

1 International Criminal Court
2 Appeals Chamber
3 Situation: Democratic Republic of the Congo
4 In the case of The Prosecutor v. Germain Katanga - ICC-01/04-01/07
5 Presiding Judge Howard Morrison, Judge Silvia Fernández
6 de Gurmendi, Judge Sanji Monageng, Judge Christine Van den Wyngaert and
7 Judge Piotr Hofmanski
8 Appeals Judgment on Reparations - Courtroom 2
9 Thursday, 8 March 2018
10 (The hearing starts in open session at 3.01 p.m.)
11 THE COURT USHER: [15:01:57] All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE MORRISON: [15:02:38] Afternoon, everyone.
15 The court is in session. Will the court officer please call the case.
16 THE COURT OFFICER: [15:02:45] Good afternoon, Mr President, your Honours.
17 The situation in the Democratic Republic of the Congo, in the case of The Prosecutor
18 versus Germain Katanga, case reference ICC-01/04-01/07.
19 PRESIDING JUDGE MORRISON: [15:02:59] Thank you.
20 My name is Judge Howard Morrison, and I am the Presiding Judge on the appeals in
21 the case of the Prosecutor versus Germain Katanga, arising from the order of
22 reparations issued by Trial Chamber II pursuant to Article 75 of the Statute on
23 24 March 2017. I will be delivering the judgment on behalf of the Appeals Chamber.
24 The other judges of the Appeals Chamber on this appeal and who join me today are
25 Judge Silvia Fernández de Gurmendi, Judge Sanji Monageng, Judge Christine Van

1 den Wyngaert and Judge Piotr Hofmanski. I am also joined today by legal staff of
2 the Appeals Division, Mr Volker Nerlich, Ms Barbara Roche, Mr Anthony Abato,
3 Ms Chitrangada Singh and Ms Annabel Gary.

4 May I ask the parties and participants to introduce themselves for the record, starting
5 with the Legal Representative of Victims.

6 MR LUVENGIKA: [15:04:10] (Interpretation) Thank you, Mr President. My name
7 is Maître Fidel Nsita Luvengika, lawyer at the Brussels Bar and counsel in the
8 Prosecutor versus Katanga case. We have Julie Emmanuelle Goffin, who is legal
9 assistant and also case manager and -- or, rather, legal assistant, and then there is
10 Cheihk Ahmadou Bamba Fall. There is also Maître Flora Mbuyu, who is a legal
11 assistant based in the field. Thank you.

12 PRESIDING JUDGE MORRISON: [15:05:00] Now, please, the Office of the
13 Public Counsel for Victims.

14 MS MASSIDDA: [15:05:04] Good afternoon, Mr President, your Honours. For the
15 Office of Public Counsel for Victims, appearing today, Mr Orchlou Narantsetseg,
16 Mr Alexis Larivière. Maître Bibiane Bakento is able to follow these proceedings in
17 the field, our field counsel; and myself Paolina Massidda.

18 PRESIDING JUDGE MORRISON: [15:05:25] Thank you. And now counsel for
19 the Defence of Mr Katanga.

20 MS MENEGON: [15:05:33] (Interpretation) Good afternoon, Mr President.
21 Maître Sophie Menegon of the Paris Bar, legal assistant in the Katanga case.

22 MR DE BAAN: [15:05:47] Good afternoon, Mr President, your Honours. I am
23 joined today by Ms Erin Rosenberg, associate legal expert, officer with the Trust Fund
24 for Victims. And my name is Pieter de Baan, I am the executive director for the
25 Trust Fund for Victims.

1 PRESIDING JUDGE MORRISON: [15:06:00] Thank you.
2 I am probably going to be reading rather more slowly than usual, for the
3 interpretation not only into French but also into Kiswahili, and that will take a little
4 longer. So there may be more extended gaps than normal.
5 During the course of today's hearing I will refer to Mr Germain Katanga as
6 Mr Katanga, the Office of Public Counsel for Victims as the OPCV, and the Legal
7 Representative for Victims as the LRV.
8 Today, the Appeals Chamber is delivering its judgment on three appeals pursuant to
9 article 82(4) of the Statute by Mr Katanga, the OPCV, and the LRV against the order
10 for reparations issued by Trial Chamber II on 24 March 2017. I will refer to this
11 order as the impugned decision.
12 I shall now summarise the Appeals Chamber's judgment, which was taken
13 unanimously. This summary is not part of the written judgment. Please note that
14 only the written judgment is authoritative. It will be notified to the parties and
15 participants shortly after this hearing.
16 Before I summarise the Appeals Chamber judgment, I recall that Mr Katanga was
17 found guilty as an accessory to murder as a crime against humanity, four counts of
18 war crimes of murder, attack against a civilian population as such or against
19 individual civilians not taking part in hostilities, destruction of enemy property and
20 pillaging. These crimes were committed on 24 February 2003 during the attack on
21 Bogoro, a village in the Ituri district of the Democratic Republic of the Congo.
22 Mr Katanga was sentenced to a 12-year term of imprisonment.
23 I will refer to the judgment pursuant to Article 74 of the Statute, dated 7 March 2014,
24 as the judgment on conviction and to the decision pursuant to Article 76 of the Statute,
25 rendered on 23 May 2014, as the decision on sentence.

1 The Appeals Chamber received the appeal briefs from Mr Katanga, the OPCV, and
2 the LRV on 27 June 2017 and the responses to those appeal briefs on 28 August 2017.
3 The LRV submitted his observations on the OPCV's appeal on 23 August 2017.
4 Pursuant to the Appeals Chamber's direction, the Trust Fund filed its observations on
5 5 October 2017, to which the OPCV responded on 26 October 2017.
6 I first turn to the appeal filed by Mr Katanga in which he raises four grounds of
7 appeal.
8 In his first ground of appeal, Mr Katanga challenges the reliance that the
9 Trial Chamber placed on presumptions in order to enter findings of the existence of
10 material harm resulting from the pillaging of livestock, destruction of fields and
11 harvests and pillaging of harvests.
12 Mr Katanga's first ground of appeal raises the broader issue of the approach taken by
13 the Trial Chamber in this case, including its presumptions to make finding of harm,
14 both material and non-material, and to allocate a monetary value to that harm.
15 Therefore, before turning to the substance of this ground of appeal, I would like to
16 first outline the Appeals Chamber's observations on the Trial Chamber's overall
17 approach to reparations proceedings in the present case.
18 The legal framework at the ICC leaves it for the trial chambers to decide on the best
19 approach to take in reparations proceedings depending on the concrete circumstances
20 of the case at hand. These proceedings, intended to compensate victims for the harm
21 they suffered, often years ago, must be as expeditious and cost-effective as possible.
22 The Appeals Chamber is not persuaded that the approach chosen by the
23 Trial Chamber for the reparations proceedings before it, which was based on an
24 individual assessment of each application by the Trial Chamber, was the most
25 appropriate in this regard as it has led to delays in the award of reparations.

1 The Trial Chamber set out to identify and value the harm. The different types of
2 harm for each applicant were identified and it then attached a monetary value to the
3 respective kinds of harm found to exist for each applicant. On this basis, it assessed
4 341 applications and accepted 297 applicants as victims. The results of the
5 individual analysis were set out in an annex to the impugned decision. The
6 Trial Chamber decided to award symbolic individual reparations to those 297
7 applicants, in addition to collective reparations. This overall approach was based on
8 the Trial Chamber's view "that the extent of the harm suffered by the victims for the
9 purposes of reparations in the case ... is the sum total of the harm which the
10 Trial Chamber has found established". The sum total of the harm, as assessed by the
11 Trial Chamber, amounted to USD 3,752,620 and Mr Katanga was then held liable to
12 pay USD 1,000,000 of that sum.

13 The Trust Fund for Victims has submitted a detailed draft implementation plan that
14 categorises the 297 victims into five categories based on the findings of harm in the
15 annex. It went through an equally detailed analysis of the applications for
16 reparations and arrived at a different monetary value for the cost of repairing the
17 harm caused. Therefore, while the Trial Chamber's sum total of the monetary value
18 of harm, ie the figure of \$3,752,620, was used as a reference point to determine the
19 amount of money that Mr Katanga is liable for, this monetary value of harm had no
20 relationship to the reparations projects proposed by the TFV. The result of the
21 overall approach by the Trial Chamber was resource intensive, and, in the end,
22 disproportionate.

23 The Appeals Chamber notes that there may be circumstances where a trial chamber
24 finds it necessary to individually set out findings in respect of all applications in order
25 to identify the harms in question. However, when there are more than a very small

1 number of victims, this is neither necessary nor desirable. This is not to say that the
2 Trial Chamber should not consider those applications - indeed the information
3 therein may be crucial to assess the types of harm alleged and it can assist a Chamber
4 in making findings as to that harm. However, setting out an analysis for each
5 individual, in particular in circumstances where a subsequent individual award bears
6 no relation to that detailed analysis, appears to be contrary to the need for fair and
7 expeditious proceedings.

8 Rather than attempting to determine the sum total of the monetary value of the harm
9 caused, trial chambers should seek to define the harms and to determine the
10 appropriate modalities for repairing the harm caused with a view to, ultimately,
11 assessing the costs of the identified remedy.

12 The Appeals Chamber considers that focusing on the cost to repair is appropriate, in
13 the light of the overall purpose of reparations, which is indeed to repair.

14 In assessing the cost of repair, the Trial Chamber may seek the assistance of experts
15 and other bodies, including the Trust Fund for Victims, before making a final ruling
16 thereon. The ruling on the cost of repairing the harm is to be taken by the
17 Trial Chamber, in the exercise of its judicial functions under the Statute.

18 The Appeals Chamber thus has concerns about the Trial Chamber's approach.
19 Nevertheless, it considers that the approach adopted by the Trial Chamber did not
20 amount to an error of law or abuse of discretion that would justify the reversal of the
21 impugned decision.

22 Bearing this in mind, the Appeals Chamber now turns to Mr Katanga's first and
23 second grounds of appeal, in which he challenges the Trial Chamber's reliance upon
24 presumptions.

25 The Appeals Chamber considers that in the absence of direct evidence in certain

1 circumstances, for example, owing to difficulties in obtaining evidence,
2 a Trial Chamber may resort to factual presumptions in its identification of the heads
3 of harm. Resort to factual presumptions in reparations proceedings is within a
4 trial chamber's discretion in determining "what is 'sufficient' for purposes of an
5 applicant meeting the burden of proof". While a trial chamber has discretion to
6 freely evaluate the evidence of harm in a particular case, this discretion is not
7 unlimited.

8 A trial chamber must respect the rights of victims as well as the convicted person
9 when resorting to presumptions.

10 The reasonableness of a factual presumption drawn by a trial chamber in reparation
11 proceedings will depend upon the circumstances of the case. On appeal, bearing in
12 mind the standard of review, a party challenging a factual presumption must
13 demonstrate that no reasonable trier of fact could have formulated the presumption in
14 question in the light of the particular set of circumstances in that case.

15 Ground 1:

16 In his first ground of appeal, Mr Katanga challenges the Trial Chamber's presumption
17 concerning the existence of material harm claimed by victims who allege that they
18 had lost cattle, fields and crops, but who did not provide sufficient evidence in
19 support thereof. Having regard to the findings on pillaging of livestock and food as
20 well as the agrarian nature of the society in Bogoro, the Trial Chamber had held that if
21 these victims were able to demonstrate that their house was destroyed as a result of
22 the attack on Bogoro, it would be presumed that they also suffered material harm
23 resulting from the loss of livestock, fields and harvest during the attack.

24 The Appeals Chamber finds that the presumption in question was based on the
25 findings in the judgment on conviction, decision on sentence, the application for

1 reparations, and declarations of livestock ownership, where provided, as well as the
2 Trial Chamber's assessment of the difficulties in obtaining evidence in support of the
3 claims.

4 The Appeals Chamber notes that it may have been advisable for the Trial Chamber to
5 have indicated to the parties and the participants that it was intending to draw the
6 impugned presumption, including but not limited to inviting submissions on its
7 formulation. The Appeals Chamber considers that the presumption in question
8 could have benefited from further reference to other material on the record in support.
9 However, despite this, and despite its concerns as previously indicated regarding
10 individual analysis, the Appeals Chamber finds that Mr Katanga has not
11 demonstrated an error in the Trial Chamber's approach concerning this presumption.

12 Ground 2:

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

17 The Appeals Chamber finds that the definition of victims entitled to reparations
18 under Article 75 of the Statute, whether direct or indirect, is not restricted to any
19 specific class of persons. The definition of victims under Rule 85(a) of the Rules of
20 Procedure and Evidence emphasises the requirement of the existence of harm rather
21 than whether the indirect victim was a close or distant family member of the direct
22 victim.

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

25 The Appeals Chamber notes, however, that, as established in the judgment on

1 conviction, at the time of the attack, the village of Bogoro was a small community of
2 at least 800 civilians. The testimonies of witnesses at trial further "allowed
3 the Chamber to measure the very specific significance of local customs and the role of
4 family relationships in Ituri". In the reparations proceedings before the
5 Trial Chamber, both the LRV and the TFV advocated for an assessment of
6 psychological harm which takes into account the local societal characteristics. The
7 Appeals Chamber also recalls that the attack itself was particularly intense.
8 Bearing in mind also that the Trial Chamber had the benefit of reviewing applications
9 for reparations, which in many cases detailed the relationships amongst villagers, the
10 Appeals Chamber finds that it was not unreasonable for the Trial Chamber to
11 presume that psychological harm was experienced by the inhabitants of Bogoro
12 resulting from the loss of their family members, near or distant. Consequently, and
13 bearing in mind the standard of review, the Appeals Chamber defers to the
14 Trial Chamber's presumption of psychological harm - both to close and distant family
15 members of deceased victims of the attack.

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

17 Ground 3:

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

23 Ground 4:

24 In his fourth ground of appeal, Mr Katanga submits that the award of one million US
25 dollars made against him is excessive in the light of his circumstances, responsibilities,

1 and culpability. He argues that the Trial Chamber improperly weighed his
2 participation in the crimes vis-à-vis others, that it failed to fully consider the relevant
3 mode of liability, and that it improperly considered or failed to consider other
4 findings in the decision on sentence and the decision on reduction of sentence.
5 The Appeals Chamber recalls the principles set out in the Lubanga reparations appeal
6 judgment regarding the scope of a convicted person's liability for reparations. This
7 principle stated, inter alia, that "a convicted person's liability for reparations must be
8 proportionate to the harm caused and, inter alia, his or her participation in the
9 commission of the crimes for which he or she was found guilty in the specific
10 circumstances of the case".
11 The Appeals Chamber does not consider this to mean that the amount of reparations
12 for which a convicted person is held liable must reflect his or her relative
13 responsibility for the harm in question, vis-à-vis others who may also have
14 contributed to that harm.
15 The purpose of reparations is to repair the harm that was inflicted on the victims.
16 This corresponds to the general principle of public international law that reparations
17 should, where possible, attempt to restore the status quo ante. For these reasons, the
18 Appeals Chamber finds that, in principle, the question of whether other individuals
19 may also have contributed to the harm resulting from the crimes for which the person
20 has been convicted is irrelevant to the convicted person's liability to repair that harm.
21 While a reparations order must not exceed the overall cost to repair the harm caused,
22 it is not, per se, inappropriate to hold the person liable for the full amount necessary
23 to repair the harm.
24 As to whether the mode of liability should be taken into account, the
25 Appeals Chamber recalls that the responsibility to repair harm under Article 75

1 of the Statute arises from a criminal conviction. The modes of individual criminal
2 responsibility which may underpin such a conviction are, in the view of the
3 Appeals Chamber, relevant for capturing criminal responsibility. However, at the
4 reparations stage, the focus is on repairing the harm that has resulted from the crimes
5 in question. The Appeals Chamber is not persuaded by Mr Katanga's argument that
6 the Trial Chamber's approach was flawed in this regard.

7 Mr Katanga also challenges the Trial Chamber's reliance on factors taken into account
8 in sentencing and in the subsequent reduction of sentence. The Appeals Chamber
9 does not agree that the factors set out by Mr Katanga in his appeal brief, which do not
10 relate to the goal of reparations, should have been "given weight at the reparations
11 stage".

12 The Appeals Chamber also rejects Mr Katanga's argument that he faces a double
13 punishment on account of the magnitude of the award against him. As long as
14 a convicted person is held liable for the costs that it takes to repair the harm caused,
15 there is no punitive element. That this amount may be high is simply a result of the
16 extent of the harm caused by the crimes for which the person was convicted.

17 The Appeals Chamber shall not address whether the Trial Chamber should have
18 found Mr Katanga liable for the entire cost or for more than the USD 1,000,000 figure
19 because Mr Katanga has appealed the Trial Chamber's finding as to his liability, with
20 a view to reducing it, and it would therefore be inappropriate to amend this finding
21 to his detriment.

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

24 The fourth ground of appeal is rejected.

25 I turn to the appeal of the OPCV.

1 The OPCV raises one ground of appeal on behalf of a group of victims, to whom I
2 shall now refer to as the concerned victims.

3 The concerned victims were represented by a legal representative who withdrew
4 during the course of the proceedings, and to whom I shall now refer as the former
5 LRV.

6 The OPCV alleges that the Trial Chamber made a procedural error by not appointing
7 a new lawyer for victims immediately after authorising the former LRV to terminate
8 his mandate in respect of the concerned victims. The OPCV argues that victims
9 must remain represented throughout the proceedings until the completion of the
10 reparations phase.

11 The OPCV requests that the concerned victims should be granted reparations, after
12 having been given an opportunity to present or supplement their application for
13 reparations.

14 The Appeals Chamber notes that, generally, it is not only in the interests of victims,
15 but also in the interests of the efficient conduct of the proceedings, that victims are
16 legally represented during the reparations phase. The Appeals Chamber notes,
17 however, that the Court's legal texts do not expressly provide that victims must be
18 represented by counsel at all times before a trial chamber and the Appeals Chamber
19 therefore rejects the OPCV's argument that representation of victims must be
20 continuous.

21 The question arises in this case as to whether the Trial Chamber abused its discretion
22 by not appointing counsel immediately after the former LRV was granted leave to
23 withdraw as counsel, in the circumstances of this case, where the proceedings had, at
24 that point, been ongoing for some time. In the circumstances, the Appeals Chamber
25 finds that the Trial Chamber did not abuse its discretion in failing to appoint new

1 counsel for the purposes of assisting the concerned victims in completing their
2 applications, and, therefore, the Appeals Chamber rejects the OPCV's appeal.
3 The LRV's appeal.

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

6 The five applicants were born after the attack on Bogoro. They submitted their
7 applications for reparations in the present case for harm suffered on account of their
8 parents' experience during the attack.

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

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

17 The Appeals Chamber recalls that the Trial Chamber found in relation to all five
18 applicants, in annex II to the impugned decision, that they suffered psychological
19 harm.

20 In the view of the Appeals Chamber, and in the absence of any further explanation by
21 the Trial Chamber, the Trial Chamber's conclusion that the causal nexus had not been
22 established was contrary to the Trial Chamber's statement that all five applicants were
23 "in all likelihood" suffering from transgenerational harm. The finding in the
24 impugned decision that the causal nexus has not been established was repeated, but
25 not further elaborated upon in annex II to the impugned decision, where the

1 Trial Chamber assessed the individual applications. This finding cannot be
2 reconciled with the Trial Chamber's conclusion that all five applicants had suffered
3 psychological harm and that the harm was "in all likelihood" transgenerational.
4 The Appeals Chamber finds, therefore, that the Trial Chamber erred in failing to
5 properly reason its decision in relation to the causal nexus between the attack on
6 Bogoro and the harm suffered by the five applicants. This makes it impossible for
7 the Appeals Chamber to assess the reasonableness of the Trial Chamber's finding that
8 the causal nexus has not been established to a balance of probabilities.

9 In the circumstances of the present case, and bearing in mind that the number of
10 applications alleging transgenerational harm is low, the Appeals Chamber considers
11 it appropriate that these applications be assessed anew. Thus, the Appeals Chamber
12 considers it appropriate to reverse the Trial Chamber's finding in relation to the five
13 applicants and to remand the matter to the Trial Chamber, which has a detailed
14 knowledge of the case, for it to assess the question of causal nexus between the crimes
15 of which Mr Katanga was convicted and their psychological harm and whether they
16 should be awarded reparations.

17 The Appeals Chamber rejects the LRV's second ground of appeal for reasons which
18 are set out in the judgment.

19 The overall conclusion is as follows:

20 For all the aforementioned reasons, the Appeals Chamber has thus decided:

- 21 1. The reparations order is reversed to the extent that it rejected the applications for
22 reparation of the five applicants. The Trial Chamber is directed to carry out a new
23 assessment of these applications, providing sufficient reason for its eventual
24 conclusion thereon.
- 25 2. The remainder of the reparations order is confirmed.

- 1 And that concludes this session of the Appeals Chamber.
- 2 THE COURT USHER: [15:35:52] All rise.
- 3 (The hearing ends in open session at 3.35 p.m.)