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Date: **28 August 2017**

**THE APPEALS CHAMBER**

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

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

**IN THE CASE OF  
*THE PROSECUTOR v. GERMAIN KATANGA***

**Public Document**

**Observations on the “Defence Document in Support of Appeal against  
the Reparations Order”**

**(ICC-01/04-01/07-3747-Conf-Exp and ICC-01/04-01/07-3747-Red)**

**Source:** The Legal Representative of Victims

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

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**Legal Representatives of Victims**  
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**Legal Representatives of Applicants**

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**Unrepresented Applicants for  
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**States' Representatives**

**Amicus Curiae**

## **REGISTRY**

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**Registrar**

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**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Trust Fund for Victims**  
Mr Pieter de Baan

## I. SUBJECT OF THE PRESENT OBSERVATIONS

1. The Legal Representative has apprised himself of the document filed by the Defence in support of its appeal<sup>1</sup> and hereby responds to each of the four grounds of appeal in the order used in the Defence document.

## II. PROCEDURAL HISTORY

2. On 7 March 2014, Germain Katanga was convicted of crimes against humanity and war crimes committed during the attack on Bogoro of 24 February 2003.<sup>2</sup>

3. On 23 May 2014, Trial Chamber II, ruling in the majority, sentenced Germain Katanga to 12 years in prison.<sup>3</sup>

4. On 8 May 2015, Trial Chamber II (“the Chamber”) issued a Decision on the request for clarification regarding the application of rule 94 of the Rules of Procedure and Evidence and future stages of the proceedings (“Decision No. 3546”).<sup>4</sup> In the Decision the Legal Representative was ordered, in consultation with the Registry, to file the consolidated applications for reparations for those victims authorized to participate in the proceedings and for all new requests for reparations<sup>5</sup> by 1 October 2015. Following two successive requests<sup>6</sup> for an extension by the Legal

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<sup>1</sup> “Defence Document in Support of Appeal against the Reparations Order”, 27 June 2017, ICC-01/04-01/07-3747-Conf-Exp. A public redacted version was notified on 29 June 2017, ICC-01/04-01/07-3747-Red (“Defence Document in Support of Appeal”).

<sup>2</sup> “Judgment pursuant to article 74 of the Statute”, ICC-01/04-01/07-3436-tENG (“Judgment”).

<sup>3</sup> “Decision on Sentence pursuant to article 76 of the Statute”, ICC-01/04-01/07-3484-tENG (“Decision on Sentence”).

<sup>4</sup> “Decision on the ‘Demande de clarification concernant la mise en œuvre de la Règle 94 du Règlement de procédure et de preuve’ and future stages of the proceedings”, ICC-01/04-01/07-3546-tENG.

<sup>5</sup> Decision No. 3546, operative part and para. 19.

<sup>6</sup> “Demande en prorogation du délai fixé par la décision ICC-01/04-01/07-3546 pour le dépôt et la transmission des demandes en réparation”, 7 September 2015, ICC-01/04-01/07-3586; “Demande en prorogation du délai fixé par la décision ICC-01/04-01/07-3599 pour le dépôt et la transmission des demandes en réparation”, 25 November 2015, ICC-01/04-01/07-3620 (notified on 26 November 2011).

Representative, the Chamber subsequently extended the deadline to 1 December 2015<sup>7</sup> and then to 29 February 2016.<sup>8</sup>

5. Pursuant to the Decision of 8 May 2015, the Legal Representative and his team travelled to the field between June 2015 and February 2016 to meet all participating victims and new applicants for reparations, and by October 2015 the Legal Representative had begun filing consolidated reparations applications with the Registry. The filing process was completed on 29 February 2016 in accordance with the Chamber's most recent instructions.

6. On 13 May 2016, the Legal Representative filed his "Report on the implementation of Decision No. 3546, including the identification of harm suffered by victims as a result of crimes committed by Germain Katanga" ("Report on the implementation of Decision No. 3546").<sup>9</sup>

7. On 30 September 2016, he filed observations on the monetary value of the alleged harm<sup>10</sup> and on 8 December 2016, he filed Recommendations on reparations modalities in the present case ("Recommendations on reparations modalities").<sup>11</sup>

8. On 24 March 2017, the Chamber issued the "Order for Reparations pursuant to Article 75 of the Statute" ("Order for Reparations").<sup>12</sup> In the order, for the purpose

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<sup>7</sup> "Decision on the requests of the Common Legal Representative of Victims and the Registry for an extension of time limit for transmitting and filing applications for reparations", 25 September 2015, ICC-01/04-01/07-3599-tENG.

<sup>8</sup> "Decision granting a further extension of time to the Common Legal Representative of Victims for submitting applications for reparations", 8 December 2015, ICC-01/04-01/07-3628-tENG.

<sup>9</sup> "Report on the implementation of Decision No. 3546, including the identification of harm suffered by victims as a result of crimes committed by Germain Katanga (article 75(1) of the Statute and regulation 38(1)(f) of the Regulations of the Court)", ICC-01/04-01/07-3687-tENG.

<sup>10</sup> "*Observations des victimes sur la valeur monétaire des préjudices allégués (Ordonnances ICC-01/04-01/07-3702 et ICC-01/04-01/07-3705)*", ICC-01/04-01/07-3713.

<sup>11</sup> "*Propositions des victimes sur des modalités de réparation dans la présente affaire (Article 75 du Statut et norme 38-1-f du Règlement de la Cour)*", ICC-01/04-01/07-3720.

<sup>12</sup> "Order for Reparations pursuant to Article 75 of the Statute", 24 March 2017, ICC-01/04-01/07-3728-tENG, with one public annex (Annex I) and one confidential annex *ex parte*, Common Legal Representative of the Victims, Office of Public Counsel for Victims and Defence team for Germain Katanga (Annex II).

of reparations, it recognized as victims two hundred and ninety-seven (297) applicants for reparations – of whom two hundred and eighty-three (283) are represented by the Legal Representative – and awarded them individual and dedicated collective reparations<sup>13</sup> for the total harm suffered, which it assessed at USD 3,752,620. It set the reparations award for which Mr Katanga is liable at USD 1 million.

9. The Order for Reparations includes one public annex (Annex I),<sup>14</sup> containing the procedural history, and one confidential *ex parte* annex (Annex II),<sup>15</sup> containing an individual analysis of the reparations applications.

10. On 25 April 2017, the Legal Representative filed a notice of appeal against part of the Order for Reparations and its Annex II.<sup>16</sup>

11. On 26 April 2017, the Defence filed a notice of appeal against part of the same Order for Reparations.<sup>17</sup>

12. Also on 26 April, the Office of Public Council for Victims (“OPCV”) filed a notice of appeal against the entirety of the Order for Reparations and its Annex II regarding the 37 applicants represented by the OPCV.<sup>18</sup>

13. On 27 June 2017, the Legal Representative,<sup>19</sup> the Defence and the OPCV<sup>20</sup> filed their appeal briefs.

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<sup>13</sup> Order for Reparations, operative part, pp. 118-120.

<sup>14</sup> ICC-01/04-01/07-3728-tENG-AnxI.

<sup>15</sup> ICC-01/04-01/07-3728-Conf-Exp-AnxII. A public redacted version was notified on 3 August 2017, ICC-01/04-01/07-3728-AnxII-Red.

<sup>16</sup> “Notice of Appeal against the ‘*Ordonnance de réparation en vertu de l’article 75 du Statut*’ and its Annex II”, ICC-01/04-01/07-3737-tENG.

<sup>17</sup> “Defence Notice of Appeal against the ‘*Ordonnance de réparation en vertu de l’article 75 du Statut*’”, ICC-01/04-01/07-3738.

<sup>18</sup> “Notice of Appeal against the Reparations Order and its Annex II issued in accordance with article 75 of the Statute on 24 March 2017”, ICC-01/04-01/07-3739.

<sup>19</sup> “Document in Support of the Appeal against the Order for Reparations under Article 75 of the Statute with its Annex II”, ICC-01/04-01/07-3745-tENG.

<sup>20</sup> “Document in Support of the Appeal against Trial Chamber II’s ‘*Ordonnance de réparation en vertu de l’article 75 du Statut*’”, ICC-01/04-01/07-3746-Conf. A public redacted version was notified on 28 June 2017, ICC-01/04-01/07-3746-Red.

14. Taking account of the public redacted version of the Defence Document in Support of Appeal (ICC-01/04-01/07-3747-Red) and the fact that the present observations do not contain anything confidential, the Legal Representative is filing them publicly.

### III. ANALYSIS OF THE GROUNDS OF APPEAL ON WHICH THE DEFENCE RELIES

(A) First ground of appeal: “The Trial Chamber erred in ordering compensation in respect of material harm relating to loss which was insufficiently proven”

#### **Defence Arguments:**

15. According to the Defence, the way in which the Chamber applied the “balance of probabilities” standard of proof is questionable, especially in the light of how it broadly relied on circumstantial evidence and presumptions to infer the existence of loss of livestock and crops (harvests). The Defence, however, does not contest the use of the above-mentioned standard of proof itself.

#### **Analysis of the Legal Representative:**

16. As indicated by the Chamber, when determining the applicable standard of proof for reparations proceedings, it is necessary to take into consideration the characteristics of the case at bar and, specifically, the difficulties victims may face in obtaining evidence in support of their claim.<sup>21</sup> On this basis, the Chamber concluded that the “balance of probabilities” standard of proof is the most appropriate in the present case.

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<sup>21</sup> Order for Reparations, para. 47.

17. This conclusion is in accordance with the principles laid down by the Appeals Chamber<sup>22</sup> and, as stated above, the Defence does not contest the relevance of the standard adopted.

18. In its application of the adopted standard, the Chamber stated that it saw fit to proceed on presumptions and to act on circumstantial evidence to satisfy itself of certain facts in the case.<sup>23</sup>

19. The Chamber relied on the practice of regional courts and transitional justice mechanisms and also on ICC case law – which does not preclude reliance on circumstantial evidence, even when “beyond reasonable doubt” is the standard of proof applied.<sup>24</sup>

20. The case law of the European Court of Human Rights (ECHR) is both relevant and enlightening with regard to the possible use of presumptions and circumstantial evidence and the limits which should guide the judge in their use. It should be noted that, in view of the specificity of its task under article 19 of the European Convention on Human Rights, the ECHR considers that it is not under any obligation to national systems for applying standards of proof. It therefore states that, in the proceedings before the Court, there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment, and that it adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties’ submissions.<sup>25</sup> It concludes that “[a]ccording to its established case-law, proof may follow from the coexistence of

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<sup>22</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, “Order for Reparations”, 3 March 2015, ICC-01/04-01/06-3129-AnxA, para. 65; *The Prosecutor v. Thomas Lubanga Dyilo*, “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 (Annex A) and public annexes 1 and 2”, 3 March 2015, ICC-01/04-01/06-3129, paras. 81-84 (“*Lubanga Judgment on the Appeals*”).

<sup>23</sup> Order for Reparations, para. 61.

<sup>24</sup> Order for Reparations, para. 58.

<sup>25</sup> *Nachova and others v. Bulgaria*, 6 July 2005, 43577/98 and 43579/98, para. 147.

sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact.”<sup>26</sup> It adds that

the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake.<sup>27</sup>

21. The criticism raised by the Defence is precisely about an exaggerated reliance by the Chamber on presumptions and circumstantial evidence. It is, therefore, important to recall all evidence on which the Chamber relies to arrive at the conclusions it does regarding proof of material harm in connection with the loss of livestock and harvests.

22. In its assessment of the evidence relating to the pillaging of livestock and the destruction of fields, the Chamber notes that some applicants produced proof of ownership of livestock. It also notes that Trial Chamber II, in its previous composition, concluded in the Judgment<sup>28</sup> that such pillaging and destruction had taken place and it recognizes that a good many inhabitants of Bogoro kept livestock and farmed the land.<sup>29</sup>

23. The Chamber considered that “[g]iven the importance to the local society of agriculture and keeping livestock, [...] it is reasonable to presume that the great majority of Bogoro’s population owned livestock and/or fields to meet their daily needs.”<sup>30</sup> It therefore considered as established the harm of pillaged livestock and the destruction of crops – even without supporting documentation regarding

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<sup>26</sup> *Nachova and others v. Bulgaria*, 6 July 2005, 43577/98 and 43579/98, para. 147.

<sup>27</sup> *Nachova and others v. Bulgaria*, 6 July 2005, 43577/98 and 43579/98, para. 147; and references cited: *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, pp. 64-65, para. 161; *Ribitsch v. Austria*, judgment of 4 December 1995, Series A no. 336, p. 24, para. 32; *Akdivar and others v. Turkey*, judgment of 16 September 1996, Reports 1996-IV, p. 1211, para. 68, *Tanlı v. Turkey*, no. 26129/95, para. 111, ECHR 2001-III; and *Ilaşcu and others v. Moldova and Russia* [GC], no. 48787/99, para. 26, ECHR 2004-VII.

<sup>28</sup> The ASP resolution on reparations (ICC-ASP/10/Res.3) indicates that “evidence concerning reparations may be taken during trial hearings so as to ensure that the judicial phase of reparations is streamlined and does not result in any delay thereof”.

<sup>29</sup> Order for Reparations, para. 98.

<sup>30</sup> Order for Reparations, para. 98.

the livestock – if the applicant claims such harm has occurred and can establish the destruction of his/her home.

24. The presumption established by the Chamber relies primarily on the findings contained in the “Judgment pursuant to article 74 of the Statute” (“Judgment”),<sup>31</sup> which states that “[t]he keeping of grazing animals was a significant part of the Bogoro economy, especially amongst the Hema, who are herders by tradition. The inhabitants of Bogoro also farmed the land.”<sup>32</sup> To support this, it cited the statements of witnesses P-166 and V-2. When questioned about whether keeping livestock was reserved for certain families, P-166 stated that it was an activity “that was carried out by everyone living in Bogoro”.<sup>33</sup> When questioned about whether there were any cultivated farms, the witness indicated that the population carried out farming activities.<sup>34</sup> The Judgment refers to the existence in Bogoro of a livestock market<sup>35</sup> and states in several places that, for the inhabitants of Bogoro, livestock was property essential to daily life, much like furniture or roofing sheets.<sup>36</sup>

25. Regarding the Defence’s claim that the livestock had been evacuated from Bogoro before the attack – the subject of much debate during the proceedings – the Legal Representative refers to his Report on the Implementation of Decision No. 3546, recalling that:

the victims do not deny that some graziers with large herds may have moved some of their animals. However, given the importance of herding in the Hema tradition, most victims had kept some of their cattle as a way of meeting their everyday needs. Others did not have the financial means to move their animals elsewhere.<sup>37</sup>

26. The evidence admitted by the Judgment comes not only from statements given during the proceedings but also from common knowledge, such as the importance of the cow in Hema culture and its presence in all essential aspects of

<sup>31</sup> 7 March 2014, ICC-01/04-01/07-3436-tENG.

<sup>32</sup> Judgment, para. 724.

<sup>33</sup> ICC-01/04-01/07-T-225-Red-tENG, p. 63.

<sup>34</sup> ICC-01/04-01/07-T-225-Red-tENG, p. 65.

<sup>35</sup> Judgment, para. 730.

<sup>36</sup> See above all para. 1660 of the Judgment.

<sup>37</sup> Report on the Implementation of Decision No. 3546, para. 114.

Hema life. Evidence that the Chamber considered it could take from the Judgment was discussed during the proceedings; the Defence had the opportunity to freely contest the statements to which the Order for Reparations refers. The Chamber added that it had taken account of the Decision on Sentence<sup>38</sup> and also of the statements of applicants who were asked, to the extent possible, to provide documents in support of their claims. All of this evidence confirms the arguments that can be put forward in view of the content of the Judgment.

27. The Chamber therefore relied on the coexistence of strong, clear and concordant evidence, specifically on conclusions drawn from a judgment and based on factual elements that have been freely debated among the parties and participants during proceedings. In no way was its reasoning arbitrary, nor did it place the Defence in an unfair position by making it impossible to contest its conclusions. In the light of the evidence in its possession and taking into account the specificity of facts, and the burden and adopted standard of proof, the Chamber could reasonably presume the existence of harm in connection with the loss of livestock and harvests when claimed, once the loss of someone's home in Bogoro had been established.

**(B) 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"**

**Defence Arguments:**

28. According to the Defence, the Chamber erred by adopting too broad an interpretation of "relative" to include any member of the family.

29. Although it distinguishes between close and distant relatives, the Chamber awarded reparations for death in both cases. Aside from the fact that the Chamber adopted an extensive definition of the meaning of close relatives, it referred to distant relatives as "other relatives", also establishing the right to reparations in

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<sup>38</sup> ICC-01/04-01/07-3484-tENG.

the case of death. The Defence therefore finds the Chamber's categorization of indirect victims unacceptable.

### **Analysis of the Legal Representative:**

30. The Chamber called for the demonstration of the existence of a close personal relationship between the direct and indirect victims. Such proof was needed to establish that the harm was personally suffered.<sup>39</sup> In its analysis, the Chamber noted that it took account not only of victims' statements but also of all other documents provided in support of the reparations applications.

31. The Chamber also noted that it took account of family and social structures in Ituri when assessing the concept of family and that the existence of relationships between family members is such that death would cause harm to indirect victims. It concluded that "[i]n the specific circumstances of the attack on Bogoro, (...) the loss of a family member [i]s a traumatic experience entailing psychological suffering – it is of little consequence whether the relative was near or distant."<sup>40</sup>

32. The Chamber's reasoning is in accordance with the principles laid down by the Appeals Chamber in *The Prosecutor v. Thomas Lubanga Dyilo* ("Lubanga case")<sup>41</sup> and is similar to the approach taken in most domestic jurisdictions, including those to which the Defence makes reference in its Document in Support of Appeal.<sup>42</sup>

33. The Chamber's reasoning revolves around the demonstration of harm personally suffered owing to an emotional bond with the deceased. This harm is presumed to exist if the deceased is a close family member. According to some legal traditions – e.g. French jurisprudence, cited by the Defence – this includes grandparents and others beyond the nuclear family unit.

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<sup>39</sup> Order for Reparations, para. 113.

<sup>40</sup> Order for Reparations, para. 121.

<sup>41</sup> ICC-01/04-01/06-3129-AnxA, para. 7.

<sup>42</sup> Defence Document in Support of Appeal, paras. 34-41.

34. As regards more remote family, it is a matter of demonstrating the harm suffered personally which is not automatically presumed given the family relationship but which can be inferred from the circumstances which illustrate the existence of an emotional bond. Moreover, this approach is not contested by the Defence.<sup>43</sup>

35. The case law cited by the Defence even recognizes the possibility of someone non-related claiming harm if that person establishes that such harm was suffered.<sup>44</sup> Similarly, the decision of the Extraordinary Chambers in the Courts of Cambodia – cited by the Defence – confirms the existence of a broadly recognized approach according to which

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>45</sup>

36. In the present case, the Chamber quite rightly considered that the situation in Bogoro was such that the presence of family relationships justifying the existence of harm could be inferred, even in cases involving the death of a direct victim who was not a close family member (in the sense defined above) of the indirect victim.

37. Within the context of life in a place that is limited geographically, such as Bogoro, and a community where family plays a central role in society, the existence of a familial proximity extends to all members of a family, whether we refer to them as "close" or "distant".

38. An emotional bond undoubtedly exists between people who interact daily and, in a general sense, live together within the same community, namely that of the residents of the village of Bogoro.

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<sup>43</sup> Defence Document in Support of Appeal, para. 32.

<sup>44</sup> Defence Document in Support of Appeal, para. 36.

<sup>45</sup> Defence Document in Support of Appeal, para. 51.

39. All deaths concern persons killed in Bogoro and are referred to by people residing in Bogoro at the time of death or, for a very small minority, people not permanently residing there but who had established their family life and social life there and whose main interests were in Bogoro. The deceased and survivors who lived in Bogoro were necessarily in regular contact and, therefore, had inevitably developed an emotional bond, which illustrates the existence of harm personally suffered, especially for people within the same family. By indicating that the Chamber's reasoning could lead to recognizing harm even in the case of members of the same family who had never met, the Defence refers to a scenario that does not apply here because it is wholly impossible in the context of Bogoro.

40. The Chamber took into account the specific context of the case in its reasoning and clearly defined – albeit implicitly – the boundaries within which it considers that harm connected to the death of a family member could be admitted if kinship is established.

**(C) Third ground of appeal: “The Trial Chamber erred in ruling *ultra petita* by allocating compensation exceeding several applicants’ claims”**

**Defence Arguments:**

41. The Defence submits that the Chamber erred in ruling *ultra petita* by awarding reparations exceeding those requested. It is alleged to have done this on at least three occasions:

- (a) when it awarded a minimum amount to all the applicants who claimed a loss of cattle and demonstrated the loss of a house, even when the alleged loss of cattle was less than the minimum defined by the Trial Chamber;<sup>46</sup>

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<sup>46</sup> Defence Document in Support of Appeal, para. 58.

- (b) when it awarded reparations for the mental harm connected to having lived through the attack to all the applicants who demonstrated the existence of mental or material harm;<sup>47</sup> and
- (c) by awarding compensation of USD 250 to all applicants despite the Legal Representative's request for a symbolic award of EUR 1.<sup>48</sup>

### **Analysis of the Legal Representative:**

42. The Legal Representative notes that the first example raised by the Defence, point (a), in fact concerns the assessment of criteria the Chamber could apply when ruling on the extent of harm claimed and, specifically, on the application of the concept of fairness. It should be recalled that the application of fairness is particularly justified when it is difficult to put a specific figure on the harm, or as a corrective measure to more fairly balance out the strict application of rules for assessing harm. It applies to both material and non-material harm. The Inter-American Court of Human Rights, for example, regularly applies the concept of fairness when assessing certain financial losses.<sup>49</sup>

43. As regards the question of mental harm recognized for each applicant for the harm suffered from the attack (points (b) and (c) above), the Legal Representative wishes to respond on the principle of this recognition and the amount awarded.

#### *(i) The principle of awarding reparations for mental harm connected with the attack*

44. The Chamber noted that some applicants explicitly mentioned in their applications psychological harm connected to living through the attack – and some

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<sup>47</sup> Defence Document in Support of Appeal, para. 59.

<sup>48</sup> Defence Document in Support of Appeal, para. 62.

<sup>49</sup> See above all *Vélez Loor v. Panama*, judgment of 23 November 2010, series C, no. 218.

have submitted medical certificates concerning their mental health.<sup>50</sup> The Chamber also noted that in the view of the Legal Representative all victims suffered such mental harm to one degree or another. In his observations on the monetary value of the harm alleged, the Legal Representative referred to extremely severe trauma from the attack, experienced not just by individuals, by the community as a whole.<sup>51</sup> In his Recommendations on Reparations Modalities, he repeated that all victims suffered mental harm to one degree or another as a result of the attack (trauma in conjunction with having experienced the attack, and some people continue to suffer from post-traumatic stress, trauma caused by exile, dispersion of the family unit and loss of social status.<sup>52</sup> In this regard, he sought compensation from the convicted person of a symbolic amount for all victim applicants (see above on this amount).

45. It is therefore clearly a matter here of defending the existence of harm shared by all the victims of the attack regardless how it is formulated in the reparations applications. The Legal Representative stated this in the observations cited above and, on behalf of all victims, called for this harm – which is unique to them and unanimously shared – to be taken into account.

46. The Chamber itself noted that the attack was extremely violent and that every applicant who can establish that he or she was affected by the attack materially or physically can be presumed to have suffered mental health repercussions.<sup>53</sup> The Chamber noted the existence of mental harm not only to those who were present during the atrocities committed and who saw the massacres and destruction of their community but also to those who were not present in Bogoro but whose life and family had always been there. Much in the same way, they also suffered trauma caused by the deaths and destruction. As with the victims present in Bogoro on 24 February 2003, they experienced individual and community trauma, further

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<sup>50</sup> Order for Reparations, para. 123.

<sup>51</sup> ICC-01/04-01/07-3713, paras. 78 and 79.

<sup>52</sup> Recommendations on Reparations Modalities, para. 71.

<sup>53</sup> Order for Reparations, para. 125.

exacerbated by the impossibility of returning to where they had so many family and social ties, the place where their main interests lay and where they had built their homes.

47. With consideration for the claim raised by the Legal Representative to take into account the situation of all of these people and the harm they have all suffered, the Chamber cannot be criticized as having ruled *ultra petita* when it

decided to make a finding that an Applicant sustained psychological harm connected to the experience of the attack on Bogoro, where it is proven that that person suffered other harm during the attack, even if he or she makes no explicit allegation of psychological harm.<sup>54</sup>

The Chamber could be criticized for having ruled *ultra petita* only if it had ruled on a request that had not been submitted to it. It would have then ventured beyond its remit. However, that is not the case considering the reference to such harm in the reparations applications and the reasoning repeated by the Legal Representative regarding its general existence.

**(ii) The amount awarded for this damage**

48. In its assessment of the extent of the harm, the Chamber rightly noted that the Legal Representative had estimated at USD 25,000 the mental harm connected to the trauma of the attack. The Chamber considered that this must be assessed *ex aequo et bono* at USD 2,000 per applicant.<sup>55</sup>

49. Having then defined the extent of reparations for which Germain Katanga is responsible (see point (D) below), the Chamber ruled on the types and modalities of reparations that it intends to order in the present case. In doing so, it applied the principles defined by the Appeals Chamber in the *Lubanga* case.<sup>56</sup>

50. The Chamber stated that it considered individual and collective reparations simultaneously. Regarding individual reparations, it referred to the Legal

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<sup>54</sup> Order for Reparations, para. 129.

<sup>55</sup> Order for Reparations, para. 236.

<sup>56</sup> ICC-01/04-01/06-3129-AnxA.

Representative's proposal to symbolically award EUR 1 to all victims in recognition of the mental harm suffered from the attack. As indicated above, the proposal was formulated with consideration for the adoption of appropriate modes of reparations relevant in the present case, regardless of the monetary assessment of the harm. The Defence said that it found this measure appropriate and reasonable.<sup>57</sup>

51. On the basis of this proposal, the Chamber made its own assessment of the amount it considers appropriate for reparations for this harm considering the types and modalities of reparations applied. Ruling *ex aequo et bono* taking into account the proposed amount – which in the absence of a fixed and objective base for calculating the harm can only be a lump-sum amount – the Chamber enjoyed full liberty to set this amount in a fair way given the circumstances of the present case.

52. In the light of the Chamber's assessment of the harm in question in the present case at USD 2,000 (whereas the Legal Representative had assessed it at USD 25,000) on the one hand and the Legal Representative's proposed symbolic compensation of EUR 1 under the reparations modalities on the other hand, it was reasonable for the Chamber to set the amount of compensation at USD 250, taking into account its wish to make it meaningful. The Chamber's approach is beyond reproach both as regards its assessment *ex aequo et bono*, the only possible choice in the present case, and as regards its determination of the amount awarded, which is perfectly reasonable and fair in the light of the circumstances of the present case.

53. To conclude, there can be no question here of criticizing the Chamber for having ruled *ultra petita* insofar as it ruled on the assessment of damage for which reparations had been sought by the Legal Representative, by ruling *ex aequo et bono*, in the light (1) of the impossibility of using a different mode of damage assessment, and (2) of the procedure followed by the Chamber which consists, once the amount

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<sup>57</sup> "Defence Response to the '*Propositions des victimes sur des modalités de réparation dans la présente affaire*'", 30 December 2016, ICC-01/04-01/07-3722, para. 11: "The defence agrees with the proposal that all the applicants should be entitled to psychological support and be granted one symbolic euro."

of damage has been assessed, in setting the types and modalities of reparations that are appropriate given the circumstances of the present case.

**(D)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”**

#### **Defence Arguments:**

54. The Defence maintains that, within the context of reparations, there can be no question of punitive damages, only compensatory damages. Reparations cannot serve as double punishment.

55. The Defence submits that the Chamber considered many circumstances as aggravating that had not been considered as such by the same Chamber with a different composition when it issued its Decision on Sentence. By contrast, the latter had given weight to a number of mitigating circumstances that were not considered in the Order for Reparations. Similarly, the Appeals Chamber’s bench of three judges, which ruled on the reduction of sentence, considered factors that the Chamber wrongly failed to take into account when it assessed the Accused’s responsibility.<sup>58</sup>

56. The Chamber therefore attributed to Germain Katanga greater moral culpability than when it ruled (in a different composition) on the sentence by taking portions of the Judgment and the Decision on Sentence out of context.

57. The fact that none of the judges sitting on the bench when the Chamber issued these two decisions sat on the bench of the newly composed Chamber was prejudicial to the convicted person.

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<sup>58</sup> Defence Document in Support of Appeal, paras. 76-77.

58. By not taking into account the role of other individuals guiltier than Germain Katanga in the commission of crimes in the present case, in reality the Chamber applied the joint and several liability principle, despite the subsidiary role played by Germain Katanga.

59. Lastly, the Chamber should have taken greater account of Germain Katanga's current situation regarding his inability to pay reparations.

### **Analysis of the Legal Representative:**

#### *(i) Regarding consideration of legal and factual elements that are the basis of Germain Katanga's responsibility in the reparations*

60. The Legal Representative shares the Defence's analysis that the reparations are to be strictly based on the individual responsibility of the convicted person and that there can be no question of ordering reparations as punitive damages. He rejects, however, the Defence's inference of confusion between or lumping together of the criteria that are to guide two fundamentally distinct debates, namely the discussion on the sentence and the specific determination of the convicted person's responsibility in the reparations. There can be no question of shifting the debate to criticism of the Chamber's lack of assessment of the only mitigating circumstances on the ground that a punitive quality must not be injected into the reparations. Framing the reparations debate as an assessment of mitigating circumstances considered against the convicted person in the Decision on Sentence paves the way for taking into account the convicted person's conduct up until the very day of the decision on reparations and would fundamentally distort the reparations proceedings. It would switch the focus from determining the amount of compensation owed to the victims on the basis of the accused person's responsibility in the commission of crimes to what would be just or fair to ascribe to the Accused on the basis of his conduct following the commission of crimes. Such

reasoning would lead to limited responsibility in terms of reparations for commendable conduct, while poor, reprehensible or punishable conduct would lead to increased responsibility for reparations.

61. The Legal Representative does not subscribe to the standpoint according to which the Chamber allegedly gave excessive weight to certain aggravating circumstances that it took out of context from the Judgment or Decision on Sentence, and failed to take into account mitigating circumstances. In any event, the assessment of the Chamber's reasoning must rely on the criteria specific to the reparations proceedings, as the Defence recalls, namely

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>59</sup>

62. The Chamber, however, applied the rule to a T, setting out the principle that it "must first and foremost examine, *vis-à-vis* the specific circumstances of the case, Mr Katanga's participation in the commission of the crimes of which he was convicted."<sup>60</sup>

63. The Chamber undertook its own methodical and fully independent assessment of elements to serve as a basis for Germain Katanga's liability in the commission of the crimes for which reparations are to be made. To this end, it objectively analysed the factual and legal elements concerning this participation as they were noted in the Judgment and Decision on Sentence. Unlike the Defence, the Legal Representative considers that this assessment is all the more objective because the composition of the Chamber that issued the Order for Reparations is distinct from that of the Chamber that issued the Judgment and the Decision on Sentence, offering a greater guarantee of independence and impartiality. In the light of the requirements set out in the Rome Statute, under which the order for reparations is issued following distinct proceedings in the case, which include

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<sup>59</sup> Defence Document in Support of Appeal, para. 68, citing the *Lubanga* Judgment on the Appeals, para. 118.

<sup>60</sup> Order for Reparations, para. 257.

the decision on sentence,<sup>61</sup> the composition of the new Chamber ensures that the elements upon which the Judgment is based will be considered in full independence and impartiality, and that the accused's responsibility in the reparations will be objectively assessed. The Legal Representative considers that this guarantee is all the greater because it is rooted in the determination of the accused person's responsibility on the basis of elements of the Judgment and not following proceedings in which this responsibility is assessed anew.

64. In the present case, the Defence does not demonstrate that the Chamber exercised its discretionary power in an inappropriate way. As a reminder, the Appeals Chamber's intervention in the discretionary power of the Trial Chamber is subject to specific conditions:

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

[...][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 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.<sup>62</sup>

65. In the present case, the Defence does not demonstrate that such conditions have been met.

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<sup>61</sup> Decision on conclusion of term of office of Judges Bruno Cotte and Fatoumata Dembele Diarra, 16 April 2014, ICC-01/04-01/07-3468-AnxI, p. 3: "The differences between reparations proceedings and criminal proceedings are numerous, spanning many aspects of substance and procedure. While the Court's jurisprudence on reparations is limited, some differences, such as the participants and evidentiary standards, are evident. Notably, victims receive an enhanced procedural role in that they become parties to the proceedings, thereby altering the nature and focus of proceedings from punitive to reparative. The Appeals Chamber has held that 'reparations proceedings are a distinct stage of the proceedings.'" (Annex to "Decision replacing two judges in Trial Chamber II", 16 April 2014, ICC-01/04-01/07-3468).

<sup>62</sup> *Lubanga* Judgment on the Appeals, para. 43.

*(ii) Regarding the type of responsibility applied*

66. The Defence maintains that the Chamber applied the joint and several liability principle against Germain Katanga.<sup>63</sup>

67. However, nothing could be further from the truth because, although the Chamber noted the presence of combatants other than Ngiti during the attack on Bogoro and their implication in the crimes for which Germain Katanga was convicted,<sup>64</sup> it underscored that it

is not bound by national practice and so takes the view that the justification advanced to order against the convicted person an award for reparations for the totality of the harm suffered by the victims – namely, the concern to shield victims from the insolvency of one of the co-offenders – cannot be imported into the particular context of cases before this Court.<sup>65</sup>

The Chamber therefore expressly ruled out any system similar to “joint and several liability” which involves holding each participant liable for the totality of the harm done, on the understanding that the person responsible for the reparations payment can seek recourse against the other participants.

*(iii) Regarding the failure to take into account Germain Katanga's indigence*

68. According to the Defence, the current financial situation of the convicted person should be taken into account in that the Chamber should have issued an order that reflects the means and capacity of Germain Katanga to pay.<sup>66</sup> However, the Chamber clearly indicated that it intended to follow the Appeals Chamber on this

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<sup>63</sup> Defence Document in Support of Appeal, para. 81.

<sup>64</sup> Order for Reparations, paras. 166 and 262.

<sup>65</sup> Order for Reparations, para. 263.

<sup>66</sup> Defence Document in Support of Appeal, para. 84.

point, and it considered irrelevant the current financial situation of Germain Katanga.<sup>67</sup>

69. The Defence offers no argument that might justify the Chamber diverging from these principles. The Legal Representative further notes that, in most legal systems, the financial situation of the convicted person does not play a part in determining that person's liability regarding reparations for harm caused. Indigence becomes a factor later on when it comes to implementing the decision awarding compensation and when this cannot be paid, in whole or in part, by the convicted person. In the present case, the Legal Representative questions the Defence's interest in raising this question given that reparations financing is a matter for the Trust Fund for Victims and, as things stand, Germain Katanga has not given any indication of financing even the tiniest amount of reparations.

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<sup>67</sup> Order for Reparations, para. 245 *et seq.*

**For these reasons,**

**May it please the Appeals Chamber to dismiss each of the grounds of appeal raised by the Defence.**

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Mr Fidel Nsita Luvengika

Legal Representative of Victims

Dated this 28 August 2017

At Kinshasa, Democratic Republic of the Congo