence's Appeal against the Reparations Order.

II- CONFIDENTIALITY

8. Pursuant to Regulation 23bis(1) of the Regulations of the Court, the Defence files this Response confidential as it contains confidential information, including information regarding protected witnesses. The Defence will submit a public redacted version in due course.

III- PROCEDURAL BACKGROUND

9. On 27 April 2026, the Reparations Chamber issued its Reparations Order.⁶

10. On 28 May 2026, the Defence submitted its Notice of Appeal against the Reparations Order.⁷

⁶ Reparations Order, [ICC-01/12-01/18-2782](#).

⁷ Defence Notice of Appeal Against the Reparations Order, [ICC-01/12-01/18-2784](#), 28 May 2026.

11. On 29 May 2026, the LRVs and OPCV submitted their respective Notice to Appeal against the Reparations Order.⁸

12. On 28 July 2026, the Defence, LRVs and OPCV submitted their respective Appeal Brief against the Reparations Order.⁹

IV- SUBMISSIONS

A. Procedural errors within the OPCV Appeal Brief

- i. *The OPCV has exceeded its mandate and its Grounds of Appeal are inadmissible insofar as they are brought on behalf of victims it does not represent*
- a. The scope of the OPCV's mandate defined by the Chamber

13. The OPCV may fulfil a variety of functions in the reparations phase, but “[t]he role of the OPCV must be delineated by the Chamber in order to ensure the fair and expeditious conduct of proceedings”.¹⁰ However, when acting as a legal representative, the OPCV is considered equivalent to any legal representative of victims and is subject to the same limits.¹¹

14. A legal representative is appointed to represent specific individuals at trial and to convey the views and concerns of its clients, and its clients alone.¹² This follows from the nature of legal representation itself: the mandate flows from the represented persons (or from the Chamber appointing the representative on their behalf), and the representative owes fidelity to the sole interests of those persons.¹³ A representative who makes submissions extending beyond the interests of its clients does not enlarge its mandate; it acts without one.

15. In the present case, the Trial Chamber delineated the OPCV's mandate narrowly¹⁴ – to represent four individuals arising from a potential conflict of interest. This mandate differs from instances in which a Chamber authorises the OPCV to represent the general interests of groups of victims. In those cases, the Chamber has clearly and explicitly authorised such a

⁸ Acte d'appel des Représentants légaux des victimes de l'Ordonnance de réparations rendue par la Chambre de première instance X, [ICC-01/12-01/18-2785](#), 29 mai 2026; OPCV Notice of Appeal against the Reparations Order, [ICC-01/12-01/18-2786](#), 29 May 2026.

⁹ Defence Appeal Brief, [ICC-01/12-01/18-2797-Red](#); OPCV Appeal Brief, [ICC-01/12-01/18-2796](#); LRVs Appeal Brief, [ICC-01/12-01/18-2795](#).

¹⁰ *Lubanga* Decision on OPCV's participation to reparations, [ICC-01/04-01/06-2858](#), para. 7.

¹¹ *Regulations of the Court*, regulations 81(4)(d), 80(1), 73(4); *Lubanga* Decision on 'indirect victims', [ICC-01/04-01/06-1813](#), paras 37-39.

¹² *Code of Professional Conduct for counsel*, articles 6, 14, 16(1)-(2); *Rules of Procedure and Evidence*, Rules 90, 91; *Rome Statute*, Article 68(3); *Regulations of the Court*, regulations 81(4). See also, *Lubanga* Decision on the admissibility of the appeals, [ICC-01/04-01/06-2953](#), para. 72.

¹³ *Code of Professional Conduct for counsel*, articles 6, 11, 14; *Regulations of the Court*, regulations 81(4).

¹⁴ Decision on potential conflict of interest, [ICC-01/12-01/18-2728-Conf](#), paras 10, 20-27, p. 9; OPCV Submissions on Reparations, [ICC-01/12-01/18-2747-Conf-Corr](#), paras 9, 12, 14, 21, 25, 28, 31, 36, 40, 44. See also OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), para. 1; [T-219](#) (Red), p. 26, ln. 24, p. 27, ln. 13.

representation mandate.¹⁵ No such authorisation exists here. Although the Chamber stated that the OPCV may represent “any of the relevant victims who cho[se] to be represented by OPCV”,¹⁶ the OPCV confirmed, repeatedly and consistently throughout its reparations submissions, that it represents four victims.¹⁷ The Defence has otherwise not been notified of any other victims who have chosen to be represented by the OPCV.

16. The remaining participating victims in this case, 2,195 individuals, are represented by the LRVs, who filed their own notice of appeal.¹⁸

b. The OPCV’s appeal is partially ultra vires

17. The Appeals Chamber’s jurisprudence is clear: the OPCV is entitled to appeal on matters relating to the specific victims it was appointed to represent. In *Lubanga*, the Appeals Chamber determined that while the OPCV could appeal on behalf of the specific individuals it represented, the appeal was inadmissible “to the extent that the OPCV ha[d] appealed [...] on behalf of [...] unidentified individuals”, because it was impossible to discern who belonged to that group.¹⁹

18. The OPCV’s Appeal Brief is overarching, in that it makes submissions for victims beyond the four it has been mandated to represent, which must result in those submissions being inadmissible. The Grounds contained in the OPCV Appeal Brief, in particular Ground 1 and Ground 5, do not articulate nor are based on, the views and concerns of the four victims it represents. Instead, Ground 1 seeks to expand the number of direct victims as found by the Reparations Chamber, asserting a reversal of the Chamber’s finding on victim eligibility in favour of “any victim [...] who, on a balance of probabilities, can prove having suffered harm” under Counts 1-6 and 14;²⁰ while Ground 5 seeks a finding that transgenerational harm was

¹⁵ For example, see *Situation in the State of Palestine*, Decision on the victims, [ICC-01/18-256-Red](#), para. 8: “the Chamber notes regulation 81(4)(e) of the Regulations and grants the OPCV to represent the general interests of victims”. Similarly, see *Situation in the Bolivarian Republic of Venezuela I*, Decision on OPCV’s request to appear, [ICC-02/18-54](#), para. 7; *Situation in the Philippines*, Decision on Victims involvement, [ICC-01/21-01/25-66](#), para. 24; *Situation in the Central African Republic II*, Order on the Conduct of Proceedings, [ICC-01/14-203](#), para. 8. See also *El Hishri* Order on the organisation of the LRVs, [ICC-01/11-01/25-47](#), para. 5; *Said* Decision on legal representation of victims, [ICC-01/14-01/21-119](#), p. 12. *Contra Ntaganda* Decision Concerning the CLRVs, [ICC-01/04-02/06-160](#), p. 11(a); *Yekatom & Ngaïssona* Decision on the Legal Representation of Victims, [ICC-01/14-01/18-205](#), p. 9.

¹⁶ Decision on potential conflict of interest, [ICC-01/12-01/18-2728-Conf](#), p. 9, para. 24.

¹⁷ OPCV Submissions on Reparations, [ICC-01/12-01/18-2747-Conf-Corr](#), paras 9, 12, 14, 21, 25, 28, 31, 36, 40, 44; see also OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), para. 1; [T-219](#) (Red), p. 26, ln. 24, p. 27, ln. 13.

¹⁸ LRVs observation on Reparations, [ICC-01/12-01/18-2732-Red](#), para. 27; LRVs Appeal Brief, [ICC-01/12-01/18-2795](#), para. 1.

¹⁹ *Lubanga* Decision on the admissibility of the appeals, [ICC-01/04-01/06-2953](#), para. 72.

²⁰ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), paras 43-45, 116.

suffered by “the next generation members” of the entire community.²¹ These grounds are advanced on behalf of an unidentified and open-ended category of potentially thousands of individuals, a group in respect of which the OPCV holds no mandate from the Chamber and no relationship of legal representation, and therefore should be considered *ultra vires*.

19. The difference between what the OPCV was authorised to do by the Chamber and the relief it now seeks is incompatible. [REDACTED].²² [REDACTED]. Yet the relief sought under Ground 1 expressly encompasses all victims under Counts 1-6 and Count 14, and is similarly all-inclusive in Grounds 2, 3 and 5.²³

20. Even regarding the counts which concern the OPCV’s clients, those Grounds are not confined to the personal interests of those four individuals. Ground 1 seeks a determination of eligibility for “any victim” beyond the 49 individuals identified in the Trial Judgment – which is clearly outside the sole interests of their four clients; Ground 2 addresses the material harm suffered by direct and indirect victims in general terms rather than being specific to their clients; Ground 4 also addresses physical harm in general terms; and Ground 5 concerns the “next-generation members” of the Timbuktu community.²⁴ Irrespective of the merits of these claims, they are claims that are beyond the expressed mandate of the OPCV. The OPCV cannot transform itself, *proprio motu*, into the legal representative of the whole population of Timbuktu when it clearly does not have this mandate.

21. As such, the OPCV has done again what the Appeals Chamber rejected in *Lubanga*. The OPCV itself acknowledged that its submissions in the present proceedings are informed by its “expertise on reparations proceedings and implementation of reparations measures”.²⁵ Expertise is an attribute of the OPCV, not a mandate conferred by any Chamber; it may inform the submissions made on behalf of the OPCV’s clients, but it does not equate to representation for victims with whom the OPCV holds no relationship of representation. It also departs from the principle that victims’ representatives act “in respect of [the victims’] personal interests”, that is, the interests of the victims they actually represent.²⁶

22. Accordingly, Grounds 1 and 5 of the OPCV’s Appeal Brief, together with any part of Grounds 2 to 4 advanced on behalf of potential victims other than the four represented

²¹ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), paras 97-100, 116.

²² [REDACTED]. See Second Joint Report, [ICC-01/12-01/18-2725-Conf-Red](#), para. 17, fns 24-27.

²³ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), paras 29 (Ground 1), 64, 77 (Ground 2), 85 (Ground 3), 104 (Ground 5), 116.

²⁴ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), paras 29, 64, 77, 93, 104, 116.

²⁵ OPCV Submissions on Reparations, [ICC-01/12-01/18-2747-Conf-Corr](#), para. 9.

²⁶ *Lubanga* Second Appeal Judgment, [ICC-01/04-01/06-3121-Red](#), para. 36.

individuals whom the OPCV was appointed to represent, should be declared *ultra vires* the OPCV's mandate and dismissed *in limine*.

B. OPCV and LRV Ground 1 : The Reparations Chamber did not err in finding that the direct victims for Counts 1-6 and 14 are the 49 victims named in the Trial Judgment

23. A Reparations Order must be anchored within the geographic, temporal and material scope of the culpability of the Convicted person.²⁷ Despite acknowledging this fundamental legal principle of reparations,²⁸ the OPCV and LRVs contend that the Chamber erred in finding that only the 49 individuals named in the Trial Judgment and Sentencing Decision are eligible for reparations as direct victims of the crimes under Counts 1-6 and 14.

24. Rather, the OPCV and LRV assert that all persons in Timbuktu who claim to have suffered harm as a result of the crimes under Counts 1-6 and 14 for which Mr Al Hassan was convicted, as opposed to the incidents in respect of which he was found guilty and which therefore form the basis of his conviction, should be considered potential beneficiaries. In their view, the Reparations Chamber erred in failing to provide an “open-ended description of the victim population.”²⁹

25. Both parties fail to substantiate any error made by the Reparations Chamber in its determination of direct victims under Counts 1-6 and 14 or how the alleged errors produced any material impact on the outcome.³⁰ The failure of both OPCV and the LRVs to substantiate their arguments by identifying the applicable law and adducing supporting evidence is a recurring deficiency throughout their respective Appeal Briefs and falls short of the requirements of Regulation 58(2) of the Regulations of the Court.³¹

²⁷ *Ntaganda* Reparations Order, [ICC-01/04-02/06-2659](#), para. 106; *Ongwen* Reparations Order, [ICC-02/04-01/15-2074](#), para. 96; *Lubanga* Amended Reparations Order, [ICC-01/04-01/06-3129-AnxA](#), paras 20-21; *Lubanga* Appeal Judgment on principles for reparations, [ICC-01/04-01/06-3129](#), paras 65, 99. See further, *Lubanga* Appeals Judgment on the Reparations Award, [ICC-01/04-01/06-3466-Red](#), paras 90, 311; *Katanga* Reparations Order, [ICC-01/04-01/07-3728-tENG](#), para. 251; *Al Mahdi* Reparations Order, [ICC-01/12-01/15-236](#), para. 110; *Affaire Bozizé et al.* jugement d'appel, [No 13-2023](#), paras 101-105.

²⁸ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), paras 40, 47-49; LRVs Appeal Brief, [ICC-01/12-01/18-2795](#), paras 25-26, 39.

²⁹ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), para. 29.

³⁰ See above, paras 25 and 73.

³¹ Regulations of the Court, Regulation 58(2). See further, *Prosecutor v. Ongwen*, Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled “Trial Judgment”, [ICC-02/04-01/15-2022-Red](#), 15 December 2022, para. 88; *Prosecutor v. Ntaganda*, Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled ‘Judgment’, [ICC-01/04-02/06-2666-Red](#), 30 March 2021, para. 47; *Prosecutor v. Gbagbo & Blé Goudé*, Judgment in the appeal of the Prosecutor against Trial Chamber I’s decision on the no case to answer motions, [ICC-02/11-01/15-1400](#), 31 March 2021, para. 73; *Prosecutor v. Lubanga*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, [ICC-02/05-01/20-3121-Red](#), 1 December 2014, para. 12; *Prosecutor v. Kony et al.*, Judgment on the appeal of the

i. Scope of the Reparations Chamber's obligations under Article 75 of the Statute

26. Both the OPCV and LRVs make submissions regarding the obligations incumbent on the Reparations Chamber pursuant to Article 75 of the Statute.³² Certain submissions are non-specific as to which part of Article 75 the relevant obligation is said to arise,³³ and therefore not properly substantiated.³⁴ These submissions also obscure the difference between a Chamber's conclusion that the OPCV or LRVs disagree with, with the Reparations Chamber failing to discharge an express obligation under the Statute.³⁵ The Chamber clearly discharged the overarching requirement to include the five components of a reparations order,³⁶ and therefore on its face has complied with its obligation to consider reparations to victims under Article 75, in particular adopting the relevant harm suffered by the victims. The conclusions reached by the Reparations Chamber within those components are subject to proper legal and factual analysis, and exercise of the Chamber's discretion. For the reasons below, neither the OPCV nor LRV substantiate any reversible errors in the Chamber's conclusions in their appeal briefs. In addition, Article 75(1) also provides the Reparations Chamber with an express ability to formulate relevant reparations principles in light of the specific circumstances of the case.³⁷ Neither the OPCV and LRVs argue the reasonableness of the Chamber adopting those principles.

ii. The Chamber's power to decide who can be a beneficiary

27. Article 75 of the Statute is silent as to who may qualify as a beneficiary and how Chambers should identify beneficiaries.

28. As referred to by the LRVs,³⁸ the Appeals Chamber in *Lubanga* established the guiding principle that a reparations chamber either "must identify the victims eligible to benefit from the awards for reparations or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted."³⁹ However, that

Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute" of 10 March 2009, [ICC-02/04-01/05-408](#), 16 September 2009, para. 48.

³² OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), paras 40, 50, 89, 95, 99, 100-101, 104, 106-107, 109; LRVs Appeal Brief, [ICC-01/12-01/18-2795](#), paras 24, 27-29, 31, 136.

³³ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), paras 40, 50, 89, 100, 104, 106, 109; LRVs Appeal Brief, [ICC-01/12-01/18-2795](#), paras 24, 27-29, 31, 136.

³⁴ See [Regulations of the Court](#), regulations 58(2).

³⁵ See Section C(i) and (ii); Section D, at para. 101, (i); and Section E, at para. 115, (i).

³⁶ Reparations Order, [ICC-01/12-01/18-2782](#), para. 18 referring to *Lubanga* Appeal Judgment on principles for reparations, [ICC-01/04-01/06-3129](#), para. 32. See specifically Reparations Order, [ICC-01/12-01/18-2782](#), Part V(A)-(E).

³⁷ *Ongwen* Reparations Order, [ICC-02/04-01/15-2074](#), para. 57 referring to *Lubanga* Appeal Judgment on principles for reparations, [ICC-01/04-01/06-3129](#), para. 55.

³⁸ LRVs Appeal Brief, [ICC-01/12-01/18-2795](#), para. 24.

³⁹ *Lubanga* Appeal Judgment on principles for reparations, [ICC-01/04-01/06-3129](#), para. 32 (emphasis added).

eligibility for reparations must be determined by reference to the territorial, temporal and subject matter scope of the crimes for which Mr Al Hassan was convicted.⁴⁰

29. This jurisprudence clearly sets out that the Chamber has the power and flexibility to adopt either approach in determining eligible beneficiaries, due to the operative term of “or”. “Or” clearly demonstrates that the two approaches are alternatives: the Chamber may **either** identify the victims eligible to benefit from reparations **or** establish the criteria of eligibility by reference to the link between the harm suffered and the crimes for which the person was convicted. Indeed, the Chamber adopted both approaches in this Reparations Order – it identified beneficiaries of Counts 1-6 and 14 and specified eligibility criteria for potential beneficiaries of Count 13.⁴¹

30. In light of this, the OPCV and LRVs fail to substantiate that any legal obligation exists on the Chamber to adopt an open-ended description of potential beneficiaries, which may be determined at a later stage on the basis of eligibility criteria.

31. The LRVs mischaracterise the state of the jurisprudence when referring to *Ntaganda*, where the Reparations Order stated that “[i]n light of the type of reparations to be awarded, the Chamber finds it appropriate to establish the eligibility criteria for reparations rather than identifying the victims eligible itself.”⁴² Further affirming that a chamber has the flexibility and the discretion to adopt either approach. The identification of victims who may be eligible for reparations must be specific to the circumstances of each case and in accordance with the scope of the conviction as set out in the Trial Judgment and Sentencing Judgment.⁴³ The manner in which a Chamber exercises its discretion in determining eligibility will accordingly depend on a variety of considerations, including the type of reparations to be awarded.⁴⁴ The Reparations

⁴⁰ *Ntaganda* Reparations Order, [ICC-01/04-02/06-2659](#), para. 106; *Ongwen* Reparations Order, [ICC-02/04-01/15-2074](#), para. 96; *Lubanga* Amended Reparations Order, [ICC-01/04-01/06-3129-AnxA](#), paras 20-21; *Lubanga* Appeal Judgment on principles for reparations, [ICC-01/04-01/06-3129](#), paras 65, 99. See further, *Lubanga* Appeals Judgement on the Reparations Award, [ICC-01/04-01/06-3466-Red](#), paras 90, 311; *Katanga* Reparations Order, [ICC-01/04-01/07-3728-tENG](#), para. 251; *Al Mahdi* Reparations Order, [ICC-01/12-01/15-236](#), para. 110; *Affaire Bozizé et al.* jugement d’appel, [No 13-2023](#), paras 101-105.

⁴¹ Reparations Order, [ICC-01/04-01/06-3129](#), paras 61, 64-66, 247, 252-254.

⁴² LRVs Appeal Brief, [ICC-01/12-01/18-2795](#), para. 25 referring to *Ntaganda* Reparations Order, [ICC-01/04-02/06-2659](#), para.105 and citations.

⁴³ *Ntaganda* Reparations Order, [ICC-01/04-02/06-2659](#), para. 106; *Ongwen* Reparations Order, [ICC-02/04-01/15-2074](#), para. 96; *Lubanga* Amended Reparations Order, [ICC-01/04-01/06-3129-AnxA](#), paras 20-21; *Lubanga* Appeal Judgment on principles for reparations, [ICC-01/04-01/06-3129](#), paras 65, 99. See further, *Lubanga* Appeals Judgement on the Reparations Award, [ICC-01/04-01/06-3466-Red](#), paras 90, 311; *Katanga* Reparations Order, [ICC-01/04-01/07-3728-tENG](#), para. 251; *Al Mahdi* Reparations Order, [ICC-01/12-01/15-236](#), para. 110; *Affaire Bozizé et al.* jugement d’appel, [No 13-2023](#), paras 101-105.

⁴⁴ *Ntaganda* Reparations Order, [ICC-01/04-02/06-2659](#), para.105.

Chamber reasonably exercised its discretion in its determination of eligibility under Counts 1-6 and 14, having also been clearly reasoned in the Reparations Order.⁴⁵

32. Moreover, the Reparations Chamber’s approach does not produce any discriminatory effect.⁴⁶ The Chamber applied the same principled limitation to all potential beneficiaries – eligibility for reparations must be on the basis that the harm was caused by the crimes as convicted. The fact that this may result in different outcomes for individuals who suffered harm from different incidents does not, in itself, amount to discrimination. Where the underlying incidents fall within different factual and legal circumstances, treating them differently may simply reflect the limits of the conviction. The Chamber’s approach therefore preserves, rather than undermines, consistency and equal treatment by ensuring that the scope of reparations and liability is determined according to the same legal parameters for all potential beneficiaries.

iii. The Reparations Chamber did not err in reflecting the incident-based structure from the Trial Judgment in the Reparations Order

33. The OPCV asserts that the Chamber “erroneously confined its analysis to the individuals expressly identified in the incidents listed”,⁴⁷ and that “the incidents should have been understood as illustrative examples of a broader pattern of criminality perpetrated through the Islamic Police and attributed to Ansar Dine/AQIM, to which Mr Al Hassan’s contribution was found to have been ‘*vital and important*’”.⁴⁸ The OCPV refers to the Pre-trial list of incidents provided by the Prosecution in *El Hishri* and *Duterte* as examples of such.⁴⁹ There is no error as the Reparations Chamber simply gave effect to the scope of the conviction.

34. An ICC trial proceeds on the basis of the charges confirmed against the accused, as set out in the document containing the charges (“DCC”). A DCC may be used to discharge the Prosecution’s burden of informing the accused of the nature and content of the charges brought against him or her, including the underlying facts and circumstances, prior to trial.⁵⁰

35. At the end of the trial, the chamber issues a judgment on the basis of the Prosecution’s case and strategy as set out in the charging document and the evidence that was presented in

⁴⁵ Reparations Order, [ICC-01/12-01/18-2782](#), paras 61, 66, 247, 252-254.

⁴⁶ *Contra* LRVs Appeal Brief, [ICC-01/12-01/18-2795](#), para. 28.

⁴⁷ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), para. 33.

⁴⁸ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), para. 39.

⁴⁹ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), para. 36.

⁵⁰ *Ntaganda* Decision on the updated document containing the charges, [ICC-01/04-02/06-450](#), para. 17, fns 44-45.

the course of the trial.⁵¹ The DCC then becomes a moot document, as its purpose has been fulfilled as the operative charging document at trial.⁵²

36. When it comes to the next stage, namely the reparations stage, the Reparations Order must remain within the confines of the conviction decision.⁵³ The contours of the Reparations Order are defined by the trial judgment, which establishes the facts proven **beyond a reasonable doubt**. Not the DCC, or any other lists of incidents utilised at a pre-trial stage. A Reparations Order cannot, therefore, expand or rewrite the judgment merely because victims may be dissatisfied with the manner in which the Prosecution presented or conducted its case.

37. Despite this, the OPCV asserts that there “is no reason to interpret the list of incidents [as submitted in *El Hishri* and *Duterte*] in the present case differently”.⁵⁴ The OPCV fails to establish on what basis any pre-trial document has any relevance for the current purposes of determining reparations. Similarly, the Trial Judgment should not be treated as a pre-trial document. The current proceeding is at a fundamentally dissimilar stage than that of *El Hishri* and *Duterte* – the Trial Chamber has pronounced its findings on the charges that the Prosecution has proven at trial. Those findings are final. The jurisprudence is clear that a reparations order must remain faithful to the findings of criminal responsibility as outlined in the Trial Judgment and Sentencing Judgment.

a. *The Reparations Chamber did not fail to account for the “entirety of the historical events” in Timbuktu*

38. In addition, the OPCV argues that, pursuant to Article 74 of the Statute, the list of incidents set out in the Judgment does not represent “the entirety of the historical events encompassed by the charges”.⁵⁵ The OPCV relies on several authorities in support of this proposition.⁵⁶ These authorities, however, do not support the broader proposition advanced by

⁵¹ [Rome Statute](#), Article 74(2); *Lubanga* Judgment pursuant to Article 74 of the Statute, [ICC-01/04-01/06-2842](#), paras 98-101; *Lubanga* Appeal Judgment on legal characterisation of the facts, [ICC-01/04-01/06-2205](#), paras 89-93.

⁵² See e.g. *Ongwen* Reparations Order, [ICC-02/04-01/15-2074](#), paras 20-21; *Lubanga* Appeals Judgment on Principles of Reparations, [ICC-01/04-01/06-3129](#), para. 99.

⁵³ *Ntaganda* Reparations Order, [ICC-01/04-02/06-2659](#), para. 106; *Ongwen* Reparations Order, [ICC-02/04-01/15-2074](#), para. 96; *Lubanga* Amended Reparations Order, [ICC-01/04-01/06-3129-AnxA](#), paras 20-21; *Lubanga* Appeal Judgment on principles for reparations, [ICC-01/04-01/06-3129](#), paras 65, 99. See further, *Lubanga* Appeals Judgement on the Reparations Award, [ICC-01/04-01/06-3466-Red](#), paras 90, 311; *Katanga* Reparations Order, [ICC-01/04-01/07-3728-tENG](#), para. 251; *Al Mahdi* Reparations Order, [ICC-01/12-01/15-236](#), para. 110; *Affaire Bozizé et al.* jugement d’appel, [No 13-2023](#), paras 101-105. See also Defence Appeal Brief, [ICC-01/12-01/18-2797-Red](#), Ground 1.

⁵⁴ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), paras 36-37.

⁵⁵ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), paras 36-39.

⁵⁶ See OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), fns 44-46.

the OPCV that these “historical events” are relevant to determine reparations, nor do they establish that the incidents identified in the Judgment may be disregarded for purposes of determining the scope of reparations.

39. *First*, the jurisprudence relied upon by the OPCV provides limited support for its position concerning the level of detail required in charging documents before the ICC, and even less support that a charging document should be relied upon for determining reparations.⁵⁷ Although the Appeals Chamber observed that “it is not necessarily the case that such determination is possible only where the charging documents list all criminal acts underlying each charge exhaustively”, this was immediately qualified by the Chamber. It emphasised that the level of detail required in the charges depends on the circumstances of each case, including, notably, the scale of the alleged criminality and the mode of individual criminal responsibility charged.⁵⁸ This cannot establish a general proposition that incidents included in a charging document, or those subsequently reflected in the Judgment, can be treated as non-exhaustive for the purposes of determining reparations.

40. There are also material differences between the *Ntaganda* and the present case in terms of scope of criminality and modes of liability as charged. Mr Ntaganda was tried as a co-perpetrator and as a key actor in the development and implementation of the common plan. By contrast, notwithstanding Mr Al Hassan’s position within the Islamic Police, he was charged under Article 25(3)(c) and (d) of the Statute in relation to the majority of the incidents. The scale of criminality also differed, being substantially more limited in this case.

41. *Second*, the OPCV’s reliance on the *Duterte* case is equally misplaced. Contrary to the proposition advanced by the OPCV, the issue of an open-ended list of incidents has not been conclusively resolved in favour of the Prosecution. To the contrary, during a status conference held after Pre-Trial Chamber I committed Mr Duterte to trial, Trial Chamber III’s Presiding Judge has expressly raised concerns regarding the continued addition of incidents and indicated that the Prosecution would be required to bring its investigation to an end.⁵⁹

42. This is significant as it demonstrates that the possibility of an open-ended list of incidents is not an uncontroversial or settled feature of the *Duterte* proceedings. Rather, the Trial Chamber has itself recognised the need to impose a temporal limit on the Prosecution’s

⁵⁷ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), para. 35 referring to *Ntaganda* Appeal Judgment, [ICC-01/04-02/06-2666-Red](#), paras 5, 336.

⁵⁸ *Ntaganda* Appeal Judgment, [ICC-01/04-02/06-2666-Red](#), paras 5, 331.

⁵⁹ *Duterte* [T-0009](#), p. 26, lns. 17-22.

ability to add further incidents, thereby ensuring that the case proceeds on the basis of a defined and settled set of incidents, to provide the adequate and required notice to the accused. Subsequent to this status conference, the Defence in *Duterte* sought to have the DCC struck out and replaced with one with defined counts, limited to crimes under the Statute, and supported by an exhaustive list of the underlying acts constituting the charges against the accused, which to date remain pending.⁶⁰ At most, the *Duterte* case demonstrates that this issue remains subject to judicial consideration and, indeed, has given rise to express concerns from the bench. It certainly does not lend support any proposition that any such a document is useful or relevant to a Trial Chamber in determining reparations.

b. Patterns of criminality exceed the scope of the conviction

43. The OPCV's broader submission that a list of incidents should be construed as "illustrative examples of a broader pattern of criminality" is plainly erroneous and seeks to expand Mr Al Hassan's conviction. That proposition conflates two concepts: (1) the contribution of an accused person to the commission of crimes and elements of the mode of liability; and (ii) findings concerning the specific criminal acts forming the basis of the conviction. This distinction is fundamental to the scope of a conviction and absolutely cannot be dispensed with. By characterising the incidents as convicted simply as examples of a broader pattern which ought to be repaired by Mr Al Hassan, the OPCV is requesting the Appeals Chamber to unlawfully expand the scope of his conviction. Such an approach would effectively attribute to Mr Al Hassan all acts and harm arising from the entirety of Ansar Dine/AQIM's conduct imposed upon the population of Timbuktu, irrespective of whether those acts formed part of the conduct for which he was convicted. As the Defence demonstrated in its Defence Appeal Brief against the Reparations Order, it was impermissible for the Reparations Chamber to adopt such an approach.⁶¹

44. A broad pattern of criminality may be relevant to establishing several elements at trial of the charged crimes, but does not, without more, establish an accused's responsibility for every individual manifestation within that pattern. The existence of an organisational policy of repression, for example, does not itself establish that each particular act of torture, cruel treatment, mutilation, sentencing without due process, or other outrage upon personal dignity

⁶⁰ *Duterte* Defence Motion on the Form of the Charges, [ICC-01/21-01/25-487](#).

⁶¹ Defence Appeal Brief against the Reparations Order, [ICC-01/12-01/18-2797-Red](#), Ground 1, subsection addressing the scope of Mr Al Hassan's conviction for persecution; see also the section addressing the incorrect assessment of harm attributable to Mr Al Hassan.

occurred, much less that the accused is criminally responsible for each such act. Each individual crime remains subject to its own constituent elements and must be established on the evidence.

45. In the context of reparations, this distinction remains of particular importance, notwithstanding the difference in the applicable standard of proof. The accused may be held liable only for the crimes of which he was convicted and, accordingly, cannot be ordered to provide reparations for incidents falling merely within a “broader pattern of violence” perpetrated by, in this case, any organ of Ansar Dine/AQIM. To adopt such an approach would effectively dispense with a fundamental element of reparations proceedings, namely, the establishment of a causal nexus between the harm for which reparations are sought and the crimes for which the accused was convicted. To hold Mr Al Hassan personally liable to repair the entire “pattern of criminality” perpetuated by Ansar Dine/AQIM clearly goes beyond his personal contributions which have been set down by the Trial Judgment and Sentencing Judgment.⁶²

c. Previous ICC practice of utilising an incident-based analysis for reparations

46. In order to remain within the strict confines of Trial Judgment findings, it has been the practice of the ICC that, where the trial judgment identifies the victims of the crimes as convicted, the direct victims of those crimes are identified as eligible beneficiaries in the reparations order.

47. The Addendum to the Reparations Order in *Ntaganda* provides an illustration of this practice. The Trial Chamber produced an annex identifying the crimes and underlying acts included in the conviction per location, while separately identifying the negative findings concerning incidents and locations that had been charged but dismissed for insufficient evidence.⁶³ For example, in relation to the crime of murder and attempted murder as a crime against humanity and as a war crime (Counts 1 and 2) that occurred in Sangi, the Addendum to the Reparations Order identified the specific beneficiaries, and expressly stated that Mr Ntaganda was liable to repair the harm suffered by: (a) A woman who was raped and who tried to defend herself and P-0018’s sister-in-law, in the bushes surrounding Sangi; and

⁶² *Lubanga* Appeals Judgment on Principles of Reparations, [ICC-01/04-01/06-3129](#), para. 184; *Ntaganda* Reparations Order, [ICC-01/04-02/06-2659](#), paras 131-135; *Ntaganda* Reparations Order Addendum, [ICC-01/04-02/06-2858-Red](#), para. 17; *Ntaganda* Appeals Judgment on Reparations Order, [ICC-01/04-02/06-2782](#), paras 482, 531 Defence Appeal Brief, [ICC-01/12-01/18-2797-Red](#), Ground 1 and section entitled “The Reparations Chamber’s failure to apply any standard of causation”.

⁶³ *Ntaganda* Reparations Order Addendum, [ICC-01/04-02/06-2858-Red](#), paras 17-18. See further [ICC-01/04-02/06-2858-AnxI](#).

(b) Attempted murder of P-0018.⁶⁴ These findings were based on the factual findings set out in the Trial Judgment.⁶⁵ *Ongwen*'s Reparation Order follows the same architecture.⁶⁶

48. More significantly, the Addendum expressly explained that the scope of reparations was confined to the four corners of the conviction. The Reparations Chamber in *Ntaganda* was clear: "as much as the Chamber would like to see the reparative right of all victims of the situation fully realised, the scope of these reparations proceedings is strictly limited in reach and scope to the terms of the conviction. As noted by commentators, also in the context of reparations the role of international criminal justice is only to complement domestic justice systems".⁶⁷

iv. *The Reparations Chamber did not err in its application of the reparations standard of proof for the direct victims of Counts 1-6 and 14*

49. The OPCV argues that Mr Al Hassan could be held liable to repair harm arising within "the context of a broader system of repression" implemented by Ansar Dine/AQIM merely because those incidents could subsequently be established on the basis of the lower standard of proof applicable at the reparations stage.⁶⁸ The OPCV entirely misconceive the application of this standard.

50. The balance of probabilities standard at a reparations stage applies to establishing whether an individual qualifies as a victim within the scope of the conviction, and the harm they suffered as a result of this crime. This standard is to applied to relevant evidence on the record, and to Trial Judgment and Sentencing Judgment findings.⁶⁹ It is not to be applied to facts or information in a vacuum. This lower standard of proof does not function to alter the scope of the conviction, or transform incidents that were not established at trial into crimes for which the convicted person may be held personally responsible to repair at the reparations stage.

51. If the OPCV's approach was accepted, an incident whereby Mr Al Hassan's responsibility was not established beyond reasonable doubt could nevertheless become a basis for imposing a reparations obligation against him simply because, at the reparations stage, that

⁶⁴ *Ntaganda* Annex I to the Addendum to the Reparations Order, [ICC-01/04-02/06-2858-AnxI](#), p. 12.

⁶⁵ *Ntaganda* Reparations Order, [ICC-01/04-02/06-2659](#), para. 109; *Ntaganda* Judgment, [ICC-01/04-02/06-2359](#), paras 1199, 873, 880-881, 899; for factual findings, see paras 600-601.

⁶⁶ *Ongwen* Reparations Order, [ICC-02/04-01/15-2074](#), paras 62, 96-101.

⁶⁷ *Ntaganda* Reparations Order Addendum, [ICC-01/04-02/06-2858-Red](#), para. 17.

⁶⁸ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), para. 46.

⁶⁹ See e.g. *Ongwen* Reparations Order, [ICC-02/04-01/15-2074](#), para. 230 ("Considering the findings beyond reasonable doubt reached by the Chamber in its Conviction Judgment and Sentence, the evidence heard during trial proceedings, and the information the Chamber obtained from its assessment of the Sample, all summarised above, the Chamber is satisfied that it has been established on a balance of probabilities that direct victims of the attacks suffered physical harm".) See similar application *Ongwen* Reparations Order, [ICC-02/04-01/15-2074](#), paras 242, 256, 269, 275, 290, 306, 314, 318, 326, 332, 340, 346, 357, 369, 376, 378, 382, 386, 392, 398, 407, 413-414.

same incident could be established on a lower standard of proof. As an example, the OPCV's approach could result in Mr Al Hassan being held liable to provide reparations to, for instance, [REDACTED], notwithstanding the fact that he was acquitted in relation to this specific incident.⁷⁰ The Trial Judgment found that the evidence presented by the Prosecution was "insufficient to link the physical and mental injuries described by Gaichatane Mohamed [REDACTED] to Mohamed Oye Ag Inhinane's [REDACTED] whipping on the tarmac road by Ansar Dine/AQIM".⁷¹ If, however, the same evidentiary record were reassessed at the reparations stage on the basis of a lower standard of proof, the very insufficiency of evidence that led the Chamber to acquit Mr Al Hassan could potentially be circumvented and establish a reparations obligation. This clearly does not comply with the obligation to ensure that reparations remain within the confines of a conviction.

52. Conversely, if [REDACTED] was not found eligible as a beneficiary because Mr Al Hassan was acquitted in respect of that incident, but other individuals for whom the Prosecution presented no evidence and whose harm did not arise as a result of a crime that Mr Al Hassan was convicted of, were found eligible to receive reparations, [REDACTED] would have an inequitable outcome. This underscores the fundamental problem with extending the reparations process beyond the factual scope of the conviction.

53. This is further exemplified by the OPCV's reliance on the TFV's Voices that Count material to illustrate "the breadth of victimisation" that is sought to be repaired.⁷² The OPCV states that far beyond the 49 victims, the number of persons who are affected "[REDACTED]".⁷³ The TFV material referred to is in fact the TFV's estimate of 1,210 victims who were "[REDACTED]".⁷⁴ Mr Al Hassan was not a member of the Islamic Court and was not responsible for entering convictions; and there is no specificity as to who these persons were physically assaulted or flogged by. He was also not a member of the *Hesbah* and was not found guilty of any conduct emanating from that organ. Mr Al Hassan's individual criminal responsibility with respect to his dealings with the Islamic Court and floggings are well set out in the Trial Judgment – which are limited in scope⁷⁵ – and represents the full scope of the factual matrix relevant for reparations for those counts.

⁷⁰ Annex 3 to Trial Judgment, [ICC-01/12-01/18-2594-Anx3](#), [REDACTED].

⁷¹ Trial Judgment, [ICC-01/12-01/18-2594](#), para. 806.

⁷² OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), para. 51.

⁷³ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), para. 51.

⁷⁴ Voices that Count, [ICC-01/12-01/18-2737-Conf-AnxC](#), slide 11.

⁷⁵ Trial Judgment, [ICC-01/12-01/18-2594-Red](#), paras 1591-1600, 1606-1615; See further Defence Appeal Brief against the Reparations Order, [ICC-01/12-01/18-2797-Red](#), Ground 1.

54. The approach advocated by the OPCV would introduce precisely the type of legal uncertainty that the Appeals Chamber sought to avoid,⁷⁶ and would be highly prejudicial to the convicted person against whom the Reparations Order is directed. If incidents falling outside the factual basis of the conviction could subsequently form the basis of a reparations obligation merely because they could be established on the balance of probabilities, the convicted person could not ascertain, from the conviction and sentencing decisions, the totality of harm for which he may ultimately be held liable to repair. The parameters of reparations liability would thereby remain open to expansion at the reparations stage, notwithstanding the clear limits established by the conviction.

v. The Reparations Chamber was not wrong in treating Count 1-6 and 14 differently from Count 13, and this approach did not result in inconsistency relating to eligibility within the Reparations Order

55. The OPCV's submission that the Chamber's methodology to identify victims between the different counts lacks a principled basis, internal consistency, common sense and judicial logic, falls short of establishing an error that meets the applicable appellate standard.⁷⁷

56. The fact that the Reparations Chamber adopted a distinct approach in relation to Count 13, as compared with the other crimes, does not establish any error.⁷⁸ The OPCV places particular reliance on the fact that Count 13 contained only one incident in the "Updated self-contained set of charges" in Annex 3 to the Judgment.⁷⁹ Not only this is erroneous in itself, but that fact also does not support the conclusion that the Reparations Chamber was required to adopt the same approach in relation to Count 13 as it did in relation to the other crimes.

57. Persecution criminalises the discriminatory intent of an underlying act. For this reason it has been considered as an "umbrella crime".⁸⁰ The underlying acts in this case are Counts 1-6 and 14 which each consist of a specific incident, or a set of individually identified acts. As such, Counts 1-6 and 14 related to specific facts and circumstances which necessitated the

⁷⁶ *Ntaganda* Appeal Judgment on Reparation Order Addendum, [ICC-01/04-02/06-2908-Red](#), paras 3, 350; *Ntaganda* Reparations Appeal Judgment, [ICC-01/04-02/06-2782](#), para. 566.

⁷⁷ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), paras 32-33, 51. See above, para 25.

⁷⁸ *Contra* OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), paras 31-33.

⁷⁹ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), para. 32. It is noted that the one incident in Count 13 as referred to by the OPCV did not fall within Mr Al Hassan's scope of conviction. See Annex 3 to Trial Judgment, [ICC-01/12-01/18-2594-Anx3](#), fn. 2.

⁸⁰ *Kupreškić*, Appeal Judgement, [IT-95-16-A](#), para. 98; Separate and Partly Dissenting Opinion of Judge Tomoko Akane, [ICC-01/12-01/18-2594-OPI](#), paras 99-103. See also Defence Appeal Brief, [ICC-01/12-01/18-2797-Red](#), Ground 1, discussion distinguishing the collective dimension of the persecutory policy from the scope of individual criminal responsibility.

Chamber to take in to account particular considerations as to eligible victims under each of those counts. This does not result in an incoherent divergent approach to eligibility.⁸¹

vi. The OPCV and LRVs' argument on the broad intent of the drafter of the Statute is inaccurate

58. The LRVs contend that it is “*peu probable*” (unlikely) that the drafters of the Statute intended to limit reparations to victims identified in the Judgment.⁸² The OPCV advances a similar position, arguing that a narrow interpretation of who may qualify as a victim in the present case would run counter to the foundation of the Statute.⁸³ Neither contention, however, truly finds support in the drafting history of Article 75.

59. A careful examination of the drafting history of Article 75 reveals a considerably more nuanced picture than what is suggested by the OPCV and LRVs.⁸⁴ Throughout the drafting process, delegations expressed divergent views as to the appropriate form and scope of reparations that should be available to the victims of cases before the Court. As such, the *travaux préparatoires* provide no basis for attributing a clear or settled intention by the drafters to extend reparations beyond a determined set of victims when identified in the Trial Judgment. In fact, the scope of reparations, and in particular their relationship to the crimes established at trial, was the subject of considerable debate and evolving views among the delegations. There were also broader concerns regarding the feasibility of providing reparations through a criminal court with limited resources in circumstances of mass victimisation.

a. The history of the drafting of Article 75 of the Rome Statute, from 1981 onwards

60. Reparations were initially conceived through the lens of State responsibility, or as sanctions (penalties) rather than a proper compensation scheme for victims. However, those discussions reflect an early divergence of views among States regarding the responsibility for paying sanctions.⁸⁵

⁸¹ *Contra* OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), para. 31.

⁸² LRVs Appeal Brief, [ICC-01/12-01/18-2795](#), paras 30-32.

⁸³ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), paras 58-62.

⁸⁴ LRVs Appeal Brief, [ICC-01/12-01/18-2795](#), paras 28, 32, 34; OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), paras 60-62.

⁸⁵ ILC 1985, Volume II (Part Two), [A/40/10](#), p. 15, para. 73; ILC 1983, Volume I, [A/CN.4/SER.A/1983](#), p. 13, paras 12-13, p. 32, para. 36; ILC 1984, Volume I, [A/CN.4/SER.A/1984](#), p. 27, para. 36, p. 32, para. 36; ILC 1985, Volume I, [A/CN.4/SER.A/1985](#), p. 42, para. 7; ILC 1985, Volume I, [A/CN.4/SER.A/1985](#), pp. 78-79, para. 6.

61. In 1992, the first draft provision on compensation put forward by the Special Rapporteur⁸⁶ resulted in an overwhelmingly adverse reaction from States.⁸⁷ Some delegations questioned whether the Court was the appropriate forum to address such claims.⁸⁸ Several members supported the provision.⁸⁹ However, there were also objections concerning the practical feasibility of such a compensation scheme. Concerns that damages were “on such a scale that no physical person, or group of physical persons, would be able to make restitution”, meant it would therefore be better left to national jurisdictions,⁹⁰ and only States would have the capacity “to compensate for substantial harm”.⁹¹ Delegations raised further concerns regarding practical and logistical implications of such a compensation scheme.⁹² The Commission’s final report recounts strong reservations about combining criminal proceedings and civil claims for damages. Against this background, the proposed provision was ultimately abandoned.⁹³ Notably, concerns had already been raised regarding the feasibility of providing compensation to potentially large groups of beneficiaries, particularly in the context of a Court whose primary function was understood to be the prosecution of international crimes.⁹⁴

b. 1994: No reparations scheme in the Zutphen Draft

⁸⁶ ILC 1992, Volume II (Part One), [A/CN.4/SER.A/1992/Add.I \(Part 1\)](#), pp. 51-58.

⁸⁷ **United States** “radically out of place and capable only of creating further confusion”: ILC 1992, Volume I, [A/CN.4/SER.A/1992](#), p. 57, para. 22; **Australia and Brazil** “compensation for injury had no place in the draft Code”: ILC 1992, Volume I, [A/CN.4/SER.A/1992](#), p. 61, para. 54 (Brazil), p. 61, para. 57 (Australia); **Japan** “it would be unwise to expand the court’s function beyond criminal proceedings”: ILC 1992, Volume I, [A/CN.4/SER.A/1992](#), p. 61, para. 60.

⁸⁸ **Mexico** “not in favour of the inclusion in the statute of an article on compensation”: ILC 1992, Vol I, [A/CN.4/SER.A/1992](#), p. 63, para. 10; **Jamaica** “doubted [that] compensation for injuries [...] was within the scope of the mandate”: ILC 1992, Volume I, [A/CN.4/SER.A/1992](#), p. 63, para. 13; **Mali** “problem that arose was whether the right to claim compensation should be exercised before and international criminal court”: ILC 1992, Volume I, [A/CN.4/SER.A/1992](#), p. 65, para. 32.

⁸⁹ **Turkey** “compensation was in conformity with the general principles of the right to compensation”: ILC 1992, Vol I, [A/CN.4/SER.A/1992](#), p. 62, para. 2; **Guatemala** “necessary to be as flexible as possible so that claims could be decided by the court”: ILC 1992, Volume I, [A/CN.4/SER.A/1992](#), p. 63, para. 6.

⁹⁰ **Russia** “It was quite likely that cases before the international criminal court would involve damages on such a scale that no physical person, or group of physical persons, would be able to make restitution in the event of an award by the court”: ILC 1992, Volume I, [A/CN.4/SER.A/1992](#), p. 65, para. 29.

⁹¹ **Madagascar**: ILC 1992, Volume I, [A/CN.4/SER.A/1992](#), p. 64, para. 24.

⁹² ILC 1992, Volume I, [A/CN.4/SER.A/1992](#), pp. 66-69. See specifically **Brazil** (Chairman): “in the case of compensation which was claimed from an individual and which, in actual terms, would inevitably be far less than the compensation which could be claimed from a State” ILC 1992, Volume I, [A/CN.4/SER.A/1992](#), p. 67, para. 15.

⁹³ ILC 1992, Volume II (Part Two), [A/CN.4/SER.A/1992/Add.I \(Part 2\)](#), p. 15, paras 89-90.

⁹⁴ ILC 1993, Volume II (Part One), [A/CN.4/SER.A/1993/Add.I \(Part 1\)](#), p. 71, para. 15 (**Belgium**); ILC 1993, Volume II (Part One), [A/CN.4/SER.A/1993/Add.I \(Part 1\)](#) (**Nordic countries**); ILC 1993, Volume II (Part One), [A/CN.4/SER.A/1993/Add.I \(Part 1\)](#), p. 89, para. 16; ILC 1993, Volume II (Part One), [A/CN.4/SER.A/1993/Add.I \(Part 1\)](#), p. 140, para. 1 (**Panama**), p. 137, para. 11 (**Italy**).

62. States remained insistent that compensation be tethered to State responsibility, on the basis that States were responsible for war reparations.⁹⁵ The Special Rapporteur stressed that, since perpetrators were often State agents acting in an official capacity, State responsibility had to be addressed, particularly where the damages exceeded the agents' capacity to provide reparation.⁹⁶ Members sought to clarify that individual prosecution would be "without prejudice to any responsibility of the State under international law."⁹⁷ In 1994, the ILC noted concerns that small States might struggle with the costs of separate proceedings.⁹⁸ States considered restitution more appropriate for civil procedure, or considered them inconsistent with the court's primary function of prosecuting and punishing offenders.⁹⁹ After a decade of debate, the 1994 ILC Draft Statute contained no reparations provision at all, but it kept the discretion for victims to "obtain reparation through other courts".¹⁰⁰

c. 1996: The continued absence of a reparations scheme

63. In 1996, the Preparatory Committee's report extensively debated the issue of compensation, including proposals for the establishment of a court-administered fund and, alternatively, for the Court to establish principles governing compensation while leaving remedies to national jurisdictions.¹⁰¹ Concerns remained regarding the availability of funding and the difficulties of providing compensation to potentially large numbers of victims.¹⁰² Despite these discussions, the 1996 draft contained no reparations provision.¹⁰³

d. 1998: a bracketed, last-minute compromise

64. At the Rome Conference, prompted in part by NGOs advocacy, a joint France-UK proposal¹⁰⁴ and a second proposal put forward by Japan,¹⁰⁵ brought back to the negotiating table the issue of reparations. Support for the inclusion of reparations was broad, but not universal;

⁹⁵ ILC 1993, Volume II (Part One), [A/CN.4/SER.A/1993/Add.I \(Part 1\)](#), p. 71, para. 15 (**Belgium**); ILC 1993, Volume II (Part One), [A/CN.4/SER.A/1993/Add.I \(Part 1\)](#) (**Nordic countries**); ILC 1993, Volume II (Part One), [A/CN.4/SER.A/1993/Add.I \(Part 1\)](#), p. 89, para. 16. ILC 1993, Volume II (Part One), [A/CN.4/SER.A/1993/Add.I \(Part 1\)](#), p. 140, para. 1 (**Panama**), p. 137, para. 11 (**Italy**).

⁹⁶ ILC 1994, Volume II (Part One), [A/CN.4/SER.A/1994/Add.I \(Part 1\)](#), pp. 101-102, paras 46-48.

⁹⁷ ILC 1994, Volume I, [A/CN.4/SER.A/1994](#), pp. 139-140, para. 4 (2349th meeting) (**Algeria**).

⁹⁸ UN Report, 1993, [A/CN.4/457](#), para. 186.

⁹⁹ ILC 1994, Volume II (Part Two), [A/CN.4/SER.A/1994/Add.I \(Part 2\)](#), p. 60, paras 3-4.

¹⁰⁰ ILC 1994, Volume II (Part Two), [A/CN.4/SER.A/1994/Add.I \(Part 2\)](#), p. 60, para. 4. According to some authors, the Trust Fund was a compromise aimed at the perceived inadequacy of a criminal court confronted with large numbers of victims of mass crimes, see Moffett, 'Justice for Victims before the International Criminal Court', p. 151 (Annex B, p. 51); Peter Lewis and Hakan Friman, 'Reparations to Victims', p. 475, fn. 125 (Annex B, p. 26).

¹⁰¹ UN, Preparatory Committee 1996, [A/51/22](#), p. 59, para. 282, p. 61, para. 292.

¹⁰² UN, Preparatory Committee 1996, [A/51/22](#), p. 63, para. 307.

¹⁰³ [1996 Draft Statute Commentaries; 1996 Draft Statute](#).

¹⁰⁴ France-UK Proposal, [A/CONF.183/C.1/WGPM/L.28](#).

¹⁰⁵ Japan Proposal, [A/CONF.183/C.1/WGPM/L.30](#); Muttukumaru, 'Reparation to Victims', pp. 264-265.

the aim was to deter and protect, not merely to punish.¹⁰⁶ Luxembourg importantly cautioned that “[t]he Court must respect the rights of the individual and the rights of the defence. It must give the accused a fair trial and grant reparation to victims. [...]”¹⁰⁷

65. Authors state that even during the last negotiations, delegations remained concerned as the primary purpose of the Statute was the prosecution of crimes. Introducing reparations could divert the court from its core trial functions and have implications for domestic legal systems that did not recognise reparations.¹⁰⁸ Authors interpreted that thus, the very establishment of the Court was itself understood to recognise victims’ rights through its retributive and deterrent functions.¹⁰⁹

66. Although there was dissatisfaction with abandoning the possibility of awards against States, it was understood that the Court was intended to address individual criminal responsibility.¹¹⁰ The Trust Fund emerged as a response to the practical problem posed by the scale of potential reparations, operating as a subsidiary mechanism providing assistance in situations where the convicted person lacked sufficient assets.¹¹¹ At the same time, some delegations viewed the reparations provision as a “stalking-horse” for awards against States: although the individuals would be held criminally liable, the ultimate burden of paying, in practice, would still fall on States.¹¹²

67. Even at the end of the Preparatory Committee, the entire article on reparations remained in brackets (indicating that the concept was not accepted by all delegations).¹¹³ The Chairman described Article 75 as “constructive ambiguity” – so many compromises meant that the ultimate result was purposefully vague, falling short of the French tradition of *partie civile*.¹¹⁴

¹⁰⁶ 1998 UN Conference, [A/CONR183/13\(Vol.II\)](#), pp. 70-71, para. 100.

¹⁰⁷ 1998 UN Conference, [A/CONR183/13\(Vol.II\)](#), p. 101, para. 69.

¹⁰⁸ Muttukumaru, ‘[Reparation to Victims](#)’, pp. 263-264; Moffett, ‘Justice for Victims before the fair trial and grant reparation to victims International Criminal Court’, p. 152 (Annex B, p. 52); McKay, ‘Are Reparations Appropriately Addressed in the ICC Statute’, pp. 168-169 (Annex B, pp. 105-106); Boven, ‘Victims’ Rights and Interests in the International Criminal Court’, p. 900 (Annex B, p.9); Fernández de Gurmendi, ‘Victims and Witnesses’, p. 429 (Annex B, p.21).

¹⁰⁹ Muttukumaru, ‘[Reparation to Victims](#)’, p. 264; Moffett, ‘Justice for Victims before the International Criminal Court’, p. 152 (Annex B, p. 52); Boven, ‘Victims’ Rights and Interests in the International Criminal Court’, p. 900 (Annex B, p. 9); Fernández de Gurmendi, ‘Victims and Witnesses’, p. 429 (Annex B, p. 21).

¹¹⁰ Muttukumaru, ‘[Reparation to Victims](#)’, p. 267; Moffett, ‘Justice for Victims before the International Criminal Court’, p. 152 (Annex B, p. 52); McKay, ‘Are Reparations Appropriately Addressed in the ICC Statute’, pp. 168-169 (Annex B, pp. 105-106); Boven, ‘Victims’ Rights and Interests in the International Criminal Court’, p. 900 (Annex B, p. 9); Fernández de Gurmendi, ‘Victims and Witnesses’, p. 429 (Annex B, p. 21).

¹¹¹ Ambos, [The Rome Statute : A Commentary](#) (2022), pp. 2245, 2255; Moffett, ‘Justice for Victims before the International Criminal Court’, p. 152 (Annex B, p. 52); Klamberg [Commentary on the Law](#) (2023), p. 549.

¹¹² Muttukumaru, ‘[Reparation to Victims](#)’, p. 264.

¹¹³ Bassiouni, Schabas, ‘[Part 6 The Trial](#)’, p. 662; Muttukumaru, ‘[Reparation to Victims](#)’, p. 263.

¹¹⁴ Van den Wyngaert [Victims before International Criminal Courts](#), p. 478. See also, Schabas, ‘[Victims of Crimes and Their Concerns](#)’, p. 366.

Many questions remained unresolved and the drafters preferred to leave most issues unsettled to be determined through the judiciary.¹¹⁵

e. The relevance of the drafting history to the scope of potential beneficiaries

68. As such, contrary to the OPCV and LRVs assertions,¹¹⁶ the final version of Article 75 cannot be treated as the drafters' considered and self-contained endpoint. Its adoption reflected a series of compromises reached at the final stages of the negotiations, leaving a number of fundamental questions unresolved. That process, including the competing proposals, reservations and compromises that shaped the provision, must be considered as a whole. It also emerged against the backdrop of sustained civil society advocacy, which contributed to a significant shift after more than a decade of State resistance to a broad scheme of individual reparations liability. To treat the 1998 outcome as a freestanding statement of the drafters' intent would therefore overlook the preceding fifteen years of negotiations, during which States largely approached victim compensation through the lenses of State responsibility and penal sanctions. The vocabulary of mass, population-wide remediation on which the OPCV and LRVs draw upon was developed in, and contained within, this State-responsibility sphere.¹¹⁷

69. The OPCV and LRVs read the drafting history as placing victims at the centre of the Court's mandate and, on that basis, construe Article 75 expansively.¹¹⁸ Yet the drafting history does not support such a reading. Reparations were created as compensatory and restorative,¹¹⁹ by definition being circumscribed to the harm caused as a result of the crimes in respect of which the perpetrators were convicted the harm caused.¹²⁰ The *travaux préparatoires* also consistently demonstrates that the determination of reparations took into account the rights of

¹¹⁵ Moffett, 'Justice for Victims before the International Criminal Court', p. 159 (Annex B, p. 59). See also Van den Wyngaert [Victims before International Criminal Courts](#), pp. 486-487; Peter Lewis and Hakan Friman, 'Reparations to Victims', p. 476; (Annex B, p. 27); Klamberg [Commentary on the Law](#) (2023), p. 456.

¹¹⁶ LRVs Appeal Brief, [ICC-01/12-01/18-2795](#), paras 28-32; OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), paras 58-62.

¹¹⁷ [Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries \(2001\)](#). See also above, paras 61-63.

¹¹⁸ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), paras 58-62; LRVs Appeal Brief, [ICC-01/12-01/18-2795](#), paras 28-32, 136.

¹¹⁹ According to the Collins Dictionary: [Reparations](#): "sums of money that are paid after a war by the defeated country for the damage and injuries it caused in other countries" (emphasis added); [Compensation](#) "is money that someone who has experienced loss or suffering claims from the person or organization responsible, or from the state" (emphasis added); [Restore](#): "To restore someone or something to a previous condition means to cause them to be in that condition once again". See also the Cambridge Dictionary: [Reparations](#); [Compensation](#); [Restore](#). See also, Moffett, 'Justice for Victims before the International Criminal Court', pp. 144, 146-147 (Annex B, pp. 44, 46, 47).

¹²⁰ Muttukumaru, '[Reparation to Victims](#)', p. 264; Van den Wyngaert [Victims before International Criminal Courts](#), pp. 491-492; Ambos, [The Rome Statute : A Commentary](#) (2022), p. 2241.

the convicted person.¹²¹ The assertion by the LRVs that the drafters' shift away from the punitive nature of reparations towards a "victim-centred" approach meant that there was "aucune prévalence d'un lien strict avec le cadre défini par la condamnation prévue" is simply unsupported by the drafting history as developed above.¹²²

70. The mere fact that most interventions made during the negotiation rounds were suggesting that other international tribunal such as the ICJ or domestic jurisdictions were more appropriate to address civil claims by victims than a purely criminal court whose mandate was to deal with individual or state responsibility, shows that reparations at this Court did not have the obvious recognition that the OPCV and LRVs are pretending.¹²³

71. Article 75(6) preserves external remedies precisely because the Court's regime was not designed to offer comprehensive reparations – it is not the role of the Court to create equal opportunities of access to reparations for all victims of a situation.¹²⁴ The Trust Fund assistance mandate was adopted to palliate such a situation, as the appropriate channel for situation wide remedy, it comes from former article 47(3)(c) of the 1994 draft statute.¹²⁵ To the extent the Trust Fund's assistance mandate is broader, operating independently of any reparations order or conviction, it confirms, rather than undermines, the restraint of the Rome drafters in respect of article 75.

vii. No material impact

72. The Reparations Chamber committed no legal, factual or procedural error in its conclusions that the direct victims of Counts 1-6 and 14 are limited to the 49 individuals expressly named in the Trial Judgment. The Reparations Chamber correctly explained the factual and legal basis to arrive at its determination, and therefore the intervention of the

¹²¹ Muttukumaru, 'Reparation to Victims', pp. 264–266, 269. See also, ILC 1992, Volume I, [A/CN.4/SER.A/1992](#), pp. 57-62, particularly p. 57, para. 22, p. 61, para. 57, (2262nd meeting); ILC 1992, Volume II (Part Two), [A/CN.4/SER.A/1992/Add.I \(Part 2\)](#), p. 15, para. 89; ILC 1994, Volume II (Part Two), [A/CN.4/SER.A/1994/Add.I \(Part 2\)](#), pp. 60-61, paras 3-4; UN, Preparatory Committee 1996, [A/51/22](#), p. 59, para. 282; *Ambos*, *The Rome Statute : A Commentary* (2022), pp. 2252-2253; *Lubanga* Appeal Judgment on principles for reparations, [ICC-01/04-01/06-3129](#), para. 6.

¹²² LRVs Appeal Brief, [ICC-01/12-01/18-2795](#), paras 31-32. See *Lubanga* Appeals Judgment on Principles of Reparations, [ICC-01/04-01/06-3129](#), para. 99.

¹²³ ILC 1992, Volume II (Part One), [A/CN.4/SER.A/1992/Add.I \(Part 1\)](#), pp. 56-57; UN ILC 1992, Volume I, [A/CN.4/SER.A/1992](#), pp. 4, 12 (2254th meeting); ILC 1992, Volume I, [A/CN.4/SER.A/1992](#), p. 63, para. 10, p. (2263rd meeting); ILC 1994, Volume II (Part Two), [A/CN.4/SER.A/1994/Add.I \(Part 2\)](#), p. 60, paras 3-4; Moffett, 'Justice for Victims before the International Criminal Court', pp. 151-152 (Annex B, p. 51-52).

¹²⁴ *Ambos*, *The Rome Statute : A Commentary* (2022), p. 2252; *Van den Wyngaert* *Victims before International Criminal Courts*, pp. 491-492; *Bemba* Separate Opinion, [ICC-01/05-01/08-3636-Anx2](#), para. 74.

¹²⁵ ILC 1994, Volume II (Part Two), [A/CN.4/SER.A/1994/Add.I \(Part 2\)](#), pp. 60-61. See also *Rome Statute*, Articles 75(2), 79(1)–(2); *Rules of Procedure and Evidence*, Rule 98(1)–(5). See also *Triferrer*, *The Rome Statute : A Commentary* (2016), commentary on Article 79.

Appeals Chamber is not necessary. Neither the OPCV nor LRVs substantiate that this conclusion was unreasonable.

73. Moreover, the OPCV and LRVs also fail to demonstrate that the alleged errors in Ground 1 materially affected the Reparations Order. The Appeals Chamber has further held that “as part of the reasons in support of a ground of appeal, an appellant is obliged not only to set out the alleged error, but also to indicate, with sufficient precision, how this error would have materially affected the impugned decision”.¹²⁶ “Materially affected” has been interpreted as “would have rendered a judgment that is substantially different from the decision that was affected by the error, if it had not made the error”.¹²⁷ Individuals who have suffered harm similar to that suffered by the victims identified in relation to Counts 1 to 6 and 14 would remain eligible for reparations and would be entitled to individualised reparations on the same basis.¹²⁸ Without prejudice to the Defence’s appeal, the Chamber has also found that each and every individual in Timbuktu is eligible for reparations on the basis of persecution. The alleged errors would therefore not deprive any other victims of Counts 1 to 6 and 14 of access to reparations, nor would they alter the basis on which their individual claims would be assessed.

C. LRVs’ Ground 2 and OPCV’s Ground 5 : The Reparations Chamber did not err in declining to adopt transgenerational harm

74. The Defence maintains that it does not necessarily oppose a finding of transgenerational harm in this proceeding.¹²⁹ However, the OPCV and LRVs fail to establish a reversible error on the part of the Reparations Chamber that requires the intervention of the Appeals Chamber in relation to transgenerational harm.

¹²⁶ *Prosecutor v. 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, [ICC-02/04-01/05-408](#), 16 September 2009, para. 48; see also *Prosecutor v. Lubanga*, Judgment on the appeals against Trial Chamber II’s ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’, [ICC-01/04-01/06-3466-Red](#), 17 July 2019, para. 28-29; *Prosecutor v. Ntaganda*, Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled “Reparations Order”, [ICC-01/04-02/06-2782](#), 12 September 2022, para. 29-35; *Prosecutor v. Ongwen*, Judgment on the appeal of Mr Dominic Ongwen against the decision of Trial Chamber IX of 28 February 2024 entitled “Reparations Order”, [ICC-02/04-01/15-2108](#), 7 April 2025, paras 26-29.

¹²⁷ Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I entitled ‘Décision relative à l’exception d’irrecevabilité pour insuffisance de gravité de l’affaire soulevée par la défense’, [ICC-01/12-01/18-601-Red](#), 19 February 2020, para. 38; *Prosecutor v. Bemba*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute” [ICC-01/05-01/08-3636-Red](#), 8 June 2018, para. 36; *Prosecutor v. Simone Gbagbo*, Judgment on the appeal of Côte d’Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled “Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo”, [ICC-02/11-01/12-75-Red](#), 27 May 2015, para. 41.

¹²⁸ Reparations Order, [ICC-01/12-01/18-2782](#), paras 194-195, 202.

¹²⁹ [T-219](#), p. 68, lns 2-3; Defence Response to Observations on Reparations”, [ICC-01/12-01/18-2741-Red](#), paras 3, 9.

75. It is helpful to recall that transgenerational harm is a distinct and technical typology of harm.¹³⁰ Previous experts called before this Court have provided various theories to explain the transgenerational transmission of trauma, including the “epigenetic transmission theory in neuropsychiatry” and the “social transmission theory.”¹³¹ The Trial Chamber in *Katanga* considered that “both theories posit a relationship between the trauma to which the parents were exposed and the behaviour of the children who were not exposed directly to the parents’ traumatic experience.”¹³²

76. The Trial Chamber in *Ntaganda* ultimately found that “[t]ransgenerational harm refers to the phenomenon, whereby social violence is passed on from ascendants to descendants with traumatic consequences for the latter. It is characterised by the existence of an intergenerational cycle of dysfunction that traumatised parents set in motion”.¹³³ The Chamber noted that while the *existence* of transgenerational harm is rooted in a common understanding of the phenomenon within the scientific and academic community, its *transmission* remains subject to theory.¹³⁴ It is notable that the Appeals Chamber considered that the concept of transgenerational harm is “novel and evolving”.¹³⁵ However most recently in *Ongwen*, the Trial Chamber supported the conclusions in *Ntaganda* and found that “despite the different explanations as to the way in which harm is transmitted, the phenomenon of transgenerational harm is rooted in sound science, reasoning, research, and qualitative study.”¹³⁶

77. In light of this jurisprudence, the Reparations Chamber correctly stated that transgenerational harm “relates to the phenomenon in which traumatised parents set in motion an intergenerational cycle of dysfunction, handing-down trauma to their children, who themselves did not directly experience the atrocities their parents endured, affecting their children’s emotional behaviour, attachment, and well-being as a result”.¹³⁷ There is no legal error in this regard.¹³⁸

¹³⁰ *Katanga* Decision on Transgenerational Harm, [ICC-01/04-01/07-3804-Red-tENG](#), para. 11; *Ntaganda* Reparations Order Addendum, [ICC-01/04-02/06-2858-Red](#) paras 193, 195, 196; *Ongwen* Reparations Order, [ICC-02/04-01/15-2074](#), paras 166-168.

¹³¹ *Katanga* Decision on Transgenerational Harm, [ICC-01/04-01/07-3804-Red-tENG](#), paras 11, 13.

¹³² *Katanga* Decision on Transgenerational Harm, [ICC-01/04-01/07-3804-Red-tENG](#), para. 11.

¹³³ *Ntaganda* Reparations Order, [ICC-01/04-02/06-2659](#), para. 73.

¹³⁴ *Ntaganda* Reparations Order Addendum, [ICC-01/04-02/06-2858-Red](#), paras 176-177.

¹³⁵ *Ntaganda* Reparations Appeal Judgment, [ICC-01/04-02/06-2782](#), para. 491.

¹³⁶ *Ongwen* Reparations Order, [ICC-02/04-01/15-2074](#), para. 182. See also paras 179-181.

¹³⁷ Reparations Order, [ICC-01/12-01/18-2782](#), fn. 465.

¹³⁸ *Contra* LRVs Appeal Brief, [ICC-01/12-01/18-2795](#), paras 41-54.

78. While it is not disputed that other Trial Chambers have recognised transgenerational harm as a possible reparable harm,¹³⁹ this does not mean that it will necessarily apply or exist to all victims and to all victim communities at large, or meet the requisite legal thresholds required to be applied at the reparations stage. Transgenerational harm did not form part of the reparations order in *Lubanga*,¹⁴⁰ and was ultimately denied in *Katanga* due to a failure to establish the causal link.¹⁴¹ In *Ntaganda*, the Chamber rejected adopting a presumption of transgenerational harm¹⁴² and established specific evidentiary criteria for victims claiming this type of harm,¹⁴³ which was strictly limited to children of direct victims.¹⁴⁴ In *Ongwen*, the Chamber also considered that no presumption of transgenerational harm could be adopted due to insufficient information of such.¹⁴⁵

79. Accordingly, this Court has been clear that transgenerational harm must be assessed on a “case-by-case basis”,¹⁴⁶ and that “caution should certainly be exercised” when evaluating victims who claim transgenerational harm as eligible beneficiaries of reparations.¹⁴⁷ The Court has not adopted a general presumption of transgenerational harm in its previous jurisprudence, however the OPCV and LRVs sought such a presumption to be applied.¹⁴⁸

i. The OPCV and LRV fail to substantiate any error committed by the Chamber rejecting to adopt a presumption of transgenerational harm

80. The OPCV asserts that the Reparations Chamber erred by disregarding its own findings and by failing to engage with the evidence demonstrating transgenerational harm,¹⁴⁹ in its conclusion that there was “insufficient information in the Trial Judgment, the Sentencing Decision, and the case record to determine, on a balance of probabilities, that all or most of the next-generation members of the case may be presumed to have suffered transgenerational harm”.¹⁵⁰ The LRVs similarly submit that the Reparations Chamber erred in

¹³⁹ See OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), para. 96.

¹⁴⁰ *Lubanga* Amended Reparations Order, [ICC-01/04-01/06-3129-AnxA](#).

¹⁴¹ *Katanga* Decision on Transgenerational Harm, [ICC-01/04-01/07-3804-Red-tENG](#), paras 141-142.

¹⁴² *Ntaganda* Reparations Order Addendum, [ICC-01/04-02/06-2858-Red](#), para. 182.

¹⁴³ *Ntaganda* Reparations Order Addendum, [ICC-01/04-02/06-2858-Red](#), para. 185.

¹⁴⁴ *Ntaganda* Reparations Order Addendum, [ICC-01/04-02/06-2858-Red](#), para. 183.

¹⁴⁵ *Ongwen* Reparations Order, [ICC-02/04-01/15-2074](#), paras 195, 555.

¹⁴⁶ *Ntaganda* Reparations Order Addendum, [ICC-01/04-02/06-2858-Red](#), para. 197; *Ntaganda* Appeal Judgment on Reparation Order Addendum, [ICC-01/04-02/06-2908-Red](#), paras 322-324.

¹⁴⁷ *Ntaganda* Reparations Order Addendum, [ICC-01/04-02/06-2858-Red](#), para. 193; *Ongwen* Reparations Order, [ICC-02/04-01/15-2074](#), para. 197.

¹⁴⁸ OPCV Submissions on Reparations, [ICC-01/12-01/18-2747-Conf-Corr](#), paras 40, 43; OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), paras 97-99; LRVs Response to order on observation for reparation, [ICC-01/12-01/18-2740](#), para. 46; LRVs Appeal Brief, [ICC-01/12-01/18-2795](#), paras 55-68.

¹⁴⁹ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), Ground 5(a).

¹⁵⁰ Reparations Order, [ICC-01/12-01/18-2782](#), para. 177.

law and fact by failing to conclude that there was a presumption of transgenerational harm on the part of descendants of direct victims.¹⁵¹

81. In establishing errors of fact, an appellant must show that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts, or failed to take into account relevant facts.¹⁵² The Chamber's conclusion must have also reasonably been reached from the evidence before it.¹⁵³ The Appeals Chamber has indicated that the standard of balance of probabilities as applied in reparations proceedings should be specifically considered.¹⁵⁴

82. In terms of adopting certain presumptions, a Chamber may only resort to factual presumptions where it is reasonable to do so within the circumstances of the case.¹⁵⁵ On appeal, "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."¹⁵⁶

83. The Reparations Chamber was very clear in its Reparations Order – there was insufficient information to support a presumption of transgenerational harm for the Timbuktu community at large. There appears no reason to believe that the Reparations Chamber did not undertake the exercise of reviewing all factual findings as set out in the Trial Judgment or Sentencing Judgment to come to this conclusion.¹⁵⁷ To the contrary, the Chamber explicitly indicates that both the Trial Judgment and Sentencing Judgment were considered.¹⁵⁸ In any event, this conclusion was not unreasonable due to a clear lack of factual findings in the Trial and Sentencing Judgments as well as a lack of evidence on the case record, to support a presumption of transgenerational harm.

84. As transgenerational harm is a specific type of harm, it is helpful to identify material capable of supporting a finding of harm. In *Lubanga*, the Appeals Chamber considered that a Trial Chamber's finding of a specific harm may be based on: i) evidence presented under

¹⁵¹ LRVs Appeal Brief, [ICC-01/12-01/18-2795](#), paras 55-68.

¹⁵² *Ongwen* Appeal Judgment on Reparations, [ICC-02/04-01/15-2108](#), para. 27 referring to *Ntaganda* Appeal Judgment on Reparation Order Addendum, [ICC-01/04-02/06-2908-Red](#), para. 15. See also above para. 25.

¹⁵³ *Ongwen* Appeal Judgment on Reparations, [ICC-02/04-01/15-2108](#), para. 27 referring to *Ntaganda* Appeal Judgment on Reparation Order Addendum, [ICC-01/04-02/06-2908-Red](#), para. 15. See also above para. 25.

¹⁵⁴ *Ongwen* Appeal Judgment on Reparations, [ICC-02/04-01/15-2108](#), para. 28 referring to *Ntaganda* Appeal Judgment on Reparation Order Addendum, [ICC-01/04-02/06-2908-Red](#), para. 16.

¹⁵⁵ *Katanga* Appeals Judgment on Reparations, [ICC-01/04-01/07-3778-Red](#), para. 76.

¹⁵⁶ *Katanga* Appeals Judgment on Reparations, [ICC-01/04-01/07-3778-Red](#), para. 77; *Ongwen* Appeal Judgment on Reparations, [ICC-02/04-01/15-2108](#), para. 84.

¹⁵⁷ *Contra* LRVs Appeal Brief, [ICC-01/12-01/18-2795](#), para. 51.

¹⁵⁸ Reparations Order, [ICC-01/12-01/18-2782](#), para. 177.

regulation 56 of the Regulations of the Court during the trial for the purposes of reparations; ii) based on evidence received at a reparations hearing, in written submissions from the parties and participants, or from experts who were engaged for the purpose of providing such evidence; or iii) based on evidence contained in a request for reparations pursuant to rule 94 of the Rules of Procedure and Evidence that identifies a harm.¹⁵⁹ Absent any specific evidence, the Appeals Chamber is limited by the Trial Chamber's findings regarding the harm to direct and indirect victims caused by the crimes as convicted.¹⁶⁰

85. Accordingly, in assessing whether the adoption of a presumption of harm (or not) was reasonable in the circumstances, the aforementioned principles apply.

86. Neither the OPCV nor LRVs refer to any specific evidence that was before the Reparations Chamber regarding the existence of transgenerational harm in this case.¹⁶¹ While the OPCV refers to the TFV's estimates of that 3% of 102 women consulted in the study, reported "ma grossesse a été interrompue ou bébé [sic] avec problèmes de santé",¹⁶² this does not necessarily provide the specificity and wide-reaching detail necessary to establish transgenerational harm within the community at large. The Reparations Chamber also took in to account the written submissions on reparations presented by the OPCV and LRVs, these also lack detail for the Reparations Chamber to have made a finding on the balance of probabilities regarding the existence of transgenerational harm in the community at large, or by descendants of direct victims.¹⁶³

87. The lack of direct evidence is not cured by any expert evidence on this matter. In *Ongwen*, in addition to the Court's jurisprudence and the submissions of the parties on this topic, the Chamber relied upon testimony from four experts called at trial, which discussed "the transmission of trauma from one generation to the next and provided evidence regarding the trauma suffered by victims of the LRA in Northern Uganda during the period of the charges, as well as the trauma's impact on their offspring and future generations."¹⁶⁴ In *Ntaganda*, the Chamber appointed four experts for the purposes of reparations to provide reports on *inter alia*

¹⁵⁹ *Lubanga* Appeal Judgment on principles for reparations, [ICC-01/04-01/06-3129](#), para. 185.

¹⁶⁰ *Lubanga* Appeal Judgment on principles for reparations, [ICC-01/04-01/06-3129](#), para. 186.

¹⁶¹ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), paras 95-109 (Ground 5), particularly, paras 95, 96, 100 where they refer to evidence on the record without any details or footnote; LRVs Appeal Brief, [ICC-01/12-01/18-2795](#), paras 41-87 (Ground 2).

¹⁶² OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), para. 100 referring to TFV's Observations on Reparations, [ICC-01/12-01/18-2737](#), paras 22, 26 and Voices that Count, [ICC-01/12-01/18-2737-Conf-AnxC](#), slide 16.

¹⁶³ See e.g. OPCV Submissions on Reparations, [ICC-01/12-01/18-2747-Conf-Corr](#), para. 40; LRVs observation on Reparations, [ICC-01/12-01/18-2732-Red](#), para. 51; [T-219](#), p. 8, lines 17-19.

¹⁶⁴ *Ongwen* Reparations Order, [ICC-02/04-01/15-2074](#), paras 173, 179, see also para. 167.

the scope, extent, and evolution of the harm suffered by both direct and indirect victims.¹⁶⁵ The Chamber relied on these reports, amongst other evidence, to ultimately conclude the existence of transgenerational harm.¹⁶⁶ No similar expert report was called for, or submitted by the OPCV or LRV, in this case; and neither the OPCV nor LRVs have substantiated why it was an unreasonable exercise of discretion for the Reparations Chamber not to have commissioned expert reports on transgenerational harm.¹⁶⁷

88. Finally, the LRVs submit that the Reparations Chamber's findings concerning the impact of persecution on Timbuktu as a whole,¹⁶⁸ including the alteration of the social fabric, results in « l'hypothèse la plus probable » that transgenerational harm exists in Timbuktu through descendants of individuals who lived through the occupation.¹⁶⁹ Transgenerational harm has been considered to be a separate and distinct form of harm.¹⁷⁰ The Reparations Chamber made certain findings of harm suffered by the population of Timbuktu at the time of the events; however, this does not necessarily extend to a finding that transgenerational harm exists. Without specific evidence which establishes transgenerational harm on the balance of probabilities, the LRVs fail to establish any factual error committed by the Chamber.

89. The OPCV and LRVs were required to illustrate how the Chamber misappreciated the facts, took into account irrelevant facts, or failed to take into account relevant facts, which could have reasonably supported a finding of transgenerational harm by the Reparations Chamber. Without relying on or referring to specific evidence or substantiated submissions as to the existence of transgenerational harm in Timbuktu as a whole, they fail to establish any factual error.

90. As such, the Appeals Chamber is left to determine whether the Reparations Chamber's conclusion of the insufficiency of information regarding transgenerational harm was reasonable on the basis of its findings in the Trial Judgment and the Sentencing Judgment.¹⁷¹

¹⁶⁵ *Ntaganda* Decision appointing experts on reparations, [ICC-01/04-02/06-2528-Red](#), para. 1.

¹⁶⁶ *Ntaganda* Reparations Order Addendum, [ICC-01/04-02/06-2858-Red](#), para. 175.

¹⁶⁷ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), para. 80.

¹⁶⁸ LRVs Appeal Brief, [ICC-01/12-01/18-2795](#), paras 70-73.

¹⁶⁹ LRVs Appeal Brief, [ICC-01/12-01/18-2795](#), para. 74.

¹⁷⁰ *Katanga* Decision on Transgenerational Harm, [ICC-01/04-01/07-3804-Red-tENG](#), para. 11; *Ntaganda* Reparations Order Addendum, [ICC-01/04-02/06-2858-Red](#) paras 193, 195, 196; *Ongwen* Reparations Order, [ICC-02/04-01/15-2074](#), paras 166-168.

¹⁷¹ *Lubanga* Appeal Judgment on principles for reparations, [ICC-01/04-01/06-3129](#), paras 186-187.

91. The OPCV relies on two findings from the Trial Judgment and Sentencing Judgment to support a presumption of transgenerational harm in this proceeding, which are insufficient.¹⁷² The Trial Judgment finding cited relates to specific victims, namely P-0565 and P-0557 and their “enduring social stigma and embarrassment associated with the floggings”.¹⁷³ These findings do not suggest that the children of P-0565 and P-0557 (if any) suffered specific markers of transgenerational harm, rather, that P-0565 and P-0557 ([REDACTED]) directly suffered deleterious social effects as a result of the floggings. The Sentencing Judgment findings otherwise referred to by OPCV recognised that victims of floggings suffered “long-term consequences”, and that the “public floggings and the amputation also impacted members of the population of Timbuktu, including by exposing them to violent scenes.”¹⁷⁴ There were no findings in the Trial Judgment relating to what consequences this exposure had on the descendants of the members of the population of Timbuktu that experience this violence, which is necessary to substantiate to establish that the existence of transgenerational harm could be detected. As such, neither the OPCV nor LRVs refer to any relevant facts that could have materially impacted the Chamber’s conclusion regarding the insufficiency of information to adopt a presumption of transgenerational harm. The OPCV and LRVs merely disagree with this conclusion.

ii. OPCV and LRV fail to establish any legal error committed by the Chamber in dismissing transgenerational harm

92. In concluding that it was “unnecessary to include transgenerational harm”, the OPCV asserts that “the Chamber failed to discharge its mandate under article 75 to determine the scope of harm suffered by victims”¹⁷⁵ and that the Chamber “had an obligation to establish, to the fullest extent possible, the scope and nature of the victimisation resulting from the crimes committed by the convicted person.”¹⁷⁶

93. In determining errors of law, the Appeals Chamber “will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the

¹⁷² OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), paras 98-99, fns 130-133.

¹⁷³ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), para. 98, fns 130-131 *referring to* Trial Judgment, [ICC-01/12-01/18-2594](#), para. 1314.

¹⁷⁴ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), fns 130-133 *referring to* Sentencing Judgment, [ICC-01/12-01/18-2662](#), para. 47.

¹⁷⁵ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), paras 95, 109.

¹⁷⁶ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), para. 96, fn. 128.

law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision”.¹⁷⁷

94. The jurisprudence cited by the OPCV¹⁷⁸ provides the obligation that a Trial Chamber must “define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted”¹⁷⁹ for the purposes of a reparations order. However, this jurisprudence does not mandate categories of harm that the Trial Chamber must consider and establish in order to fulfil the component of “defining harm”. Whether a type of harm exists will obviously depend on the circumstances of the case. The Chamber’s ability to provide judicial recognition of such a harm as a measure of satisfaction rests upon the ability for parties and participants to prove its existence.¹⁸⁰

95. The Court has consistently held that the extent of a trial chamber’s obligation is that it “must clearly define the harms that result from the crimes for which the person was convicted”.¹⁸¹ The Chamber fulfilled this obligation by making various findings of harm that existed in this case,¹⁸² representing the full scope and nature of the victimisation which was found to exist on the balance of probabilities. In contrast, and as outlined above, there is limited to no evidence referred to by the OPCV or LRV to support a finding of transgenerational harm. As such, there was no legal error committed by the Chamber rejecting the existence of transgenerational harm as it discharged its obligation to “define harm” for the purposes of the Reparations Order.

96. Finally, both the OPCV and LRVs assert that the Chamber erred by concluding that “to the extent that the Reparations Order addresses the harm of the current population in a timely manner, it thereby mitigates the harm of the next generations”.¹⁸³ The OPCV suggests that the Chamber “necessarily accepted the possibility that subsequent generations are experiencing, or may experience harm resulting from the crimes” and therefore failed to properly consider this

¹⁷⁷ *Ongwen* Appeal Judgment on Reparations, [ICC-02/04-01/15-2108](#), para. 26; *Ongwen* Appeal Judgment, [ICC-02/04-01/15-2022-Red](#), para. 76; *Ntaganda* Appeal Judgment, [ICC-01/04-02/06-2666-Red](#), para. 36; *Lubanga* Second Appeal Judgment, [ICC-01/04-01/06-3121-Red](#), para. 18; *Bemba* Appeal Judgment, [ICC-01/05-01/08-3636-Red](#), para. 36.

¹⁷⁸ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), fn. 128 referring to *Lubanga* Appeal Judgment on principles for reparations, [ICC-01/04-01/06-3129](#), para. 1.

¹⁷⁹ *Lubanga* Appeal Judgment on principles for reparations, [ICC-01/04-01/06-3129](#), paras 1, 181-191.

¹⁸⁰ *Contra* OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), para. 105.

¹⁸¹ *Lubanga* Appeal Judgment on principles for reparations, [ICC-01/04-01/06-3129](#), para. 184; See also *Ntaganda* Appeals Judgment on Reparations Order, [ICC-01/04-02/06-2782](#), para. 531.

¹⁸² Reparations Order, [ICC-01/12-01/18-2782](#), Part V(C).

¹⁸³ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), paras 101-104; LRVs Appeal Brief, [ICC-01/12-01/18-2795](#), paras 82-87, specifically para. 86.

harm.¹⁸⁴ Both OPCV and LRVs fail to illustrate that the harm said to be suffered by subsequent generations can be accurately characterised as transgenerational harm, which is understood by this Court is limited to the transmission of trauma. In any event, and without prejudice to the Defence's appeal, the Chamber's finding that all residents of Timbuktu were direct victims of persecution would enable indirect victims (i.e. family members, including children) to claim other heads of harm i.e. moral, psychological and material harm, if this is substantiated to the requisite standard of proof. Otherwise, potential collective and community-based reparations could address these harms.

iii. No material impact

97. Aside from the fact that the OPCV and LRVs fail to establish any factual or legal error, the Court has otherwise been clear that defining harm seeks to ensure that reparations are not awarded to remedy harms beyond the crimes for which the convicted person was convicted.¹⁸⁵ This has resulted in a standard of causation being applied to all reparations orders, that is, that the crime committed was the actual ("but/for") and "proximate cause" of the harm for which reparations is sought.¹⁸⁶ Despite this necessary step, neither the OPCV nor LRVs sufficiently establish that the transgenerational harm which is said to exist was caused **but for** Mr Al Hassan's crimes, or that his crimes were the proximate cause of such harm. By failing to do so, any alleged error committed by the Chamber by rejecting the existence of transgenerational harm has no material impact on the outcome of the Reparations Order, as the existence of transgenerational harm has not been substantiated to meet the requisite standard of causation.

98. The OPCV submit that persecution of which Mr Al Hassan was convicted, "is inherently capable of producing effects that endure beyond the immediate victims and continue to affect later generations."¹⁸⁷ The LRVs also submit that « il existe à Tombouctou un phénomène de transmission du préjudice, à leurs descendants, par les individus ayant vécu l'occupation de la ville durant la période infractionnelle et donc subi la persécution ».¹⁸⁸ Transgenerational harm

¹⁸⁴ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), para. 101. See also LRVs Appeal Brief, [ICC-01/12-01/18-2795](#), para. 85.

¹⁸⁵ *Ntaganda* Reparations Order, [ICC-01/04-02/06-2659](#) para. 130; *Ongwen* Reparations Order, [ICC-02/04-01/15-2074](#), para. 166.

¹⁸⁶ *Al Mahdi* Reparations Order, [ICC-01/12-01/15-236](#), para. 44; *Ntaganda* Reparations Order, [ICC-01/04-02/06-2659](#), paras 132-133; referring to *Lubanga* Amended Reparations Order, [ICC-01/04-01/06-3129-AnxA](#), para. 59; *Katanga* Decision on Transgenerational Harm, [ICC-01/04-01/07-3804-Red-tENG](#), paras 15-17; *Ongwen* Reparations Order, [ICC-02/04-01/15-2074](#), paras 418-426; *Ruto & Sang* Decision on the Requests regarding Reparations, [ICC-01/09-01/11-2038](#), para. 7.

¹⁸⁷ *Contra* OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), para. 99.

¹⁸⁸ LRVs Appeal Brief, [ICC-01/12-01/18-2795](#), para. 74.

which may or may not have arisen as a result of persecution, requires causation to be established on the balance of probabilities. That is, **but for** Mr Al Hassan's contributions to the crime of persecution, the said trauma would not exist. The Defence refers to its submissions within the Appeal Brief concerning the Chamber's finding that each and every individual of Timbuktu was a direct victim of persecution results in a clear expansion of Mr Al Hassan's conviction and warrants reversal.¹⁸⁹ Given Mr Al Hassan's limited contributions to the crime of persecution, neither the OPCV nor LRVs substantiate how his contributions to persecution, as found within the Trial Judgment and Sentencing Judgment, are causally linked to the existence of transgenerational harm to the requisite legal threshold.

99. Rather, both the OPCV and LRV simply make general or broad assertions that, more likely than not, transgenerational harm exists. The OPCV submits that "transgenerational harm had already begun to materialise well before the Impugned Decision was issued. The crimes for which Mr Al Hassan was convicted disrupted family structures and relationships, educational opportunities, livelihoods, community life and social cohesion for more than a decade prior to the reparations proceedings."¹⁹⁰ The OPCV Appeal Brief¹⁹¹ and LRV Appeal Brief¹⁹² repeatedly utilise similar general and broad statements. Additionally, transgenerational harm, as understood by this Court, relates to the handing-down of trauma rather than ongoing socio-economic deprivations within the community at large. These submissions do not establish, on the balance of probabilities, that **but for** Mr Al Hassan's crimes, or his contributions thereto, caused this harm, and therefore neither the OPCV or LRVs can establish any material impact of the Chamber failing to adopt transgenerational harm.

D. OPCV's Grounds 2 and 3: The Reparations Chamber did not err in finding that only certain individuals suffered material harm under Counts 1-5 and 14

100. The OPCV contends that the Reparations Chamber failed to determine that victims under Count 1-6 and 14 all suffered material harm, and accordingly failed to adopt the appropriate reparations modalities to remedy for this material harm.¹⁹³ The OPCV further allege that the Reparations Chamber failed to consider their submissions regarding material harm for victims under Count 6.¹⁹⁴ The OPCV rely on its reparations submissions to say that two of the

¹⁸⁹ Defence Appeal Brief, [ICC-01/12-01/18-2797-Red](#), paras 119-128.

¹⁹⁰ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), para. 104.

¹⁹¹ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), paras 98, 99, 102.

¹⁹² LRVs Appeal Brief, [ICC-01/12-01/18-2795](#), paras 52, 58, 73-74.

¹⁹³ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), paras 64-89.

¹⁹⁴ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), para. 69.

victims they are representing suffer material harm as they have never financially recovered from the events they experienced.¹⁹⁵

101. As set out above,¹⁹⁶ the jurisprudence requires the Chamber to assess, to the fullest extent possible, the harm suffered by victims on the basis of the available evidence. However, it does not require the Chamber to accept every form of harm advanced by the parties. The OPCV therefore misconstrues the obligation incumbent upon the Reparations Chamber in determining the harm to be repaired.

i. The Reparations Chamber correctly assessed the evidence available to determine the material harm for victims under Counts 1-6 and 14

102. While the Reparations Chamber does an individual assessment of the 14 victims of Counts 1-6 and 14¹⁹⁷ and does not automatically recognise that each of them suffered from material harm, it also specified that “[a]ny additional harm experienced by the 14 direct victims not considered by the Chamber here, may be raised by the victims in its reparations application form, for later assessment at the implementation stage of the reparations.”¹⁹⁸ The OPCV, in their argumentation, overlooks this point. The Reparations Order clearly enables any direct victim to make an application for material harm suffered, which can be assessed at a later stage,¹⁹⁹ and therefore there is no material impact of any alleged error on the Reparations Order.

103. The OPCV does not establish that the Reparations Chamber had, as a matter of law, the obligation to consider the *foreseeability* of a certain type of harm.²⁰⁰ The jurisprudence is clear about the evidence that may be considered by the Reparations Chamber – being specific reparations evidence, the trial judgment and sentencing judgment findings, expert reports, and evidence contained in victim applications for reparations.²⁰¹ This evidence must meet the threshold of a balance of probabilities to establish harm suffered, as opposed to being foreseeable.

104. As above, the Chamber undertook an individualised assessment of the material harm suffered by victims of counts 1-6 and 14, and assessed the available evidence it was entitled to

¹⁹⁵ OPCV Submissions on Reparations, [ICC-01/12-01/18-2747-Conf-Corr](#), paras 32-34.

¹⁹⁶ See above, paras 93-96.

¹⁹⁷ Reparations Order, [ICC-01/12-01/18-2782](#), paras 145-167.

¹⁹⁸ Reparations Order, [ICC-01/12-01/18-2782](#), para. 140.

¹⁹⁹ Reparations Order, [ICC-01/12-01/18-2782](#), para. 140.

²⁰⁰ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), para.70.

²⁰¹ *Lubanga* Appeal Judgment on principles for reparations, [ICC-01/04-01/06-3129](#), paras 185-186; Reparations Order, [ICC-01/12-01/18-2782](#), paras 27-30; *Ongwen* Reparations Order, [ICC-02/04-01/15-2074](#), paras 20-23; *Ntaganda* Judgment on the appeals against the Reparations Addendum, [ICC-01/04-02/06-2908-Red](#), paras 351-352.

consider to determine the harm suffered.²⁰² While direct victims may have also been ostracised and excluded from participating in society,²⁰³ this on its own does not establish, on the balance of probabilities, what if any material harm they have suffered – being, the loss of or damage to property, loss of earnings, opportunity to work, reduced standard of living and socio-economic opportunities and/or loss of schooling and vocational training.²⁰⁴ Further, the TFV’s study does not provide any specificity as to whether those persons were direct victims, and what crimes they were victims of.²⁰⁵ The OPCV merely disagrees with the Chamber’s assessment, without demonstrating any error meeting the applicable appellate standard.

105. With regards to the OPCV’s argument about the narrow interpretation by the Reparations Chamber of “persistent” material harm,²⁰⁶ the Chamber does not, in fact, utilise this phrasing. The OPCV relies on the case of Dedéou Maiga. However, a closer examination of that case shows that the Chamber recognised that, as a consequence of its amputation and in light of the fact that he was a manual worker, his loss of opportunity resulted in material harm.²⁰⁷ The same is true of the material harm suffered by P-0554²⁰⁸ and P-0557.²⁰⁹ The Chamber based its findings of the material harm suffered by Dedéou Maiga, P-0554, and P-0557 on the evidence on the case record and findings within the Trial Judgment and Sentencing Judgment, as it was required to.²¹⁰ Contrary to OPCV’s argument, the Reparations Chamber did not commit any mistake; OPCV is simply mischaracterising the Chamber’s findings by characterising it as a narrow interpretation of “persistent” material harm.²¹¹ It was simply what could be proven on the evidence in accordance with the Chamber’s legal obligation to do so.

106. It is noted that Dedéou Maiga, P-0554, and P-0557 [REDACTED]. However, the entire population of Timbuktu was considered a direct victim as a result of the crime of persecution, which includes OPCV’s clients. Indeed, the Chamber recognised material harm arising from the crime of persecution, including loss of income, property and economic opportunities, and the lasting disruption of livelihoods.²¹²

²⁰² Reparations Order, [ICC-01/12-01/18-2782](#), paras 149, 156, 160, 164.

²⁰³ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), para. 70.

²⁰⁴ Reparations Order, [ICC-01/12-01/18-2782](#), para. 71.

²⁰⁵ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), para. 72 and fns 95-97 *referring to* Voices that Count, [ICC-01/12-01/18-2737-Conf-AnxC](#), slides 15, 28, 33, 38.

²⁰⁶ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), para. 73.

²⁰⁷ Reparations Order, [ICC-01/12-01/18-2782](#), paras 154-157.

²⁰⁸ Reparations Order, [ICC-01/12-01/18-2782](#), paras 158-161.

²⁰⁹ Reparations Order, [ICC-01/12-01/18-2782](#), paras 147-150.

²¹⁰ See Reparations Order, [ICC-01/12-01/18-2782](#), para. 149, fn. 374; para. 156, fns 398-399; para. 160, fn. 412.

²¹¹ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), para. 73 and fn. 100.

²¹² Reparations Order, [ICC-01/12-01/18-2782](#), para. 113.

107. Finally, in relation to indirect victims of material harm, the OPCV rely on discrete information provided by the TFV and consultations with clients to support the argument that the Chamber should have established this harm for the extended community.²¹³ No other evidence on the record, or any Trial or Sentencing Judgment findings were referred to.²¹⁴ This is plainly deficient to establish that the Chamber erred in concluding that there was an insufficiency of information to find that all indirect victims suffered material harm,²¹⁵ and therefore the OPCV fail to establish any error.

ii. The Reparations Order adopted adequate modalities to repair the identified material harm

108. Having identified the extent of the material harm suffered by the victims, the Reparations Chamber expressly determined that collective reparations were appropriate to address much of the harm suffered by victims of crimes other than persecution.²¹⁶ It awarded rehabilitation programmes to victims of all crimes of conviction, expressly identifying material harm as one of the harms to be addressed through socio-economic support, particularly income-generating activities, and educational support.²¹⁷ The Chamber further endorsed an Economic Resilience Facility-type scheme to address the economic consequences of the crimes, including support for farming, crafts and income-generating activities, and contemplated cash-based assistance and tailored interventions to help individual victims restart economic activities.²¹⁸ It ultimately allocated €4 million to socio-economic measures for all victims, incorporating educational support into that award.²¹⁹

109. The OPCV does not articulate how these measures are insufficient to address the material harm said to exist. These are available to “victims of all crimes of which Mr Al Hassan was convicted”, while reserving the additional individualised component for particular physical and psychological harm.²²⁰ These types of measures are usually considered as adequate and appropriate to redress long-term loss of income, reduce standard of living and broader socio-economic consequences of harm suffered as a result of the commission of international crimes.²²¹

²¹³ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), para. 81 and fns 112-113.

²¹⁴ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), paras 77-83. See above para, 25.

²¹⁵ Reparations Order, [ICC-01/12-01/18-2782](#), para. 171.

²¹⁶ Reparations Order, [ICC-01/12-01/18-2782](#), paras 186-187.

²¹⁷ Reparations Order, [ICC-01/12-01/18-2782](#), para. 202.

²¹⁸ Reparations Order, [ICC-01/12-01/18-2782](#), paras 207-209.

²¹⁹ Reparations Order, [ICC-01/12-01/18-2782](#), paras 233-234.

²²⁰ Reparations Order, [ICC-01/12-01/18-2782](#), para. 202.

²²¹ *Ongwen* Reparations Order, [ICC-02/04-01/15-2074](#), paras 78, 613-618; *Ntaganda* Reparations Order, [ICC-01/04-02/06-2659](#), paras 87, 183(a)(v)-(vi), 183(b)(v), 183(c), 183(d)(v), 203; *Katanga* Reparations Order, [ICC-](#)

110. The Chamber clearly sought to redress the specific material harm suffered by victims after considering the available evidence on the record at the time of issuing the Reparations Order, and therefore did not come to an unreasonable decision.

iii. No material impact

111. The OPCV fails to demonstrate how any of the alleged errors regarding material harm materially affected the Reparations Order.²²² Instead, it merely asserts, in general terms, that the Chamber should have awarded reparations for the material harm suffered by victims of the crimes under Counts 1-6 and 14. The OPCV fails to demonstrate that the Reparations Chamber relied on irrelevant facts or failed to consider relevant ones in its conclusions of material harm. The Reparations Chamber undertook a thorough assessment of the evidence available regarding the material harm experienced by each of the 14 victims,²²³ and the OPCV does not provide any alternative factual material that was not considered within the Reparations Order. The Reparations Chamber considered the OPCV's submissions on reparations regarding their clients and the material harm suffered,²²⁴ despite not making specific findings. This notwithstanding, the 14 victims who may have suffered additional harm are not precluded from applying for reparations with sufficient evidence,²²⁵ and more broadly, any victim who may have suffered such material harm are not precluded from applying for reparations with sufficient evidence as a result of the Chamber's wide recognition of the existence of material harm suffered by victims of the crime of persecution.²²⁶

E. OPCV's Ground 4: the Reparations Chamber did not err in relation to recognising physical harm for the crime of passing of sentence without due process under Count 6

112. The OPCV submits that the Chamber failed to rule on its request for recognition of the physical harm suffered by direct victims of Count 6,²²⁷ failed to identify and define the physical harm suffered by direct and indirect victims,²²⁸ and failed to reconcile that omission with its finding that the detailed recounting of harm constitutes a satisfaction measure.²²⁹

[01/04-01/07-3728-tENG](#), paras 273, 304-306; *Lubanga* Decision establishing the principles and procedures to be applied to reparations, [ICC-01/04-01/06-2904](#), paras 230(c)-231; see also *Lubanga* Amended Reparations Order, [ICC-01/04-01/06-3129-AnxA](#), para. 67(iii).

²²² See above, para. 73.

²²³ Reparations Order, [ICC-01/12-01/18-2782](#), paras 139-167.

²²⁴ Reparations Order, [ICC-01/12-01/18-2782](#), fns 302-305.

²²⁵ Reparations Order, [ICC-01/12-01/18-2782](#), para. 171, read with paras 145-146.

²²⁶ Reparations Order, [ICC-01/12-01/18-2782](#), para. 113.

²²⁷ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), para. 90.

²²⁸ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), para. 91.

²²⁹ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), para. 91.

113. Contrary to OPCV's contention, the full scope of the physical harm suffered by its clients has been addressed by the Reparations Chamber – dire detention conditions was examined in the context of the crime of persecution (Count 13).²³⁰ [REDACTED].²³¹

114. The Reparations Chamber was also not required to additionally attribute physical harm to victims of Count 6, in light of the legal scope of the crime of sentencing without due process under Article 8(2)(c)(iv). The mere fact that arrest, detention or ill-treatment occurred in the same sequence of events does not, without more, establish that the resulting physical harm was caused by the conduct underlying Count 6.

115. As set out above,²³² the jurisprudence requires the Chamber to assess, to the fullest extent possible, the harm suffered by victims on the basis of the available evidence. However, it does not require the Chamber to accept every form of harm advanced by the parties. Once again, the OPCV misconstrues the obligation incumbent upon the Reparations Chamber in determining the harm to be repaired.

i. The full scope of OPCV's clients' suffering has been acknowledged and repaired

116. The OPCV argues that the Reparations Chamber failed to assess “the nature and extent of the harm resulting from the unlawful deprivation of liberty” and, further, that victims of Count 6 were subjected to “detention in degrading conditions”, such that the Reparations Chamber was required to determine whether the suffering resulting from those conditions constituted physical harm.²³³

117. The Reparations Chamber, under Count 6, discussed the physical harm that arose from the detention conditions and punishment inflicted under Ansar Dine/AQIM, and specifies that “[t]he harm linked to those detentions and punishments will be analysed later in th[e] order.”²³⁴ Under the crime of persecution – Count 13, the Reparations Chamber then recognised the “dire conditions” in which victims were held, and the physical punishments carried out by Ansar Dine/AQIM.²³⁵ The Reparations Chamber also recognised physical harm as a result of the crimes under Counts 1-5 and 14 for certain specific victims in light of the available evidence on the record.²³⁶ The harm suffered as a result of the harsh detention conditions was therefore

²³⁰ Reparations Order, [ICC-01/12-01/18-2782](#), paras 131. See also paras 81-82, 186-187.

²³¹ Reparations Order, [ICC-01/12-01/18-2782](#), paras [REDACTED].

²³² See above, paras 93-96.

²³³ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), paras 90, 92-93.

²³⁴ Reparations Order, [ICC-01/12-01/18-2782](#), para. 131.

²³⁵ Reparations Order, [ICC-01/12-01/18-2782](#), paras 81-82.

²³⁶ Reparations Order, [ICC-01/12-01/18-2782](#), paras [REDACTED].

acknowledged by the Chamber. Accordingly, OPCV's argument that the Chamber failed to give effect to its own finding that judicial recognition constitutes a form of reparation is also moot.²³⁷

118. To recognise the same harm again under Count 6 would have been non-compliant with the principle of no over-compensation,²³⁸ as it would have repaired the same harm caused by the same conduct twice.²³⁹ However, to be clear, the Defence maintains that the direct victims remains limited to 49 persons – poor detention conditions experienced by other persons impermissibly expands the scope of his conviction and results in reparations liability for acts that Mr Al Hassan was neither charged or convicted of.

ii. The legal scope of Count 6 does not include unlawful deprivation of liberty or conditions of detention

119. In any event, Chamber did not err in not entering a finding recognising the physical harm suffered by the victims in connection with the crime of passing sentence without due process. The mere fact that a person is a direct victim of Count 6 does not, on its own, establish that every form of physical harm experienced by that person during the broader factual sequence of arrest, detention, adjudication and punishment falls within the legal scope of Article 8(2)(c)(iv) of the Statute, and therefore compensable under Count 6.

120. Article 8(2)(c)(iv) criminalises the passing of sentences without a judgment pronounced by a regularly constituted court affording the indispensable judicial guarantees. The Elements of Crimes require: (i) the passing of a sentence; (ii) the protected status of the person; (iii) awareness of that status; (iv) the absence of a previous judgment or a judgment rendered by a court lacking the requisite independence, impartiality or other indispensable guarantees; and (v) awareness of the relevant absence or denial of guarantees.²⁴⁰ The Reparations Chamber recalled that the elements of this crime are, indeed, highly specific and narrowly defined as “sentencing without due process occurs is when sentences are passed on the basis of judgments pronounced by a court that lacks the essential guarantees of independence and impartiality.”²⁴¹

121. In its pronouncement of the applicable law of Article 8(2)(c)(iv), the Trial Judgment does not provide any indication that this crime extends to associated detention conditions.²⁴²

²³⁷ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), para. 94; Reparations Order, [ICC-01/12-01/18-2782](#), para. 74.

²³⁸ *Ntaganda* Reparations Order, [ICC-01/04-02/06-2659](#), paras 99-100; *Ongwen* Reparations Order, [ICC-02/04-01/15-2074](#), para. 57(iv)(b).

²³⁹ See *general liability principles Lubanga* Appeal Judgment on principles for reparations, [ICC-01/04-01/06-3129](#), paras 68-70, 99, 102-105.

²⁴⁰ *Elements of Crimes*, pp. 23-24; Trial Judgment, [ICC-01/12-01/18-2594](#), paras 1155-1180.

²⁴¹ Reparations Order, [ICC-01/12-01/18-2782](#), para. 132.

²⁴² Trial Judgment, [ICC-01/12-01/18-2594](#), paras 1155-1180.

This is also supported by the ICRC Commentary on Common Article 3 of the Four 1949 Geneva Conventions (“Common Article 3”), more specifically Article 3(1)(d), which treats the passing of sentences without the requisite judicial guarantees as distinct prohibitions relating to “‘summary’ justice or trial”, and explains that its fair-trial guarantee concerns the prosecution and punishment of persons charged with a penal offence.²⁴³ By contrast, inappropriate conditions of confinement are addressed in the Commentary in connection with degrading treatment, while in detention outside a criminal process, is treated separately in Common Article 3(1)(c).²⁴⁴

122. This distinction corresponds to the structure of the Statute. Article 8(2)(c)(i) address severe physical or mental pain or suffering constituting torture and cruel treatment. Article 8(2)(c)(ii) separately criminalises outrages upon personal dignity. Article 7(1)(k), in turn, addresses other inhumane acts intentionally causing great suffering or serious injury to body or to mental or physical health; the Trial Chamber expressly recalled that international jurisprudence has treated serious beatings and deplorable detention conditions as capable of constituting such inhumane acts.²⁴⁵

123. This statutory differentiation is not merely formal. The Trial Chamber itself explained that what distinguishes sentencing without due process from cruel treatment, torture and outrages upon personal dignity is the punitive character of the conduct: the perpetrator must exercise the requisite authority, and the conduct must serve as punishment for alleged wrongdoing.²⁴⁶ The Reparations Chamber maintained that distinction. Of the 48 direct victims of Count 6, it identified 14 who were also victims of torture, other inhumane acts, cruel treatment, outrages upon personal dignity and/or mutilation “in relation to the dire detention conditions experienced and/or the violent punishments imposed on them”, and expressly stated that “[t]he harm linked to those detentions and punishments will be analysed later in this order”.²⁴⁷ The OPCV cannot therefore support the proposition that a Count 6 victim who was detained in poor conditions, suffered physical harm as a result of criminal conduct encompassed by Count 6.

124. Mr Al Hassan was not charged or convicted for conduct relating to “degrading detention conditions” in relation to OPCV’s clients. The OPCV also refers to the detention conditions of

²⁴³ ICRC, [Article 3 – Conflicts not of an international character](#), paras 710-712.

²⁴⁴ ICRC, [Article 3 – Conflicts not of an international character](#), paras 708, 730, 756-757.

²⁴⁵ Trial Judgment, [ICC-01/12-01/18-2594](#), para. 1186 and fn. 3919.

²⁴⁶ Trial Judgment, [ICC-01/12-01/18-2594](#), paras 1167-1168.

²⁴⁷ Reparations Order, [ICC-01/12-01/18-2782](#), para. 131.

certain individuals detained by the *Hesbah* who was responsible for the BMS at that time,²⁴⁸ or being detained at the Central Prison where Mr Al Hassan did not work and in relation to an incident that was not substantiated.²⁴⁹ Given that Mr Al Hassan was not part of *Hesbah* and was not found responsible for acts carried out by its members, as per Judge Akane's Separate opinion,²⁵⁰ and given that he was explicitly acquitted with respect to P-0636 and Salamata Warnamougrez,²⁵¹ these incidents clearly fall outside of his scope of individual criminal responsibility.²⁵²

iii. *The Reparations Chamber did not fail to consider a detailed recounting of harm*

125. The OPCV's contention that the Chamber deprived Count 6 victims of an "important form of acknowledgment"²⁵³ rests upon the same conflation as above. The dire detention conditions suffered by OPCV's clients were explicitly considered by the Chamber under the crime of persecution. The issue then is not whether the physical suffering experienced by those victims deserved judicial acknowledgment. It received such acknowledgment. The Trial Judgment made detailed findings concerning the detention conditions, floggings, physical pain, bruising, inflammation, scars and other suffering experienced by victims.²⁵⁴ The Judgment itself, and the recounting of harm, is a form of satisfaction for victims.²⁵⁵ The Reparations Order is only able to recount harm that exists, was substantiated by evidence and falls within the scope of Mr Al Hassan's conviction and the legal contours of each crime.

iv. *No material impact*

126. For the reasons above, the OPCV fails to establish any factual or procedural error committed by the Reparations Chamber. The OPCV also fails to substantiate how the alleged errors materially affected the Reparations Order in a manner that would warrant the intervention of the Appeals Chamber.²⁵⁶ Victims are not entitled to double compensation where this would result in the same conduct being recognised and compensated under two different counts. Simply because judicial recognition was requested does not oblige the Chamber to do so.

²⁴⁸ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), fn.124 referring to Trial Judgment, [ICC-01/12-01/18-2594](#), paras 841; 864 (see para. 863 for context); 904 (see para. 903 for context), 1648 (see paras 1647 and 1949 for context).

²⁴⁹ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), fn. 124 referring to Trial Judgment, [ICC-01/12-01/18-2594](#), fn. 2556 (see fn. 2553 and para. 561 for context), for lack of substantiation see para. 806.

²⁵⁰ Akane's Separate Opinion, [ICC-01/12-01/18-2594-OPI](#), paras 8, 12, and more specifically 14.

²⁵¹ Annex 3 to Trial Judgment, [ICC-01/12-01/18-2594-Anx3](#), para. 12(oo); Akane's Separate Opinion, [ICC-01/12-01/18-2594-OPI](#), paras 14-33, 48.

²⁵² Akane's Separate Opinion, [ICC-01/12-01/18-2594-OPI](#), paras 14-33.

²⁵³ OPCV Appeal Brief, [ICC-01/12-01/18-2796](#), para. 91.

²⁵⁴ Trial Judgment, [ICC-01/12-01/18-2594](#), paras 1308-1324, 1343-1350.

²⁵⁵ *Ongwen* Reparations Order, [ICC-02/04-01/15-2074](#), para. 636; Reparations Order, [ICC-01/12-01/18-2782](#), paras 74, 144.

²⁵⁶ See above, para. 73.

Moreover, in light of the legal elements of the crime of passing a sentence without due process, there was no legal basis for the Chamber to recognise the conditions of detention in its assessment of the harm caused by the crime under Count 6. The harm that the OPCV claims should have been recognised under Count 6 was in fact taken into account in the Reparations Order, albeit under a different crime for which the Chamber found that reparations were more appropriate.

F. LRVs' Ground 3: The Reparations Chamber erred in setting in setting the total amount of liability, but for different reasons

127. The Defence agrees with the LRVs that the Reparations Chamber committed errors in determining the total amount of liability of Mr Al Hassan, but for different reasons. The Defence has explained in its Appeal Brief how the Reparations Chamber's assessment was erroneous and that the total amount of reparations that Mr Al Hassan is liable for is too high.

128. The LRVs challenge the Reparations Chamber's factual assessment of the number of victims of persecution in a similar situation than the 49 victims, as well as its application of the applicable law and conclusions in determining the final cost of reparations for those victims.²⁵⁷ The LRVs challenge the Reparations Chamber's adjustment of the percentage of victims suffering physical harm from 23% (Registry estimate) to 15%.²⁵⁸ However, their argument lacks an evidentiary basis and contains significant inconsistencies.²⁵⁹ As such, the LRVs fail to demonstrate that the Reparations Chamber committed errors of law, fact, or discretion, nor demonstrated how any alleged error materially affected the Reparations Order.

129. The LRVs argue that the Reparations Chamber committed an error of fact in considering the Registry's estimate of 23% to establish the number of victims having suffered physical harm without providing a comprehensive justification. The LRVs subsequently challenge the Chamber's own conclusion about the 15%. Yet, apart from questioning the unclear methodology used by the Registry and the Registry's failure to provide a breakdown of this figure, including the percentage of victims who experienced difficult living conditions, the LRVs fail to identify any sound reason why the Chamber should not have based its calculation on the Registry's figures. As pointed out above, to show a factual error, the LRVs had to show that the Chamber misappreciated the facts, took into account irrelevant facts, or failed to take

²⁵⁷ LRVs Appeal Brief, [ICC-01/12-01/18-2795](#), para. 105.

²⁵⁸ LRVs Appeal Brief, [ICC-01/12-01/18-2795](#), paras 104, 119-121.

²⁵⁹ See above, para. 25 on Regulations 58(2) requirement.

into account relevant facts, or that the Chamber's conclusion had not been reasonably reached on the basis of the evidence before it.²⁶⁰

130. The LRVs then suggest that the percentage of victims suffering physical harm should be over 40%.²⁶¹ On a closer look, the figure of 44% was submitted by the LRVs three months after the Reparations Order was issued. It was therefore impossible for the Reparations Chamber to have considered or relied on this number in its evaluation.²⁶² Moreover, at the time of submissions – both oral and in writing - the LRVs did not challenge the Registry's initial estimate of 23%,²⁶³ and provided no alternative calculation or evidence to support a different figure.²⁶⁴ The LRVs even explicitly supported the Registry and TFV's submissions and the study it relied upon.²⁶⁵ The LRVs cannot, on appeal, complain of an alleged error in respect of a matter that was not before the Chamber and upon which the Chamber therefore had no opportunity to rule.²⁶⁶

131. Further, the LRVs do not provide any evidentiary basis, including a reference to statements, studies or even annexes, to assert a higher figure which should have been considered by the Chamber for physical harm. The LRVs simply state that “il suffit d'avoir égard aux propos précisément des victimes reprises dans ce groupe qui presque toutes ont insisté justement sur le fait que de nombreuses personnes de leur entourage avaient vécu des faits similaires.”²⁶⁷

132. The LRVs go a step further, by asserting that “[l]eur seul témoignage suffit à démontrer qu'il est bien plus probable qu'improbable qu'un pourcentage substantiel de la population et en tous les cas bien plus de 15% ou même 23% de la population devrait tomber dans la catégorie des victimes dont la Chambre établit ici l'estimation aux fins de l'évaluation du coût des mesures de réhabilitation physique et psychologiques”.²⁶⁸ This assertion is also unsupported by any reference to actual findings in the Trial Judgment, Sentencing Judgment, or victim's

²⁶⁰ *Ongwen* Appeal Judgment on Reparations, [ICC-02/04-01/15-2108](#), para. 27 referring to *inter alia* *Ntaganda* Appeal Judgment on Reparation Order Addendum, [ICC-01/04-02/06-2908-Red](#), para. 15.

²⁶¹ LRVs Appeal Brief, [ICC-01/12-01/18-2795](#), fn. 93.

²⁶² In the submissions made before the Reparations Order was issued, the LRVs never discuss that number, see LRVs Response to order on observation for reparation, [ICC-01/12-01/18-2740](#). They discussed the figure of 44% in July 2026, months after the Reparations Order was issued. See Response to the Registry Submissions on reparations process, [ICC-01/12-01/18-2791](#), paras 25-29.

²⁶³ LRVs Response to order on observation for reparation, [ICC-01/12-01/18-2740](#), paras 11-12.

²⁶⁴ For example, see LRVs observation on Reparations, [ICC-01/12-01/18-2732-Red](#), paras 38, 49.

²⁶⁵ LRVs Response to order on observation for reparations, [ICC-01/12-01/18-2740](#), paras 11-12, 48.

²⁶⁶ *Situation in the Republic of the Philippines*, Judgment on the appeal to resume investigation, [ICC-01/21-77](#), para. 57; *Ongwen* Appeal Judgment on Confirmation of Charges, [ICC-02/04-01/15-1562](#), para. 154.

²⁶⁷ LRVs Appeal Brief, [ICC-01/12-01/18-2795](#), para. 119.

²⁶⁸ LRVs Appeal Brief, [ICC-01/12-01/18-2795](#), para. 119.

application which could reasonably illustrate any factual error committed by the Chamber in reaching their conclusion of 15%. The LRVs are asking this Court to accept speculation in place of evidence.

133. In arriving at the figure of 15%, the Reparations Chamber explained that it had examined the evidence on the record. The Chamber further explained that the 23% figure would overestimate the proportion of victims currently suffering physical harm, since reparations are intended to repair the harm suffered and, to the extent possible, restore the person to the situation in which they would have been had the crime not been committed.²⁶⁹ Accordingly, where a victim no longer suffers from physical harm, there is no longer physical harm to be repaired. This does not preclude the existence of other forms of harm, such as economic harm resulting from medical expenses incurred or loss of income, but such harm is distinct from physical harm that has since ceased to exist.²⁷⁰

134. The LRVs appear to assert that any physical harm that was suffered at any point should trigger compensation for medical costs regardless of the prognosis of the harm today. This ignores the established framework. Physical harm that has since been resolved could be compensated as material harm, such as for the reimbursement of medical treatments, loss of incomes or other; and moral harm, for associated pain and suffering.²⁷¹ Ongoing physical harm necessitates continuous medical treatment, support and accommodation, and therefore continues to require rehabilitative measures.²⁷² However, the LRVs do not make this distinction. The LRVs focus exclusively on the percentage of victims who suffered “physical harm” without distinguishing whether that harm persists to the present day. By doing so, they conflate past and resolved physical harm to continuous physical harm. This conflation would violate the principle of no over-compensation.

135. In *Lubanga*, the TFV draft implementation plan treated physical rehabilitation as a need for improving an **existing physical condition** to enable self-reliance.²⁷³ Similarly, in *Ongwen*,

²⁶⁹ Reparations Order, [ICC-01/12-01/18-2782](#), para. 237.

²⁷⁰ *Lubanga* Decision establishing the principles and procedures to be applied to reparations, [ICC-01/04-01/06-2904](#), para. 230(c) (“loss of savings”). See also, *Lubanga* Amended Reparations Order, [ICC-01/04-01/06-3129-AnxA](#), para. 40(c); *Katanga* Victims observations on principles for Reparations, [ICC-01/04-01/07-3555-tENG](#), para. 107(c).

²⁷¹ *Lubanga* Decision establishing the principles and procedures to be applied to reparations, [ICC-01/04-01/06-2904](#), para. 230(c) (“loss of savings”). See also, *Lubanga* Amended Reparations Order, [ICC-01/04-01/06-3129-AnxA](#), para. 40(c); *Katanga* Victims observations on principles for Reparations, [ICC-01/04-01/07-3555-tENG](#), para. 107(c).

²⁷² *Ongwen* Reparations Order, [ICC-02/04-01/15-2074](#), para. 214; *Ongwen* TFV’s submissions on reparations, [ICC-02/04-01/15-1920](#), para. 168; *Lubanga* Draft Implementation Plan, [ICC-01/04-01/06-3177-AnxA](#), paras 157-159.

²⁷³ *Lubanga* Draft Implementation Plan, [ICC-01/04-01/06-3177-AnxA](#), paras 157-159.

the TFV submitted that it would need to assess whether victims still required rehabilitation, noting that “insofar as beneficiaries received such rehabilitative measures[...] it will need to be carefully assessed whether they still require additional rehabilitation.”²⁷⁴ The Trial Chamber in Ongwen accepted the TFV’s submissions regarding physical rehabilitation, describing physical harm as involving “persistent health challenges or continuous disability”.²⁷⁵ The same principle is applicable here – only victims with a persistent need for rehabilitation should receive reparations for physical harm.

136. The Chamber assessed the TFV’s study as credible and reliable in the Reparations Order and the LRVs provide no basis to overturn that assessment.²⁷⁶ It is also not uncommon for a Chamber to rely on the studies done by the TFV or the Registry.²⁷⁷ The LRVs have not identified why the TFV’s methodology should be rejected in this case when they did not contest it during the reparations proceedings. Curiously, the LRVs now challenge the very study upon which they previously relied, without explaining the apparent inconsistency in their position.²⁷⁸

137. The 15% figure was thus established by the Chamber for the purpose of assessing the amount of reparations. In carrying out that task, the Chamber was required to take into account the relevant facts and evidence before it, which it did. Although the calculation was indeed erroneous, as the LRVs point out,²⁷⁹ the underlying reasoning provided by the Reparations Chamber explains why, in its view, the figure of 23%²⁸⁰ would have overestimated the number of victims who suffered physical harm. In reaching this conclusion, the Reparations Chamber did not exercise its discretion in a manner warranting the intervention of the Appeals Chamber.

i. No material impact

138. Unlike the Reparations Chamber in *Ntaganda*, where the Appeals Chamber found that the Trial Chamber’s reparations order was made “without having any concrete estimate as to one of its fundamental parameters, namely the number of victims,” the Reparations Chamber

²⁷⁴ *Ongwen* TFV’s submissions on reparations, [ICC-02/04-01/15-1920](#), para. 168.

²⁷⁵ *Ongwen* Reparations Order, [ICC-02/04-01/15-2074](#), para. 214. See also, *Lubanga* Draft Implementation Plan, [ICC-01/04-01/06-3177-AnxA](#), paras 157-159.

²⁷⁶ Reparations Order, [ICC-01/12-01/18-2782](#), paras 34, 236-237, fn. 617; Registry Submissions on Reparations, [ICC-01/12-01/18-2733](#), para. 19; Voices that Count, [ICC-01/12-01/18-2737-Conf-AnxC](#), slide 11.

²⁷⁷ *Lubanga* Appeals Judgement on the Reparations Award, [ICC-01/04-01/06-3466-Red](#), paras 90, 120-121. The Trial Chamber relied on the Registry’s number, and that was not challenged on appeal, see *Ongwen* Reparations Order, [ICC-02/04-01/15-2074](#), paras 701-705, it is also mentioned throughout the section on the amount of liability; *Ongwen* Appeal Judgment on Reparations, [ICC-02/04-01/15-2108](#), paras 157-161.

²⁷⁸ LRVs Appeal Brief, [ICC-01/12-01/18-2795](#), Ground 3. See LRVs Response to order on observation for reparation, [ICC-01/12-01/18-2740](#), paras 11, 12.

²⁷⁹ LRVs Appeal Brief, [ICC-01/12-01/18-2795](#), paras 122-123.

²⁸⁰ The LRVs also refer to 24%, but it appears to be a clerical error.

in this case provided a reasoning linking the 15% estimate to the total liability amount.²⁸¹ The LRVs do not explain how the Chamber's reliance on the Registry estimate and submissions were unreliable, or an unreasonable exercise of its discretion, nor which legal principle was incorrectly followed by the Chamber.²⁸² As such, the LRVs have not established any legal error on the part of the Reparations Chamber. The LRVs also fail to establish what, if any, other relevant factual material the Chamber should have considered to base its estimate for physical harm. Further, the LRVs have not substantiated how any increase in the estimate of physical harm would have materially impacted the final conclusion concerning the amount of reparations for this harm. In particular, they have failed to show that, had the Chamber not committed the alleged error, it would have rendered a decision substantially different from the one under appeal.

V- RELIEF SOUGHT

139. In light of the foregoing the Defence respectfully requests the Appeals Chamber to:

CONSIDER this response to the LRVs' and OPCV's Appeal Briefs;

DISMISS the LRVs' and OPCV's Appeal Briefs.



Mélissa Beaulieu Lussier
Counsel for Mr Al Hassan

Dated this 2nd day of October 2026
At The Hague, The Netherlands

²⁸¹ *Ntaganda* Reparations Appeal Judgment, [ICC-01/04-02/06-2782](#), para. 749.

²⁸² See above, para. 73.