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No.: **ICC-01/04-01/07**
Date: **28 August 2017**

THE APPEALS CHAMBER

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

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

Public

Consolidated Response to the Common Legal Representative's and the Defence's Documents in Support of the Appeal against Trial Chamber II's "Ordonnance de réparation en vertu de l'article 75 du Statut"

Source: **Office of Public Counsel for Victims**

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

The Office of the Prosecutor

Counsel for the Defence
Mr David Hooper
Ms Caroline Buisman

Legal Representatives of the Victims
Mr Fidel Nsita Luvengika
Ms Paolina Massidda

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims
Ms Paolina Massidda
Mr Orchlon Narantsetseg
Mr Alexis Larivière

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. INTRODUCTION

1. The Principal Counsel of the Office of Public Counsel for Victims - acting as Legal Representative of a number of victims (the "Legal Representative")[1] submits her consolidated response to the Documents in Support of the Appeal filed by the Common Legal Representative and the Defence against the Order for Reparations and its Annex II (the "Impugned Decision")[2] issued by Trial Chamber II (the "Chamber").

2. The Legal Representative supports in whole both grounds of appeal raised by the Common Legal Representative and agrees that said grounds show that the Chamber committed errors of law and fact in the Impugned Decision. Moreover, the Legal Representative submits that the absence of sufficient reasoning for the rejection of reparations claims based on transgenerational harm also affects *"the fairness or reliability of the proceedings or decision"* under article 81(1)(b)(iv) of the Rome Statute.

3. The Legal Representative opposes in whole the four grounds of appeal raised by the Defence and submits that none of said grounds shows that the Chamber committed a legal or factual error materially affecting the validity of the Impugned Decision. Consequently, the relief sought by the Defence is opposed in whole and the appeal should be dismissed in its entirety.

[1] See the "Décision relative à la requête du Représentant légal commun des victimes du 2 mars 2017" (Trial Chamber II), No. ICC-01/04-01/07-3727, 15 March 2017.
[2] See the "Ordonnance de réparation en vertu de l'article 75 du Statut" and its Confidential *Ex parte* Annex II (Trial Chamber II)", No. ICC-01/04-01/07-3728+Anxs, 24 March 2017 (the "Impugned Decision").

II. PROCEDURAL HISTORY

4. On 7 March 2014, the Chamber, in its previous composition issued, by majority, the "Judgment pursuant to article 74 of the Statute" (the "Judgement").[3] On 9 April 2014, the Prosecution and the Defence filed their respective notices of appeal against the Judgement.[4] On 23 May 2014, the Chamber, in its previous composition, issued, by majority, its decision on the sentence pursuant to article 76 of the Rome Statute.[5] On 25 June 2014, the Prosecution and the Defence discontinued their appeals against the Judgement.[6]

5. On 24 March 2017, the Chamber issued the Impugned Decision.[7] On 24 April 2017, the Common Legal Representative filed his notice of appeal against the Impugned Decision.[8] On 25 April 2017, the Legal Representative and the Defence filed their notices of appeal against the Impugned Decision.[9] On 27 June 2017, the

[3] See the "Judgment pursuant to article 74 of the Statute" (Trial Chamber II), No. ICC-01/04-01/07-3436, 7 March 2014 (the "Judgement"), and the "Minority Opinion of Judge Christine Van den Wyngaert", No. ICC-01/04-01/07-3436-Anx1.

[4] See the "Prosecution's Appeal against Trial Chamber II's 'Jugement rendu en application de l'article 74 du Statut'", No. ICC-01/04-01/07-3462 A2, 9 April 2014 and "Defence Notice of Appeal against the decision of conviction 'Jugement rendu en application de l'article 74 du Statut' rendered by Trial Chamber II, 7 March 2014", No. ICC-01/04-01/07-3459 A, 9 April 2014.

[5] See the "Decision on Sentence pursuant to article 76 of the Statute" (Trial Chamber II), No. ICC-01/04-01/07-3484-tENG, 23 May 2014, and the "Dissenting opinion of Judge Christine Van den Wyngaert", No. ICC-01/04-01/07-3484-Anx1, 23 May 2014.

[6] See the "Notice of Discontinuance of the Prosecution's Appeal against the Article 74 Judgment of Conviction of Trial Chamber II dated 7 March 2014 in relation to Germain Katanga", No. ICC-01/04-01/07-3498 A2, 25 June 2014 and the "Defence Notice of Discontinuance of Appeal against the 'Jugement rendu en application de l'article 74 du Statut' rendered by Trial Chamber II on 7 April 2014", No. ICC-01/04-01/07-3497 A, 25 June 2014.

[7] See the Impugned Decision, *supra* note 2.

[8] See the "Acte d'appel relatif à l'Ordonnance de réparation en vertu de l'article 75 du Statut et son Annexe II", No. ICC-01/04-01/07-3737 A3, 24 April 2017.

[9] See the "Notice of Appeal against the Reparations Order and its Annex II issued in accordance with article 75 of the Statute on 24 March 2017", No. ICC-01/04-01/07-3739 A5, 25 April 2017 and the "Defence Notice of Appeal against the Ordonnance de réparation en vertu de l'article 75 du Statut", No. ICC-01/04-01/07-3738 A4, 25 April 2017.

Common Legal Representative[10], the Defence[11] and the Legal Representative[12] filed their respective documents in support of the appeals.

6. On 7 August 2017, the Appeals Chamber: (i) instructed the Trust Fund for Victims to indicate whether it seeks to submit observations on the appeals and on which particular issue; and (ii) ordered that any request for leave to submit observations on the appeals under rule 103 of the Rules of Procedure and Evidence (the "Rules") be filed by 25 August 2017.[13] Accordingly, on 25 August 2017, the Trust Fund for Victims filed its Request for leave to file observations.[14]

7. Having noticed the public redacted version of the Defence's Document in Support of the Appeal and considering that this submission does not contain information which should remain confidential, the Legal Representative files the present submission as public.

III. LEGAL STANDARD ON APPEAL AGAINST REPARATIONS ORDER

8. Before arguing on each ground of appeal, the Legal Representative preliminarily recalls that the Appeals Chamber, in addressing the legal standards for appeal under articles 81 and 82 of the Rome Statute, which are the same for reparations orders,[15] held that:

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[10] See the "Document déposé à l'appui de l'appel relatif à l'Ordonnance de réparation en vertu de l'article 75 du Statut et son Annexe II", No. ICC-01/04-01/07-3745 A3, 27 June 2017 (the "Common Legal Representative's Document in Support of the Appeal").

[11] See the "Defence Document in Support of Appeal against the Reparations Order", No. ICC-01/04-01/07-3747-Conf-Exp A4, 27 June 2017 (the "Defence's Document in Support of the Appeal"). A public redacted version was filed on 29 June 2017, see ICC-01/04-01/07-3747-Red A4.

[12] See the "Document in Support of the Appeal against Trial Chamber II's 'Ordonnance de réparation en vertu de l'article 75 du Statut'", No. ICC-01/04-01/07-3746-Conf A5, 27 June 2017. A public redacted version was filed on 28 June 2017, see No. ICC-01/04-01/07-3746-Red A5.

[13] See the "Directions on the conduct of the appeal proceedings" (Appeals Chamber), No. ICC-01/04-01/07-3752 A3 A4 A5, 07 August 2017.

[14] See the "Request for leave to file observations", No. ICC-01/04-01/07-3755 A3 A4 A5, 25 August 2017.

[15] See the "Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012 with AMENDED order for reparations (Appeals

"[…] *Pursuant to article 81(1)(b) of the Statute, in an appeal against a conviction decision, the convicted person may raise (i) procedural errors, (ii) errors of fact, or (iii) errors of law, as well as (iv) '[a]ny other ground that affects the fairness or reliability of the proceedings or decision'. Article 83(2) of the Statute also establishes that the Appeals Chamber may only interfere with a conviction decision if the error of fact or law or a procedural error 'materially affected' that decision, and, in respect of unfairness allegations, that the unfairness 'affected the reliability of the decision'.* […] [T]*he standard of review for legal errors in appeals pursuant to article 82 of the Statute is:* [the 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.* […] *A judgment is 'materially affected by an error of law' if the Trial Chamber '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'.* […] *Regarding factual errors, the Appeals Chamber* […] *will not interfere with factual findings of the first-instance Chamber unless it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts, or failed to take into account relevant facts. As to the 'misappreciation of facts',* [the Appeals Chamber] *will interfere only in the case where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it'.* […] *Accordingly, when a factual error is alleged, the Appeals Chamber will determine whether a reasonable Trial Chamber could have been satisfied beyond reasonable doubt as to the finding in question. The Appeals Chamber will not assess the evidence de novo with a view to determining whether it would have reached the same factual conclusion as the Trial Chamber".*[16]

Chamber)", No. ICC-01/04-01/06-3129 A2 A3, 03 March 2015, paras. 40 and 42 (the "Lubanga Appeals Judgment on Reparations") and Annex A.

[16] See the "Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction (Appeals Chamber), No. ICC-01/04-01/06-3121-Red A5, 01 December 2014, paras. 16 - 27. See also the "Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1)

9. The Appeals Chamber also held with regard to errors committed in discretionary decisions that it:

> "[…] *will not interfere with the Pre-Trial Chamber's exercise of discretion* […] *merely because the Appeals Chamber, if it had the power, might have made a different ruling.* […] *The function of the Appeals Chamber* [is to review] *the exercise of discretion by the Pre-Trial Chamber to ensure that the Chamber properly exercised its discretion. However, the Appeals Chamber will not interfere with the Pre-Trial 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* [including]*: (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".*[17]

10. Moreover, the Appeals Chamber stressed that an appellant is obliged not only to set out the alleged error, but also to indicate, with sufficient precision, how the error would have materially affected the impugned decision.[18]

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of the Statute' of 10 March 2009 (Appeals Chamber)", No. ICC-02/04-01/05-408 OA3, 16 September 2009, paras. 46-48.

[17] See the "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, *supra* note 16, paras. 79-80. See also the "Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the "Decision on Sentence pursuant to Article 76 of the Statute", (Appeals Chamber), No. ICC-01/04-01/06-3122 A4 A6, 1 December 2014, paras. 41-42.

[18] See the "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", *supra* note 16, para. 48. See also the "Corrigendum to Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled 'Decision on the Admissibility and Abuse of Process Challenges'", (Appeals Chamber), No. ICC-01/05-01/08-962-Corr OA3, 26 October 2010, para. 103.

IV. SUBMISSIONS ON THE GROUNDS OF APPEAL FILED BY THE COMMON LEGAL REPRESENTATIVE

11. The Legal Representative addresses first and jointly the two grounds of appeal raised by the Common Legal Representative, namely; (i) the misapplication by the Chamber of the standard of proof in relation to transgenerational harm; and (ii) the Chamber's failure to take into account all evidence before it and to provide adequate reasoning in relation to the rejection of reparations claims based on transgenerational harm.[19]

12. The Legal Representative supports in whole both grounds of appeal and agrees that said grounds show that the Chamber committed errors of law and fact in the Impugned Decision. Moreover, the Legal Representative submits that the absence of sufficient reasoning for the rejection of reparations claims based on transgenerational harm also affects *"the fairness or reliability of the proceedings or decision"* under article 81(1)(b)(iv) of the Rome Statute.

13. The Legal Representative stresses that the Chamber did not dismiss the notion of transgenerational harm. Rather, the Chamber implicitly acknowledged the potential existence of this type of harm by noting that the five victims claiming said prejudice are "*in all likelihood, suffering from transgenerational psychological harm*",[20] which has been described as "*a phenomenon whereby social violence is passed on from ascendants to descendants with traumatic consequences for the latter*".[21]

14. Nevertheless, the Chamber then simply and erroneously concluded that "*no evidence is laid before the Chamber to establish on a balance of probabilities the causal nexus*

[19] See the Common Legal Representative's Document in Support of the Appeal, *supra* note 10, paras. 3, 28 - 60 and 61 – 87.
[20] See the Impugned Decision, *supra* note 2, paras. 134.
[21] *Idem*, para. 132.

between the trauma suffered and the attack on Bogoro."[22] This terse conclusion on a serious matter is hollow of satisfactory judicial reasoning. Thus, the Legal Representative agrees that, without properly explaining the reasons underpinning this conclusion, the Chamber did indeed fail to provide sufficient reasoning for its rejection of the reparations claims based on transgenerational harm. Furthermore, the Legal Representative avers that the Chamber's inadequate reasoning not only infringed the fundamental right of the victims to a reasoned decision, but also precludes a fair and comprehensive appellate review by the Appeals Chamber.

15. Indeed, judicial decisions "*must be supported by sufficient reasoning. The extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before* [a Chamber] *to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion. The Statute and the Rules of Procedure and Evidence emphasise in various places the importance of sufficient reasoning*. […] *Similarly, the Appeals Chamber of the ICTY has held that the right to a reasoned decision is an element of the right to a fair trial and that only on the basis of a reasoned decision will proper appellate review be possible*".[23]

16. In particular, the Chamber should have provided adequate reasoning in order for the concerned victims to clearly appreciate the reasons for the rejection of their reparations claims. In this regard, the Supreme Court Chamber of the Extraordinary Chamber in the Courts of Cambodia held that "*the fact that* [the decision on reparations] *is subject to appeal confirms one functional aspect of judicial reasoning: to render meaningful the right to appellate review.* [Civil parties] *enjoy the right to a reasoned decision on their reparation claims*. […] *To begin with, apart from any requirements that might be imposed by the law, it is for judicial organs to decide the manner in which their*

[22] *Ibidem*, para. 134.
[23] See the "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81'", (Appeals Chamber), No. ICC-01/04-01/06-773 OA5, 14 December 2006, para. 20.

reasoning is to be articulated. [Yet, a Chamber's course of action infringes] *the right to a reasoned decision* [if the decision in question] *does not allow the Civil Party Appellants to unambiguously identify the reasoning pertinent to certain reparation requests*".[24]

17. Additionally, the Legal Representative argues that ensuring the five victims' exercise of their right to a reasoned decision was even more critical in this instance since the Chamber had the opportunity to address the issue of transgenerational harm for the first time in the brief but important history of the Court. Yet, in the Impugned Decision, the Chamber simply failed to properly examine the essential legal and factual matters related to the reparations claims based on transgenerational harm.

18. Therefore, these errors have grossly affected the fairness and reliability of the Impugned Decision and consequently, the Legal Representative supports in whole the relief sought by the Common Legal Representative[25].

V. SUBMISSIONS ON THE GROUNDS OF APPEAL RAISED BY THE DEFENCE

1. First ground of appeal: The Trial Chamber erred in ordering compensation in respect of material harm relating to loss which was insufficiently proven

19. The Defence challenges the manner in which the balance of probabilities standard was applied by the Chamber and, in particular, the extent to which the Chamber relied on presumptions and circumstantial evidence with respect of loss of

[24] See ECCC, *Co-Prosecutors v. Kaing Guek Eav Alias 'Duch'*, Appeal Judgement (Supreme Court Chamber), Case File/Dossier No. 001/18-07-2007-ECCC/SC, 3 February 2012, paras. 670 – 671. See also ECCC, *Co-Prosecutors v. Ieng Sary, Ieng Thirith, Nuonchea and Khieu Samphan*, the "Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications (Pre-Trial Chamber), Case File No. 002/19-09-2007-ECCC/OCIJ (PTC76, PTC112, PTC113, PTC114, PTC115, PTC142, PTC157, PTC164, PTC165 and PTC172), 24 June 2011, paras. 37 – 39.

[25] See the Common Legal Representative's Document in Support of the Appeal, *supra* note 10, paras. 88 and 89.

fields and crops and loss of cattle where no sufficient evidence was allegedly adduced by the applicant of such loss.[26] The Defence avers further that the assumptions made by the Chamber with respect of loss of cattle, fields and crops are unreasonable and unfair to Mr Katanga.[27] The Defence adds that the Chamber has thus relied on insufficient evidence to meet the requisite standard of proof on a balance of probabilities and, as a result, its approach violated the requirement of fairness of the proceedings against Mr Katanga and his fair trial rights.[28]

20. The Legal Representative opposes in whole this ground of appeal. It should be noted at the outset that the Defence does not identify whether this alleged error constitutes an error of law or an error of fact or a mixed one. However, from the general context of the arguments made therein, it appears that the Defence is alleging a factual error. The Appeals Chamber may overturn the factual findings of a Chamber only when it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts or failed to take into account relevant facts.[29]

21. The Legal Representative submits that the Defence fails to show any clear error in the Chamber's factual findings in respect of the loss of fields and crops and the loss of cattle in the Impugned Decision. As to the "misappreciation of facts", the Appeals Chamber may disturb a Chamber's evaluation of the facts only in the case where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it.[30] The main question is therefore whether a reasonable Chamber could have made the challenged factual findings under the appropriate standard of proof. In fact, with respect to the loss of fields and crops and the loss of cattle, the Chamber did consider the evidence of the case which clearly

[26] See the Defence's Document in Support of the Appeal, *supra* note 11, para. 16.
[27] *Idem*, paras. 18-19.
[28] *Ibidem*, para. 20.
[29] See the "Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction", *supra* note 16, paras. 16 – 27.
[30] *Idem*.

proved the existence of an agricultural economy of the area in which the victims lived. Consequently, the Chamber's presumption based on the average personal consumption of the victims and their usual subsistence needs in that local economic structure was nothing but reasonable.[31]

22. In this regard, the Legal Representative stresses that the reliance on circumstantial evidence and presumptions are permissible "*when they lead to consistent conclusions as regards the facts of the case*",[32] especially under the standard of proof applicable to reparations proceedings. The standard of "the balance of probabilities" applied in the Impugned Decision[33] is indeed "*a less exacting standard*", according to the Appeals Chamber, due to the fundamentally different and distinct nature of reparations proceedings.[34] The Appeals Chamber further clarified that the difficulties victims may face in obtaining the necessary evidence to substantiate their claims is of significance in determining the appropriate standard of proof in reparations proceedings. In this sense, the Chamber did give due consideration, in the Impugned Decision, to the specific features of the case, namely the substantive obstacles the victims encounter in obtaining evidence in support of their claims, such as the destruction or the unavailability of evidence concerning the Bogoro attack which occurred fourteen years ago.[35]

23. Yet, the Defence fails to demonstrate how the Chamber's reliance on circumstantial evidence and presumptions was unreasonable in the context of the case. Therefore, since the Chamber's factual findings cannot be disturbed simply because the Defence is in disagreement, this ground of appeal must be dismissed.

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[31] See the Impugned Decision, *supra* note 2, paras. 98-101.
[32] See IACtHR, *Gangaram Panday v. Suriname*, Merits, reparations and costs, Judgment of January 21, 1994, Series C No. 16, para. 49.
[33] See the Impugned Decision, *supra* note 2, paras. 46-50.
[34] See the Lubanga Appeals Judgment on Reparations, *supra* note 15, para. 81.
[35] See the Impugned Decision, *supra* note 2, para. 47.

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

24. The Defence argues that the Chamber erred in providing a too broad interpretation of a parent to include any family member, regardless of their bonds of affection or level of dependence, either close or remote.[36] Moreover, the Defence argues that the Chamber's definition of close family members, including conjoins (husband-wife/partners), parents, children, grandparents and grandchildren, goes beyond the generally accepted definition of the immediate or nuclear family consisting of spouses, their children and siblings.[37] The Defence also takes issue with the Chamber's reference to "other parents" which could include any relative who is not covered by the definition of a close family member and avers that this broad concept of a parental link far exceeds any definition of an "indirect victim".[38] The Defence then suggests that the definition of "parent" should not extend beyond close family members, including only the actual parents, and other family members with a dependency or parent-child-like relationship with the deceased.[39]

25. The Legal Representative opposes in whole this ground of appeal. While failing again to identify the nature of this alleged error, it seems that the Defence is claiming an error of law, and in particular the Chamber's alleged misinterpretation of the definition of "family" and "family member" or "parent".

26. However, the Appeals Chamber already ruled that, pursuant to rule 85 of the Rules, reparations may be granted to: "*a. direct victims, and b. indirect victims, including i. the family members of direct victims"* and "*the concept of 'family' may have many cultural variations, and the Court ought to have regard to the applicable social and familial*

[36] See the Defence's Document in Support of the Appeal, *supra* note 11, paras. 25 – 26 and 29 – 31.
[37] *Idem*, para. 26.
[38] *Ibidem*, paras. 27 - 28.
[39] *Ibid.*, para. 54.

structures."[40] In the same vein, the Chamber recalled in the Impugned Decision that "*the concept of 'family' must be understood in relation to the relevant family and social structures*", and consequently "*treated the concept of 'family' with due regard for family and social structures in the DRC and in Ituri in particular*."[41] Thus, there is no error in the Chamber's interpretation of the term "family" which was made after having properly examined the culture and structures of the society in which the victims were born and live. The Defence proffers no compelling facts or scientific evidence contradicting the Chamber's finding in this regard. Rather, the Defence's arguments merely express a disagreeing opinion which lacks evidentiary support. Even the Defence itself agrees with the fact that "[s]*ocial and family structures in Ituri may be different from those in Europe*" and "[i]*n Ituri (and other African regions) persons tend to have significantly larger extended families than in Europe*."[42] The Defence also agrees with the submission of the Trust Fund for Victims 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.[43] Thus, the Defence simply fails to demonstrate how exactly the Chamber committed a legal error in defining the concept of family based on the social and familial structures existing in the DRC and in Ituri in particular.

27. Likewise, the Appeals Chamber ruled that "[…] *the harm suffered by a natural person is harm to that person, i.e. personal harm.* […] *Harm suffered by one victim as a result of the commission of a crime within the jurisdiction of the Court can give rise to harm suffered by other victims. The issue for determination is whether the harm suffered is personal to the individual. If it is, it can attach to both direct and indirect victims. Whether or not a person has suffered harm as the result of a crime within the jurisdiction of the Court and is therefore a victim before the Court would have to be determined in light of the particular*

[40] See Annex A to the Lubanga Appeals Judgment on Reparations, *supra* note 15, paras. 6 - 7.
[41] See the Impugned Decision, *supra* note 2, para. 121.
[42] See the Defence Document in Support of the Appeal, *supra* note 11, paras. 50 and 52.
[43] *Idem*, para. 49.

circumstances."[44] In the case at hand, the Chamber did examine whether, as a result of their (the indirect victims') relationship with the direct victim, the loss, injury, or damage suffered by the latter gives rise to harm to them in the specific circumstances of the attack on Bogoro and did conclude that the loss of a family member is regarded as a traumatic experience entailing psychological suffering for the indirect victims, regardless of the dependency or intensity of their family relationship.[45] Hence, there is no legal error in this finding. Indeed, the Defence fails to demonstrate why the psychological suffering endured by the indirect victims (or, in this case, a family member of a deceased direct victim) is not "*personal to the individual*". The Appeals Chamber only required indirect victims to show that the harm they claim to have suffered from was *personal*, in other words "*harm to that person, i.e. personal harm."* Furthermore, as recalled *supra,*[46] *a* decision is "*materially affected by an error of law*" if the Chamber would have rendered a ruling substantially different from the one affected by the error. Yet, with respect to the indirect victims, the Chamber could not possibly have made a substantively different ruling from the Impugned Decision as long as the harm that the victims suffered from the death of their family members remains "*personal*", irrespective of their familial dependency or closeness.

28. In addition, other examples of the definition of "family" offered by the Defence are wholly unsupportive of its contentions. Indeed, the definitions contained in the decisions of other chambers of the Court are non-binding upon the Chamber, but also are made in the parameters of specific cases in light of their own unique cultural and local contexts for different purposes. The various other examples extracted from national jurisdictions also appear even more unpersuasive since they are too inconsistent and varied in degree amongst themselves and thus do in fact demonstrate the opposite of what the Defence attempts to prove. The Defence itself

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[44] See the "Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008 (Appeals Chamber)", No. ICC-01/04-01/06-1432 OA9 OA10, 11 July 2008, para. 32 (Emphasis added).
[45] See the Impugned Decision, *supra* note 2, para. 121.
[46] See the "Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, *supra* note 16, paras. 16 – 27.

acknowledges that "[there is] *the lack of agreement on the issue of compensation to family members of a deceased for their immaterial damage*" and thus declines to "*suggest that the more restricted approach taken by multiple domestic jurisdictions be adopted* [in this case]."[47]

29. The examples of the definition of "family" taken from various internationals courts and organizations are equally unhelpful. All these *fora* deal with the concept of family within the framework of their unique mandates (e.g. human rights institutions dealing with state responsibility, etc.) and their own constitutive legal documents which are very different from the statutory instruments of the Court governing reparations proceedings. The practice of said institutions is not directly importable to the specific legal and factual circumstance dealt with in the Impugned Decision. Consequently, this ground of appeal must be rejected as well.

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

30. The Defence argues that the Chamber erred in ruling *ultra petita* in, at least, three occasions, namely (i) in allocating a minimum amount to all the applicants who claimed the loss of cattle even if the applicants alleged a loss of cattle whose value was inferior to the minimum defined by the Chamber[48]; (ii) in allocating compensation for a specific moral harm *"lié au vécu de l'attaque de Bogoro"* to all 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[49]; and (iii) in allocating $250 to each applicant, while the Common Legal Representative asked for symbolic reparation of $1 for each applicant.[50]

[47] See the Defence's Document in Support of the Appeal, *supra* note 11, para. 42.
[48] *Idem*, para. 58.
[49] *Ibidem*, para. 59.
[50] *Ibid.*, para. 62.

31. The Legal Representative opposes this ground of appeal in whole. While the *non ultra petita* rule is a well-established principle in international law, she submits that it has limited applicability in reparations proceedings at the Court for the following reasons.

32. As referred by the Defence, in the Asylum case and other cases, the International Court of Justice (the "ICJ") interpreted the *non ultra petita* principle in the following terms:

> "*it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions*".[51]

33. This formulation clearly shows the parameters of this principle which limits the jurisdiction of the ICJ to the initial submissions of the parties appearing before it. Thus, under the *non ultra petita* principle, the ICJ is confined within the limits laid down by the parties, either in special agreements or in their submissions.[52] In other words, this illustrates the consensual nature of the jurisdiction of the ICJ based on the specific types of legal disputes submitted to it. In this regard, Judge Buergenthal opined that:

> "[…] *the non ultra petita rule, a cardinal rule governing the Court's judicial process* […] *does not allow the Court to deal with a subject in the dispositif of its judgment that the parties to the case have not, in their final submissions, asked it to adjudicate*. […] *The non ultra petita rule has a direct bearing on the scope of the Court's*

[51] See ICJ, *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), Judgment, 14 February 2002, para. 43 (citing Asylum Judgment, ICJ Reports 1950, p. 402). (Emphasis added.) See also ICJ, *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning Temple of Preah Vihear*, (Cambodia v. Thailand), Judgment, 11 November 2013, para. 71.

[52] See SHABTAI ROSENNE, The Law and Practice of the International Court 1920-2005, Martinus Nijhoff Publishers, Leiden/Boston, 2006, p. 578. See for the application of *non ultra petita* principle applied in an agreement concluded between parties - ICJ, *Frontier Dispute* (Burkina Faso v. Niger), Judgment, 16 April 2013, para. 74.

jurisdiction. Since this Court's jurisdiction in a particular case is strictly limited to the consent given by the parties to a case, the function of the non ultra petita rule is to ensure that the Court does not exceed the jurisdictional confines spelled out by the parties in their final submissions. That is what is meant by the Court's statement in the Asylum case […] *that 'it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions". Fitzmaurice puts the matter in the following terms: 'The non ultra petita rule is not only an inevitable corollary - indeed, virtually a part of the general principle of consent of the parties as the basis of international jurisdiction - it is also a necessary rule, for without it the consent principle itself could constantly be circumvented*.' […]."[53]

34. Obviously, the power of the ICC to adjudicate serious crimes falling under its jurisdiction and to order ensuing reparations is not consensual as the Court does not require the consent of the parties involved, or in other words, that of the convicted person and of the victims. Even *arguendo* that the *non ultra petita* principle may require the specific consent of the victims in reparations proceedings, as alleged by the Defence, the victims in this case have already given their consent by virtue of the submission of their applications for participation and reparations. Moreover, even if the Chamber disregards the jurisdictional differences between the international courts and still decides to strictly adhere to the spirit of the *non ultra petita* principle in reparations proceedings, the allocation of the three types of compensation challenged by the Defence would still fall within the subject matters specifically

[53] See ICJ, *Oil Platforms* (Islamic Republic of Iran v. United States of America), Judgment, Separate Opinion of Judge Buergenthal, 6 November 2003, paras. 3 and 8.

"*brought before it*" by the victims,[54] in the sense that the Chamber merely exercised its power to grant reparations in response to their applications to this effect.[55]

35. Furthermore, the reach of the *non ultra petita* principle is not unlimited. Judge Fitzmaurice also famously stated that: "[…] *unless certain distinctions are drawn, there is a danger that* [the *non ultra petita* rule] *might hamper the tribunal in coming to a correct decision, and might even cause it to arrive at a legally incorrect one, by compelling it to neglect juridically relevant factors*".[56]

36. Hence, the Legal Representative submits that, with respect to reparations proceedings before the Court, the important distinction that has to be made *vis-a-vis* the *non ultra petita* principle is the discretionary nature of the Chamber's decision on the modalities of reparations and, in particular, the scope and amount of compensation to be allocated to victims. Indeed, the Chamber expressly stated in the Impugned Decision that "*where it lies with a Trial Chamber to examine the issue of the type of reparations to be awarded, it is open to that bench to decide, in view of the specific circumstances of the case, whether to award individual reparations, collective reparations, or both, and to determine the appropriate modalities of reparations*."[57] The Appeals Chamber also recognized the discretionary nature of these aspects of reparations orders.[58]

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[54] See ECHR, Judgment, *Case of Guzzardi v. Italy* (Application no. 7367/76), Dissenting Opinion of Judge Sir Fitzmaurice, 6 November 1980, para. 4. "*The ultra petita (or as it is sometimes called, the ex, or extra, petita) rule precludes that an international tribunal or equivalent body should deal with matters that are not the subject of the complaint brought before it, and still more that it should give a decision on those matters against the defendant party in the case. If it does this, proprio motu, it is acting ultra vires*." (Emphasis added.)

[55] See ICTR, *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Decision on Georges A.N. Rutaganda's Appeal against Decision on Request for Closed Session Testimony and Sealed Exhibits (Appeals Chamber), Case No. ICTR-96-3-R, 22 April 2009, paras. 26 and 29.

[56] See ICJ, *Case Concerning Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, 14 February 2002, par. 12 (citing The Law and Procedure of the International Court of Justice, 1986, Vol. II, pp. 529-530).

[57] See the Impugned Decision, *supra* note 2, para. 334 and footnote 484.

[58] See the Lubanga Appeals Judgment on Reparations, *supra* note 15, para. 43.

37. As recalled *supra*,[59] the Appeals Chamber may invalidate discretionary decisions only under limited conditions. However, except arguing in very general terms the applicability of the *non ultra petita* principle, the Defence fails to show that the Chamber's exercise of discretion in allocating compensation was either based on an erroneous legal interpretation and on incorrect conclusion of fact, or so unfair and unreasonable as to constitute an abuse of discretion. The Chamber properly exercised its discretion in the Impugned Decision and thus there exists no error. Consequently, this ground of appeal should equally be dismissed.

4. Fourth ground of appeal: 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

38. The Defence argues that reparations at the Court are intended to repair the harm suffered from by the victims and should not have a punitive character.[60] The Defence further contends that the Chamber failed to abide to these principles in calculating the amount which must, at least theoretically, be paid by Mr Katanga and that the imposition of said amount is excessive and disproportionate in light of the circumstances, responsibilities and culpability of the convicted person.[61]

39. The Legal Representative opposes this ground of appeal in whole. Diverging from the requirements set out by the Appeals Chamber, the Defence again fails to demonstrate that the Chamber's exercise of discretion in setting the amount for the convicted person's liability was either based on an erroneous legal interpretation and on incorrect conclusion of fact, or so unfair and unreasonable as to constitute an abuse of discretion.

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[59] See the "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", *supra* note 16, paras. 79-80.
[60] See the Defence's Document in Support of the Appeal, *supra* note 11, paras. 70-71.
[61] *Idem*, paras. 73-74 and 83.

40. In particular, the Defence argues that the Chamber failed to give sufficient weight to the fact that Mr Katanga was initially charged under article 25(3)(a) but convicted on the basis of article 25(3)(d) of the Rome Statute which allegedly significantly reduced his moral liability.[62] However, the Appeals Chamber held that: "[t]*he 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*."[63] Accordingly, the Chamber: (i) did recall the fact that Mr Katanga was convicted on the basis of article 25(3)(d) of the Rome Statute as an accessory[64]; and (ii) did examine at length the factual and legal elements of his participation, as determined by the Chamber, in its previous composition, in order to set the amount for which he is liable.[65] Thus, after having carefully weighed the level of Mr Katanga's liability to the harm caused to the victims and his participation in the commission of the crimes, and judiciously evaluating the specific circumstances of the case and all relevant factors, the Chamber set the total sum for which the convicted person is liable. The Chamber did proceed exactly in accordance with the guidance of the Appeals Chamber and did give due consideration to the facts advocated by the Defence.

41. The Defence also argues that the Chamber unduly considered many circumstances as aggravating, while disregarding a number of mitigating circumstances found by the Chamber, in its previous composition, in the sentencing decision, as well as numerous mitigating factors found by the panel of three judges of the Appeals Chamber in the ruling on the review concerning reduction of sentence.[66] Yet, the Defence simply ignores the critical fact that the proceedings for sentencing and for review concerning reduction of sentence are distinct and separate procedural steps, governed by their own set of legal criteria while serving very different purposes than that of reparations proceedings. Moreover, the Defence fails to explain

[62] *Ibidem*, para. 80.
[63] See Annex A to Lubanga Appeals Judgment on Reparations, *supra* note 15, para. 21.
[64] See the Impugned Decision, *supra* note 2, para. 254.
[65] *Idem*, paras. 257 – 263.
[66] See the Defence's Document in Support of the Appeal, *supra* note 11, paras. 76 - 77.

why the Chamber was obliged to take into account these circumstances and factors which are extraneous to reparations proceedings.

42. Furthermore, the Defence argues that the Chamber failed to take fully into account the fact that others were also responsible for the crimes committed at Bogoro and thus Mr Katanga cannot be held disproportionately accountable for the crimes committed on the basis that he is the sole person convicted for the attack.[67] In this regard, the Chamber recalled that, as instructed by the Appeals Chamber, "*an order for reparations is intrinsically linked to the individual whose criminal responsibility is established in a conviction and whose culpability for those criminal acts is determined in a sentence*."[68] Indeed, the Chamber did acknowledge the fact that Mr Katanga was convicted on the basis of article 25(3)(d) of the Rome Statute as an accessory for his contribution "*in any other way to the commission of a crime by a group of persons acting with a common purpose*" and that, at present, no other person is convicted for the attack on Bogoro.[69] The Chamber did still proceed to examine, in the specific circumstances of the case, Mr Katanga's *personal* participation in the commission of the crimes.[70] Consequently, the Defence's allegation to the effect that the Impugned Decision put the whole blame of the attack and the resulting harm solely on Mr Katanga is simply without any basis.

43. Finally, the Defence argues that Mr Katanga's indigence should not have been ignored altogether since he has neither the means, nor any prospect to pay the amount established in the order which will hang over him for the rest of his life.[71] The Defence adds that the Chamber's errors have resulted in the making of an unreasonably high and disproportionate reparation award against Mr Katanga.[72]

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[67] *Idem*, para. 81.
[68] See the Impugned Decision, *supra* note 2, para. 251 (Emphasis added).
[69] *Idem*, paras. 254 and 263 (Emphasis added).
[70] *Ibidem*, paras. 258 - 262.
[71] See Defence's Document in Support of the Appeal, *supra* note 11, para. 82-83.
[72] *Idem*, para. 86.

44. However, as the Defence itself agrees,[73] the Appeals Chamber held previously that indigence is not an obstacle to the imposition of liability for reparations on the convicted person.[74] Accordingly, the Chamber, while noting the fact that Mr Katanga is indigent, ruled that his financial situation cannot be regarded as material to the determination of the extent of the amount of the reparations award for which he is liable.[75] Again, the Defence fails to show how the Chamber made an erroneous legal interpretation and/or incorrectly assessed the facts, or why the Chamber's ruling was so unfair and unreasonable as to constitute an abuse of discretion. The Chamber set the amount of the reparations award for which Mr Katanga is liable after having carefully examined his participation in the commission of the crimes in the specific circumstances of the case. While itself acknowledging the "*difficulty in quantifying damages for human rights violations*"[76], the Defence offers no compelling facts showing that the Chamber did indeed abuse its discretion in quantifying the amount of the reparations award for which the convicted person is liable. For these reasons, the fourth ground of appeal should also be dismissed.

VI. CONCLUSION

For the foregoing reasons, the Principal Counsel respectfully requests the Appeals Chamber to grant the appeal lodged by the Common Legal Representative and to dismiss all grounds of appeal raised by the Defence.

[73] *Ibidem*, para. 82.
[74] See Annex A to the Lubanga Appeals Judgment on Reparations, *supra* note 15, paras. 102 – 104.
[75] See the Impugned Decision, *supra* note 2, paras. 245 – 246 and 327-328.
[76] See the Defence Document in Support of the Appeal, *supra* note 11, para. 74.

It is hereby certified that this document contains a total of 7657 words and complies in all respects with the requirements of regulation 36 of the Regulations of the Court.[77]

Paolina Massidda
Principal Counsel

Dated this 28th day of August 2017

At The Hague, The Netherlands

[77] This statement (70 words), not itself included in the word count, follows the Appeals Chamber's direction. See No. ICC-01/11-01/11-565 OA6, 24 July 2014, para. 32.