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**THE APPEALS CHAMBER**

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

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

**Public Redacted Version of the  
Defence Document in Support of Appeal against the  
Reparations Order**

**Source:** Defence for Mr Germain Katanga

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

to:

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## INDEX

<b>INTRODUCTION.....</b>	<b>4</b>
<b>PROCEDURAL BACKGROUND.....</b>	<b>5</b>
<b>STANDARD OF REVIEW.....</b>	<b>6</b>
<b>DISCUSSION.....</b>	<b>7</b>
<i>Ground 1: The Trial Chamber erred in ordering compensation in respect of material harm relating to loss which was insufficiently proven.....</i>	<i>7</i>
<i>Ground 2: The Trial Chamber erred in giving too broad an interpretation of a parent whose death warrants reparations to the remaining children.....</i>	<i>12</i>
<i>Ground 3: The Trial Chamber erred in ruling ultra petita by allocating compensation exceeding several applicants' claims.....</i>	<i>25</i>
<i>Ground 4: The Trial Chamber erred in issuing an order for reparations of 1,000,000 USD against Mr Germain Katanga because it is not proportionate to, and does not fairly reflect the part played by the accused in the crimes.....</i>	<i>28</i>
<b>CONCLUSION.....</b>	<b>36</b>

## INTRODUCTION

1. The defence for Germain Katanga (the ‘defence’) respectfully submits its document in support of its Appeal against the *Ordonnance de réparation en vertu de l'article 75 du Statut* (hereafter the “Reparation Order”).<sup>1</sup> The Defence submits this document in support of its appeal pursuant to 82(4) of the Rome Statute, Rule 150(1) of the Rules of Procedure and Evidence and Regulation 58 of the Regulations of the Court.
  
2. The Defence submits the following grounds in support of its appeal:
  - Ground 1: The Trial Chamber erred in ordering compensation in respect of material harm relating to loss which was insufficiently proven.
  
  - Ground 2: The Trial Chamber erred in giving too broad an interpretation of a parent whose death warrants reparations to the remaining children.
  
  - Ground 3: The Trial Chamber erred in ruling *ultra petita* by allocating compensation exceeding several applicants’ claims.
  
  - Ground 4: The Trial Chamber erred in issuing an order for reparations of \$1,000,000 against Mr Germain Katanga because it is not proportionate to, and does not fairly reflect, the part played by the Appellant in the crimes.
  
3. These submissions are filed as confidential *ex parte* because they refer to confidential *ex parte* information contained in the Annex II of the Reparation Order. A public redacted version will be filed shortly.

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<sup>1</sup> ICC-01/04-01/07-3728.

## PROCEDURAL BACKGROUND

4. On 7 March 2014, Trial Chamber II issued its Judgment pursuant to article 74 of the Statute.<sup>2</sup>
5. On 23 May 2014, Trial Chamber II delivered its Decision on Sentence pursuant to article 76 of the Statute.<sup>3</sup>
6. Following several submissions from the parties and participants, on 24<sup>th</sup> March 2017, Trial Chamber II rendered its *Ordonnance de réparation en vertu de l'article 75 du Statut* (“Reparation Order”).<sup>4</sup>
7. On 25 April 2017, the Legal Representative of Victims filed his *Acte d'appel relatif à l'Ordonnance de réparation en vertu de l'article 75 du Statut et son Annexe II*.<sup>5</sup>
8. On 26 April 2017, the defence for Mr Germain Katanga (“the defence”) gave notice of its appeal against the Reparation Order issued on 24 March 2017.<sup>6</sup>
9. On the same day, the Office of Public Counsel for the Victims filed a Notice of Appeal against the Reparations Order and its Annex II issued in accordance with article 75 of the Statute on 24 March 2017.<sup>7</sup>
10. On 17 May 2017, the Trust Fund for Victims notified the Trial Chamber of its decision to complement the payment of the individual and collective awards for reparations ordered in the Katanga case for the benefit of the 297 victims identified in the Trial Chamber's Reparation Order in the amount of \$1,000,000.<sup>8</sup>
11. Throughout this filing the Trial Chamber dealing with reparations is referred to as Trial Chamber (R) to distinguish it from the previously constituted Trial Chamber which rendered the Article 74 and 76 decisions.

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<sup>2</sup> ICC-01/04-01/07-3436-tENG.

<sup>3</sup> ICC-01/04-01/07-3484-tENG.

<sup>4</sup> ICC-01/04-01/07-3728.

<sup>5</sup> ICC-01/04-01/07-3737.

<sup>6</sup> ICC-01/04-01/07-3738.

<sup>7</sup> ICC-01/04-01/07-3739.

<sup>8</sup> ICC-01/04-01/07-3740.

12. No English translation of the Reparation Judgment has been filed to date.

### STANDARD OF REVIEW

13. Pursuant to Article 82 (4) of the Statute, a legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 75 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence.

14. The Appeals Chamber, in the *Lubanga* Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012, stressed that, with respect to the errors alleged by the parties and participants against the Impugned Decision, the standard of review is the same for all appeals raised before the Appeals Chamber.<sup>9</sup> The Appeals Chamber summarized the standard of review as follow:<sup>10</sup>

41. Accordingly, the standard of review for alleged legal errors is:

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

[An Impugned Decision] is “materially affected by an error of law” if the Trial Chamber “would have rendered a [decision] that is substantially different from the decision that was affected by the error, if it had not made the error”.

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

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

43. Regarding alleged errors in discretionary decisions, the Appeals Chamber held:

79. The Appeals Chamber will not interfere with the [first-instance] Chamber’s exercise of discretion [...] merely because the Appeals Chamber, if it had the power, might have made a different ruling. To do so would be to usurp powers not conferred

<sup>9</sup> ICC-01/04-01/06-3129, *Pros. v. Lubanga*, 3 March 2015, para. 40, with reference to ICC-01/04-01/06-3121-Red, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, para. 17.

<sup>10</sup> ICC-01/04-01/06-3129, *Pros. v. Lubanga*, 3 March 2015, paras. 41-43 [Footnotes omitted].

on it and to render nugatory powers specifically vested in the [first-instance] Chamber.

80. [...] [T]he Appeals Chamber's functions extend to reviewing the exercise of discretion by the [first-instance] Chamber to ensure that the Chamber properly exercised its discretion. However, the Appeals Chamber will not interfere with the [first-instance] Chamber's exercise of discretion [...], save where it is shown that that determination was vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected the determination. This means in effect that the Appeals Chamber will interfere with a discretionary decision only under limited conditions. The jurisprudence of other international tribunals as well as that of domestic courts endorses this position. They identify the conditions justifying appellate interference to be: (i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion.

## DISCUSSION

### *Ground 1: The Trial Chamber erred in ordering compensation in respect of material harm relating to loss which was insufficiently proven*

15. In the Reparation Order, the Trial Chamber (R) applied the standard of a balance of probabilities.<sup>11</sup> In doing so, the Trial Chamber (R) applied the same standard of proof as that adopted in the *Lubanga* case which was not appealed in that case and therefore not subject of review by the Appeals Chamber.<sup>12</sup> The Appeals Chamber developed these principles in the Order for Reparations annexed to its Judgment. Paragraphs 22 and 65 of the Appeals Chamber Order for Reparations read:

#### **6. Standard and burden of proof**

*22. In the reparation proceedings, the applicant shall provide sufficient proof of the causal link between the crime and the harm suffered, based on the specific circumstances of the case. Given the fundamentally different nature of reparations proceedings, a standard less exacting than that for trial, where the prosecution must establish the relevant facts to the standard of "beyond a reasonable doubt", should apply. In determining the appropriate standard of proof in reparation proceedings, various factors specific to the case should be considered, including the difficulty victims may face in obtaining evidence in support of their claim due to the destruction or unavailability of evidence.*<sup>13</sup>

#### **5. Scope of Mr Lubanga's liability for reparations**

<sup>11</sup> Reparation Order, paras 47-50.

<sup>12</sup> ICC-01/04-01/06-3129, *Pros. v. Lubanga*, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012, paras 81, 84.

<sup>13</sup> ICC-01/04-01/06-3129-AnxA, *Pros. v. Lubanga*, Order for Reparations, para. 22.

[...]

65. In relation to the standard of proof, the standard of “a balance of probabilities” shall apply.<sup>14</sup>

16. The defence does not challenge the appropriateness of applying the balance of probabilities standard in reparation proceedings but challenges the manner in which this standard was applied by the Trial Chamber (R) and in particular the extent to which the Trial Chamber (R) decided that it could rely on presumptions and circumstantial evidence to conclude that loss to an applicant was proved in respect of loss of fields and crops and loss of cattle where no sufficient evidence was adduced by the applicant of such loss. The defence accepts that there may be particular circumstances where it is fair and reasonable for presumptions and indirect evidence to be relied upon but such was not appropriate in respect of such loss.

17. In making its Reparation Order the Trial Chamber (R) stated;

**ii. Destruction ou pillage de meubles, des affaires personnelles et marchandises**

[...]

90. La Chambre estime qu'il est raisonnable de présumer que la grande majorité des personnes qui vivaient à Bogoro possédaient des biens essentiels à la vie quotidienne et qu'en raison de la destruction de maisons, d'annexes aux maisons et de locaux professionnels durant l'attaque de Bogoro, les biens qui s'y trouvaient ont été détruits ou pillés.

91. Dès lors, la Chambre considère que dès le moment où le Demandeur a établi avoir subi un préjudice matériel du fait de la destruction d'une maison, d'une annexe à une maison ou d'un local professionnel, le préjudice matériel du fait de la destruction ou du pillage de meubles, d'affaires personnelles ou de marchandises est présumé établi, en l'absence d'un élément de preuve spécifique.

92. La Chambre considère également que le préjudice matériel du fait de la destruction ou du pillage des biens essentiels à la vie quotidienne est présumé établi à l'égard du Demandeur qui présente la preuve de la destruction de la maison dans laquelle il vivait, mais dont il n'était pas propriétaire.

93. S'agissant du Demandeur qui allègue uniquement la destruction ou le pillage d'affaires personnelles essentielles à la vie quotidienne, la Chambre considère que ce préjudice est présumé établi lorsque, au vu d'un faisceau d'indices concordants, le Demandeur démontre, selon le standard de preuve requis, qu'il était présent ou vivait à Bogoro lors de l'Attaque.

94. La Chambre n'est cependant pas en mesure de déterminer, d'après les éléments de preuve produits, le type et la quantité de meubles, d'affaires personnelles et de marchandises que les Demandeurs possédaient.

**iii. Pillage du bétail ou destruction des champs et des récoltes ou pillage des récoltes**

[...]

98. La Chambre réitère ses constatations, à savoir que les habitants de Bogoro subsistaient en partie en élevant du bétail et en cultivant des champs. Par ailleurs, la

<sup>14</sup> ICC-01/04-01/06-3129-AnxA, *Pros. v. Lubanga*, Order for Reparations, para. 65.

*Chambre de première instance II, dans sa composition antérieure, a conclu au pillage d'animaux domestiques et de bétail. Au vu de l'importance de l'agriculture et de l'élevage dans la société locale, la Chambre estime qu'il est raisonnable de présumer que la grande majorité des habitants de Bogoro possédaient du bétail et/ou des champs pour subvenir à leurs besoins quotidiens. Il s'ensuit qu'il est plus probable qu'improbable qu'en parallèle à la destruction des maisons durant l'attaque de Bogoro, le bétail ainsi que les champs et les récoltes ont également été pillés ou détruits.*

*99. Compte tenu de ce qui précède, la Chambre considère que dès le moment où le Demandeur a établi un préjudice du fait de la destruction d'une maison, le préjudice matériel du fait du pillage du bétail ou d'autres animaux ainsi que de la destruction de champs et des récoltes ou le pillage des récoltes est présumé établi, en l'absence d'un élément de preuve spécifique.*

*100. La Chambre considère également que le préjudice matériel du fait du pillage du bétail ainsi que de la destruction de champs et des récoltes ou le pillage des récoltes est présumé établi à l'égard du Demandeur qui présente la preuve de la destruction de la maison dans laquelle il vivait, mais dont il n'était pas propriétaire.*

*101. S'agissant de l'étendue des préjudices allégués, la Chambre n'est pas en mesure de déterminer, dans la plupart des cas, le type et la quantité de bétail pillé, la superficie des champs détruits ou le type et la quantité de récoltes détruites ou pillées, faute d'éléments de preuve précis. Par conséquent, la Chambre considère que ces préjudices sont, en règle générale, équivalents à une consommation personnelle.*

*La Chambre décide que la consommation personnelle à l'égard du bétail équivaut à la valeur d'un cheptel composé d'une vache, de deux chèvres et de trois poules et la consommation personnelle à l'égard des champs ou des récoltes équivaut à la valeur de la vente de dix piquets des cultures les plus fréquentes à Bogoro.*

*[...]*

*170. La Chambre a retenu à l'égard des Demandeurs ayant établi la destruction d'une maison, que le préjudice matériel du fait de la destruction et du pillage de meubles a également été démontré.*

18. While, for example, it may be reasonable in the circumstances of the case to assume that those who proved they lived in Bogoro on the day of the attack, and further proved the loss of home or business premises, also suffered the loss of the contents of those premises, the assumptions made by the Trial Chamber (R) in respect of loss of cattle, fields and crops is unreasonable and unfair to the appellant. The amount awarded in 239 instances for the loss of fields/crops and loss of cattle amounted to \$84,470.<sup>15</sup>

19. Such presumptions were made without sufficient or any proof of loss and ran counter to the evidence available before the Trial Chamber. In its observations on reparations the defence referred to trial testimony that Bogoro had been the object of several attacks and pillaging before the 24 February 2003 attack, including an attack just a few weeks before the 24<sup>th</sup>, and that most of the cattle in the area had already been sent

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<sup>15</sup> Reparation Order, p. 87.

away to prevent their theft, submissions which tend to refute the applicants' assertions and the Trial Chamber's (R) presumptions:

29. [...] However, careful scrutiny of claims concerning loss of cattle is necessary, particularly given that there was evidence, from a Hema witness, that most of the cattle was sent away long before the Bogoro attack to avoid their being stolen. Also, as a number of prosecution witnesses testified, cattle rustling and theft of crops and property was a feature of life in the area for a substantial period of time, doubtless due to the background of hardship and starvation.<sup>16</sup>

The defence further noted:

32. The defence notes that most of the affidavits confirming that a person was the owner of cattle do not indicate the number of cattle owned. The number of cows, goats, and other farm animals claimed varies significantly between victim applicants. Accordingly, the defence submits that it is not sufficient to provide a signed affidavit that the applicant was the owner of cattle. At the very least, such affidavit should provide the number of cattle owned. In addition, the affidavits usually do not indicate whether the cattle was pillaged or not and, if so, whether this happened during the 24 February 2003 attack. Therefore the defence submits that such affidavits are insufficient to demonstrate a material harm linked to the loss of cattle during the 2003 Bogoro attack.<sup>17</sup>

20. In relying on presumptions and circumstantial evidence to the extent that it did, the Trial Chamber has relied on evidence insufficient to meet the requisite standard of proof on a balance of probabilities. Its approach is too arbitrary; a defendant will be unable to contest, or have difficulty contesting, findings based on such presumptions or circumstantial evidence. This violates the requirement of fairness of the proceedings against the defendant and his right not to have imposed on him any reversal of the burden of proof or any onus of rebuttal, pursuant to Article 67 (1)(i) of the Statute.

21. A fair and reasonable application of the standard of proof is a protection for the accused, particularly in the particular circumstances of this case. The defence reiterates its previous submissions:

44. In such circumstances, it should be no surprise that sometimes individuals may present false or exaggerated claims. By way of example, two victims admitted to participate in the *Katanga* case and to testify as witnesses, were not called as witnesses, because of their unreliability. They were withdrawn from the list of

<sup>16</sup> ICC-01/04-01/07-3564, para. 29. See also ICC-01/04-01/07-3549, para. 48 ; ICC-01/04-01/07-3681-Conf, para. 39; ICC-01/04-01/07-3660, para. 18.

<sup>17</sup> [REDACTED].

victims at the request of the Legal Representative of Victims. Economic hardship has led witnesses to make false allegations during the trial. As a result, in the Article 74 Judgment, the Trial Chamber considered that several witnesses were unreliable. While these witnesses were put to the test of cross-examination, most victims will not be put to any test at all. Their word alone should be insufficient and should be adequately corroborated. If the Chamber were to accept the assertions of the claimants at face value, without requiring adequate supporting documentation or other evidence, the burden would effectively fall on the defence to disprove such allegations.

45. This is in line with the Appeals Chamber's observation in *Kony et al* that:<sup>18</sup>

[I]t is an essential tenet of the rule of law that judicial decisions must be based on facts established by evidence. Providing evidence to substantiate an allegation is a hallmark of judicial proceedings; courts do not base their decisions on impulse, intuition and conjecture or on mere sympathy or emotion. Such a course would lead to arbitrariness and would be antithetical to the rule of law.<sup>19</sup>

62. The defence reiterates its previous Defence Observations, agreeing with the prosecution's submission that "Victims seeking reparations bear the burden of showing the necessary harm."

69. [...] In addition, the claim of an applicant cannot rely solely on his/her own words, otherwise the defence would be prevented from challenging the claims.

73. [...] If the individual claims of each victim cannot be substantiated, then individual reparation cannot be awarded.

74. While a long time has elapsed since the Bogoro attack and the submission of the victims applications, this is not the fault of the convicted person and any difficulty to gather evidence now to support the victims' claims should not justify the application of a standard of evidence so low that it would prevent any meaningful challenge by the defence.<sup>20</sup>

22. The Trial Chamber apparently relied on such presumptions or circumstantial evidence because it would be difficult for the applicants, several years after the crimes, to produce evidence, in particular documentary evidence, in support of their allegations.<sup>21</sup> However, the first Legal Representatives of Victims were appointed at the beginning of 2008 and therefore had ample time to gather appropriate evidence in support of the victims' applications for reparation. Indeed, many of the applicants were able to submit appropriate documentary evidence, such as death and kinship certificates, residence certificates, cattle certificates, *etc.* Any difficulty encountered by the victims to gather evidence was sufficiently taken into account by the Trial

<sup>18</sup> ICC-02/04-179, Judgment on the appeals of the Defence against the decisions entitled "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06" of Pre-Trial Chamber II, 23 February 2009, para. 36.

<sup>19</sup> ICC-01/04-01/07-3549, Defence Observations on Reparations, paras 44-45.

<sup>20</sup> ICC-01/04-01/07-3564, Defence Consolidated Response to the Parties, Participants and Other Interested Persons' Observations on Reparation, paras 62, 69, 73, 74.

<sup>21</sup> See for instance Reparation Order, paras 60, 84.

Chamber's (R) decision to admit as evidence, instead of official certificates, statements signed by two witnesses.<sup>22</sup> This provided a reasonable and fair basis for applicants to provide sufficient measure of proof on the one hand, while providing some protection for the appellant from false claims on the other.

23. The conditions defined by the ECHR to rely on presumptions are stricter than the one defined by the Trial Chamber in its Reparation Order. The ECHR defined cumulative requirements to rely on presumptions: the presumptions must result "from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact".<sup>23</sup> The Trial Chamber (R) has remained vague and has not demonstrated the existence of any of those criteria to rely on its presumptions. Its approach is too arbitrary, leaving the defendant unable to challenge meaningfully such presumptions.
24. For the reasons above, the Appeals Chamber should reverse the Reparation Order in respect of the awards to 109 applicants for loss of fields/crops and 130 applicants for loss of cattle.<sup>24</sup>

***Ground 2: The Trial Chamber erred in giving too broad an interpretation of a parent whose death warrants reparations to the remaining children.***

*Position of the Trial Chamber(R)*

25. The Trial Chamber(R) erred in providing too broad an interpretation of a parent to include any family member, be it a close or more distant family member. The Trial Chamber(R) allows compensation to any individual victim for the death of any remote family member who died at Bogoro. No evidence of a particular proximate relationship between the family member and the deceased is necessary, as this

<sup>22</sup> See for instance Reparation Order, paras 102-104.

<sup>23</sup> CEDH, *Irlande c. Royaume-Uni*, arrêt du 18 janvier 1978, requête n°5310/71, para. 161; CEDH, *Aydin c. Turquie*, arrêt de la Grande chambre du 25 septembre 1997, requête n°23178/94, paras 72 et 73; CEDH, *Mentes et autres c. Turquie*, arrêt de la Grande chambre du 28 novembre 1997, requête n°23186/94, para. 66; CEDH, *Nachova et autres c. Bulgarie*, arrêt de la Grande chambre du 6 juillet 2005, requêtes n°43577/98 et 43579/98, para. 147.

<sup>24</sup> Reparation Order, page. 87.

proximity is assumed by virtue of the family connection, no matter how remote. The Chamber defines the required family relationship as follows:

*121. La Chambre note que la Défense soumet que les membres de la famille de la victime directe sont éligibles aux réparations uniquement lorsqu'ils sont suffisamment proches de la victime directe, comme par exemple un parent et son enfant, ou autrement lorsqu'ils démontrent qu'ils étaient à charge de la victime directe. Dans ce contexte, la Chambre rappelle que le concept de « famille » doit être apprécié au regard des structures familiales et sociales concernées. Dans l'affaire Lubanga, la Chambre d'appel a fait référence à la présomption largement reconnue « qu'un individu a pour ayants droit son conjoint et ses enfants ». Dans la présente affaire, la Chambre a apprécié le concept de « famille » au regard des structures familiales et sociales qui sont applicables en RDC et en particulier, en Ituri. La question que la Chambre doit se poser est de savoir si, « en raison de leur relation avec une victime directe, les pertes, les blessures ou les dommages subis par cette dernière leur a causé un préjudice ». Dans les circonstances spécifiques de l'attaque de Bogoro, la Chambre estime que la perte d'un membre de la famille est une expérience traumatisante entraînant des souffrances psychologiques. Il importe peu qu'il s'agisse d'un parent proche ou éloigné.*

*122. Dès lors, la Chambre considère qu'à partir du moment où le décès de la victime directe durant l'attaque de Bogoro et le lien de parenté entre la victime directe et le Demandeur sont établis à la lumière de l'ensemble des pièces et éléments de preuve fournis au soutien de la demande en réparation, le préjudice psychologique du fait du décès d'un parent est établi.*

*232. La Chambre décide de retenir deux catégories de décès ayant un impact sur chacune des victimes : D'une part celui des parents proches (conjoint, parents, enfants, grands-parents, petits-enfants) et d'autre part, celui des autres parents plus éloignés (autres parents). Le préjudice psychologique lié au décès d'un parent proche est évalué ex aequo et bono à 8.000 USD et le préjudice psychologique lié au décès d'un parent plus éloigné est évalué ex aequo et bono à 4.000 USD.*

26. The Defence submits that the Trial Chamber (R) definition is too wide. The Trial Chamber(R) makes a distinction between close and remote family members, but allows compensation for both categories. Whilst it defines 'close parents', it fails to define remote family members. Close family members are said to include conjoints (husband-wife/partners), parents, children, grandparents and grandchildren. This definition goes beyond the generally accepted definition of the immediate family, which is understood to mean the nuclear family consisting of spouses, their children and siblings.<sup>25</sup> Grandparents and grandchildren are usually not included in the notion

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<sup>25</sup> 07.02.2014 - Second Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings - ICC-01/04-02/06-251, para. 23; 15.01.2014 -Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings-ICC-01/04-02/06-211, para. 48; Shelton, D., Remedies in International Human Rights Law (Oxford University Press, 2005), p. 420.

of close family members. The Trial Chamber(R) therefore erroneously widens the notion of close family members.

27. More problematic is that the Trial Chamber(R) refers to remote family members as ‘other parents’. These ‘other parents’ could include any relative who is not covered by the definition of a close family member. In defining the required parental link in such a broad manner, the Trial Chamber(R) has significantly broadened the category of indirect victims who are eligible for compensation.
28. The defence submits that this broad concept of a parental link far exceeds any definition of an ‘indirect victim’ as adopted in any national or international jurisdiction. It also expands the definition adopted in *Lubanga*, and other ICC cases. Fairness requires an appropriate determination of who qualifies as a victim of the convicted person, against whom the order will be made.

*Accurate Definition of ‘Indirect Victim’*

29. The position of the defence has been consistent throughout the reparation proceedings. The defence reiterates that position here: The defence accepts that ‘victims’ who are entitled to reparations pursuant to Rule 85(a) of the Rules of Procedure and Evidence include both direct and indirect victims.<sup>26</sup> Indirect victims are individuals whose victimhood is not connected to any harm done directly to them, but is rather the result of harm done to others. Indirect victims who may be granted reparations from Mr. Katanga are limited to: (i) family members of direct victims; (ii) other persons who suffered personal harm as a result of these offences. By ‘family members of direct victims’ the defence submits that they should qualify as indirect victims only when sufficiently close, as in parent/child or a demonstrated similar relationship. In line with the jurisprudence on victim participation, other persons who suffered personal harm as a result of the crimes for which Mr. Katanga has been convicted should be limited to their “dependents”.<sup>27</sup>

<sup>26</sup> ICC-01/04-01/07-1491-Red-tENG, Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims, 23 September 2009, paras. 49-56.

<sup>27</sup> ICC-01/04-01/07-3564, 16 June 2015, para. 9.

30. In support of this position, the defence refers to the Trial decision in *Lubanga*, where it was held that, in order to be eligible for reparations, “[i]ndirect victims must establish that, as a result of their relationship with the direct victim, the loss, injury, or damage suffered by the latter gives rise to harm to them. It follows that the harm suffered by indirect victims must arise out of the harm suffered by direct victims, brought about by the commission of the crimes charged.”<sup>28</sup> The harm suffered by these indirect victims “may include the psychological suffering experienced as a result of the sudden loss of a family member or the material deprivation that accompanies the loss of his or her contributions.”<sup>29</sup>
31. The *Lubanga* Trial Chamber further held that “close personal relationships, such as those between parents and children, are a precondition of participation by indirect victims.”<sup>30</sup> This definition excludes remote family members from reparations (unless they have a parent-child-like relationship, or qualify in another way, as direct victim or indirect victim in relation to the death of another close family member). In line with the *Lubanga* jurisprudence on victim participation, other persons who suffered personal harm as a result of the crimes for which Mr. Katanga has been convicted should be limited to their « dependents ».<sup>31</sup>
32. Other Chambers adopted a similar approach, though sometimes with a different emphasis.<sup>32</sup> The Pre-Trial Chamber in *Ntaganda* was, for instance, more explicit in its

<sup>28</sup> TCI, *Pros. v. TLD*, Redacted version of “Decision on ‘indirect victims’”, ICC-01/04-01/06-1813, 8 April 2009, para. 49.

<sup>29</sup> *Ibid* para. 50. See also ICC-01/04-01/07-1491-Red-tENG, Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims, 23 September 2009, paras. 51, 56.

<sup>30</sup> *Ibid*, para. 50. See also Stanislas Kabalira, *Under the Rome Statute of the International Criminal Court (ICC), The content of the right and its implementation in the light of the early case law of the Court* (Wolf Legal Publishers 2016), pp 181-184.

<sup>31</sup> PTCI, *Pros. v. TLD*, Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-172-tENG, 29 June 2006, at pages 7-8 (defining indirect victims as ‘close family or dependents’). See also *Pros. v. TLD*, Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo, ICC-01/04-01/06-228-tENG, 28 July 2006.

<sup>32</sup> 07.02.2014 - Second Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings - ICC-01/04-02/06-251, par. 23; 06.02.2013 - Corrigendum to the Second decision on victims' participation at the confirmation of charges hearing and in the related proceedings, ICC-02/11-01/11-384-Corr, para. 33; 04.06.2012- Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings, ICC-02/11-01/11-138, par. 30; 26.08.2011 - Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, ICC-01/09-02/11-267, para. 69;

refusal to automatically exclude other members of the family, such as uncles, aunts, nephews, nieces or grandparents. Whether such further remote family members would qualify as an indirect victim would depend on a demonstrated proximity with the victim:<sup>33</sup>

[...] it would be arbitrary to assume that they are automatically excluded from the notion of "immediate family" on account of their second degree familiarisation with the victim applicant. However, in order to claim victim status within the meaning of rule 85(a) of the Rules, the victim applicant must establish that at the time of the victimization, a sufficient proximity existed between him or herself and the family member(s) who directly suffered harm as a result of one or more crimes with which the suspect is charged.

The Single Judge considers that such proximity necessarily depends on the particular circumstances of each case and may, for instance, be the case where the victim applicant grew up with the family member in question or where he or she raised such a family member. Conversely, instances where the victim applicant was assisting the family member or vice versa in economic activities will not suffice as such to demonstrate the required kinship between them. By the same token, stating that the victim applicant considered his or her family members in question as a father will not be sufficient, in the absence of further information as to the reason of such perception by the victim applicant.

33. The Trial Chamber(R) goes much further than the *Ntaganda* Pre-Trial Chamber, requiring no proof of any specific proximity, once the (remote) family relationship has been established. The *Ntaganda* Pre-Trial Chamber, on the other hand, requires evidence of a relationship which goes beyond one of economic assistance, but involves the upbringing of one by the other, or a similarly proximity. The Defence agrees with the approach adopted by the *Ntaganda* Pre-Trial Chamber, and submits the Trial Chamber(R) erred in going way beyond this approach.

#### *Approach of Domestic Jurisdictions*

34. The approach of the Trial Chamber(R) also exceeds the approach adopted by a substantial number of (if not all) domestic jurisdictions. If domestic jurisdictions even acknowledge the right for indirect victims to receive immaterial reparations (in

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05.08.2011- Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, ICC-01/09-01/11-249, 55.

<sup>33</sup> 07.02.2014 - Second Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings - ICC-01/04-02/06-251, paras. 24, 25, (emphasis added). *See also* 15.01.2014 -Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings-ICC-01/04-02/06-211, paras. 32, 49.

respect of their psychological trauma) in wrongful death cases, these indirect victims are limited to dependants or ‘next of kin’.<sup>34</sup>

35. To provide a few examples: In the United States, the surviving spouse, the children, and the parents of a deceased, unless they previously abandoned the deceased minor child, can claim damages in the case of a wrongful death.<sup>35</sup>

36. In France, immediate family members of a deceased can claim compensation for immaterial damages in case of a wrongful death. More remote family members can, in certain circumstances, equally claim compensation in a wrongful death case. However, the French criminal courts usually require “*un lien affectif spécifique*”<sup>36</sup> or “*des liens affectifs réguliers*” to allocate compensation for the death of a remote relative:

*5.2.2. Préjudice d'affection*

*Ou préjudice moral dû à la souffrance causée par le décès d'un proche.*

*Une indemnisation est accordée sans justificatif particulier aux parents, grands parents, enfants et conjoints ou concubins, en revanche, des parents plus éloignés doivent pour obtenir une réparation justifier qu'ils entretenaient avec la victime décédée des liens affectifs réguliers. Une personne non apparentée à la victime peut également être indemnisée si elle établit la réalité de son préjudice. Un enfant né après le décès ne peut être indemnisé d'un préjudice moral à défaut de lien de causalité entre le décès et le préjudice allégué (Cass. 2e Civ., 4 novembre 2010, pourvoi n° 09-68.903).<sup>37</sup>*

37. As summarized by a French Association d'Aide aux Victimes d'Accidents Corporels for instance,

*Ainsi, il faut indemniser, quasi automatiquement, les préjudices d'affection des parents les plus proches de la victime ( père, mère ...).*

<sup>34</sup> See, for instance, Fatal Accidents Act 1976, sections 1 and 2, at: [http://www.legislation.gov.uk/ukpga/1976/30/pdfs/ukpga\\_19760030\\_en.pdf](http://www.legislation.gov.uk/ukpga/1976/30/pdfs/ukpga_19760030_en.pdf).

<sup>35</sup> <http://derechos.org/nizkor/econ/TVPA.html>. See also *Doe v. Qi*, 349 F. Supp. 2d at 1313, where the court held that a plaintiff did not have standing to sue under the TVPA for alleged torture of a relative (parent) who was still alive; and *Cabello Barrueto v. Fernandez Larios* 205 F.Supp.2d 1325 (S.D.Fla. 2002).

<sup>36</sup> Cass. Crim. 6 septembre 2005, N° 05-80515, available @ <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007638657&fastReqId=892240381&fastPos=1>; Cass. Crim. 12 février 2002, N° 01-85553, available @ <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007606490&fastReqId=892240381&fastPos=2>.

<sup>37</sup> *Indemnisation des dommages corporels - Recueil méthodologique commun*, March 2013, p. 168, available @ [http://www.avocat-perigueux-laboetie.fr/sites/avocat-perigueux-laboetie.fr/IMG/pdf/referentiel\\_ca\\_indemnisation.pdf](http://www.avocat-perigueux-laboetie.fr/sites/avocat-perigueux-laboetie.fr/IMG/pdf/referentiel_ca_indemnisation.pdf).

*S'il convient d'indemniser systématiquement les parents les plus proches, le préjudice est d'autant plus important qu'il existait une communauté de vie avec la victime.*

*Cette communauté de vie peut justifier l'indemnisation d'un proche dépourvu de lien de parenté.*

*Les autres parents ou proches de la victime doivent rapporter la preuve d'un lien affectif spécifique justifiant une indemnisation qui ne dépassera qu'exceptionnellement 5 000 €.*

*On peut aussi envisager d'indemniser des personnes dépourvues de lien de parenté, si elles peuvent établir, par tout moyen, avoir entretenu un lien affectif réel avec la victime décédée.<sup>38</sup>*

38. In the Netherlands, compensation awarded to indirect victims in wrongful death cases is limited to material damage, which includes the loss of maintenance and the cost of the deceased's funeral, but not bereavement (immaterial) damage.<sup>39</sup> Pursuant to article 6:108 of the Dutch Civil Code, persons who can claim compensation for material damage in wrongful death cases in The Netherlands include a husband or wife or registered partner, minor children, relatives to the extent they were dependent on the deceased at the time of his death, any other dependent who shared the same household, or other persons within the same household, provided the deceased contributed to his/her living conditions and limited to the extent of his/her actual damage.<sup>40</sup> Indirect victims are excluded from participating in criminal proceedings. This is no different for close family members of a deceased person, who cannot participate in the criminal trial.<sup>41</sup>

39. The German position is similar to the Dutch position, though slightly broader in criminal trials. The right to participate as a private accessory prosecutor vests in immediate family members of a deceased victim, but does not extend beyond immediate family members (Section 395(2) Criminal Procedure Code).<sup>42</sup> Under German civil law a circle of possible next of kin can similarly be awarded damages solely for the loss of maintenance and funeral expenses (see § 844 of the German

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<sup>38</sup>

[http://www.aavac.asso.fr/conseils\\_pratiques/association\\_aide\\_juridique/prejudice\\_moral\\_subis\\_en\\_cas\\_de\\_deces\\_p\\_m\\_s\\_c\\_d\\_\\_344.php](http://www.aavac.asso.fr/conseils_pratiques/association_aide_juridique/prejudice_moral_subis_en_cas_de_deces_p_m_s_c_d__344.php).

<sup>39</sup> See Rianka Rijnhout and Jessy M. Emaus, Damages in Wrongful Death Cases in the Light of European Human Rights Law: Towards a Rights-Based Approach to the Law of Damages, 10 Utrecht Law Review 3 (June) 2014, pp. 100-101. See however a proposal for reform: [http://www.internetconsultatie.nl/wetsvoorstel\\_zorg\\_en\\_affectieschade](http://www.internetconsultatie.nl/wetsvoorstel_zorg_en_affectieschade)

<sup>40</sup> *Ibid.*

<sup>41</sup> See article 287 of the Dutch Criminal Code; see however articles 51d; 51f-2 of the Criminal Code, extending certain rights to close family members, such as the right to be informed and review of the casefile, but not the right to participate.

<sup>42</sup> Strafprozeßordnung, StPO) <http://www.iuscomp.org/gla/statutes/StPO.htm> See also L Markus 'The Victim In Criminal Proceedings: A Systematic Portrayal Of Victim Protection Under German Criminal Procedure Law' at p. 33.

Civil Code). But the liability of a wrongdoer is limited to the person whose protected position interest has been wrongfully infringed.<sup>43</sup> Whilst ‘life’ is one of the protected interests mentioned in § 823 I of the German Civil Code, this does not extend to the next of kin because his/her protected interest has not been infringed. Accordingly, bereavement (immaterial) damages are not compensated.<sup>44</sup>

40. In Italy, heirs from a deceased, or other persons with an expectancy of financial maintenance from the deceased are entitled to compensation for the estimated financial loss which they have suffered as a result of his/her wrongful death.<sup>45</sup> Similar positions have been adopted by Denmark, Austria, Portugal and Spain where immaterial damages for the death of a family member are not compensated.<sup>46</sup>
41. Accordingly, it appears that, in most European domestic jurisdictions, only members of the ‘nuclear’ family or dependants can claim compensation, be it for material damages only or immaterial damages as well. In the event that more distant family members can claim compensation, like in France, it is only when they have demonstrated regular contact and an affectionate relationship.
42. The defence agrees with the Trial Chamber(R)’s position that both material and immaterial damage caused by the death of a close family member should be compensated, which is consistent with the Court’s jurisprudence.<sup>47</sup> The defence does not suggest that the more restricted approach taken by multiple domestic jurisdictions be adopted here. But given the lack of agreement on the issue of compensation to family members of a deceased for their immaterial damage, the Defence suggests that only a limited number of close family members (nuclear family members or other family members with a similar relationship) should be entitled to receive such compensation.

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<sup>43</sup> See Rianka Rijnhout and Jessy M. Emaus, Damages in Wrongful Death Cases in the Light of European Human Rights Law: Towards a Rights-Based Approach to the Law of Damages, 10 Utrecht Law Review 3 (June) 2014, pp. 98-104.

<sup>44</sup> *Ibid.*

<sup>45</sup> See Stanislas Kabalira, *supra*, p. 185.

<sup>46</sup> European Commission Green Paper on Compensation to Crime Victims Brussels, 28 September 2001, COM (2001) 536 at para 3.3.4 See also PEOPIL (Pan-European Organisation of Personal Injury Lawyers), *Fatal Accidents and Secondary Victims* (web guide book 2), which reviews European practice concerning secondary victims and the attendant evidential requirements. <http://www.peopil.com/pdf/WebGuideBook2.pdf>.

<sup>47</sup> 15.01.2014 -Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings-ICC-01/04-02/06-211, para. 28.

*Definition of 'Indirect Victim' under International Law*

43. The United Nations ('UN') Basic Principles and Guidelines expressly recognize that the right to participate as an indirect victim on the basis of moral harm is not a principle of law, and notes that States are only required to give effect to this right if the national legislation provides.<sup>48</sup> The 1985 UN Basic Principles have defined indirect victims as including “the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent [victimisation]”.<sup>49</sup> A similar definition of indirect victims has again been adopted in the 2005 UN Basic Principles.<sup>50</sup>
44. The UN Recommendations made by the Panel of Commissioners concerning Individual Claims for Serious Personal Injury or Death (UN Compensation Commission),<sup>51</sup> stipulates that firstly, the definition of family only includes the nuclear family (parent/child, spouses), and excludes claims put forward by other relatives such as brothers or sisters, grandchildren, grandparents, nieces, nephews or uncles and aunts of the deceased,<sup>52</sup> and secondly, that the claimant must adduce simple documentation of both the death of the person and their relationship to this person.<sup>53</sup>
45. The Inter-American Court of Human Rights ('IACHR') has held that the existence of moral damage must in general be proved. This would be facilitated if the applicants establish that they are the direct successor of the deceased.<sup>54</sup> Provided it has been established that the applicants have a parent-child relationship with the deceased, their moral harm can be assumed. In this regard, it noted:

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<sup>48</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, part VIII, Access to Justice (Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

<sup>49</sup> See Principle 2 of the 1985 UN Basic Principles.

<sup>50</sup> See Principle 8 of the 2005 UN Basic Principles.

<sup>51</sup> UN Doc. S/AC.26/1994/1, 26 May 1991.

<sup>52</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, part VIII, Access to Justice (Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, p. 17.

<sup>53</sup> *Ibid*, pp. 39-40.

<sup>54</sup> *Aloeboetoe et al. v. Suriname* Case, Reparations (Art. 63(1) American Convention on Human Rights), Judgment of 10 September 1993 at paras. 75-76.

57. [...] *À titre d'exemple, la Cour interaméricaine considère que les parents sont les victimes indirectes de violations des droits de l'homme subies par leur(s) enfant(s) et que le préjudice psychologique résultant de la mort cruelle de leur enfant peut être présumé du fait du lien de parenté. [...]*<sup>55</sup>

46. In terms of material damage, the IACtHR allows dependents of a deceased to claim compensation for their material damage, provided they meet the following three conditions:<sup>56</sup>

- (1) The payment sought must be based on *payments actually made* by the victim to the claimant, regardless of whether or not they constituted a *legal obligation* to pay support. Such payments cannot be simply a series of sporadic contributions; they must be regular, periodic payments either in cash, in kind, or in services. What is important here is the effectiveness and regularity of the contributions.
- (2) The nature of the relationship between the victim and the claimant should be such that it provides some basis for the assumption that the payments would have continued had the victim not been killed.
- (3) The claimant must have experienced a financial need that was periodically met by the contributions made by the victim.

47. Accordingly, also according to international standards, only close family members and dependants may claim (material and or immaterial) compensation for the wrongful death of a deceased.

#### *Local social and family structures*

48. Given these examples, it is clear that the Trial Chamber(R) went far beyond the norm. The Chamber refers to the social and family structures as they exist in the DRC, and specifically Ituri but was not more specific in what, in its view, these local social and family structures entail, but simply held that the loss of any family member, in the context of the Bogoro attack, should lead to compensation.

<sup>55</sup> Reparation Order, para. 57 [footnotes omitted].

<sup>56</sup> *Ibid*, para. 68.

49. The Trust Fund for Victims ('TFV') has similarly submitted that [...] the local cultural customs should guide the decision on the understanding of family concept, which may be larger than the narrow parent/child relationship.<sup>57</sup> The Defence does not disagree with this submission in principle, but submits that the broader 'parent/child relationship' must be clearly defined and limited to a family relationship which is like a parent/child relationship. Contrary to the Trial Chamber(R)'s definition of a 'parent', this relationship should be tight, and not include all family members.
50. Social and family structures in Ituri may be different from those in Europe. But this difference has various aspects – not all justifying a wider notion of a 'parent'. In *Lubanga*, the Chamber and Appeals Chamber took into account the 'widely accepted presumption that an individual is succeeded by his/ her spouse and children.'<sup>58</sup> As has been noted above, it is also possible that a child in reality is raised by an aunt or grandparent and not an actual biological parent. The Defence accepts that, if that is the case, such a family member may be included in the definition of a 'parent', provided sufficient evidence is provided to prove the proximity between the family member and the deceased.<sup>59</sup> In other words, the parameters of such parental relationship with a non-parent should be clearly defined and its existence established on the basis of sufficient evidence.
51. The Defence agrees with the ECCC approach, as adopted in the Case against *Kaing Guek Eav*.<sup>60</sup>

Although the immediate family members of a victim fall within the scope of Internal Rule 23(2) (b), direct harm may be more difficult to substantiate in relation to more attenuated familial relationships. The Chamber nevertheless considers that harm alleged by members of a victim's extended family may, in exceptional circumstances, amount to a direct and demonstrable consequence of the crime where the applicants are able to prove both the alleged kinship and the existence of circumstances giving rise to special bonds of affection or dependence on the deceased.

<sup>57</sup> ICC-01/04-01/07-3548, para. 129.

<sup>58</sup> The 2012 Decision on Principles and Procedures, para.195 and ICC, *Prosecutor v Lubanga*, Appeals Chamber, Order for reparation (amended), ICC-01/04-01/06-3129- AnxA 03-03-2015 1/20 NM A A2 A3, para.7; see also LACtHR, *Aloeboetoe et al. v Suriname*, Reparations and Costs, Judgment of 10 September 1993, para.62.

<sup>59</sup> See above 07.02.2014 - Second Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings - ICC-01/04-02/06-251, paras. 24, 25. See also 07.02.2014 - Second Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings - ICC-01/04-02/06-251, paras. 23, 25.

<sup>60</sup> ECCC, Case KAING Guek Eav *alias* Duch, Appeal Judgement of 3rd February 2012, paras. 418, 447. See also Stanislas Kabalira, *supra*, pp. 184-185.

52. The Trial Chamber(R) has gone beyond this and requires merely that there is a family relationship, no matter how remote. It does not require any evidence of the existence of circumstances giving rise to special bonds of affection or dependence on the deceased. The mere fact of being family related is sufficient according to the Trial Chamber(R)'s definition of a 'parent'. The Trial Chamber(R) has failed to impose any 'dependency' or shared household requirement. The result of this is that any remote family member could receive reparation for the loss of a family member even if they never lived together, or had any contact at all. In Ituri (and other African regions) persons tend to have significantly larger extended families than in Europe. A very large number of persons could claim reparations for the death of a remote family member, unless appropriate control mechanisms are imposed, without which the overall amount awarded would significantly exceed that in any other jurisdiction.

53. This can have a disproportionate effect, especially because the Trial Chamber(R) did not limit itself to the deaths established beyond reasonable doubt.<sup>61</sup> Indeed, considering that the conviction judgment has determined that the crime of murder was committed in the course of the Bogoro attack, the Trial Chamber (R) has recognized the moral harm of 201 applicants for the killing of a close relative and of 284 applicants for the killing of a remote relative,<sup>62</sup> while the Trial Chamber, in its previous composition, established the killing of only 60 persons during the attack, of which 30 were attributable to the Ngiti combatants (see further ground 4).<sup>63</sup>

54. In light of the above, the Defence submits that the definition of a 'parent' should not extend beyond close family members, including only the actual parents, and other family members, provided a dependency or parent-child-like relationship with the deceased has been established. The Chamber erred in extending the concept of a 'parent' to any remote family member, irrespective of any shown proximity to the deceased.

*Definition must be more specific*

<sup>61</sup> Sentencing Decision, para. 47; Article 74 Judgment, para. 869.

<sup>62</sup> Reparation Order, para. 174.

<sup>63</sup> ICC-01/04-01/07-3436-tENG, para. 838.

55. The Appeals Chamber has stressed the importance of the principle, as codified in Rule 97(3) of the Rules of Procedure and Evidence, that, in awarding reparations, “the Court shall respect the rights of victims and the convicted person”. This means, *inter alia*, that the reparation order must clearly inform the convicted person and the victims of the parameters within which damages may be recovered. The right to be adequately informed is a general principle of fair proceedings, which must also be respected in reparation proceedings. This is the only way to guarantee a meaningful appeal against a reparation order pursuant to article 82(4) of the Rome Statute.<sup>64</sup> In compliance with this fairness principle, the reparation order “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”.<sup>65</sup> Indeed, “[g]iven the fact that case-based reparations are ordered against a convicted person, fairness of a trial will require the Court to determine which individuals qualify as victims of a convicted person”.<sup>66</sup>

56. The defence submits that the Trial Chamber’s broad and open-ended definition of a ‘parent’ is insufficiently specific to comply with these principles. It is, for instance, unclear whether only children who lost a close or remote ‘parent’ may claim compensation; or whether a parent may similarly claim compensation for the loss of a close or remote child. And what if the indirect victim and victim are of the same generation - e.g. sisters, brothers, cousins – could they claim psychological damages for the victim’s death? It is also unclear whether there is any limit to ‘remote’. Does it, for instance, include great grandchildren, half-cousins and nieces, uncles and aunts in the third or fourth degree? With such vagueness many questions about the scope of the Chamber’s definition of a ‘parent’ remain unanswered and indirect victims eligible must be clearly defined.

<sup>64</sup> ICC-01/04-01/06-3129, 3 March 2015, paras. 181-184.

<sup>65</sup> ICC-01/04-01/06-3129, 3 March 2015, para. 1.

<sup>66</sup> See Stanislas Kabalira, *supra*, p. 181.

***Ground 3: The Trial Chamber erred in ruling *ultra petita* by allocating compensation exceeding several applicants' claims.***

57. The defence submits that the Trial Chamber (R) erred in ruling *ultra petita* by allocating compensation which exceeded the claims of the applicants. The defence has identified at least three occasions where the Trial Chamber ruled *ultra petita*.
58. First, the defence submits that the Trial Chamber erred in allocating a minimum amount to all the applicants who claimed the loss of cattle and demonstrated the loss of a house, even if the applicants alleged a loss of cattle whose value was inferior to the minimum defined by the Trial Chamber:

*101. S'agissant de l'étendue des préjudices allégués, la Chambre n'est pas en mesure de déterminer, dans la plupart des cas, le type et la quantité de bétail pillé, la superficie des champs détruits ou le type et la quantité de récoltes détruites ou pillées, faute d'éléments de preuve précis. Par conséquent, la Chambre considère que ces préjudices sont, en règle générale, équivalents à une consommation personnelle. La Chambre décide que la consommation personnelle à l'égard du bétail équivaut à la valeur d'un cheptel composé d'une vache, de deux chèvres et de trois poules et la consommation personnelle à l'égard des champs ou des récoltes équivaut à la valeur de la vente de dix piquets des cultures les plus fréquentes à Bogoro.*

*[...]*

*105. La Chambre note que certaines déclarations de possession de bétail présentées indiquent une quantité de bétail inférieure à celle définie pour la consommation personnelle. Dans les circonstances spécifiques de cette affaire, la Chambre considère qu'il n'est pas justifié de procéder à une évaluation inférieure à celle de la consommation personnelle telle qu'établie dans cette Section. Cela mènerait à une situation injuste dans laquelle la présentation d'un élément de preuve précis, qui indique le type et la quantité de bétail, pourrait mener à une évaluation inférieure à celle résultant d'un élément de preuve imprécis, qui ne mentionne pas le type ou la quantité de bétail. Dès lors, la Chambre estime que, si la présomption du pillage de bétail pour une consommation personnelle est applicable au Demandeur qui n'a pas présenté de déclaration de possession de bétail, elle doit a fortiori être applicable au Demandeur qui présente une déclaration précisant la quantité de bétail dont il était le propriétaire, mais qui est inférieure à la consommation personnelle, ou au Demandeur qui produit une déclaration n'indiquant pas le type ou la quantité de bétail qu'il possédait. Par conséquent, pour des raisons d'équité, la Chambre évalue le préjudice subi par ces derniers comme équivalent à une consommation personnelle.<sup>67</sup>*

59. Second, the defence maintains that the Trial Chamber erred in allocating compensation for a specific moral harm "*lié au vécu de l'attaque de Bogoro*" to all

<sup>67</sup> Reparation Order, paras 101-105 [footnotes omitted].

the applicants having demonstrated moral or material harm, even if some of them did not claim any such particular harm or were not present during the attack:

*129. À la lumière de ces constatations et de ces considérations, la Chambre a décidé de reconnaître un préjudice psychologique lié au vécu de l'attaque de Bogoro au bénéfice de tous les Demandeurs, même s'ils ne l'ont pas explicitement allégué, dans les cas où un autre préjudice subi lors de l'Attaque a été démontré. La Chambre estime que cette approche est justifiée par le fait que chaque Demandeur qui a établi avoir été affecté par l'attaque de Bogoro de manière matérielle ou physique peut être présumé avoir subi des répercussions sur sa santé mentale.<sup>68</sup>*

60. For instance, the Trial Chamber decided that “*le préjudice psychologique général lié au vécu de l'Attaque allégué par le Demandeur [REDACTED] est présumé établi*”<sup>69</sup> while this applicant explicitly stated in his reparation form that he had left Bogoro in [REDACTED] and that he had come back only in [REDACTED], and therefore was not present during the attack of February 2003.<sup>70</sup>

61. The defence submits that the moral harm “*lié au vécu de l'attaque de Bogoro*” is linked to the presence of the applicants *themselves during* the attack and that compensation for such harm can be awarded only if the applicants were present during the attack and have claimed such moral harm. The Trial Chamber (R) itself initially connected this type of harm with the victim being present during the Bogoro attack:

*125. La Chambre considère que le fait d'avoir été présent à Bogoro le 24 février 2003 lors de l'Attaque et d'avoir assisté aux ou fui les massacres et les atrocités perpétrés est suffisant pour avoir entraîné des conséquences majeures sur la santé mentale des personnes présentes ce jour-là.*

62. Third, While the Legal Representative of victims asked for symbolic reparation of \$1 for each applicant the Trial Chamber decided to allocate \$250 to each applicant:<sup>71</sup>

*298. La Chambre rappelle la proposition du Représentant légal et de la Défense d'octroyer un euro symbolique à chaque victime de M. Katanga. [...]*

<sup>68</sup> Reparation Order, paras 125-129.

<sup>69</sup> ICC-01/04-01/07-3728-Conf-Exp-AnxII, *Analyse individuelle des demandes en réparation*, [REDACTED].

<sup>70</sup> [REDACTED].

<sup>71</sup> ICC-01/04-01/07-3720, *Propositions des victimes sur des modalités de réparation dans la présente affaire*, paras 80-82.

300. Dans cette optique, la Chambre considère qu'une indemnisation sous la forme d'un montant symbolique de 250 USD par victime que la Chambre a reconnue se révèle approprié. La Chambre souligne le fait que ce montant symbolique ne vise pas à indemniser les préjudices dans leur intégralité. Cependant, la Chambre estime que ce montant pourrait assister à soulager les préjudices subis par les victimes. En effet, ce montant pourrait contribuer à l'autonomisation économique des victimes, en leur permettant par exemple d'acheter des outils ou du bétail, ou de monter une petite entreprise. Les victimes pourront ainsi prendre leurs propres décisions sur la base de leurs besoins actuels<sup>72</sup>

63. In the three previous examples, the Trial Chamber (R) allocated compensation to victims who had not asked for it or allocated an amount exceeding their claims. By doing so, it ruled *ultra petita*. The defence submits that an *ultra petita* decision is incorrect in law<sup>73</sup> and is typically and successfully appealed on that ground. This rule is significant in international law; it was stated in the *Asylum* case that it was the duty of the International Court of Justice:

"... not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding issues not included in those submissions."<sup>74</sup>

64. In 2002, Prager Dietmar wrote in *Law & Practice of International Courts and Tribunals*:

"The *non ultra petita* rule is an emanation of the general principle that an international tribunal's powers are limited to what is conferred upon it by the parties. The Court is accordingly confined to acting on and cannot go beyond the submissions of the parties themselves."<sup>75</sup>

65. In 'The right to reparations under the Rome Statute of the International Criminal Court (ICC)', S Kabalira opined :

As for the scope and the nature of reparations, there is a question as to whether the Court can order the types of reparations (restitution and/or compensation and/or rehabilitation) more than or different from that requested by a victim. An answer to this question requires to consider the rule *non ultra petita* which should be followed by the Court. According to this rule, a victim cannot receive more than he or she has

<sup>72</sup> Reparation Order, paras 298-300 [footnotes omitted].

<sup>73</sup> See for instance *Indemnisation des dommages corporels - Recueil méthodologique commun*, March 2013, p. 8, available @ [http://www.avocat-perigueux-laboetie.fr/sites/avocat-perigueux-laboetie.fr/IMG/pdf/referentiel\\_ca\\_indemnisation.pdf](http://www.avocat-perigueux-laboetie.fr/sites/avocat-perigueux-laboetie.fr/IMG/pdf/referentiel_ca_indemnisation.pdf) : « *Le juge doit se prononcer dans la limite des conclusions dont il est saisi. Il ne peut allouer à la victime une somme inférieure au montant admis par le responsable (Cass. Crim., 30 septembre 2003, Bull. 2003, n° 173, pourvoi n° 03-80.039). Il ne peut non plus allouer davantage que ce qui est demandé.* »

<sup>74</sup> *Asylum Case*, [1950] I.C.J. 299.

<sup>75</sup> Prager, D.W., 2002. Procedural Developments at the International Court of Justice. *The Law and Practice of International Courts and Tribunals*, Vol. I, p.414.

requested. This rule ‘is an emanation of the general principle that an international tribunal’s powers are limited to what is conferred upon it by the parties’ and accordingly, the court is confined to acting on the submissions of the parties themselves’ and cannot go beyond them.<sup>76</sup> Neither the Statute nor the RPE refers to the rule. International courts and tribunals, however, quite frequently apply, either explicitly or implicitly the principle. For instance in *Corfu Channel* case, before the ICJ, the United Kingdom claimed £700,087 for the replacement value of the destroyer *Saumarez* (a ship) while the Court’s experts assessed the true replacement cost at a slightly higher figure (£716,780). The Court awarded the lower figure, stating that ‘[i]t cannot award more than the amount claimed in the submissions of the United Kingdom Government’.<sup>77</sup> In this regard, although the ICJ did not explicitly refer to the principle *non ultra petita*, it applied it implicitly. Rule 97(3) of the RPE entitled *Assessment of reparations* provides that ‘[i]n all cases, the Court shall respect the rights of victims and the convicted person’.

Therefore, for fairness, the Court cannot order more types of reparations or awards for reparations than that requested by a victim, particularly in case of individual awards, without violating the right of the convicted person.<sup>78</sup>

66. For the reasons above, the defence requests the Appeals Chamber to determine that a Trial Chamber cannot rule *ultra petita* and to reverse the Reparation Order in respect of each of the three instances identified above.

***Ground 4: The Trial Chamber erred in issuing an order for reparations of 1,000,000 USD against Mr Germain Katanga because it is not proportionate to, and does not fairly reflect the part played by the accused in the crimes.***

#### *Objectives of Reparations*

67. The ASP Resolution on Reparations, which was adopted by the Assembly of States Parties (‘ASP’) in December 2011, ‘[s]tresses that liability for reparations is

<sup>76</sup> Prager, D.W., 2002. Procedural Developments at the International Court of Justice. *The Law and Practice of International Courts and Tribunals*, Vol. 1, p.414.

<sup>77</sup> ICJ., *Corfu Channel Case* (Assessment of the amount of compensation due from the people’s Republic of Albania to the United Kingdom of Great Britain and Northern of Ireland), p.249. By contrast, the Court awarded the full claim for repairs for the second damaged ship, the *Volage*, notwithstanding that the experts’ assessment was slightly lower (*Idem*).

<sup>78</sup> Stanislas KABALIRA, *The right to reparations under the Rome Statute of the International Criminal Court (ICC)*, Wolf Legal Publisher, 2016, p. 247.

exclusively based on the individual criminal responsibility of a convicted person [...]’.<sup>79</sup>

68. The Appeals Chamber in *Lubanga* held that “the scope of a convicted person’s liability for reparations may differ depending on, for example, the mode of individual criminal responsibility established with respect to that person and on the specific elements of that responsibility. Accordingly, the Appeals Chamber finds it necessary to be guided by a principle not previously articulated by the Trial Chamber, namely that: A convicted person’s liability for reparations must be proportionate to the harm caused and, *inter alia*, his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case.”<sup>80</sup>

69. In the *Lubanga* case, the Court has determined that under the ICC regime, reparations enable the Court to ensure that offenders account for their acts and that they repair the harm they have caused.<sup>81</sup> However, only compensatory damages and not punitive damages should be accorded.<sup>82</sup>

70. Indeed, the ICC jurisprudence has determined that reparations before the ICC should not have a punitive character, but only a remedial character. As expressed by one commentator:<sup>83</sup>

[T]he role of reparations under the ICC regime should primarily be to alleviate the consequences of the crimes, and to redress victims. In this context, reparations should exclude the punitive element. ... In the context of criminal justice, the purpose of reparations by the offender is ‘to remove the burden which the crime has unfairly placed upon the victim.’ The objective of reparation is not to make the criminal to ‘pay back’ for his wrongdoing, but to restore the victim to his baseline positions.

71. The section on reparations is included in Part 6 of the Rome Statute, entitled ‘The Trial’, and not in Part 7 ‘Penalties’. Reparations are also not mentioned in article 77,

<sup>79</sup> *Prosecutor v Lubanga*, Appeals Chamber, Order for reparation (amended), ICC-01/04-01/06-3129-03-03-2015, para. 87. *See also* Order for Reparations (Amended), ICC-01/04-01/06-3129-AnxA 03-03-2015, para. 20.

<sup>80</sup> *Prosecutor v Lubanga*, Appeals Chamber, Order for reparation (amended), ICC-01/04-01/06-3129-03-03-2015, para. 118.

<sup>81</sup> Order for Reparations (Amended), ICC-01/04-01/06-3129-AnxA 03-03-2015, para. 2.

<sup>82</sup> McCarthy, C., 2009. *Reparations under the Rome Statute of the International Criminal Court and Reparative Justice Theory*. The International Journal of Transnational Justice, Vol. 3, p. 257. *See also* IACtHR, *Velasquez Rodriguez v Honduras* [Judgment of 21st July 1989] Compensatory Damages (ART. 63 (1) American convention on human rights), para. 38.

<sup>83</sup> *See* Stanislas Kabalira, *supra*, pp. 90-91.

which lists the applicable penalties. This indicates that the drafters of the Rome Statute did not intend reparations to have a punitive character, but rather to repair the harm suffered by the victims.<sup>84</sup> This is in line with domestic justice where a civil action launched by a victim is meant to repair the situation and put the victim back where he would have been, had he/she not become a victim of a crime.<sup>85</sup> This is also the traditional position under international law on compensation.<sup>86</sup>

72. The convicted person is punished separately for his involvement in crimes under the Rome Statute. Rule 145(1) of the ICC Rules of Procedure and Evidence specifies that the determination of the sentence has to take into consideration the gravity of the crime committed and *give consideration, inter alia, to the extent of the damage caused, in particular, the harm caused to the victims and their families*. Rule 145(2)(b) goes on considering the commission of the crime ‘where the victim is particularly defenceless’ and the commission of the crime ‘with particular cruelty or where there are multiple victims’ as aggravating circumstances the Court should consider in its determination of the sentence. Reparations should therefore not serve as a double punishment which would be both unnecessary and inappropriate.<sup>87</sup>

73. The Trial Chamber accepted and adopted these principles.<sup>88</sup> However, it failed to do justice to those principles in calculating the amount which must, at least theoretically, be paid by the Appellant. Whether theoretical or not, the basis for assessment of his liability must be the same.

#### *Mr Katanga*

74. The Trial Chamber(R) ordered the Appellant to pay \$1,000,000 reparations. The Chamber considers this amount to be proportionate to his role and level of

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<sup>84</sup> In reality, the exclusion of the exemplary element from an award for reparations under the Article 75 was deliberate. Article 73(2) of the 1998 Statute of the ICC stated that ‘[An award by way of compensation may comprise: (i) an exemplary element; (ii) a compensatory element; (iii) both]’. Such a provision was eventually excluded from the ICC Statute; this reinforces the argument that reparations under the ICC Statute should not comprise the exemplary element (*ibid*, p. 91).

<sup>85</sup> C. Howard, *Compensation in French Criminal Procedure*, TOC, Vol 21, Issue 4, July 1958, p. 388.

<sup>86</sup> Barker, J., 2010. The different forms of reparation: compensation. In: J. Crawford A. Pellet and S. Olleson, eds., 2010. *The Law of International Responsibility*. Oxford (US): Oxford University Press, p. 605, 91.

<sup>87</sup> See Stanislas Kabalira, *supra*, pp. 90-93.

<sup>88</sup> ICC-01/04-01/07, 24 mars 2017, par. 252.

involvement in the Bogoro attack. The defence appreciates the difficulty in quantifying damages for human rights violations.<sup>89</sup> However, the defence submits that this amount is excessive in light of the Appellant's circumstances, responsibilities and culpability.

75. In determining this amount, the Trial Chamber(R) conceded that Mr Katanga was acquitted under article 25(3)(a) because of insufficient evidence of control over the militia involved and that not all crimes could be attributed to that part of the Ngiti militia of which he was part.<sup>90</sup> Nonetheless, it found many aggravating factors. It noted Mr Katanga's alliances with the authorities in Beni and his role as an interlocutory acting on behalf of the militia and facilitator in establishing good communication channels with the militia, as well as his involvement in designing the military strategy of the attack. The Chamber also attached importance to Mr Katanga's role in the storage and distribution of weapons. Finally, it noted Trial Chamber II's findings relating to: the objective of the Bogoro attack as the elimination of the Hema civilian population; Mr Katanga's intentional contribution thereto with plain knowledge of the intention of the attackers; and the particular cruelty and the discriminatory manner in which the crimes were committed, of which the consequences are still noticeable today.<sup>91</sup>

76. From this analysis, it appears that the Trial Chamber(R) considered many circumstances as aggravating, while the same circumstances were considered and found not to be aggravating by Trial Chamber II.<sup>92</sup> By contrast, Trial Chamber II found a number mitigating circumstances,<sup>93</sup> that is:

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<sup>89</sup> See also Susanna Quail, *What Are Our Rights Worth? Quantifying Damages for Human Rights Violations* (The Continuing Legal Education Society of British Columbia, Human Rights Conference, November 2015, paper 22).

<sup>90</sup> ICC-01/04-01/07, 24 mars 2017, paras. 261-262.

<sup>91</sup> ICC-01/04-01/07, 24 mars 2017, paras. 258-260.

<sup>92</sup> Decision on Sentence pursuant to article 76 of the Statute, ICC-01/04-01/07-3484-tENG 22-09-2015, paras. 70-75.

<sup>93</sup> Decision on Sentence pursuant to article 76 of the Statute, ICC-01/04-01/07-3484-tENG 22-09-2015, par. 144.

- Germain Katanga's young age, the fact that he is now the father of six children, and his kindly and protective disposition towards the civilians in his community;<sup>94</sup>
- Mr Katanga's active participation in the demobilisation process and the positive role he played, specifically in the process of disarming and demobilising child soldiers;<sup>95</sup>
- Mr Katanga's willingness to cooperate by providing a lengthy testimony and his readiness to answer the questions from the parties and the bench.<sup>96</sup>

77. In reducing Mr Katanga's sentence, a panel of three judges of the Appeals Chamber took into account the following factors:

- Mr Katanga's early and continuing willingness to cooperate with the Court's investigations and prosecutions.<sup>97</sup>
- Mr Katanga's genuine dissociation from his crimes, evidenced by his decision last year to withdraw his appeal against the Conviction Decision, coupled with his acceptance of the Trial Chamber's findings on his role and conduct in the Bogoro crimes and his expression of regret to the victims of Bogoro, attached to the notice of withdrawal, as well as his video recording containing Mr Katanga's filmed apology that was made available to various communities in the DRC.<sup>98</sup>
- The prospect for Mr Katanga's resocialization and successful resettlement in the DRC<sup>99</sup> (unfortunately frustrated by the DRC authorities for keeping him in prison instead).
- Mr Katanga's new role of primary provider for the families of both his deceased father and brother, including his step-mother and deceased brother's three

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<sup>94</sup> Decision on Sentence pursuant to article 76 of the Statute, ICC-01/04-01/07-3484-tENG 22-09-2015, par. 87.

<sup>95</sup> *Ibid*, par. 115.

<sup>96</sup> *Ibid*, par. 128.

<sup>97</sup> Decision on the review concerning reduction of sentence of Mr Germain Katanga, ICC-01/04-01/07-3615 13-11-2015, par. 35.

<sup>98</sup> *Ibid*, paras. 50-51.

<sup>99</sup> *Ibid*, par. 61.

children, amounting to a ‘clear and significant’ change in his individual circumstances.<sup>100</sup>

78. These factors should be given weight at the reparation stage. Mr Katanga received a sentence of twelve years and was later released after serving two-thirds of this sentence on the basis of these mitigating factors. This is a clear indication that Trial Chamber II, which determined the facts after many years of trial and having had the benefit of hearing directly from Mr. Katanga, considered his moral culpability to be much reduced. The Trial Chamber(R) should have taken these considerations more into account and not given such undue weight to aggravating circumstances.

*Mr Katanga’s level of involvement*

79. The Trial Chamber(R) erred by considering portions from the judgment and sentencing decision out of context and imputing a greater moral culpability than did the sentencing Chamber. The Trial Chamber was re-constituted and none of the judges of Trial Chamber (R) participated in the trial process that established the facts and scope of Mr Katanga’s culpability. In the circumstances of the case this is capable of being a marked disadvantage and prejudicial to the convicted person when assessing culpability and the appropriate level for reparations. The defence submits that, in fairness to the convicted person, any doubts on this aspect should be resolved in his favour. The Chamber failed to resolve any doubt in Mr Katanga’s favour. On the contrary, it failed to give due consideration to the following aspects:

80. The Trial Chamber (R) failed to give sufficient weight to the fact that Mr Katanga was initially charged under article 25(3)(a) but, after the Trial Chamber invoked Regulation 55, convicted on the basis of article 25(3)(d). This, in all the circumstances, significantly reduces his moral liability for the harm done and ought to have been taken fully into account. Trial Chamber II established Mr Katanga’s liability on his awareness, not his intent, that the crimes be committed. The attack was an attack on one day in the context of a prolonged war. The Trial Chamber established that of those killed, only 30 could be said to have been killed by Ngiti combatants.<sup>101</sup>

<sup>100</sup> *Ibid*, paras. 109-110.

<sup>101</sup> ICC-01/04-01/07-3436-tENG, para. 838.

Moreover, he did not order, command or lead the attack. He played a subsidiary background role and was neither present at the attack, nor led or supervised those who were present.<sup>102</sup> Mr Katanga had no control over the perpetrators or the commission of the crimes, nor was he found to have participated directly in their commission. The finding that the crimes were committed in a particularly cruel way by those present at the attack should have no bearing on Mr Katanga's personal culpability. It has not been established that the plan itself was to apply particular cruelty.

### *Proportionate Liability*

81. The defence notes that whilst the Trial Chamber (R) acknowledges that national principles, such as the common law principle of joint and several liability, are not applicable in cases before the ICC, it nonetheless fails to take fully into account the fact that others, more culpable than Mr Katanga, were responsible for the crimes committed. Many others participated and made greater contributions to the crimes committed at Bogoro. A large portion of these other participants physically perpetrated the crimes. Others had a superior position in the overall hierarchy that planned the attack and provided the considerable weaponry. The fact that others more culpable have not been brought to trial is largely due to the manner the Prosecutor investigated the situation and the choices made in that regard. There is no reasonable prospect of anyone else being prosecuted for the crimes, either before the ICC or in the DRC.<sup>103</sup> Mr Katanga cannot be held disproportionately accountable for the crimes on the basis that he is the sole person convicted of offences resulting from the attack. In largely disregarding the role of others, the Chamber effectively applied the joint and several liability principle, despite the fact that he played a subsidiary role.<sup>104</sup> The Chamber, by ordering he pay \$1,000,000, assigned to him too much responsibility for the crimes. Given the facts and circumstances of the case this is manifestly unfair.<sup>105</sup>

### *Mr Katanga's inability to pay*

<sup>102</sup> Observations de la Défense du 14 mai 2015, ICC-01/04-01/07-3549, par. 67-68. *See also* Article 74 Judgment, para. 752.

<sup>103</sup> *See also* Observations de la Défense du 14 mai 2015, ICC-01/04-01/07-3549, para. 86.

<sup>104</sup> *Ibid*, para. 85.

<sup>105</sup> Observations de la Défense du 14 mai 2015, ICC-01/04-01/07-3549, para. 69.

82. Finally, while the Appeals Chamber found that the indigence of an accused should not preclude the Trial Chamber from ordering reparations, the fact of indigence should not be ignored altogether.

83. Mr Katanga has neither the means nor any prospect of having sufficient means to pay. Any award should be careful not to be punitive. Aside from no opportunity to set aside such order, which will hang over him for the rest of his life, such an immense award will be perceived as reflecting his culpability in the crimes. It is only fair that it should be carefully measured to do so.

84. The defence reiterates its submissions made earlier in this regard:<sup>106</sup>

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

The advantages of an order that reflects Mr Katanga's means and capacity to pay is that the Court will be perceived to be acting in a concrete, realistic manner, rather than in a theoretical manner divorced from the realities of the situation. It will also mean that the convicted person is not burdened with an order he can never hope to meet. It will help bring finality to his situation and enable him better to re-insert himself in society when released. It is to be noted that domestic criminal justice systems do not impose compensation orders where there is no reasonable prospect of it being met, and where it may even encourage future criminality to do so.

85. This is not inconsistent with the Appeals Chamber's decision, because it does not have an adverse impact on the victims. The proposed approach would merely alter the proportionate relationship between Mr Katanga's share of the reparation burden on the one hand, and the share of the TFV, on the other and better reflect the appellants culpability.

86. The Trial Chamber(R) erred in failing to give full weight to the personal circumstances and reduced role Mr Katanga played in the commission of the crimes.

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<sup>106</sup> Observations de la Défense du 14 mai 2015, ICC-01/04-01/07-3549, paras. 72-73.

These errors have resulted in the making of an unreasonably high and disproportionate reparation award against the Appellant.

## CONCLUSION

87. For the foregoing reasons, the defence respectfully requests the Appeals Chamber to reverse in part the reparation order in order:

- That the award in respect of loss of cattle and crops referred to above be quashed;
- That compensation for the loss of a relative be limited to close relatives;
- To determine that a Trial Chamber cannot rule *ultra petita* and to reverse the Reparation Order in respect of each of the three instances identified above.
- That the financial liability of the accused be reduced.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D Hooper', with a long horizontal flourish extending to the right.

David Hooper Q.C.

Dated this 29 June 2017,  
London.