

REPARATIONS: A COMPARATIVE ANALYSIS BETWEEN JUDGMENTS ON THE APPEALS AGAINST ORDERS FOR REPARATIONS IN LUBANGA, AL MADHI AND KATANGA

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RESUMEN

En este artículo, realizaremos un análisis comparativo entre las sentencias sobre los recursos de apelación contra ordenes de reparación en tres casos de la Corte Penal Internacional (Thomas Lubanga Dyilo, Ahmad Al Faqi Al Mahdi y German Katanga). Nos enfocaremos en aspectos sustanciales de las decisiones como son el abordaje para entender los casos de daño psicológico, presunción, causalidad o causa próxima, responsabilidad y modalidades de reparación. Se analizan los aspectos procesales como requisitos generales, procedimientos para la adjudicación de reparaciones, los estándares de prueba y cargas de la prueba, los procedimientos de reparación; como se da un juicio justo y los derechos de las víctimas, de la defensa y el proceso durante la etapa de implementación. Las similitudes y diferencias de los tres casos en estudio permiten concluir que el proceso de reparaciones en casos ante la Corte Penal Internacional implica la aplicación de estándares de prueba menos rigurosos en comparación con la fase de juicio, reconociendo la responsabilidad penal ya establecida. Se destaca la importancia de equilibrar los derechos del condenado con los derechos de las víctimas durante el proceso de reparaciones. Además, se subraya el papel crucial del Fondo Fiduciario para las Víctimas (TFV) en la implementación de las órdenes de reparación.

ABSTRACT

In this article, we will conduct a comparative analysis of judgments on appeals against reparation orders in three cases from the International Criminal Court (Thomas Lubanga Dyilo, Ahmad Al Faqi Al Mahdi, and German Katanga). We will focus on substantive aspects of the decisions, such as the approach to understanding cases of psychological harm, presumption, causality or proximate cause, responsibility, and modalities of reparation. Procedural aspects will also be examined, including general requirements, procedures for the adjudication of reparations, standards of proof and burdens of proof, reparation procedures, the conduct of a fair trial, and the rights of victims, the defence, and the process during the implementation stage. The similarities and differences in the three cases under study lead to the conclusion that the reparations process in cases before the International Criminal Court involves the application of less rigorous standards of proof compared to the trial phase, recognizing the already established criminal responsibility. The importance of balancing the rights of the convicted with the rights of the victims during the reparations process is emphasized. Additionally, the crucial role of the Trust Fund for Victims (TFV) in implementing reparation orders is underscored.

PALABRAS CLAVE: reparaciones, responsabilidad, víctimas, causalidad, Fondo Fiduciario.

KEY WORDS: nature rights, amicus curiae, social movements, democratic deliberation, judicial decisions.

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INTRODUCTION

La The International Criminal Court ('ICC') has ruled on reparations in three different cases: *The Prosecutor v. Thomas Lubanga Dyilo*, *The Prosecutor v. Ahmad Al Faqi Al Mahdi* and *The Prosecutor v. Germain Katanga*.

On 7 August 2012, Trial Chamber I issued the Decision Establishing the Principles and Procedures to be Applied to Reparations and an Order for Reparations in the Case of *The Prosecutor v. Thomas Lubanga Dyilo*, both decision and the order for reparations were challenged by Mr. Lubanga, the Legal Representatives of Victims ("LRV"), and the Office of Public Counsel for Victims ("OPCV"). On 3 March 2015, the Appeal Chambers (AC) issued its decision on the appeals ('Lubanga AC Judgment').

Similarly, on 17 August 2017, TC VIII issued the reparations order in the case of *The Prosecutor v. Ahmad Al Faqi Al Mahdi*. The LRV filed an appeal against said order. On 8 March 2018, the AC issued its Judgment on the appeal against the "Reparations Order" ('Al Mahdi AC Judgment').

On 24 March 2017, Trial Chamber II issued the "Order for Reparations pursuant to Article 75 of the Statute" "in the Case of *The Prosecutor v. German Katanga*, a legal representative of victims, OPCV for victims, and Mr. Katanga, impugned such decision. On 8 March 2018 the AC issued its judgment on the appeals ('Katanga AC Judgment').

The *Lubanga AC Judgment* established a comprehensive set of procedural and substantive principles concerning reparations. The *Katanga* and *Al Mahdi AC Judgments* expanded and explained *Lubanga*, and adopted new findings touching on the rights of the convicted persons, the victims and the role of the Trust Fund for Victims ("TFV").

KEY FINDINGS¹

1. An order for reparations must contain, at a minimum, five essential elements: 1) it must be directed against the convicted person; 2) it must establish and inform the convicted person of his or her liability with

¹ The conclusions presented here represent a general framework on issues relating to reparation proceedings that were decided by the AC in the *Lubanga*, *Katanga* and *Al Madhi* Cases. The links to the cases can be found in references and the annexes of this report.

respect to the reparations awarded in the order; 3) it must specify, and provide reasons for, the type of reparations ordered, either collective, individual or both, pursuant to rules 97 (1) and 98 of the Rules of Procedure and Evidence (“Rules”); 4) it must define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted, as well as identify the modalities of reparations that the Trial Chamber considers appropriate based on the circumstances of the specific case before it; 5) it must identify the victims eligible to benefit from the awards for reparations, or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted.

2. A proximate “cause/but/for” approach to causation applies to individual and collective awards of reparations. Therefore, direct and indirect victims may be awarded reparations. However, judges must carefully establish the link between the crime for which the defendant was convicted, and the material or psychological harm caused to the victims.
3. Victims may be awarded either individual or collective reparations due to psychological harm.
4. Victims have the right to proportional, adequate, and prompt reparations.
5. A trial chamber is not required, in all circumstances, to decide upon the scope and extent of any damage, loss, or injury in relation to individual requests. When there are more than a very small number of victims, it is neither necessary, nor desirable, to award individual and personalized reparations.
6. While there is a general trend to presume psychological harm by the victim’s family members, this presumption is discretionary. Nonetheless, the causal link between the crimes and the harm (e.g., transgenerational psychological harm) must be established. The definition of family is case-specific, but sufficient evidence of cultural aspects of the definition is recommended.
7. It is not unreasonable to admit that psychological harm was experienced by those who had lost their family members, whether they were near or distant.

8. The obligation to repair is linked to the harm. The convicted is liable for the full amount of reparations, even though he or she may have shared criminal responsibility with other perpetrators. The fact that other perpetrators shared responsibility may only be relevant if they were also judged and convicted by the Court.
9. Indigence is not an obstacle to the imposition of liability, nor confers the benefit of reduced liability.
10. The Trust Fund may use its other resources to make the reparation order effective. This initiative does not exonerate the convicted from liability. In these circumstances, he or she must reimburse the Trust Fund.
11. The financial situations of the convicted should be monitored and the Court should use the cooperation with the State Parties to make reparations effective.
12. There are two distinct procedures for awards for reparations. The first, related to “individual reparation award is primarily application (‘request’) based and is mainly regulated by rules 94 and 95 of the Rules. The second relates to collective reparation awards and is regulated in relevant part by rules 97(1) and 98(3) of the Rules.
13. Expert’s assistance is possible: 1) before an order for reparations is issued, as regulated by rule 97(2) of the Rules and, 2) after the order for reparations has been issued which is regulated by the Regulations of the TFV.
14. In reparations proceedings a “lower standard of proof” applies which does not exclude the applicant’s burden of proof. However, what is sufficient for the purposes of an applicant meeting the burden of proof will depend upon the circumstances of the specific case.
15. A trial chamber has discretion in assessing the evidence and in indicating the content of the burden of proof. As a general approach, the discretion will be linked to the specific circumstances of each case. Circumstances of the case can be, for example, the difficulties applicants may face in supporting their applications, caused, among others the destruction, or even the unavailability of evidence.

16. “Presumption of facts” is possible. Moreover, this standard has been applied, albeit under different denominations, to decisions handed down by international courts, involving massive human rights violations.
17. The reference to the presumption results from the difficulty that the victims may face in obtaining evidence to support their claims which means to “presume a given fact to be established to the requisite standard of proof in the absence of direct evidence”.
18. The adoption of the presumption of facts is not unlimited. Reasonableness is an important criterion to limit the use of that presumption and will depend upon the circumstances of the case.
19. Trial Chambers can apply the principle of equity, *ex aequo et bono* to assess the value of harms suffered by victims.
20. A strict applicability of the *ultra petita* principle to reparations proceedings is precluded. A trial chamber is permitted to issue a decision on reparations without being seized by any party and this, by definition, entails making an award to victims which has not been sought.
21. Respect for the right to appeal prevents the AC from determining the scope of liability for reparations when a trial chamber did not decide.
22. The conflict between the right of the convicted person to identify the potential victims of reparations and their right to be protected should be resolved in the light of the principle of proportionality, in the sense of balancing the rights and interests of the parties. A trial Chamber should make its determination on a case-by-case basis, taking into account the various interests involved.
23. The TFV is directed to prepare the draft implementation plan, providing in the anticipated monetary amount that it considers necessary to remedy the harms caused by the crime for which a person was convicted, based on information gathered during the consultation period leading up to the submission of the draft implementation plan.
24. The TFV should also include the monetary amount, if its Board of Directors so decides, that will complement as an advance in order that the awards can be implemented.

25. When deciding on the nature of the awards for reparations, the TFV is instructed to take into account the views and proposals of victims regarding the appropriate modalities of reparations and programmes that in the view of the TFV should be part of any reparations awarded on a collective basis.
26. Although the TFV plays an important role in the implementation stage, its functions are limited by the reparations order itself.
27. The role of the TFV should not be understood in any way to suggest that the responsibility of the convicted for the person awards for reparations can go beyond the harms resulting from the crimes for which [he/she] was convicted.
28. A trial chamber shall monitor and oversee the implementation stage, including having the authority to approve de draft implementation plan, and may be seized of any contested issues arising out of the work and the decisions of the TFV.
29. Prior to approving the plan, the parties shall have the opportunity to submit observations to the Chamber. Other interested parties may request leave of the Chamber to submit observations.
30. The Trial Chamber's determination of the amount of a convicted person's liability for the awards for reparations is part of the order and is therefore appealable.

1. Substantial Aspects

1.1. Victims

a. Definition of Victim

In the AC view, in the reparations stage, the definition of victim is closely linked to harm, and such harm must have been the consequence of the commission of crimes by the accused (ICC; 2015, par. 197) (ICC; 2018 B, par. 115). Thus, in the *Lubanga* trial, the AC refused to award reparations to victims of sexual violence since Mr. Lubanga was not convicted of sexual crimes. (ICC; 2015, par. 197).

b. Indirect Victims

The *Lubanga AC Judgment* established: (a) that indirect victims are entitled to reparations as a result of the crimes for which the defendant was convicted, (b) that indirect victims include, among others, the family members of the direct victims and, other persons who suffered personal harm as a result of the offenses, and (c) that family members of death victims may be compensated for psychological harm. (*The Prosecutor v. Thomas Lubanga Dylo*), Amended Order of Reparations, Annex 1 to 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 (Annex A) and public annexes 1 and 2”. (ICC; 2015, pars. 6, 58, 128, 191).

The principles set in the *Lubanga AC Judgment* were echoed in the *Katanga AC Judgment*, where the AC further elaborated on the definition of family as indirect victims, but specified the flexible nature of the presumption of emotional harm. In the *Katanga* case, the AC rejected a limited interpretation of the term ‘indirect victim’, and emphasized that, as per articles 75 of the Statute and 85(a) of the Rules, the definition of victim is linked to the existence of harm, rather than whether the indirect victim was a close or distant family member of the direct victim. (ICC; 2018 B, par. 115). The AC in *Katanga* confirmed the Trial Chamber’s decision to award reparations where, the death of a direct victim, and the family relationship between the direct victim and the applicant were established. (ICC; 2018 B, par. 98). Furthermore, the AC pointed out that the term indirect victim is not strictly defined to include or exclude particular categories of family members. (ICC; 2018 B, par. 118). But the AC also pointed out that, although there is a general trend in the jurisprudence that a person is presumed to suffer psychological harm after the loss of an immediate family member, this presumption is discretionary (ICC; 2018 B, par. 118).

c. Eligibility

In *Lubanga*, the AC interpreted Rule 85(a) of the Rules and Regulation 46 of the Regulations of the Trust Fund (“Regulations of the TFV”), and established that only victims who suffered harm as a result of the crimes for which the accused was found guilty were eligible to claim reparations

and, that when compensation is awarded to a community, only community members who have the relevant criteria are eligible. (ICC; 2015, par. 8). In *Katanga*, the AC confirmed and expanded by stating that eligibility must be based upon the demonstration of harm rather than the demonstration that the indirect victim falls within a specified class of persons (ICC; 2018 B, par. 119).

1.2. Harm: Psychological: Presumption

When defining harm, the AC in *Lubanga* considered, among other, psychological injuries, trauma, and suffering. (ICC; 2015, par. 191; AnxA par. 58). The *Katanga AC Judgment* applied such findings but further elaborated on the issue of *presumption* of psychological harm.

In *Katanga*, the AC found that it was not unreasonable to presume a psychological harm resulting from the loss of both distant and close family members. (ICC; 2018 B, par. 126). But conversely, while it confirmed the Trial Chamber's decision to award reparations for psychological harm to all applicants who proved material harm but did not personally experience the attack, it recommended that if in the future trial chambers, were to presume psychological harm, they should carefully approach the issue and provide clear reasons as to the basis on which such a presumption is made. (ICC; 2018 B, par. 149).

The AC also recognized the possibility of transgenerational psychological harm but pointed out the need to assess individual applications (bearing in mind that the number of applications alleging transgenerational harm was low to establish whether a causal nexus existed. (ICC; 2018 B, pars. 239, 255, 260).

1.3. Causation / Proximate Cause

In *Lubanga*, the AC established, that the standard of causation is a “but/for” relationship between the crime, the harm and the crimes for which the accused was convicted, were the proximate cause of the harm (ICC; 2015, AnxA par. 59). Thus, the court dismissed the defence arguments that there is an international trend adopting a restrictive approach with regard to causation, and endorsed the possibility of indirect victims being awarded with reparations (ICC; 2015, par. 129).

The *Katanga AC Judgment* confirmed such criterion and the Trial Chamber's decision to grant reparation awards to indirect victims but stressed the need for the judge to carefully explain causality with respect to indirect victims, noticing that further analysis was needed with regard to the notion of family in the concerned community. (ICC; 2018 B, par. 122).

1.4. Liability

a. Indigence

The *Lubanga Judgment* established that indigence is not an obstacle to the imposition of liability (ICC; 2015, par. 103). The *Al Mahdi* and *Katanga AC Judgments* confirmed such principle (ICC; 2018 A, par. 62) (ICC; 2018 B, par.189). The *Katanga AC Judgment* established that the convicted person did not hold any concrete right to have the benefit of reduced liability on account of his present indigence (ICC; 2018 B, par. 190).

b. Joint Liability is Applicable in the Reparations Stage

The *Lubanga AC Judgment* established the general principle that reparation orders are intrinsically linked to the individual, whose criminal liability is established in a conviction and whose culpability for those criminal acts is determined in a sentence (ICC; 2015, par. 151). While the *Lubanga AC Judgment* stated that the convicted person must remedy the harm caused by the crimes for which he or she was convicted, it established that: a) the scope of a convicted person's liability for reparations may differ depending on the mode of individual criminal responsibility established with respect to that person; b) the convicted person's liability for reparations must be proportionate to the harm and **his participation in the commission of the crimes** (ICC; 2015, par.118; AnxA par. 45). The *Katanga* decision modifies such criteria.

The *Katanga AC Judgment*, instead, focused on the *integral reparation* of the harm suffered by the victims. (ICC; 2018 B, par. 182). The CA established that the convicted person is responsible for the total amount of the damage, although other criminals may have shared responsibility, and highlights that the amount of reparations for which a convicted person is held liable will not reflect his or her relative responsibility for the harm (ICC; 2018 B, par. 75). According to the *Katanga AC Judgment*, the responsibility to repair harm

under article 75 of the Statutes arises from a criminal conviction, and the modes of individual criminal responsibility that underpin such a conviction are relevant for capturing criminal responsibility, but at the reparation stage, the focus is on repairing the harm. (ICC; 2018 B, par. 179). Moreover, the AC established that criteria such as the gravity of the crimes or mitigating factors (such as characteristics personal to the convicted person) are not relevant, like the goal is not to punish the person, but to repair the harm caused to others. (ICC; 2018 B, par. 184)

1.5. Modalities of reparations

a. Modalities of reparations

The *Lubanga AC Judgment* set the principle that the trial chamber must identify the most appropriate modalities or reparations based on the specific circumstances of the case (ICC; 2015, par. 200). He delved into the modalities of reparations, including but not limited to restitution, compensation, and rehabilitation (ICC; 2015, AnxA par. 32 and 67). Besides stressing the relevance of restitution (ICC; 2015, AnxA par. 35 and 36) and rehabilitation (ICC; 2015, AnxA pars. 41-42). The *Lubanga* decision also described the contexts and situations in which compensation should be considered (ICC; 2015, AnxA par. 37 and 40).

The *Al Mahdi* and *Katanga* decisions reiterated that reparations proceedings are governed by article 75 of the Statute which vests the trial chamber with the power to specify appropriate reparations, including restitution, compensation, and rehabilitation (ICC; 2018 A, par. 34), stated that trial chambers should seek to determine the appropriate modalities for repairing the harm (ICC; 2018 A, pars. 64, 72) (ICC; 2018 B, par. 72), and stressed that the objective of reparations proceeding is remedial and not punitive (ICC; 2018 B, par. 185), which correspond to the general principle of public international law that reparations should, where possible, attempt to restore the *status quo ante* (ICC; 2018 B, par. 178).

b. Scope or Reparations

The *Lubanga AC Judgment* established that individual and collective reparations are not mutually exclusive, (ICC; 2015, AnxA par. 33), that there is no internationally recognized human right to consideration of individual

applications for reparations (ICC; 2015, par. 155), that individual reparations should be awarded in a way that avoids tensions and divisions within the communities, and when collective reparations are awarded, these should address the harm suffered by the victims on an individual and collective basis (ICC; 2015, AnxA par. 33).

The *Katanga* decision reiterated that the Court may award reparations on and individualized or collective basis, or both (ICC; 2018 B, par. 146). The *Al Mahdi* decision also applied *Lubanga*, and, thus, confirmed the Trial Chamber's decision is not to grant individual reparations but to extended to family members of direct victims and other members of the community that may have suffered material harm as a result of the commission of the crimes (ICC; 2018 A, pars. 35, 66, 70). The *Al Mahdi AC Judgment* observed that a report in the field of cultural rights reflected the voices of those who saw it was problematic that financial compensation be made a central component of reparations in the particular political and economic context of Mali, ICC; 2018 A, par. 36), thus applying the principle set in *Lubanga* that reparations should avoid creating tensions and divisions within the relevant communities (ICC; 2015, AnxA par. 33). *Al Mahdi* also applied the principles set up by *Lubanga*, regarding collective reparations when addressing the kind of collective reparations that the Timbuktu community may be benefited from (ICC; 2018 A, par. 39).

Meanwhile, although *Al Mahdi AC Judgment* did not modify the definition of victim as interpreted in *Lubanga*, it endorsed the Trial Chamber's decision not to order *individual* reparations but for extended to family members of the direct victims, or other persons who had sustained indirect harm (ICC; 2018 A, par. 39) In *Al Mahdi*, the AC did not address the question of causation, even though it confirmed that the Trial Chamber's decision *not* to grant individual reparations to *indirect* victims of the attacks. Nevertheless, the AC did mention the possibility for that group of people to receive a collective reparation (ICC; 2018 A, pars. 33, 34, 39, 55). The Court considered that indirect victims may be awarded with collective reparations and that it was within the Trial Chamber's discretionary prerogatives to order individual reparations only to "those whose livelihoods depended exclusively on the protected buildings" and "those whose ancestors' burial sites were damaged in the attack." (ICC; 2018 A, pars. 33, 37, 39, 42,43, 55).

1.6. Harm Must Be Defined and Assessed. Views of Victims and Experts.

The *Lubanga* AC Judgment established that the Trial Chamber must clearly define the harms that result from the crimes, the extension of which may, then be assessed by the Trust Fund, for purposes of determining the size and nature of reparation awards (ICC; 2015, par. 184). The *Lubanga* decision also instructed that the Trust Fund, in designing the awards for reparations, should be informed by the views received in the consultation stage (ICC; 2015, par. 201).

Similarly, *Al Mahdi* and *Katanga* stated that trial chambers should seek to define to determine the appropriate modalities for repairing the harm and remember that the trial chambers have the power to determine the scope and extent of any damage, and that before issuing an order for reparation they may invite and take into account representations from or on behalf of the convicted person, the victims and other interested persons (ICC; 2018 A, pars. 64, 72) (ICC; 2018 B, pars. 72,143).

The *Al Mahdi* and *Katanga* decisions reiterated the principle, set up in *Lubanga*, that the Trial Chamber must define and assess the harm (the latter with the assistance of the Trust Fund) (ICC; 2015, par. 184) (ICC; 2018 B, par. 172) (ICC; 2018 A, pars. 64, 72). But additionally, the *Katanga* decision pointed out that rather than attempting to determine the total sum of the monetary value of the harm caused, trial chambers should seek to define the harm and determine the appropriate modalities for repairing the harm (ICC; 2018 B, par. 72).

The *Katanga* decision also stressed that the objective of the reparation proceedings is remedial, which is inherent in the modalities of reparations available to victims. (ICC; 2018 B, par. 185). Such decision also explained that article 75(1) of the Statute also grants the possibility, albeit in exceptional circumstances, to determine the scope and extent of any damage for the purposes of reparations *proprio motu* (ICC; 2018 B, par. 146).

1.7. Right to proportional, adequate and prompt reparations v. individual assessment

The *Lubanga* AC Judgment established that victims should receive appropriate, adequate, and prompt reparations (ICC; 2015, AnxA par. 44 and 48).

The *Katanga* Trial Chamber went through individual applications of victims for reparations but the monetary value of the harm assessed was not used as a basis for determining what each one of the victims should receive (ICC; 2018 B, par. 68). The AC considered this approach inadequate and advised trial chambers to use a different method, (even though it confirmed the decision).

1.8. Discretion

According to the *Katanga* and *Al Mahdi* AC Judgments, a trial chamber, in making an award for reparations has discretion, circumscribed only by the scope and extent of any damage, loss and injury (ICC; 2018 A, par. 34 and 60). In fact, according to *Katanga*, a trial chamber even has the discretion to depart from an applicant's claim for reparations, if it considered it to be appropriate. (ICC; 2018 B, par. 147).

2. PROCEDURAL ASPECTS

2.1. General requirements. Due process

The *Lubanga* AC Judgment established the principles and procedures to be applied to reparations. These paradigms were not altered in the *Al Madhi* and *Katanga* cases and this remain applicable. At this point, the setting of minimum requirements that every order must contain, in an interpretation of art. 75 of the Statute. ("1. An order for reparations under article 75 of the Statute must contain, at a minimum, five essential elements: 1) it must be directed against the convicted person; 2) it must establish and inform the convicted person of his or her liability with respect to the reparations awarded in order; 3) it must specify, and provide reasons for, the type of reparations ordered, either collective, individual or both, pursuant to rules 97 (1) and 98 of the Rules of Procedure and Evidence; 4) it must define the

harm caused to direct and indirect victims as a result of the crimes for which the person was convicted, as well as identify the modalities of reparations that the Trial Chamber considers appropriate based on the circumstances of the specific case before it; 5) it must identify the victims eligible to benefit from the awards for reparations, or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted”, (ICC; 2015, par. 1).

Ensures respect for due process and indicates the path taken by a trial chamber to develop its reasoning and decision. Lastly, an essential element for the parties is to be able to exercise effectively the right to appeal. (“The AC considers that the inclusion of these five elements in an order for reparations is vital to its proper implementation. It also ensures that the critical elements of the order are subject to judicial control, consistent with rule 97 (3) of the Rules of Procedure and Evidence” (ICC; 2015, par. 34).

2.2. Procedures for awards for reparations

a. Procedures in general

The analysis of the three judgments given by the AC indicates that some important questions about the procedures are faced, and should be followed during the reparations stage. Among these issues, the one related to the functions and attributions of the TFV deserved a separate item in this report given the numerous new aspects that were raised. This section will examine the general guidelines given in *Lubanga* and the specific questions of the experts.

Regarding general guidelines, the AC, in *Lubanga*, emphasized the existence of two distinct procedures for awards for reparations. The first, related to “individual reparation award is primarily application (‘request’) based and is mainly regulated by rules 94 and 95 of the Rules. The second relates to collective reparation awards and is regulated by rules 97(1) and 98(3) of the Rules” (ICC; 2015, par. 149).

B. Experts

Regarding the experts, the issue was dealt both with in *Lubanga* and *Katanga*. In the first, the issue was considered in more general terms. The

AC indicated the stages of the procedure in which expert assistance would be possible, that is to say: 1) before a repair order is issued as regulated by rule 97(2) of the Rules, and 2) after the order for reparations has been issued, which is regulated by the Regulations of (ICC; 2015, par. 178). In *Katanga*, the analysis was more specific, thus complementing the standards established in *Lubanga*. In fact, in *Katanga* was explained that, when determining the costs of repairs, the Trial Chamber can rely not only on experts but also on the assistance of other entities such as the Trust Fund. (ICC; 2018 B, par. 172).

2.3. Standard of proof and burden of proof

One of the most contentious points about the procedures on reparations, which was referred to in the different judgments, although from different perspectives, is the standard of proof. What should be the standard to be adopted by a trial chamber regarding the definition of the harm caused, its extension, and the convicted person's liability?

a. “Less exacting standard” vs. “beyond reasonable doubt”

The consensus in all three judgments is that, at the reparations stage of the process, the standard proof that dictates the trial process does not apply, because criminal liability has already been established by the conviction and it cannot be further discussed for obvious reasons. This is why the reference to the so-called “less exacting standard” was made in AC *Lubanga Judgement*. “81. With respect to the standard and burden of proof, the AC considers that the Trial Chamber correctly articulated the principle that reparation proceedings are fundamentally different from proceedings at trial and therefore “a less exacting standard should apply (ICC; 2015, par. 81). This standard should be interpreted as a degree of judicial conviction not comparable to certainty “beyond reasonable doubt”.

b. “Balance of probabilities”/ “Preponderance of proof”/ “balance of possibility”

In an attempt to define better what standards would be applicable at this stage, the AC in *Lubanga*, referred to the “balance of probabilities”, an expression that would have as synonyms of the “preponderance of proof” and the “balance of possibility (ICC; 2015, AnxA par. 65). Although the decision

itself does not contain a definition or clarification of what that expression means, footnote 37 of the Order of Reparations contains important references for a better understanding of that meaning.² The same footnote also refers to the debate that was raised during the Preparatory Commission when some delegations suggested that evidence should be based on “balance of probabilities” as opposed to the “beyond reasonable doubt”.³

The “balance of probabilities” is also referred to in the *Katanga AC Judgment*, but not in *Al Madhi AC Judgment*. It is important to note a small, but very important, difference that relates to the application of that standard. Indeed, while in the first case the use of that standard appears to be mandatory (“shall”), in the other the requirement seems to have been relativized (“is generally”).

c. Presumption. Presumption of facts

The reference to “presumption”, as a standard of proof, clearly appears in *Katanga*. It is not referred to by other judgments, nor it is possible to say that the AC considers the expression as synonymous of the “balance of probabilities”. Nevertheless, it uses the expression “presumption of facts”, which, according to the AC, could be compared to other expressions found in judgments given by other International Courts, such as: “discretionary presumption”, “judicial presumption” or simply “presumption”.

How did the AC conclude that the “presumption of facts” would be possible in the reparation phase? And second, what can we understand by this presumption and what would be its scope?

To reach this conclusion, the AC in *Katanga* referred to different decisions handed down by International Courts, especially the Regional

² The reference was based on the definition given by Black’s Law Dictionary, that is to say: “the greater the weight of the evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other”. (Black’s Law Dictionary, Eight Edition, Garner (ed.), 2004, page 1220).

³ “It is important to note that during the Preparatory Commission some delegations suggested that the evidence standard should be based on a ‘balance of probabilities’ as opposed to the beyond reasonable doubt’ standard applied in criminal proceedings. Many reparations programmes dealing with mass claims have also adopted flexible evidential standards based on a ‘plausibility test’ in order to accommodate the situation of the victims, who usually have difficulties in providing the documentation that is required”.

Courts of Human Rights (Inter-American and European (ICC; 2018 B, par. 75). There was no precise indication, but it would be possible to deduce that statutory support for this reasoning was given by Article 21.3 of the Statute.

The reference to the presumption results from the difficulty that victims may face in obtaining evidence to support their claims, which means to “presume a given fact to be established to the requisite standard of proof in the absence of direct evidence” There is no exact criterion, and it is up to the trial chamber’s discretion to define what would be sufficient to meet the burden of proof (ICC; 2018 B, par. 75). Still in *Katanga AC Judgment* the presumption was even used to acknowledge the psychological damage sustained by all the relatives of a victim who was killed during the attack on Bogoro. (ICC; 2018 B, par. 121).

It is important to note that the adoption of the “presumption of facts” is not unlimited. In *Katanga AC Judgment*, reference was made to reasonableness as an important criterion to limit the use of that presumption. However, here was no indication of the parameters that could guide a trial chamber in the reasonableness test. The question was left to the discretion of the trial chamber and the specific circumstances of each case. (*Katanga Reparations Appeal Judgment*, ICC-01/04-01/07-3778-Conf, par. 76). Following those premises, the AC did not consider it unreasonable to admit that psychological harm was experienced by those who had lost their family members, whether they were near or distant. (ICC; 2018 B, par. 126).

d. Applicant’s burden of proof. Circumstances of the case

In any case, although the standard of proof in reparations is “lower” when it is compared to what guides the trial phase, the “relativization” does not exclude applicants’ burden of proof. This means that “the applicant shall provide sufficient proof of the causal link between the crime and the harm suffered...”. (ICC; 2015, par. 81). It is important to note that in *Lubanga*, the AC expressly stated that what “is sufficient for purposes of an applicant meeting the burden of proof will depend upon the circumstances of the specific case” (*Lubanga Reparations Appeal Judgment*, ICC-01/04-01/06-3129, par. 81).

e. Applicant's burden of proof. Trial Chamber's discretion in indicating its content

The discretion is another important point addressed by the AC. As a matter of fact, in *Katanga*, the AC expressly acknowledged the Trial Chamber's discretion evaluating the evidence and indicating the content of the burden of proof. Although there is no express reference to discretion in *Lubanga AC Judgment*, it can surely be deduced from the reading of such a decision. Reference is also made to the matter of discretion in the *Al Mahdi AC Judgment*.

f. Discretion and specific circumstances of the case

As a general approach, the discretion seems to be linked to the specific circumstances of each case. In *Lubanga AC Judgment* it was decided that "the casual link between the crime and the harm for the purposes of reparations is to be determined in light of the specificities of a case (ICC; 2015, par. 81). In *Katanga*, the AC considered appropriate the standard used by the Trial Chamber regarding the "features of the case (ICC; 2018 B, par. 89). In *Al Madhi*, the AC went even further by stating that it would be expected that the Trust Fund of Victims also is "aware of the standard applied by the Trial Chamber result from its assessment of the various factors specific to the case", and for it to be aware, in particular of the difficulties applicants, may face in supporting their applications" (ICC; 2018 A, par. 42).

At least, from the reading of the written decision presented in *Lubanga AC Judgment*, there is no express reference to examples of possible difficulties. However, in the Order for Reparations, there is a clear mention of the destruction or unavailability of evidence (ICC; 2015, par. 22). The same reference was made in the *Al Madhi AC Judgment* (ICC; 2018 A, par. 42). Obviously, the references are merely examples and do not exclude the possibility that in the future the Court will face other difficulties according to the circumstances of the case.

2.4. Reparations proceedings. Fair trial/Rights of victims/Rights of the defense

Although the presumption of innocence does not apply during the reparation stage, there are other important rights and guarantees of the convicted, related to the due legal process that must be observed. (n *Lubanga*, for example, the AC, expressly stated that the principles guiding reparations do not affect the right to a fair trial. (ICC; 2015, AnxA par. 49). In any case, in addition to those rights, the interests of victims should be observed, which relate not only to an adequate and just reparation but also to an expeditious process in which the right to their security is safeguarded. The need to strike a balance between those conflicting interests was subjected to scrutiny by the AC.

a. Decision in relation to individual requests

In *Lubanga*, the AC decided that a Trial Chamber is not required, in all circumstances, to decide upon the scope and extent of any damage, loss, or injury in relation to individual requests. That is, the existence of individual applications does not establish the duty that all requests should be considered and decided individually. The reasoning behind such a decision was, when only collective reparations are awarded, “a trial chamber is not required to rule on the merits of the individual requests. Rather the determination that is more appropriate to award collective reparations operates as a decision denying (...) individual reparation awards” (ICC; 2015, par. 152).

b. Ultra petita principle

Ultra petita principle was another critical issue to decide. In *Katanga*, the AC ruled that strict applicability of that principle to reparations proceedings is precluded. In the understanding of the AC, a trial chamber has the discretion, under article 75 of the Statute, “to depart from an applicant’s claim for reparations” and is permitted to issue a decision on reparations without being seized by any party” (ICC; 2018 B, par. 147). Besides that, a trial chamber may even “invite and shall take account of representations from, or on behalf of the convicted person, victim, other interested persons or interested States” to fulfill its power to determine the scope and extent of any damage. All this indicates that a trial chamber is not limited by the terms of the claims.

c. Issues not decided by a Trial Chamber and the right to appeal

Another relevant issue, addressed by the AC involves the obligation of the trial chamber to include fundamental matters in order for reparations. In *Lubanga*, the AC highlighted the lack of indication of the scope of reparations.⁴ According to the AC, such omission, not only violated the basic rights of the convicted person, especially the right to be informed of the terms and the extent of his responsibility resulting from the offense, but entailed another important procedural problem, namely, the violation of the right to appeal. As explained by the Court, such omission would prevent the AC from ruling on that point. Actually, a decision on the level of appeals which faces a point not examined before would clearly affect a fair trial since that question could not be appealed. Thus, in *Lubanga*, the AC noted:

The AC also notes that if it were to specify the scope of Mr Lubanga's liability in the amended reparation order [...] such a stipulation would be made for the first time [...]. Accordingly, that stipulation would at the same time be final and, thus, nor subject to appeal. The AC therefore considers that, in the circumstances of the present case, it is not appropriate for it to determine the scope of [the convicted] liability for reparation. (ICC; 2015, par. 239)

The above quotation highlights an important procedural rule to be observed in future decisions on reparations: respect for the right to appeal prevents the AC from determining the scope of liability for reparations when a trial chamber has not decided upon such point.

d. Fairness and expeditiousness of proceedings

Regarding the fair and expeditious trial, in *Lubanga*, the AC established that where there are more than a few victims, the Trial Chamber will not attempt to take evidence from or enter orders identifying separate victims or concerning their individual claims for reparation (ICC; 2018 B, par. 150).

The same approach was taken in *Katanga*. Indeed, the AC considered that “when there are more than a very small number of victims, it is neither necessary nor desirable, to award individual and personalized reparations” (ICC; 2018 B, par. 3). However, there was no objective reference to the number of victims that could match the criterion “more than a very small number”.

⁴ One of the five requirements that any reparations order must contain. See para. 24 above.

e. Confidentiality and fair trial

A very important issue addressed by the AC decisions involves the confidentiality of victims, identities during reparations proceedings and during the implementation stage. This issue was faced by in *Al Madhi AC Judgment*. The question was raised by the defence because that maintaining confidentiality would be prejudicial to a fair trial, since the convicted person would not be able to challenge any requests made by unidentified victims.

In addressing the issue, the AC made explicit reference to the principle of proportionality “in the sense of balancing” the rights and interests of the parties. Considering such premises, the AC reversed the decision of the Trial Chamber that had determined the removal of confidentiality of the victims. They considered that, for the decision to be generic and without any basis in new facts or circumstances that could justify a change in the situation. In addition, the AC held that the interests of the convicted person would be limited at this stage of the proceedings, which would qualify the decision as disproportionate in view of the interests it would seek to protect. “A wholesale ruling, granting access to all victims’ identifying information, at a stage of the proceedings where the interest of the defense is limited in this way is disproportionate” (ICC; 2018 A, pars. 90, 92)

2.5. Proceedings during the implementation stage

a. Trial Chamber and Trust Fund of Victims

The powers and functions of both, the Trial Chamber and the Trust Fund of Victims, were the subject of important considerations in *Lubanga* and in *Al Madhi*. At this point, the two judgments complement each other, thus providing a better picture of the procedure to be observed at the implementation stage.

b. Trust Fund’s role

The Trust Fund plays an important role regarding the order of reparations. In *Lubanga*, the AC highlighted the two functions to be carried out by the Trust Fund, namely: (1) implementing the orders given by the trial chamber, and (2) assisting the victims.

Although important, these functions are limited. The limits are given by the order itself. As highlighted by the AC, “the role of the Trust Fund should not be understood in any way to suggest that [a convicted person’s] liability for awards for

reparations can go beyond the harms resulting from the crimes for which [he/she] was convicted” (ICC; 2015, par. 237).

These limitations stem from the very administrative and non-judicial function that the Trust Fund exercises. Regarding individual applications for reparations, the Trust Fund is responsible for examining the eligibility of possible victims, according to the criteria set by the chamber, and for the preparation of a draft implementation plan, which will then be presented to the trial chamber, which does not need to be the same chamber in its original composition (ICC; 2015, par. 239). Also, “the Trust Fund is directed to provide, in the draft implementation plan, the anticipated monetary amount that it considers necessary to remedy the harms caused by the crime for which [a person was convicted], based on information, gathered during the consultation period leading up, to the submission of the draft implementation plan” (ICC; 2015, AnxA par. 78).

In the case of collective reparations, as decided in *Lubanga*, the Trust Fund shall “take into account the views and proposals of victims regarding the appropriate modalities of reparations and programmes that, in the view of the Trust Fund, should be part of any reparations awarded on a collective basis”. It should also take into account the views and proposals already submitted in the course of the reparation proceedings”. (ICC; 2015, AnxA par. 79).

c. Trust Fund and judicial control

The Trust Fund’s decisions are not immune to judicial control which will be done by a trial chamber. In the end, a trial chamber will have the final decision on the eligibility of the victims and the implementation plan.

d. Trust Fund, judicial control and rights of the parties

Prior to a trial chamber setting the amount, “the parties shall have the opportunity to appear before or will make submissions in writing on the scope of the [convicted] liability, in light of the information provided by the Trust Fund in its draft implementation plan, within a time limit to be set by [a] Trial Chamber” (ICC; 2015, AnxA par. 80).

e. Trial Chamber's control of "other resources" of the Trust Fund

Not only does the Trust Fund have to obey the limits of its attributions. There are also limits to be observed by a trial chamber. In fact, the trial chamber must refrain from issuing orders that advance over the discretion of the *Trust Fund's Board of Directors*. This issue was very controversial in *Lubanga AC Judgment*. In that case, as a way of enforcing the execution of its order, the Trial Chamber determined that the Trust Fund would make available the amounts allocated from other sources. In addressing this issue, the AC was categorical in stating that:

Article 79(2) of the Statute provides that '[the Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund]'. Notably, this provision does not contain any corresponding power to order the Trust Fund to make its other resources available to the Court. (ICC; 2015, par. 112)

Thus, the decision of whether to allocate other resources is a discretionary decision of the Trust Fund's Board of Directors, a conclusion that is even supported by regulation 56 of the Regulations of the TFV, "The AC considers that the word 'may' in rule 98(5) of the Rules of Procedure and evidence means that a decision to use 'other resources' is a discretionary decision and not mandatory. Regarding who is to make the decision to use these 'other resources', the AC considers that the wording of regulations 50 and 56 of the Regulations of the Trust Fund makes it clear that this decision is to be made by the Board of Directors, not by the Court." (ICC; 2015, par. 108).

f. Indigence. Giving effect to the order

Moreover, as decided in the *Lubanga AC Judgment*, the indigence of the convicted does not remove his responsibility for redressing the damages caused to the victims as a result of the offenses for which he was convicted. Liability is - and always will be - individual (ICC; 2015, par. 103). Thus, indigence does not transfer the obligation to repair the harm caused to other entities, such as the Trust Fund. This one only complies with the orders for reparations imposed on the convicted person. How to proceed in such situations?

Some indications of how to proceed were given in *Lubanga AC Judgment*. The financial situations of the convicted should be monitored, a measure that

should be taken by the Presidency, with the assistance of the Registrar. (Regulation 117 of the Regulations of the Court). Besides that, the Court may make use of the cooperative mechanisms, such as the identification and freezing of property, with States Parties pursuant article 75(1) of the Statute. “The AC considers that the specific reference in article 75(4) of the Statute to the possibility of seeking assistance of States Parties in, inter alia, the identification and freezing of property and assets indicate that indigence is not an obstacle to the imposition of liability for reparations on the convicted person. In this sense, the AC notes that the provision provides that the Trial Chamber may seek assistance from States Parties ‘in order to give effect to the reparation order’” (ICC; 2015, par. 103).

In any case, even though the Trust Fund may use its other resources to make the reparation order effective, this initiative does not exonerate the convicted from liability. In these circumstances, he or she remains liable and must reimburse the Trust Fund (ICC; 2015, par. 116).

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