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TRIAL CHAMBER VI

Before: Judge Chang-Ho Chung, Presiding Judge
Judge Robert Fremr
Judge Olga Herrera Carbuca

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

Public

**Observations on the Appointed Experts' Reports and
further submissions on reparations on behalf of the Former Child Soldiers**

Source: Office of Public Counsel for Victims (CLR1)

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for the Defence

Mr Stéphane Bourgon
Ms Kate Gibson

Legal Representatives of the Victims

Ms Sarah Pellet
Ms Anna Bonini

Legal Representatives of the Applicants

Mr Dmytro Suprun
Ms Anne Grabowski

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Mr Philipp Ambach

Trust Fund for Victims

Mr Pieter de Baan

Other

Appointed Experts

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I. PROCEDURAL HISTORY

1. On 8 July 2019, Trial Chamber VI (the “Chamber”) – in a different composition – found Bosco Ntaganda (“Mr Ntaganda”) guilty of 18 counts of war crimes and crimes against humanity.¹
2. On 25 July 2019, Judge Chang-ho Chung, acting as Single Judge (the “Single Judge”), issued the “Order for preliminary information on reparations”,² requesting, *inter alia*, the Registry to submit information on, and any proposed methodology for, the identification of non-participating victims.
3. On 7 November 2019, Mr Ntaganda was sentenced to a total of 30 years of imprisonment.³
4. On 5 December 2019, the Single Judge issued the “Order setting deadlines in relation to reparations”,⁴ instructing, *inter alia*, the parties, the Registry, and the Trust Fund for Victims (the “TFV”), and inviting the Prosecution, to make submissions on a number of issues related to reparations.
5. On 14 May 2020, the Chamber issued the “Decision appointing experts on reparations”,⁵ appointing four experts (the “Appointed Experts”) for the reparations proceedings and instructing them to submit their report by 28 August 2020, with the parties to present observations on said report and on the submissions of other participants by 30 October 2020.
6. On 26 June 2020, the Chamber issued the First Decision, requesting a report from the Registry and inviting the TFV and the parties to provide “*observations in*

¹ See the “Judgment” (Trial Chamber VI), [No. ICC-01/04-02/06-2359](#), 8 July 2019.

² See the “Order for preliminary information on reparations” (Trial Chamber VI, Single Judge), [No. ICC-01/04-02/06-2366](#), 25 July 2019.

³ See the “Sentencing judgment” (Trial Chamber VI), [No. ICC-01/04-02/06-2442](#), 7 November 2019.

⁴ See the “Order setting deadlines in relation to reparations” (Trial Chamber VI, Single Judge), [No. ICC-01/04-02/06-2447](#), 5 December 2019.

⁵ See the “Public redacted version of ‘Decision appointing experts on reparations’” (Trial Chamber VI), [No. ICC-01/04-02/06-2528-Red](#), 14 May 2020.

relation to any key legal and factual issues identified by the Registry".⁶ The Chamber also invited the parties and the TFV to make observations in their submissions then scheduled for 30 October 2020 on (i) whether any type of harm suffered by the victims of Mr Ntaganda's crimes may be presumed; (ii) for the crimes of rape and sexual slavery, whether children born out of rape should be presumed as having suffered harm as a result of the commission of these two crimes; and (iii) whether a lower burden of proof should be retained in cases of sexual violence.⁷

7. On 20 July 2020, following a request by the Appointed Experts,⁸ the Chamber extended the deadline for submission of their report to 30 October 2020,⁹ and instructed the parties and the TFV to *"make their final submissions on the report/information presented, the submissions of other participants, and any other last arguments they wish for the Chamber to consider before the rendering of its reparations order by 18 December 2020"*.¹⁰

8. On 30 September 2020, the "Registry's Report on Reparations" was submitted.¹¹ The parties provided observations on said report on 30 October 2020.¹²

9. On 2 November 2020, the Registry transmitted two reports compiled by the Appointed Experts,¹³ namely the "Experts Report on Reparation" prepared by

⁶ See the "First Decision on Reparations Process" (Trial Chamber VI), [No. ICC-01/04-02/06-2547](#), 26 June 2020, paras. 43-44.

⁷ *Idem*, para. 46.

⁸ See the "Registry Transmission of Appointed Experts' Request for Extension of Time", [No. ICC-01/04-02/06-2549](#), 3 July 2020.

⁹ See the "Decision on Request for an Extension of Time for Filing of Experts' Report" (Trial Chamber VI), [No. ICC-01/04-02/06-2553](#), 20 July 2020.

¹⁰ *Idem*, para. 8.b.

¹¹ See the "Registry's First Report on Reparations", [No. ICC-01/04-02/06-2602](#), 30 September 2020.

¹² See the Public redacted version of the "Observations of the Common Legal Representative of the Former Child Soldiers on the 'Registry's First Report on Reparations'", [No. ICC-01/04-02/06-2620-Red](#), 18 November 2020; the "Observations of the Common Legal Representative of the Victims of the Attacks on the Registry's First Report on Reparations", [No. ICC-01/04-02/06-2621](#), 30 October 2020; and the "Defence Observations on the Registry First Report on Reparations", [No. ICC-01/04-02/06-2622](#), 30 October 2020.

¹³ See the "Registry Transmission of Appointed Experts' Reports", [No. ICC-01/04-02/06-2623](#), 2 November 2020 (dated 30 October 2020).

Ms Bonneau, Mr Mongo Malolo and Mr Wühler (the “Bonneau *et al.* Report”)¹⁴ and the “Expert Report on Reparations for Victims of Rape, Sexual Slavery and Attacks on Healthcare” prepared by Dr Gilmore (the “Gilmore Report”).¹⁵

10. On 15 December 2020, the Chamber issued its “Decision on issues raised in the Registry’s First Report on Reparations”.¹⁶

II. SUBMISSIONS

11. The Legal Representative of the 283 former Child soldiers admitted to participate in the proceedings (the “Legal Representative”) welcomes the Appointed Experts’ contribution to the reparations proceedings in the present case and commends their ability to deliver detailed reports in the current, complex framework, where a range of factors, including the COVID-19 pandemic and the ongoing insecurity in Ituri, precluded them from undertaking field work and meeting with victims face-to-face to the extent they would have desired.¹⁷ Nevertheless, the Appointed Experts were able to take advantage of the abundant information already available in relation to former child soldiers,¹⁸ supplemented by suitable consultations of relevant stakeholders, including a roundtable with civil society representatives.¹⁹

12. The Legal Representative is particularly grateful for the Appointed Experts’ willingness to engage in constructive consultations with her, and with the former child soldiers’ field counsel. To the extent the former child soldiers are concerned, the

¹⁴ See the redacted version of the “Experts Report on Reparation”, [No. ICC-01/04-02/06-2623-Anx1-Red2](#), 3 November 2020 (the “Bonneau *et al.* Report”).

¹⁵ See the redacted version of the “Expert Report on Reparations for Victims of Rape, Sexual Slavery and Attacks on Healthcare”, [No. ICC-01/04-02/06-2623-Anx2-Red2](#), 3 November 2020 (the “Gilmore Report”).

¹⁶ See the “Decision on issues raised in the Registry’s First Report on Reparations” (Trial Chamber VI), [No. ICC-01/04-02/06-2630](#), 15 December 2020.

¹⁷ See the Bonneau *et al.* Report, *supra* note 14, para. 39; the Gilmore Report, *supra* note 15, para. 2; and generally, the “Public Redacted Version of the Annex to the Registry Transmission of Appointed Experts’ Request for Extension of Time”, [No. ICC-01/04-02/06-1549-Anx-Red](#), 3 July 2020.

¹⁸ See the Bonneau *et al.* Report, *supra* note 14, para. 39.

¹⁹ *Idem*, para. 41.

general principles set out in the reports of Appointed Experts are fully in line with those outlined in the Legal Representative's submissions to date.

13. In particular, the Legal Representative concurs that it is imperative to consult the eligible or potentially eligible victims at all key junctures of the reparations process,²⁰ and to take into due consideration their views as to the appropriate reparations for the harms they suffered.²¹ The victims' views and priorities, read against the background of the applicable legal and regulatory framework, must remain the fundamental determinant of the Chamber's reparations order. As noted by scholars:

"The form in which reparations are defined and implemented could be an important way to affirm victims' dignity and agency, not only recognising the harm caused to them, but also recognising their role in addressing it. If one of the most significant challenges reparations face is their often lack of meaning or their limitations as a mere form of monetising suffering, participation and agency can help bringing meaning to sometime empty forms of material reparations or of symbolic reparations that are perceived as empty words".²²

14. The Legal Representative also shares the Appointed Experts' focus on promptness and efficiency of the reparations process,²³ and reiterates the importance of avoiding further delays,²⁴ and ensuring that as many of the available resources as possible are employed for the eligible victims' benefit, rather than spent on un unduly cumbersome or bureaucratic procedures,²⁵ while at the same time tailoring the reparations ordered to the specific needs and priorities of victims in the present case.

²⁰ *Idem*, paras. 249 *et seq.*

²¹ *Idem*, para. 151. See also the Gilmore Report, *supra* note 15, para. 168.

²² See CORREA (C.), GUILLEROT (J.), and MAGARELL (L.), "Reparations and Victim Participation: Experiences with the Design and Implementation of Domestic Reparations Programmes", in FERSTMAN (C.), GOETZ (M.), and STEPHENS (A.) (Eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity – Systems in Place and Systems in the Making*, Martinus Nijhoff Publishers, Leiden| Boston, 2020, p. 243.

²³ See the Bonneau *et al.* Report, *supra* note 14, para. 118; and the Gilmore Report, *supra* note 15, para. 18.

²⁴ See the Gilmore Report, *supra* note 15, para. 129.

²⁵ See the "[Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report](#)", 30 September 2020 (the "Independent Expert Review Report"), paras. 879 and 897.

15. Further, the Gilmore Report reflects the author's intention to provide recommendations that are "*modest and feasible*",²⁶ a concern broadly shared by the other Appointed Experts,²⁷ as well as the Legal Representative. However, on the one hand, the reparations award should not be limited by reference to the funds currently available to the TFV.²⁸ On the other hand, the impossibility of full *restitutio in integrum* at this point in time does not mean that reparations cannot be meaningful and transformative. Indeed, the Chamber's reparations order needs to strike a delicate balance between what is realistic and feasible within the existing legal and practical constraints, while at the same time striving to improve the Court's reparations framework, complementing and enhancing the applicable principles.²⁹ In this respect, while mindful of the constant need to *manage* victims' expectations in relation to Court-ordered reparations,³⁰ the Legal Representative underscores that it is equally important for all stakeholders involved in the reparations process to strive to *meet* the victims' justified expectations for reparations that are meaningful, transformative and self-sustainable, rather than symbolic or charitable in nature.

16. In addition to the principles mentioned *supra*, the vast majority of the Appointed Experts' conclusion on matters pertaining to reparations in favour of the former child soldiers are fully in line with the Legal Representative's position as set out in previous submissions. Accordingly, the present Observations will focus only on some of the points raised by the Appointed Experts which deserve, in the Legal Representative's submission, further discussion or clarification. In addition, the present Observations constitute an opportunity to address specific questions put forward by the Chamber³¹ and to make "*final submissions on the report/information*

²⁶ See the Gilmore Report, *supra* note 15, para. 6.

²⁷ See *e.g.* the Bonneau *et al.* Report, *supra* note 14, paras. 121-123.

²⁸ See the "Reparations Order" (Trial Chamber VIII), [No. ICC-01/12-01/15-236](#), 17 August 2017 (the "*Al Mahdi* Reparations Order"), para. 112. See also the "Corrigendum of the 'Public Redacted Version of the 'Submissions by the Common Legal Representative of the Victims of the Attacks on Reparations'" (ICC-01/04-02/06-2477-Red)", [No. ICC-01/04-02/06-2477-Red-Corr](#), 20 November 2020, paras. 78-79.

²⁹ See the Independent Expert Review Report, *supra* note 25, para. 896.

³⁰ See *e.g.* the Bonneau *et al.* Report, *supra* note 14, para. 150; and the Gilmore Report, *supra* note 15, para. 6. See also the Independent Expert Review Report, *supra* note 25, para. R346.

³¹ See the "First Decision on Reparations Process", *supra* note 6, para. 46.

*presented, the submissions of other participants, and any other last arguments [...] for the Chamber to consider before the rendering of its reparations order”.*³²

17. For ease of reference, and given the variety of subjects to be discussed within the present submissions, the Legal Representative will do so by reference to the five different elements to be covered in a reparations order according to the Court’s jurisprudence: (1) the liability of the convicted person; (2) the type of reparations and reasons underpinning said determination; (3) the harm caused to victims; (4) the modalities of reparations; and (5) the criteria for eligibility of victims.³³

1. Liability of Mr Ntaganda

a) Mr Ntaganda is jointly and severally liable for the harm caused to former child soldiers

18. The Legal Representative submits that, to the extent Mr Ntaganda’s conviction overlaps with that of Mr Lubanga, both are fully liable for the entirety of the harm caused based on the principle of joint and several liability discussed *infra*. Further, the Chamber is not bound by the reparations order issued against Mr Lubanga in relation to the reparations owed to the former child soldiers, as the crimes against child soldiers for which each of them was convicted only partially overlap. In particular, Mr Ntaganda’s liability for crimes concerning child soldiers should exceed that of Mr Lubanga.

19. The Legal Representative concurs with the Appointed Experts’ conclusion that the principle of joint and several liability – also known as *responsabilité solidaire* or liability *in solidum* – applies in the present case.³⁴ According to this principle, Mr Ntaganda, having been convicted as an indirect co-perpetrator for the crimes

³² See the “Decision on Request for an Extension of Time for Filing of Experts’ Report”, *supra* note 9, para. 8.b.

³³ See the “Judgment on the appeals against the ‘Decision establishing the principles and procedures to be applied to reparations’ of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2” (Appeals Chamber), [No. ICC-01/04-01/06-3129 A A2 A3](#), 3 March 2015 (the “Lubanga Reparations Appeals Judgment”), para. 32.

³⁴ See the Bonneau *et al.* Report, *supra* note 14, para. 259.

against child soldiers,³⁵ is liable to repair the full extent of the harm thereby caused,³⁶ regardless of the fact that other individuals may also have contributed to the occurrence of that harm. In other words, “each person who is jointly liable for the harm caused is fully liable for the full extent of the harm, but may take recourse action against the other persons responsible to recover part of what he or she has paid”.³⁷

20. While the Court has clarified that it is not bound by any national practice regarding civil responsibility *in solidum*,³⁸ it has found that the liability of a convicted person must be proportionate to his or her individual criminal participation and to the resulting harm.³⁹ In all reparations orders issued to date, with the notable exception of that against Mr Katanga, Chambers of this Court have applied the principle of joint and several liability, holding the convicted person financially liable for all the harm caused.⁴⁰ The differential treatment given in the *Katanga* case, where the convicted person was only held liable for a portion of the harm caused,⁴¹ has been explained by reference to the fact that Mr Katanga was convicted on the basis of Article 25(3)(d) of the Rome Statute as an accessory,⁴² for his contribution “in any other way to the commission of a crime by a group of persons acting with a common purpose”.⁴³

21. Without prejudice to the issue of whether several liability, as applied in the *Katanga* case, is appropriate in all cases where the accused was found liable on the basis

³⁵ See the Judgment, *supra* note 1.

³⁶ See the Bonneau *et al.* Report, *supra* note 14, para. 259.

³⁷ *Ibid.*

³⁸ See the “Order for Reparations pursuant to Article 75 of the Statute” (Trial Chamber II), [No. ICC-01/04-01/07-3728-tENG](#), 24 March 2017 (the “*Katanga* Reparations Order”), para. 263.

³⁹ See the “Submissions on Reparations on behalf of the Former Child Soldiers”, [No. ICC-01/04-02/06-2474](#), 28 February 2020, para. 52 (the “CLR1 Reparations Submissions”); the *Lubanga* Reparations Appeals Judgment, *supra* note 33, para. 118; the “Judgment on the appeals against Trial Chamber II’s ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’” (Appeals Chamber), [No. ICC-01/04-01/06-3466-Red](#), 18 July 2019 (the “*Lubanga* Reparations Award Appeals Judgment”), paras. 20-21; and the *Katanga* Reparations Order, *supra* note 38, para. 252.

⁴⁰ See the *Al Mahdi* Reparations Order, *supra* note 28, para. 134; and the *Lubanga* Reparations Award Appeals Judgment, *supra* note 39.

⁴¹ See the *Katanga* Reparations Order, *supra* note 38, para. 254. See also the “Judgment pursuant to article 74 of the Statute” (Trial Chamber II), [No. ICC-01/04-01/07-3436-tENG](#), 7 March 2014, pp. 658-659.

⁴² See ODIER-CONTRERAS GARDUÑO (D.I.), *Collective Reparations*, Intersentia, Cambridge | Antwerp | Portland, 2018, p. 219; and the Bonneau *et al.* Report, *supra* note 14, para. 256.

⁴³ See Article 25(3)(d) of the [Rome Statute](#).

of a lesser mode of liability,⁴⁴ the Legal Representative submits that convictions for co-perpetration based on Article 25(3)(a) necessarily entail liability *in solidum*.⁴⁵ As noted by the Appointed Experts:

*“A decision based only on several liability would hinder the right to reparation that victims have under the Rome Statute. Victims who often have been waiting for up to two decades to obtain reparation from the Court, and who are living in a highly vulnerable situation and in urgent need of redress, would have to seek justice even against unknown perpetrators, in and outside their country, to ensure that their right to reparation is fulfilled to the fullest extent. This would render meaningless their right to effective reparation and would have the potential to undermine the Court’s reparation scheme”.*⁴⁶

22. The principle of joint and several liability is fully consistent with the tenet of “responsibility proportional to harm”⁴⁷ since it merely transfers to the perpetrator the burden to recover from co-perpetrators the portion of the liability that is not attributable to him or her.⁴⁸

b) Mr Lubanga’s conviction does not affect Mr Ntaganda’s reparations liability in favour of former child soldiers

23. The Legal Representative agrees with the Appointed Experts’ conclusion that “[t]he fact that Mr. Lubanga as the Commander-in-Chief of the FPLC had overall responsibility for [the recruitment and enlisting of children under the age of 15 years] (and was convicted for this crime) does not take away from Mr. Ntaganda’s liability in this respect”.⁴⁹

⁴⁴ See in particular GOETZ (M.), “Victims’ Experiences of the International Criminal Court’s Reparations Mandate in the Democratic Republic of the Congo”, in FERSTMAN (C.), GOETZ (M.) and STEPHENS (A.) (Eds.), *op. cit.*, *supra* note 22, p. 437.

⁴⁵ See the Bonneau *et al.* Report, *supra* note 14, paras. 256-259; and the “Expert Report on Reparation Presented to Trial Chamber III, International Criminal Court”, [No. ICC-01/05-01/08-3575-Anx-Corr2-Red](#), 20 November 2017, paras. 215-222 (the “Bemba Expert Report”).

⁴⁶ See the Bonneau *et al.* Report, *supra* note 14, para. 260. See also the Bemba Expert Report, *supra* note 45, paras. 218 and 220.

⁴⁷ See the *Al Mahdi* Reparations Order, *supra* note 28, para. 110.

⁴⁸ See the Bemba Expert Report, *supra* note 45, para. 221.

⁴⁹ See the Bonneau *et al.* Report, *supra* note 14, para. 273. Also see the “Prosecution’s Observations on Reparations”, [No. ICC-01/04-02/06-2478](#), 28 February 2020, para. 21 “The Chamber may be inclined to consider any overlap in reparations due to the fact that Mr Lubanga was found liable for reparations for some of the same victims of the enlistment, conscription and use of child soldiers under 15 years old to participate actively in hostilities in Ituri from early September 2002 to 13 August 2003. However, this consideration should have no

The Appeals Chamber recently refused to reduce Mr Lubanga's reparations liability based on Mr Ntaganda's conviction for overlapping crimes⁵⁰ and confirmed that:

*"in some cases it may be appropriate for a trial chamber to take into account the role of the convicted person vis-à-vis others in the commission of the crimes when deciding on a reparations order against that person. For example, if more than one person is convicted by the Court for the same crimes at the same time, it may be appropriate to apportion liability for the costs to repair. Nevertheless, the focus in all cases should be the extent of the harm and cost to repair such harm, rather than the role of the convicted person".*⁵¹

24. To the extent Mr Ntaganda's and Mr Lubanga's convictions for conscription, enlistment and active use in hostilities of children under the age of 15 overlap, the Chamber may decide to adopt the programs ordered by Trial Chamber I in *Lubanga*. The principles of joint and several liability would then mean that each of Mr Lubanga and Mr Ntaganda can be made liable for the full extent of reparations owed to victims for those crimes, subject to the possibility of recovering from the other part of the amount paid to reflect the respective shares of responsibility. The Legal Representative recalls that Mr Lubanga was found liable for the total reparation award of 10 million USD,⁵² but has not satisfied any part of said award due to his indigence.⁵³

meaningful impact in determining Mr Ntaganda's overall liability, even to the same victims" (reference omitted).

⁵⁰ See the *Lubanga* Reparations Award Appeals Judgment, *supra* note 39, para. 308.

⁵¹ *Idem*, para. 304 (emphasis added). See also the "Public redacted Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled 'Order for Reparations pursuant to Article 75 of the Statute'" (Appeals Chamber), [No. ICC-01/04-01/07-3778-Red A3 A4 A5](#) (the "*Katanga* Reparations Appeals Judgment"), para. 180 (emphasis added).

⁵² See the "Corrected version of the 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable'" (Trial Chamber II), [No. ICC-01/04-01/06-3379-Red-Corr-tENG](#), 21 December 2017 (the "*Lubanga* Reparations Award Decision"); and the *Lubanga* Reparations Award Appeals Judgment, *supra* note 39.

⁵³ See the *Lubanga* Reparations Award Decision, *supra* note 52, para. 287. The Legal Representative recalls one of the objective underlying joint and several liability is to enable the victim to recover compensation in case of insolvency of one of the jointly and severally liable parties. See e.g. the *Bemba* Expert Report, *supra* note 45, para. 219: "the principle of joint and several liability is based on the recognition that more than one person may be responsible even if it is possible to take action against any of them for the total to ensure that there is full redress for victims. Put simply, this principle works as an insurance for victims that they will get redress for the terrible harms they have suffered. It is not the victims' fault that their harm was caused by a plurality of perpetrators; consequently, they should not have to bear the procedural risks typically involved with securing redress from multiple perpetrators such as that the persons causing the harm cannot be identified; that they cannot be traced; that they are insolvent; that the costs of a lawsuit are prohibitive; or that there is simply no legal remedy available to secure reparation. The principle also protects the funds of the Trust Fund".

Mr Ntaganda, irrespective of his likely indigence for reparations purposes,⁵⁴ should thus be held liable for a similar amount⁵⁵ in respect of the crimes covered by both his and Mr Lubanga's convictions. The Legal Representative submits that, should Mr Ntaganda's or Mr Lubanga's situation of indigence change, the Court should be able to claim the entirety of the reparations awarded for those crimes from either of them.⁵⁶ Only in that case, and only if Mr Ntaganda or Mr Lubanga were to try and recoup part of the amount paid from the other, would the complex question of their respective shares of liability arise.⁵⁷ Accordingly, the Legal Representative submits that, contrary to the Defence's submission, it is not necessary for the Chamber to "*determine the respective liability of Mr. Lubanga and Mr. Ntaganda*"⁵⁸ at this stage.

25. The Legal Representative underscores that, even if the Chamber decides to adopt the reparation programmes ordered by Trial Chamber I in *Lubanga*, additional reparations measures should be ordered in favour of child soldier beneficiaries in the present case. In fact, the crimes against child soldiers of which Mr Ntaganda was convicted are more extensive than those in the *Lubanga* case. Mr Lubanga was convicted of conscripting, enlisting and actively using in hostilities children under the age of 15 from early September 2002 to 13 August 2003.⁵⁹ By contrast, Mr Ntaganda has been found guilty of the following war crimes against child soldiers:

⁵⁴ See the "Trust Fund for Victims' observations on the impact of COVID-19 on operational capacity", [No. ICC-01/04-02/06-2517](#), 21 April 2020, para. 24.

⁵⁵ The Chamber may consider imposing a slightly reduced liability on Mr Ntaganda in recognition of the fact that the overlap not total – unlike Mr Ntaganda, Mr Lubanga has also been convicted for active use in hostilities of child soldiers in Ituri between 31 May 2003 and 13 August 2003.

⁵⁶ See e.g. ODIER-CONTRERAS GARDUÑO (D.I.), *op. cit.*, *supra* note 42, p. 57.

⁵⁷ See e.g. MUGWANYA (G.), "Reparations", in GUARIGLIA (F.), BATROS (B.), GALLMETZER (R.), and MUGWANYA (G.), *The Appeals Chamber of the International Criminal Court – Commentary and Digest of Jurisprudence*, Cambridge University Press, Cambridge, 2018, p. 382.

⁵⁸ See the "Public Redacted Version of "Defence submissions on reparations", 28 February 2020, ICC-01/04-02/06-2479", [No. ICC-01/04-02/06-2479-Red](#), 6 March 2020, para. 62 (the "Defence Submissions on Reparations"); and the "Response on behalf of Mr. Ntaganda to Registry's preliminary observations on reparations", [No. ICC-01/04-02/06-2431](#), 3 October 2019, para. 20.

⁵⁹ See the "Judgment pursuant to Article 74 of the Statute" (Trial Chamber I), [No. ICC-01/04-01/06-2842](#), 14 March 2012, para. 1358.

- (a) conscripting and enlisting children under the age of 15 years into an armed group between on or about 6 August 2002 and 31 December 2003, and using them to participate actively in hostilities between on or about 6 August 2002 and on or about 30 May 2003;
- (b) rape and sexual enslavement as a war crime against children under the age of 15 years incorporated into the UPC/FPLC between on or about 6 August 2002 and 31 December 2003, in Ituri.⁶⁰

26. Mr Ntaganda's conviction covers therefore the additional crimes of rape and sexual slavery against child soldiers within the UPC/FPLC, entailing harm of particular gravity that was not addressed by the *Lubanga* reparations order.⁶¹ Further, Mr Ntaganda's liability for recruitment of child soldiers is more extensive than Mr Lubanga's, as only the former was convicted for the enlistment and conscription of children under the age of 15 from on or about 6 August 2002 to early September 2002 and from 13 August 2003 to on or about 31 December 2003.⁶²

27. The Defence argues that the different temporal scope of Mr Ntaganda's conviction means that "*only former child soldiers enrolled in the UPC/FPLC between 6 August 2002 to 1 September 2002 and 13 August 2003 to 31 December 2003 [should] be authorised to request reparation*" in the present proceedings, while former child soldiers eligible for reparations in the *Lubanga* case "*should not be awarded further reparations in this case*",⁶³ as they would otherwise receive double compensation for "*the same harm resulting from the same crimes*".⁶⁴ The Legal Representative opposes this contention, which is based on a fundamental misunderstanding of the war crimes of enlistment

⁶⁰ See the Judgment, *supra* note 1, pp. 536-538.

⁶¹ See the "Prosecution's Observations on Reparations", *supra* note 49, para. 21; and the "Defence Submissions on Reparations", *supra* note 58, para. 59.

⁶² See *supra*, para. 25.

⁶³ See the "Defence Submissions on Reparations", *supra* note 58, paras. 61 and 63.

⁶⁴ *Idem*, para. 60.

and conscription of child soldiers, both continuous offences. As noted in the *Lubanga* case, and confirmed by the Chamber in the present case:⁶⁵

*“the crime of enlisting and conscripting is an offence of a continuing nature [...] [which] continues to be committed as long as the children remain in the armed groups or forces and consequently ceases to be committed when these children leave the groups or reach age fifteen”.*⁶⁶

28. Most of the former child soldiers found to be eligible in *Lubanga* should thus be entitled to additional reparations in the present case, as Mr Ntaganda was found liable for their recruitment within the UPC/FPLC for a more extensive period, and is therefore liable for the additional harm that ensued.⁶⁷ The point is perhaps better illustrated by reference to an hypothetical example. The Legal Representative refers therefore to a former child soldier born in 1992 who joined the UPC/FPLC before 6 August 2002 and stayed within its ranks until early 2004. The reparations awarded in the context of the *Lubanga* proceedings, where said victim would have been found to be eligible as a beneficiary, would only cover the harm he or she suffered as a child soldier recruited within the UPC/FPLC from early September 2002 to 13 August 2003.⁶⁸ By contrast, Mr Ntaganda is also liable to provide reparation for the additional 5½-month period of recruitment – between 6 August and early September 2002 and between 13 August and 31 December 2003. While the assessment of reparations liability is far from a purely arithmetical exercise, the Legal Representative underscores that – to the extent her clients are concerned – the duration of their period of recruitment is an important consideration in assessing the connected harm.

29. For these reasons, the Legal Representative submits that Mr Ntaganda is fully liable, *in solidum* with Mr Lubanga, for the crimes covered by the *Lubanga* conviction

⁶⁵ See the Judgment, *supra* note 1, para. 1112.

⁶⁶ See the “Decision on the confirmation of charges” (Pre-Trial Chamber I), [No. ICC-01/04-01/06-803-tEN](#), 29 January 2007, para. 248. See also SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, [Trial Judgment](#), 18 May 2012, para. 443.

⁶⁷ It is well established that reparations must be proportionate to the extent of harm suffered by the victims and the cost to repair it. See e.g. “Public redacted version of ‘Decision appointing experts on reparations’”, *supra* note 5, para. 13; and the “Defence Submissions on Reparations”, *supra* note 58, para. 29.

⁶⁸ See *supra*, para. 25.

and bears additional liability to repair harm arising from the more extensive crimes of which he was convicted.

2. Type of Reparations

a) *Individual and Collective Reparations*

30. The Legal Representative commends the Appointed Experts' recommendation to "*focus on the concrete measures that are the most appropriate for the victims of Mr Ntaganda*" rather than "*engaging in the sometimes overly dogmatic and theoretical debate about the distinction between collective and individual reparations*".⁶⁹ The Legal Representative concurs that the distinction between collective and individual reparations should not be regarded as a strict dichotomy.⁷⁰ On the contrary, the Court's jurisprudence to date has recognised several forms of collective reparations with an individual component, designed to benefit each victim in an individualised fashion.⁷¹

31. In the context of its recent Judgment in the *Lubanga* reparations proceedings, the Appeals Chamber stressed that:

"[i]ndividual and collective reparations are not mutually exclusive, and they may be awarded concurrently'. Future chambers should have this in mind when reaching determinations as to the appropriateness of particular reparations in the cases before them. Also, although it would not attempt to set out, in an exhaustive manner, how the concept of 'collective' reparations should be understood – bearing in mind the many permutations possible, which will also be dependent on the facts of particular cases – the Appeals Chamber would, nevertheless, also stress now that, in awarding collective reparations to victims, this can include reparations which are individualised; in this respect, collective reparations can include the payment of sums of money to individuals to repair harm suffered and the possibility for individuals to participate in particular

⁶⁹ See the Bonneau *et al.* Report, *supra* note 14, para. 153.

⁷⁰ See OHCHR, "[Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed within the Territory of the Democratic Republic of the Congo between March 1993 and June 2003](#)", August 2010, paras. 1107, 1110, and 1125; cited in the Bonneau *et al.* Report, *supra* note 14, para. 150.

⁷¹ See *e.g.* the Katanga Reparations Order, *supra* note 38, paras. 301-302.

programmes that address the specific harm that those individuals have suffered [...]".⁷²

32. Against this background, the Legal Representative reiterates that, when questioned about their preferred type of reparations, the former child soldiers she represents overwhelmingly expressed a preference for individual reparations, although they would also accept collective reparations with an individual component.⁷³ The Legal Representative welcomes therefore the reparation measure with an individual and compensatory component recommended by the Appointed Experts,⁷⁴ and notes that the financial compensation comprised in the standard compensation amount (SCA) corresponds to the wishes and priorities expressed by the former child soldiers, and empowers them to apply such funds in a manner of their choosing that would directly impact their own life and that of their children. Indeed, as noted by the Appointed Experts, *"no one else knows better than they themselves what they need and what reparation shall and shall not be"*.⁷⁵

33. The Legal Representative also notes that both individual and collective forms of reparation, including those with an individual component, should be deployed in parallel, particularly for victims of rape and sexual slavery. The Guidance Note of the Secretary-General on Reparations for Conflict-Related Sexual Violence emphasises that, in this field, *"[i]ndividual and collective reparations should complement and reinforce each other"*.⁷⁶ The Legal Representative welcomes therefore Dr Gilmore's conclusion that:

"Due to the plurality of harms associated with sexual violence and its consequences, a dual approach to reparations should be taken, one which recognises that certain needs are more readily dealt with on a collective basis, whereas others can only be addressed on an individual basis. Collective

⁷² See the *Lubanga* Reparations Award Appeals Judgment, *supra* note 39, para. 40.

⁷³ See the *Bonneau et al.* Report, *supra* note 14, para. 219.

⁷⁴ *Idem*, paras. 220-221.

⁷⁵ *Idem*, para. 153.

⁷⁶ See UNITED NATIONS, "[Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence](#)", June 2014, para. A3.

*reparation in the form of medical rehabilitation for victims who have suffered harm as a result of rape and sexual slavery can have individualised benefits”.*⁷⁷

b) Anticipated number of child soldier beneficiaries

34. To the extent the number of anticipated beneficiaries may be considered by the Chamber in assessing the appropriate type of reparations, the Legal Representative deems that the Appointed Experts’ estimates in this respect require clarification. The Bonneau *et al.* Report concludes that “*it can be estimated that at least approximately 3,500 victims of Mr. Ntaganda are potentially eligible for reparations*”,⁷⁸ including both the former child soldiers and the victims of the attack.

35. While noting that this figure was intended to provide a minimum estimate, the Legal Representative submits that it is far from being realistic and the effective number of beneficiaries eligible for reparations in the present case is likely to be significantly higher. With respect to the former child soldiers in particular, the Appointed Experts recall that “*283 child soldier victims*” were admitted for participation at the trial of Mr Ntaganda,⁷⁹ and that “*a total of 425 victims had been determined to be eligible for reparations at the time the final reparations order was issued in the Lubanga case*”.⁸⁰ It is important to add, however, that in the ongoing *Lubanga* reparation proceedings, the TFCV formulated an estimated total number of “*3,000 potentially eligible direct and indirect victims*” in that case.⁸¹ Due to the overlapping nature of the charges of conscription, enlistment and active use in hostilities of child soldiers for which Mr Lubanga and Mr Ntaganda were convicted, virtually all those victims are likely to be eligible for

⁷⁷ See the Gilmore Report, *supra* note 15, para. 103.

⁷⁸ See the Bonneau *et al.* Report, *supra* note 14, para. 29.

⁷⁹ *Idem*, para. 26

⁸⁰ *Idem*, para. 27. The figures relied upon by the Appointed Experts need to be balanced against the practice of Trial Chamber II in the *Lubanga* case and the established calendar to submit reparation requests in said case.

⁸¹ See e.g. the “Filing on Reparations and Draft Implementation Plan”, [No. ICC-01/04-01/06-3177-Red](#), 3 November 2015, para. 253; repeated in the “Prosecution’s observations on the Trust Fund for Victims’ Filing on Reparations and Draft Implementation Plan”, [No. ICC-01/04-01/06-3186](#), 18 December 2015, para. 5. See also the “Information regarding Collective Reparations”, [No. ICC-01/04-01/06-3273](#), 13 February 2017, paras. 34, and 39; and the “Opinion de Mme la juge Herrera Carbuccion”, [No. ICC-01/04-01/06-3252-Anx](#), 25 October 2016, para. 9.

reparations in both cases. As conceded by the Defence, “*eligible victims of the crimes of ‘conscripting and enlisting children under the age of 15 years into the UPC/FPLC and using them to participate actively in hostilities’ in the Lubanga case will necessarily be eligible victims in the present case*”.⁸²

36. Moreover, it would be reasonable to assume that additional former UPC/FPLC child soldiers, particularly those from the Hema community, may be willing to come forward to seek reparations against Mr Ntaganda than Mr Lubanga, who is perceived as an ethnic Hema and recently returned to the DRC, where he was welcomed as a hero.⁸³ Further, as noted in earlier submissions, additional individuals tend to come forward once they know the potential content of such reparations, due to the psychosocial and security implications said step may have.⁸⁴

37. Accordingly, the Legal Representative submits that, while a precise estimate of the total number of former UPC/FPLC child soldiers eligible for reparations in the present case cannot be calculated at the present stage, said figure is likely to exceed 3,000 individuals, covering both direct and indirect victims.

38. As for the number of former UPC/FPLC child soldiers who may claim reparations for rape and sexual slavery, the Legal Representative recalls that they can be particularly reluctant to come forward due to the high levels of both trauma and stigmatisation that often affect victims of those offences.⁸⁵ It will be of paramount importance to adequately consider and address these difficulties in the design and implementation of reparations in the present case, in order for former child soldiers, both male and female, who were subjected to rape and/or sexual slavery to be meaningfully engaged in the process and able to avail themselves of opportunities to express their views.

⁸² See the “Defence Submissions on Reparations”, *supra* note 58, para. 60.

⁸³ See the Bonneau *et al.* Report, *supra* note 14, para. 45.

⁸⁴ See the “Joint Response of the Legal Representatives of Victims to the Registry’s Observations on Reparations”, [No. ICC-01/04-02/06-2430](#), 3 October 2019, para. 36.

⁸⁵ See in particular the CLR1 Reparations Submissions, *supra* note 39, para. 26.

39. The Legal Representative is therefore perplexed by the bold statement contained in the Bonneau *et al.* Report, according to which the approach proposed by the Appointed Experts “*would combat the common but wrong assumption that victims of sexual violence will not come forward, will not identify themselves for the purpose of accountability or reparations (privately and publicly) and the tendency to infantilize victims*”.⁸⁶ The Legal Representative notes that this statement appears to be in direct contradiction with those included in other sections of the Bonneau *et al.* Report, as well as in the Gilmore Report. These include, *inter alia*, the following references:

- (a) “*to take into account large numbers of obstacles that prevent female and male victims of sexual violence from being involved and benefitting, while addressing bias and stigma*”;⁸⁷
- (b) “[s]ensitisation initiatives [...] strive to remove the social barriers (like stigma) to seeking help, while simultaneously ensuring service provision such as in the form of medical rehabilitation. Therefore, sensitisation can act a precursor to accessing reparations, encouraging victims to come forward and engage in the process”;⁸⁸
- (c) “[i]n Sierra Leone, former child soldiers who suffered sexual violence were reluctant to come forward to engage with the SCSL or the TRC due to fear that doing so will lead to punishment or upsetting their marriage or family arrangements”;⁸⁹
- (d) “[p]articular attention should be paid to victims of sexual violence, who may feel stigmatised, socially excluded or psychological [sic] harmed, for example, by providing private, discreet forums”;⁹⁰ and
- (e) “[p]ractical and procedural adaptations are therefore required to ensure that victims can not only avail of opportunities to feed into reparation design but also

⁸⁶ See the Bonneau *et al.* Report, *supra* note 14, para. 146.

⁸⁷ *Idem*, para. 144.

⁸⁸ See the Gilmore Report, *supra* note 15, para. 131.

⁸⁹ *Idem*, para. 60.

⁹⁰ *Idem*, para. 11.

*apply and receive reparations in a manner that is appropriate for them. This is particularly pertinent to victims of rape and sexual slavery in this case, for whom stigma is both a harm and a potentiator of other harms by hindering access to support”.*⁹¹

40. Furthermore, in its submissions made before Trial Chamber III as part of the *Bemba* reparations proceedings, the United Nations unequivocally explained that consultations with affected communities must be preceded by “*proactive and gender-sensitive outreach by the court [...] especially [...] where victims of conflict-related sexual violence are involved, [...] as victims of sexual violence gain trust in a judicial process, they are more likely to reveal sensitive and traumatic experiences that could bear on the type and amounts of reparations determined to be due to them*”.⁹²

41. The Legal Representative’s experience dealing with former child soldiers in Ituri over the past 13 years confirms that particular care needs to be taken to ensure that victims of sexual violence are able to come forward and meaningfully engage with the Court process. For instance, former child soldiers who participated in the proceedings were much more reluctant to disclose and discuss their victimisation by way of rape and sexual slavery, where applicable, as opposed to their conscription, enlistment and active use in hostilities. The Legal Representative recalls the Chamber’s finding within the judgment that “[f]emale members of the UPC/FPLC were regularly raped and subjected to sexual violence [...] by male UPC/FPLC soldiers and commanders” and that this amounted to a “*common practice*”.⁹³ By contrast, a limited proportion of the former child soldiers admitted to participate in the proceedings against Mr Ntaganda reported instances of sexual violence crimes. Dr Gilmore notes that “*the total number of participating victims of rape and sexual slavery in this case is low (88 victims: 4.1%), [but] a higher number is estimated to be affected both as victims of the attacks and as former child*

⁹¹ *Idem*, para. 21.

⁹² See the “Joint submissions by the United Nations containing observations on Reparations pursuant to Rule 103 of the Rules of Procedure and Evidence”, [No. ICC-01/05-01/08-3449](#), 17 October 2016, para. 32.

⁹³ See the Judgment, *supra* note 1, para. 407.

soldiers".⁹⁴ For child soldiers specifically, as communicated to Dr Gilmore upon her request, 48 participating victims discussed rape and sexual slavery in their respective application form, and indications that two additional child soldiers were subjected to those crimes have emerged since, bringing the total to 50 out of 283 participating child soldier victims (approximately 17,6%).

42. The obstacles hindering full engagement with victims of rape and sexual slavery in Ituri are compounded where the victim is male. The Legal Representative regrets that the phenomenon of sexual violence against male child soldiers within the UPC/FPLC ranks did not emerge as clearly during the proceedings as the crimes of rape and sexual slavery against female recruits. This is not because said phenomenon did not occur, but rather – *inter alia* – because of the male victims' reluctance to disclose it. The Legal Representative therefore welcomes Dr Gilmore's analysis of the specific harm suffered by male victims of rape and sexual slavery,⁹⁵ but wishes to correct the information she provided to Dr Gilmore, which led to the incorrect statement in the Gilmore Report that "*there are no participating male victims of rape or sexual slavery in this case*".⁹⁶ In fact, the Legal Representative is now aware of two cases in which, after several years of legal representation, two of her clients disclosed having been subjected to sexual violence and continuing to suffer harm as a result. There are – of course – indirect but clear indications that many further male former child soldiers experienced sexual violence within the UPC/FPLC's rank, including being forced to rape or sexually abuse civilians or fellow female child soldiers.

43. To conclude, the Legal Representative considers that taking into account – and striving to address – the peculiar hurdles that may be faced by victims of rape and sexual slavery, both male and female, does not amount to "*infantiliz[ing] victims*",⁹⁷ but

⁹⁴ See the Gilmore Report, *supra* note 15, para. 21.

⁹⁵ *Idem*, para. 20.

⁹⁶ *Idem*, para. 22.

⁹⁷ See the Bonneau *et al.* Report, *supra* note 14, para. 146.

is instead a necessary step to ensure that meaningful reparations are concretely made available to this specific category of beneficiaries.

3. Harm caused to victims

44. The Legal Representative welcomes the Appointed Experts' detailed analysis of the different types of harms suffered by victims, including the former child soldiers and their families. Since said analysis is generally in line with the position expressed by the Legal Representative in earlier submissions,⁹⁸ only two points of clarification will be addressed in this context: first, in the Legal Representative's submission, recognising the types of harms listed in the Bonneau *et al.* Report⁹⁹ would not require a significant expansion of the Court's jurisprudential approach to date. Second, while the situation of children born out of rape is different, in some respects, from that of their siblings and relatives, the Legal Representative submits that all children of former child soldiers, as well as grandchildren, parents and other immediate family members, may qualify as indirect victims eligible for reparations.¹⁰⁰

a) Recognised types of harm

45. The Bonneau *et al.* Report concludes, with respect to the harm suffered by former child soldiers victims, that:

"Having in mind the similarities between this case and the Lubanga case which have been recognized by all parties and ICC organs in these reparation proceedings, the Experts submit, as a minimum, that the same types of harms as identified by the Appeal Chamber in the Lubanga case are present in this case. In addition, the Experts propose to expand this list of harms to better reflect the reality of the harms suffered as a result of the crimes of conscription, enlistment and use of child soldiers to participate actively in hostilities, as follows (expansions in bold):

Harm suffered by direct victims:

i. **Physical injury and trauma;**

⁹⁸ See, in particular, the CLR1 Reparations Submissions, *supra* note 39.

⁹⁹ See the Bonneau *et al.* Report, *supra* note 14, para. 115.

¹⁰⁰ In this sense, see the "Decision on issues raised in the Registry's First Report on Reparations", *supra* note 16, paras. 48-56.

- ii. *Psychological trauma and the development of psychological disorders, such as, inter alia, suicidal tendencies, depression, and dissociative behaviour;*
- iii. *Interruption and loss of schooling;*
- iv. *Separation from families;*
- v. ***Loss of childhood and loss of Life Plan;***
- vi. *Exposure to an environment of violence and fear;*
- vii. ***Material harm;***
- viii. *Difficulties socialising within their families and communities, including stigmatization;*
- ix. *Difficulties in controlling aggressive impulses; and*
- x. *Non-development of “civilian life skills” resulting in the victim being at a disadvantage, particularly as regards employment.*

Harm suffered by indirect victims:

- i. *Psychological suffering **and medical disease** experienced as a result of the sudden loss of a family member;*
- ii. *Material deprivation that accompanies the loss of the family member’s contributions;*
- iii. *Loss, injury or damage suffered by the intervening person from attempting to prevent the child from being further harmed as a result of the relevant crime;*
- iv. *Psychological and material sufferings as a result of the aggressiveness on the part of the former child soldiers being relocated to their families and communities;*
- v. ***Transgenerational harm: physical and psychological harm suffered by children of former child soldiers and physical, psychological and material harm suffered by children born out of rape”***.¹⁰¹

46. The Legal Representative respectfully submits that none of the types of harm listed in the Bonneau *et al.* Report is entirely new, and that each of them has been discussed, and to some extent recognised before the Court. Accordingly, recognising the types of harms listed in the Bonneau *et al.* Report would not require a significant expansion of the Court’s jurisprudential approach to date.

¹⁰¹ See the Bonneau *et al.* Report, *supra* note 14, para. 115 (references omitted, emphasis original) and more generally Section 2.5.

Loss of childhood and loss of life plan

47. As explored in detail in earlier submissions,¹⁰² the former child soldiers suffered harm in the form of damage to their life plan or project of life. The Appeals Chamber recognised this type of harm in its 2019 Judgment on reparations in the *Lubanga* case:

*“as pointed to by the OPCV, the Appeals Chamber stresses the need to recognise and address, as one type of harm, in the projects being implemented, the damage to a life plan/the project of life, which these children may have suffered. Again, the Appeals Chamber recalled this concept in the Lubanga Amended Reparations Order, noting that ‘the concept of “damage to a life plan”, adopted in the context of State responsibility at the IACtHR, may be relevant to reparations at the Court’. In identifying the harm to direct victims of, specifically, Mr Lubanga’s crimes, the Appeals Chamber included ‘[i]nterruption and loss of schooling’ and ‘[t]he non-development of “civilian life skills” resulting in the victim being at a disadvantage, particularly as regards employment’. The Appeals Chamber emphasises that it is crucial, in the reparations provided, that the specific situation of the children at issue in this case is recognised and that their harm is appropriately remedied through the particular reparations provided”.*¹⁰³

Material harm

48. The Bonneau *et al.* Report confirms that former child soldiers suffered material harm in the form of loss of good and animals during the attacks,¹⁰⁴ as well as material and economic harm arising from their loss of childhood, interruption in schooling, stigmatisation and lack of support.¹⁰⁵

49. The Legal Representative recalls that, as part of the *Lubanga* reparations proceedings, Trial Chamber I recognised that the former child soldiers victims “suffered materially in many respects”, as the trauma they experienced negatively impacted on their education and cognitive abilities, hampering their ability to function fully even

¹⁰² See the CLR1 Reparations Submissions, *supra* note 39, paras. 43-45, and 73.

¹⁰³ See the *Lubanga* Reparations Award Appeals Judgment, *supra* note 39, para. 48 (references omitted).

¹⁰⁴ See the Bonneau *et al.* Report, *supra* note 14, para. 106.

¹⁰⁵ *Idem*, para. 107.

once the violence has ceased.¹⁰⁶ For the family members of defunct child soldiers, the material deprivation arising from the loss of contributions from a deceased family member was also recognised.¹⁰⁷

Stigmatisation

50. The Appointed Experts analysed the impact of rejection and stigmatisation as forms of social harm,¹⁰⁸ explaining that “[s]tigmatization plays an important role in the Congolese context [...] [and n]aming it will imply for the victims the recognition of this specific harm and will open the way to reparation, which will be an incentive to enable better mutual acceptance between former child soldiers and their community”.¹⁰⁹

51. The Legal Representative welcomes the Appointed Experts’ focus on the fact that the former child soldiers’ “difficulties socializing within their families and communities”, recognised as a form of harm in *Lubanga*,¹¹⁰ is due at least in part to the stigmatisation to which they are subjected. She considers that it would be broadly consistent with the Court’s caselaw to recognise this as a further source of social harm.

Medical disease experienced as a result of the sudden loss of a family member

52. The Appointed Experts explained that indirect victims who lost a family member as a child soldier suffer from “[i]ntense psychological trauma [that] may also be at the origin of the development of medical disease and an alteration of their capabilities”.¹¹¹ Since the psychological trauma arising from the sudden loss of a family member has been recognised in the Court’s reparations jurisprudence,¹¹² the Appointed Experts

¹⁰⁶ See the *Lubanga* Reparations Award Decision, *supra* note 52, para. 183, referring to the “Decision on Sentence pursuant to Article 76 of the Statute” (Trial Chamber I), [No. ICC-01/04-01/06-2901](#), 13 July 2012, paras. 39-41.

¹⁰⁷ See the *Lubanga* Reparations Award Decision, *supra* note 52, para. 183, referring to “Redacted version of ‘Decision on indirect victims’” (Trial Chamber I), [No. ICC-01/04-01/06-1813](#), 8 April 2009, para. 50.

¹⁰⁸ See the Bonneau *et al.* Report, *supra* note 14, paras. 99-102.

¹⁰⁹ *Idem*, para. 102.

¹¹⁰ See the “Order for Reparations” (Trial Chamber I), [No. ICC-01/04-01/06-3129-AnxA](#), 3 March 2015, para. 58 (the “*Lubanga* Reparations Order”).

¹¹¹ See the Bonneau *et al.* Report, *supra* note 14, para. 109.

¹¹² See the *Lubanga* Reparations Order, *supra* note 110, para. 58.

correctly propose an extremely limited, and indeed necessary, expansion of this category of harm.

Transgenerational and intergenerational harm

53. The Appointed Experts confirmed that, in the assessment of the damage caused, a relevant consideration is the transgenerational or intergenerational harm suffered by indirect victims.¹¹³ The Legal Representative recalls that, in the *Katanga* reparations proceedings, Trial Chamber II recognised the transgenerational harm suffered by children born after the attack which formed the subject-matter of that case.¹¹⁴ In particular, Trial Chamber II found that transgenerational harm is “*a phenomenon, whereby social violence is passed on from ascendants to descendants with traumatic consequences for the latter*”,¹¹⁵ and took note of the two main schools of thought concerning the transgenerational transmission of trauma.¹¹⁶

54. The Chamber would thus be acting in full accordance with the Court’s jurisprudence in recognising the full extent of transgenerational or intergenerational harm suffered by indirect victims in the present case.¹¹⁷

b) Victims suffering transgenerational harm

55. The Bonneau *et al.* Report and the Gilmore Report diverge, to some extent, as to the range of victims eligible for reparations based on transgenerational harm resulting from the crimes perpetrated against the former child soldiers.

¹¹³ See the CLR1 Reparations Submissions, *supra* note 39, paras. 47-49; the Bonneau *et al.* Report, *supra* note 14, paras. 32, 47, 69, 80 and 111-114; and the Gilmore Report, *supra* note 15, paras. 53-57.

¹¹⁴ See the *Katanga* Reparations Order, *supra* note 38, paras. 132-135 (note that in that particular case the Chamber found that the required causal nexus between that harm and the attack had not been proven to the requisite standard). See also the “Decision on the Matter of the Transgenerational Harm Alleged by Some Applicants for Reparations Remanded by the Appeals Chamber in its Judgment of 8 March 2018” (Trial Chamber II), [No. ICC-01/04-01/07-3804-Red-tENG](#), 19 July 2018, paras. 9-14 (the “Decision on Transgenerational Harm”).

¹¹⁵ See the *Katanga* Reparations Order, *supra* note 38, para. 132; and the Decision on Transgenerational Harm, *supra* note 114, para. 10.

¹¹⁶ See the Decision on Transgenerational Harm, *supra* note 114, paras. 11-14.

¹¹⁷ See also *infra* paras. 55-64.

56. The Bonneau *et al.* Report refers, in the context of transgenerational harm, to “*physical and psychological harm suffered by children of former child soldiers and physical, psychological and material harm suffered by children born out of rape*”.¹¹⁸

57. The Gilmore Report analyses in detail some of the transgenerational and/or intergenerational harms suffered by children of former child soldiers, as well as the latter’s parents. Dr Gilmore recommends that some of the forms of collective reparations be made available to children born out of rape only,¹¹⁹ while others – such as mental health services – should be provided not only to children born out of rape but also to “*other family members affected (such as grandparents or siblings)*”.¹²⁰

58. The Legal Representative submits that, while certain transgenerational consequences of the crimes of rape and sexual slavery affect exclusively – or more significantly – children born out of rape, other forms of transgenerational harm impact all children of former child soldiers, including those born out of rape.

59. On the one hand, as confirmed by both expert reports, children born out of rape are often rejected by their mothers and stigmatised by their family and community.¹²¹ The vast majority are not registered, do not have legal status, and therefore do not have Congolese nationality and are considered as foreigners.¹²² They are “*neglected, abandoned, malnourished, with no or limited access to health care, and they receive no education*”.¹²³ In addition, children born out of rape “*can also struggle to reconcile their*

¹¹⁸ See the Bonneau *et al.* Report, *supra* note 14, p. 49, para. v.

¹¹⁹ See *e.g.* with respect to HIV-related medical care, where Dr Gilmore recommends “*Appropriate HIV care, treatment and monitoring for HIV-positive direct victims and HIV-positive children born out of rape (currently adults) for five years. The court may wish to consider extending HIV healthcare to HIV-positive partners or spouses where evidence exists that on the balance of probabilities HIV was transmitted from the victim to their partner after the crime*”. See the Gilmore Report, *supra* note 15, p. 137. The Legal Representative draws the Chamber’s attention to the fact that, where a former child soldier contracted HIV while in the UPC/FPLC and remained untreated, not only her child born out of rape but also any subsequent children could contract HIV via mother-to-child transmission.

¹²⁰ See the Gilmore Report, *supra* note 15, p. 139.

¹²¹ See the Bonneau *et al.* Report, *supra* note 14, para. 113; and the Gilmore Report, *supra* note 15, paras. 54-57.

¹²² See the Bonneau *et al.* Report, *supra* note 14, para. 113.

¹²³ *Ibid.* See also the Gilmore Report, *supra* note 15, para. 54.

*affection, attachment and loyalty to their fathers with their responsibility in committing atrocities, in particular for sexual violence committed against their mothers [...] their inability to provide a clear answer [on their father's identity] can be stigmatising and may lead to problems in their relationships [...] [and] in the workplace".*¹²⁴

60. On the other hand, the Legal Representative underscores that all children of child soldiers – and particularly those child soldiers who were subjected to sexual violence – experience forms of transgenerational harm. As explained by the Appointed Experts, the trauma experienced by former child soldiers would “*influence parenting and affect the[ir] children's psychosocial development and adaptation, thereby becoming intergenerational*”¹²⁵ and “*all children suffered the consequences of the direct harms suffered by their parents and families. They often are left to themselves, as their parents cannot take care of them either, making them more vulnerable to criminality and even the possibility of being conscripted and enlisted in actual armed groups as well*”.¹²⁶

61. The Gilmore Report explains that:

*“While the direct impact of sexual violence against mothers on their children born out of rape is well documented, other researchers have suggested a strong prevalence of transgenerational trauma for all children of victims of sexual violence. In other contexts, this transgenerational trauma manifests itself in psychological problems among children who have watched their mothers being raped or suffering, with mothers themselves experiencing difficulties including struggling to control impulses and tension, behaving aggressively towards their children or being unable to bond with and express emotions toward their children. These difficulties can lead to feelings of shame, guilt, self-blame, identity crises, and frustration at continuing to be labelled a victim of sexual violence nearly two decades after the events”.*¹²⁷

62. The Legal Representative underscores that all children of former child soldiers are likely to be subject to significant levels of stigmatisation and exclusion within their communities. The stigma associated with being the son or daughter of a former child

¹²⁴ *Idem*, para. 55.

¹²⁵ See the Bonneau *et al.* Report, *supra* note 14, para. 36.

¹²⁶ *Idem*, para. 113.

¹²⁷ See the Gilmore Report, *supra* note 15, para. 54 (references omitted).

soldier who was subjected to sexual violence, and the sibling of a child born out of rape, is such that these children's situation is often not materially different, in this respect, from that of children born out of rape. Further, while the Appointed Experts link some of the negative impacts arising from the former child soldier contracting HIV only to her children born out of rape, these consequences would equally affect their siblings.¹²⁸ All children of former child soldier who contracted HIV and died would be orphaned, and all such children born since the events material to the present case may have become HIV-positive themselves.

63. The parents of former child soldiers and other family members, such as their brothers or sisters, would also suffer transgenerational harm, as they may have no choice but to take on caring responsibilities towards the former child soldier's children that the latter is unable to fulfil.¹²⁹

64. Accordingly, the Legal Representative respectfully submits that the Chamber should consider the issue of transgenerational harm not only with respect to children born out of rape, but also all children of former child soldiers and, almost 20 years after the events, their grandchildren. Transgenerational harm can impact "*succeeding generations*",¹³⁰ but also preceding generations. All these categories of family members should – in appropriate circumstances – be eligible for reparations.

c) Presumption of harm suffered by the victims

65. The Legal Representative concurs with the Appointed Experts' proposal that "[a]n individual assessment of each victim's harm and the extent of the harm is neither feasible nor desirable"¹³¹ and that "*harm must be presumed for every person who was subjected to one of Mr Ntaganda's crimes*".¹³² Requiring each victim to prove the specific harms he or she suffered as a result of those crimes, and subjecting each possible harm to a separate

¹²⁸ See the Bonneau *et al.* Report, *supra* note 14, para. 113. See also *supra* note 119.

¹²⁹ See the Gilmore Report, *supra* note 15, para. 56.

¹³⁰ See the Bonneau *et al.* Report, *supra* note 14, paras. 16, and 33.

¹³¹ *Idem*, p. 107, para. 8.

¹³² *Idem*, para. 16.

assessment by the Chamber or the Registry, would be both unduly restrictive and unnecessary.

66. First, without prejudice to Mr Ntaganda's fair trial rights, victims should not be subjected to overly restrictive standards that would undercut their right to of access to justice and to a remedy. In the specific circumstances of the present case, as concluded by Dr Gilmore, "*placing the burden on victims to evidence each harm to satisfy a reparation claim may be too onerous for such vulnerable and often stigmatised victims*".¹³³ Most of the direct and indirect victims of the child soldiers-related crimes are likely to face significant hurdles in providing documentary evidence proving the specific forms and extent of harm those crimes caused them.¹³⁴ The Legal Representative draws the Chamber's attention, in particular, to the period of time of almost two decades that elapsed since the relevant crimes; the vulnerability of most victims – both today and in the immediate aftermath of the crimes, when the former child soldiers were children or young adolescents, often displaced and removed from their families; and to the fact that the crimes occurred during a destructive armed conflict that ravaged Ituri, in a context where formal documentation of harm was not a priority, and was followed by several further conflicts since, leading to the victims' displacement and general instability.¹³⁵ In addition, a recent report by the UN Office on Drugs and Crime indicates that "*reparations processes requiring proof of harm can disadvantage women, who are disproportionately affected by sexual and gender-based violence, owing to the stigma attached to such harms [...] this may directly impede access to reparations*".¹³⁶

¹³³ See the Gilmore Report, *supra* note 15, para. 61.

¹³⁴ See the Bonneau *et al.* Report, *supra* note 14, para. 48.

¹³⁵ See *e.g.* the practice of the United Nations Compensation Commission for the Iraq-Kuwait conflict where, due to the armed conflict, many claimants and even the Iraqi government could not supply primary evidence to support their case. See CHUNG (J.J.), "The United Nations Compensation Commission and the Balancing of Rights between Individual Claimants and the Government of Iraq", *UCLA Journal of International Law and Foreign Affairs*, vol. 10, 2005, p. 155.

¹³⁶ See *e.g.* UNODC, [*Handbook on Gendered Dimensions of Criminal Justice Responses to Terrorism*](#), Vienna, 2019 (the "UNODC Handbook"), p. 188.

67. Further, and in any event, requiring each victim to prove the type and extent of harm they suffered as a result of the crime is entirely unnecessary,¹³⁷ particularly where reparations are standardised in nature, as recommended by the Appointed Experts.¹³⁸ For instance, the Bonneau *et al.* Report recommends a standard reparation package (SRP) for each former child soldier victim of Mr Ntaganda irrespective of the specific type and extent of harm proved, “*in view of the similarity of the harms that the former child soldier victims suffered*”.¹³⁹ In other words, since the Appointed Experts’ analysis demonstrate that each of Mr Ntaganda’s crimes caused at least some form of harm to both direct and indirect victims, there is “*no need to identify and prove the specific harm suffered by a particular victim*” for the purposes of reparations.¹⁴⁰

68. In this context, determining in a detailed fashion each individual claim of harm “*would only lead to an undue additional increase of the duration of the proceedings without generating additional information or knowledge*”,¹⁴¹ running counter to the approach recently confirmed by the Appeals Chamber in the *Katanga* reparations proceedings, where it held that “*proceedings intended to compensate victims for the harm they suffered, often years ago, must be as expeditious and cost effective as possible and thus avoid unnecessarily protracted, complex and expensive litigation*”.¹⁴²

69. The jurisprudence of the Court supports the application of a presumption of harm resulting from Mr Ntaganda’s crimes. The Appeals Chamber confirmed, in the *Katanga* case, that it was reasonable for the Trial Chamber to resort to factual

¹³⁷ See the *Katanga* Reparations Appeals Judgment, *supra* note 51, paras. 70-71.

¹³⁸ See the Bonneau *et al.* Report, *supra* note 14, para. 48.

¹³⁹ *Idem*, para. 217. See also the Gilmore Report, *supra* note 15, para. 76.

¹⁴⁰ See the Bonneau *et al.* Report, *supra* note 14, para. 16.

¹⁴¹ *Idem*, para. 48. In the context of the sexual violence crimes of which Mr Ntaganda was convicted, Dr Gilmore agrees that: “*engaging in calculations of pecuniary and non-pecuniary amounts is too individualised a process for the efficient adjudication of reparations for large numbers of victims; moreover, it is time consuming and unnecessarily creates an arbitrary hierarchy of those victims who are able to evidence more harm than others (which can reflect economic and social inequalities), rather than reflecting the seriousness of their suffering. Standardised amounts based on type of violation can avoid ‘disaggregating’ victims and creating discrepancies in the amount of compensation awarded to victims with similar experiences of suffering*”. See the Gilmore Report, *supra* note 15, para. 76.

¹⁴² See the *Katanga* Reparations Appeals Judgment, *supra* note 51, para. 64.

presumptions in light of the evidentiary hurdles faced by victims in proving the harms caused by the convicted person's crimes.¹⁴³ Similar presumptions have also been applied, for instance, by the Inter-American Court of Human Rights¹⁴⁴ and the European Court of Human Rights,¹⁴⁵ both with respect to the direct victims and their next of kin, as both courts presume that the suffering of the direct victim's relatives is a natural and inevitable consequence of the violation of his or her rights.¹⁴⁶

70. The Legal Representative concurs therefore that any person who proves, on the balance of probability, to have been a direct or indirect victim of Mr Ntaganda's crimes set out in counts 6, 9, 14, 15 and 16 should be presumed to have suffered one or more types of harms as a result of those crimes. This presumption of harm applies, *a fortiori*, to children of former child soldiers born out of rape, who should be presumed to have suffered various forms of harm as a result of the crimes of rape and/or sexual slavery perpetrated against their parent.¹⁴⁷ As discussed *supra*, the Appointed Experts analysed in detail the types of harm invariably experienced by children born out of rape and the pervasive and long-term impacts of the relevant crimes on their lives.¹⁴⁸ The Legal Representative submits therefore that where an individual credibly and coherently establishes that they were born as a result of sexual violence against a child soldier within the UPC/FPLC,¹⁴⁹ their resulting suffering or harm should then be

¹⁴³ *Idem*, paras. 89 and 92. The Legal Representative recalls that it may be appropriate for the Chamber to indicate its intention to rely on one or more factual presumptions at the earliest possible stage, given the Appeals Chamber's statement that "*it may have been advisable for the Trial Chamber to have indicated to the parties and the participants that it was intending to draw the impugned presumption, including but not limited to inviting submissions on its formulation*". See *idem*, para. 91.

¹⁴⁴ See e.g. IACtHR, *Caracazo v Venezuela*, [Reparations and Costs Judgment](#), 29 August 2002, para. 50(e); IACtHR, *Aloeboetoe et al. v. Suriname*, [Reparations and Costs Judgment](#), 10 September 1993, paras. 71 and 76; and IACtHR, *Loayza Tamayo v. Peru*, [Reparations and Costs Judgment](#), 27 November 1998, para. 140.

¹⁴⁵ See ECtHR, *Gridin v. Russia*, n° 4171/04, [Judgment](#), 1 June 2006, para. 20; and ECtHR, *Firstov v. Russia*, n° 42119/04, [Judgment](#), 7 July 2014, para. 49.

¹⁴⁶ See e.g. ODIER-CONTRERAS GARDUÑO (D.I.), *op. cit.*, *supra* note 42, p. 109, with further references.

¹⁴⁷ See the "First Decision on Reparations Process", *supra* note 6, para. 46.

¹⁴⁸ See *supra* para. 59.

¹⁴⁹ See the Gilmore Report, *supra* note 15, para. 80, concluding: "*There should be an evidential presumption that where they are born when their mothers were within the UPC or civilians within 42 weeks since the rape are eligible and should be assisted to apply*". The Legal Representative submits that the same presumption should apply where the applicant's mother was an UPC/FPLC's child soldier and the applicant was born within 42 weeks of her leaving the armed group.

presumed and no additional proof should be deemed necessary for their eligibility for reparations.

4. Modalities of reparations

71. The Legal Representative is broadly in agreement with the modalities of reparation proposed by the Appointed Experts. She welcomes, in particular:

- (a) the Appointed Experts' recommendations to combine individual and collective measures of reparations, which could enable victims in the present case to benefit from the most successful aspects of the reparation experiences in both the *Lubanga* and *Katanga* cases;
- (b) the clear recognition that the significant period of time that elapsed since the crimes affects not only the nature of the harms suffered by victims as a result, but also the type of measures required to address them; and
- (c) the focus on agency, sustainability and long-term empowerment as driving considerations in the selection of the appropriate modalities of reparation.

a) *Financial compensation*

72. Both the Bonneau *et al.* Report and the Gilmore Report recommend that eligible victims receive financial compensation as an important component of the reparations package. The Legal Representative can only welcome this recommendation, which reflects "*the victims' overwhelmingly uniform request and expectation that they be provided financial compensation as one form of reparation*".¹⁵⁰ Further, as noted by Dr Gilmore, "*the use of compensation can overcome some of the capacity weaknesses [...] in the delivery of collective or symbolic measures, as well as minimising administration costs in organisations providing collective measures*".¹⁵¹

¹⁵⁰ See the Bonneau *et al.* Report, *supra* note 14, recommendation 19, p. 109.

¹⁵¹ See the Gilmore Report, *supra* note 15, para. 85.

73. The Legal Representative is not in a position to comment, at the present stage, on the specific figures proposed by the Appointed Experts for different categories of victims and harms,¹⁵² nor the details of the recommended implementation methods,¹⁵³ including the modalities of payment.¹⁵⁴ The Legal Representative considers that meaningful comments on these matters would require in-depth consultations with her clients which are neither practically feasible, nor appropriate at this point in time.

74. First, the practical difficulties that precluded the Appointed Experts from conducting field missions and meeting victims face-to-face equally affect the Legal Representative's ability to meaningfully consult with her clients, particularly those deemed to be more vulnerable. The Legal Representative notes in this respect Dr Gilmore's conclusions:

"The security context and the different pandemics (COVID-19, Ebola) have already affected the way the Court interacts with victims in this case, with impossibilities to conduct field missions and to directly meet with victims. However, creative ways to organise direct consultation, including through intermediaries and in some cases with the involvement of NGOs working with victims or local chiefs, without substituting the ICC mandate and role. This consultation process towards the implementation of the victims' rights to reparation would not only be in conformity with existing international standards, but would also ensure a meaningful process and give more sense and value to reparation decided and implemented".¹⁵⁵

75. While mindful of the important role played by civil society before the Court, the Legal Representative is concerned about whether it would be appropriate to seek the intervention of additional intermediaries or NGO representatives at this phase of the proceedings, particularly if these would be required to interact directly with victims. Requesting victims to liaise with these additional contacts at this stage, in addition with or instead of the Legal Representative and field counsel who have

¹⁵² See e.g. the Bonneau *et al.* Report, *supra* note 14, paras. 174-187, 221-222, and 226; and the Gilmore Report, *supra* note 15, para. 86.

¹⁵³ See e.g. the Bonneau *et al.* Report, *supra* note 14, paras. 184, and 223-225; and the Gilmore Report, *supra* note 15, paras. 88-89.

¹⁵⁴ See e.g. the Bonneau *et al.* Report, *supra* note 14, paras. 185-191, and 227-231; and the Gilmore Report, *supra* note 15, paras. 88 and 89.

¹⁵⁵ See the Bonneau *et al.* Report, *supra* note 14, para. 140.

represented them for several years, would run counter to the Do-No-Harm principle endorsed and promoted by the Appointed Experts throughout their reports,¹⁵⁶ and could expose victims to significant risks in terms of confidentiality, security and re-traumatisation.

76. Further, and in any event, the Legal Representative is reluctant to engage in in-depth discussions with her clients about figures, categories and detailed methodologies of implementation of possible financial compensation in a context where this remains a recommendation by Appointed Experts, but there is no indication by the Chamber that this modality of reparation will effectively be granted.

77. The Legal Representative maintains her position that compensation payments, carefully managed to ensure they are gender-sensitive and avoid exacerbating inter-ethnic tensions, are the most appropriate modality of reparation in the present case,¹⁵⁷ in line with the preference clearly and consistently expressed by the former child soldiers participating in the proceedings. At the same time, the Legal Representative is conscious of the risks of unduly raising her clients' hopes of compensatory payments at this stage, particularly in light of unrealistic expectations of financial compensation that had been instilled in several clients by other stakeholders in the early days of the *Ntaganda* case, and which took months – if not years – to correct and dispel. The Legal Representative considers that questions pertaining the specific amount and the detailed implementation of potential compensatory payments can be more fully litigated – with appropriate consultations – once this modality of reparation has been adopted by the Chamber.

78. Nevertheless, two general observations can already be made at this point. First, the Legal Representative welcomes the fact that the Appointed Experts, while adopting different approaches to the quantification of compensation and the categorisation of victims for these purposes, agree that there should be no difference

¹⁵⁶ *Idem*, para. 139. See also the Gilmore Report, *supra* note 15, para. 44.

¹⁵⁷ See the CLR1 Reparations Submissions, *supra* note 39, para. 80.

in principle between the compensatory payments made to victims of the attack and those to former child soldiers.¹⁵⁸ In fact, equal treatment between the victims of the attack and the former child soldiers would minimise the risks of the reparations process indirectly aggravating inter-ethnic tensions. In particular, the approach proposed by the Appointed Experts would reflect the fact that different ethnic groups – the victims of the attack, primarily Lendu, and the former child soldiers, that also include ethnic Hema – were equally victimised by Mr Ntaganda, although through different types of crimes.

79. In this regard, the Gilmore Report states that “*the former child soldiers [...] come from mainly the Hema community*”.¹⁵⁹ The Legal Representative would like to clarify that this statement does not exactly depict the ethnic origin of the former child soldiers participating in the *Ntaganda* case. Of the 283 participating child soldier victims, 137 are Hema – specifically Hema, Gegere, Bahema, Hema Sud, Hema Nord. The number of participating child soldiers who identify themselves as Hema is nevertheless higher in the present proceedings than in the *Lubanga* case. As discussed *supra*, this may be due to the particular reluctance of members of the Hema community to come forward in prosecutions that are perceived by some as being against the former leaders belonging to their own ethnic group.¹⁶⁰

80. Second, the Chamber should consider that differentiated, and higher, compensation amounts be granted to victims of rape and sexual slavery, compared to other crimes. The Legal Representative reiterates that individual, financial compensation is particularly appropriate for victims of rape and sexual slavery in the present case,¹⁶¹ and invites the Chamber to consider whether a higher compensatory amount may be warranted for this category of victims given the particular severity of

¹⁵⁸ See the Gilmore Report, *supra* note 15, para. 61.

¹⁵⁹ *Idem*, footnote 281.

¹⁶⁰ See *supra*, para. 36. In this sense, see also *e.g.* the transcripts of the opening statements on behalf of former child soldiers, [No. ICC-01/04-02/06-T-24-ENG ET WT](#), 3 September 2015, p. 5, lines 4-8.

¹⁶¹ See the CLR1 Reparations Submissions, *supra* note 39, paras. 77-82.

the impact of sexual violence on victims physically, psychologically and socially. As noted by Dr Gilmore:

*“Individual compensation is the most appropriate form of reparations for victims of rape and sexual slavery in the Ntaganda case as it acknowledges their personal suffering as well as the resultant social, economic and medical consequences caused by such crimes. According to consultation and research related to this mandate, compensation is also a preferred form of reparation by victims, and takes a gender and contextually sensitive approach to such crimes in the face of ongoing violence and insecurity”.*¹⁶²

81. The Gilmore Report also points to examples of domestic reparations programmes providing for differentiated compensation amounts for sexual violence victims.¹⁶³

82. The Legal Representative emphasises that any such differentiated compensation amount for victims of rape and sexual slavery should be accompanied by sensibilisation initiatives and opportunities for dialogue within the affected communities explaining the reasons why victims of sexual violence crimes are entitled to additional compensation.

b) Collective reparations

83. With respect to collective modalities of reparation, the Legal Representative welcomes the Appointed Experts’ proposals. The Bonneau *et al.* Report lists the following forms of collective reparations for former child soldiers:

- a. Access to schooling and vocational training for former child soldiers and their children*
- b. Other support for income-generating activities for former child soldiers*
- c. Access to medical and mental health care for all former child soldiers for a least one year and their children*
- d. Access to collective family therapy for all former child soldiers and indirect victims*
- e. Free access to HIV-AIDS testing on a regular basis for victims of rape with HIV*

¹⁶² See the Gilmore Report, *supra* note 15, p. 136, and para. 79.

¹⁶³ *Idem*, para. 74.

- f. *Sustainable psychosocial support and mental health care for victims of rape with HIV*
- g. *Cost of promoting communities and families centered sensitization and awareness programmes (meetings within communities and families; radio; printed material; itinerant activities; building community centres) aimed at reducing the stigmatisation of former child soldiers, of victims of sexual violence and their children, including the children born out of rape, within their community and beyond, and at managing conflicts between former child soldiers and their communities and families”*.¹⁶⁴

84. Dr Gilmore recommends, in her report, measures of medical rehabilitation (including medical care for HIV and non-HIV patients, mental health services, gender-sensitive and ethical training, the establishment of a sexual violence advisor role and urgent support), measures of social rehabilitation (including a sensitisation campaign and a programme to allow the creation of identity and other legal documents for children born as a result of rape) and symbolic measures.¹⁶⁵

85. With respect to medical rehabilitation measures, the Legal Representative submits that:

- (a) Any form of reparations focusing on mental and physical health should take into account the fact that the diagnostic opportunities available to victims to date are frequently extremely limited. For instance, the Legal Representative is aware of the situation of at least some female former child soldiers who have not been subjected to any form of complete gynaecological check-up in the several years that elapsed since their recruitment in the UPC/FPLC's ranks. Accordingly, only limited reliance can be placed on the specific medical complaints advanced by victims, and suitable diagnostic tools should be included in the reparations package to ensure each victim receives treatment appropriate to his or her situation.

¹⁶⁴ See the Bonneau *et al.* Report, *supra* note 14, para. 252.

¹⁶⁵ See the Gilmore Report, *supra* note 15, pp. 136-141.

- (b) Holistic and meaningful measures should be preferred to forms of treatment that are narrowly limited in time. For instance, the Legal Representative wonders about the effective benefits connected with the provision of access to medical and health care for one year,¹⁶⁶ or the provision of food support for a period of twelve months.¹⁶⁷ Instead, medical and mental health services should be provided in a manner that is not *a priori* limited in time but that responds to the needs of each individual victim, through the implementation of programmes that allow for the effective diagnosis and care of the concerned beneficiary in light of their specific situation.
- (c) Complementary measures required to accompany the medical care provided, such as access to an appropriate sanitary environment, adequate nutrition and drinkable water, should not be regarded as a form of humanitarian assistance but rather, when provided as part of a medical rehabilitation programme, as essential components that can determine the successful outcome of the treatment.¹⁶⁸ Accordingly, while the Legal Representative agrees that “*the ICC is not an aid agency*” and that “*reparations should support victim agency rather than make them dependant*”,¹⁶⁹ the Chamber is invited to consider these elements in any form of collective reparation focusing on physical and mental health treatment.
- (d) As recommended by the Appointed Experts,¹⁷⁰ mental health services should be made available not only to direct victims, but also to affected family members of the former child soldiers and to indirect victims more broadly, as appropriate. The same applies to medical services, given the

¹⁶⁶ See the Bonneau *et al.* Report, *supra* note 14, p. 109.

¹⁶⁷ *Idem*, para. 250. See also the Gilmore Report, *supra* note 15, para. 85.

¹⁶⁸ See the Gilmore Report, *supra* note 15, paras. 25, 85, 121, 154, and 157.

¹⁶⁹ *Idem*, para. 85.

¹⁷⁰ See the Bonneau *et al.* Report, *supra* note 14, para. 252(c) and (d).

Appointed Experts' recognition that indirect victims suffered "*psychological suffering and medical disease*" among other forms of harm.¹⁷¹

86. As for measures focusing on access to schooling and vocational training for the former child soldiers and their children, the Legal Representative highlights that the simple covering of the fees associated to said courses will not be sufficient. Additional measures will need to be put in place to ensure meaningful access in a non-discriminatory and non-stigmatising fashion, including remedial and refreshment courses and preliminary alphabetisation programmes targeting adults specifically and delivered in the geographical proximity to the beneficiary's place of residence to ensure he or she can continue to carry out his or her income-generating activities and support his or her family while attending training. The provision of an additional package of supplementary family support for the duration of the training should also be considered.

87. The provision of access to education and training opportunities should also be extended to the siblings of those among the former child soldiers who were unable, as a result of the crimes, to financially support their family of origin, for instance because they died while serving in the UPC/FPLC.

88. In addition to the modalities of reparation set out in the Bonneau *et al.* Report and in the Gilmore Report, the Chamber is invited to consider:

- (a) measures to trace or discover the fate of former child soldiers who never returned to their families, together with bereavement counselling for affected families;
- (b) measures to assist former child soldiers who developed a form of addiction, including to drugs or alcohol, during their period within the UPC/FPLC's ranks or as a result of the crimes to which they were subjected;¹⁷²

¹⁷¹ See the Bonneau *et al.* Report, *supra* note 14, p. 48.

¹⁷² The Legal Representative rejects as completely antithetic to the spirit of reparations before the Court the argument emerged during the Appointed Experts' consultations, and mentioned in the Bonneau *et*

- (c) housing assistance,¹⁷³ including for instance the possibility for victims of purchasing land at preferential rates, support and incentives for home-construction activities, *etc.*; and
- (d) measures aimed at assisting direct and indirect victims who were displaced as a result of the crimes, whether they elect to continue to reside in their current place of residence or return to their original residence in Ituri.

c) Prioritisation of specific categories of victims

89. The reparations principles established in the *Lubanga* case indicate that priority must be given to victims “*who are in a particularly vulnerable situation or who require urgent assistance*”.¹⁷⁴ The Bonneau *et al.* Report recommends that certain forms of reparations, namely “*lifetime access to ARV drugs, emergency food assistance for 12 months, and access to psychosocial and/or mental health care for at least 2 years*”¹⁷⁵ be provided as a matter of priority to “*victims of rape who are HIV-positive, including HIV-positive children born of rape as well as to the partners of victims of rape who have also been infected with HIV/AIDS*”.¹⁷⁶

90. The Legal Representative submits that this recommendation, mirroring that of the experts appointed in the context of the *Bemba* reparations proceedings,¹⁷⁷ is not necessarily applicable in the present case. She recalls that, while her clients listed in their application forms several sexually-transmitted diseases from which they suffer,¹⁷⁸ the Legal Representative is only aware of one case of HIV. The case concerned an indirect victim referring to her child, a former child soldier, contracting HIV and dying as a result, together with her baby who also contracted HIV. Even taking into account

al. Report, that “*former child soldiers suffering from alcohol or drug addiction should not receive an SRP*”. See the Bonneau *et al.* Report, *supra* note 14, para. 231.

¹⁷³ See *e.g.* the *Katanga* Reparations Order, *supra* note 38, paras. 304 and 306.

¹⁷⁴ See the *Lubanga* Reparations Order, *supra* note 110, Principle 19.

¹⁷⁵ See the Bonneau *et al.* Report, *supra* note 14, paras. 160-165, 215, and p. 109.

¹⁷⁶ *Idem*, para. 160.

¹⁷⁷ *Idem*, footnote 198; and the *Bemba* Expert Report, *supra* note 45, para. 143

¹⁷⁸ See the Gilmore Report, *supra* note 15, para. 31.

the limited diagnostic opportunities available to the majority of her clients, the Legal Representative concurs with Dr Gilmore that it is highly unlikely that former child soldiers who contracted HIV while in the UPC/FPLC, and their children to whom HIV may have been vertically transmitted, would be unaware of their HIV-positive status at this stage.¹⁷⁹ Tragically, *“late diagnosis and/or non-treatment of victims who become HIV-positive as a result of rape or sexual slavery will have contributed to HIV-related deaths in the 17-18 year interim since the crimes”*¹⁸⁰ and *“in relation to children born out of rape who are HIV positive and still living, their diagnosis will most likely be known as they are now seventeen to eighteen years old”*.¹⁸¹ Accordingly, the Legal Representative does not consider that the prevalence of HIV within the health demographics of participating and new potentially eligible victims justifies HIV-related reparations becoming a central theme in the current proceedings.

91. Rather, the Legal Representative submits that victims of rape and sexual slavery as a whole should be prioritised in the delivery of reparations, for several reasons:

- (a) First, as confirmed by Dr Gilmore, *“victims of rape and sexual slavery may not have gained access to preventative, timely and good quality care during and in the aftermath of conflict”*.¹⁸² While certain forms of time-critical interventions will no longer be beneficial seventeen years after the events, the provision of urgent medical care will allow the treatment or prevention of further harms.
- (b) Second, victims of sexual violence face particular stigma that impairs their ability to sustain themselves *“through reduced earning potential due to injuries, ostracisation from their partners who may be the family’s primary earners, and even extending to internal displacement”*.¹⁸³ On this basis, in Sierra Leone, victims of sexual violence were prioritised for compensation as a vulnerable

¹⁷⁹ *Idem*, para. 119.

¹⁸⁰ *Idem*, paras. 30 and 104.

¹⁸¹ *Idem*, para. 119.

¹⁸² *Idem*, para. 27.

¹⁸³ *Idem*, para. 75.

group.¹⁸⁴ In the case of the victims represented by the Legal Representative, this situation of vulnerability is compounded by the additional stigma associated to their status of former child soldiers.

- (c) Finally, sexual violence crimes were not covered in the *Lubanga* proceedings, so former UPC/FPLC child soldiers who were subjected to rape and sexual slavery will have no opportunity to receive reparations for the ensuing harms as part of the *Lubanga* reparations process.

92. The Legal Representative notes the Appointed Experts' conclusion in the Bonneau *et al.* Report that:

*"The Registry has described another group of victims as particularly vulnerable. In its First Report on Reparations, it lists as one of the basic assumptions on which the preparation of the sample was predicated the following: 'That there are victims whose advanced age and/or health conditions impair their mobility and living standards. This places them in an extremely vulnerable situation as this also impedes access to information and the possibility to undertake any income-generating activities'. Such victims could also benefit on a priority basis from urgent reparations. Absent any further information on the types of health conditions and the age distribution, the Experts do not feel in a position to recommend any particular measures for such victims".*¹⁸⁵

93. The Legal Representative considers that the lack of sufficient available information requires that said information be adequately supplemented in order to identify victims whose mobility and living standards are impaired by their advanced age or health condition, and does not justify disregarding the particular vulnerability of this category of victims and the prioritisation they require.

5. Criteria for eligibility of victims

a) Applicable standard of proof

94. The Court's reparation jurisprudence indicates that the standard of proof to be applied depends on "*various factors specific to the case*" and must reflect the difficulties

¹⁸⁴ *Ibid.*

¹⁸⁵ See the Bonneau *et al.* Report, *supra* note 14, para. 165 (references omitted).

victims face in obtaining supporting documentation due to the destruction or unavailability of evidence.¹⁸⁶ As confirmed by the Appeals Chambers, reparations proceedings are “*fundamentally different*” from trial proceedings and thus a more flexible evidentiary standard applies.¹⁸⁷

95. In reparations proceedings to date, Chambers have found that the balance of probabilities standard of proof was appropriate to the specifics of the case at hand, and applied said standard.¹⁸⁸ Accordingly, each applicant was required to show that “*it [was] more probable than not that he or she suffered harm as a consequence of one of the crimes of which [the convicted person] was convicted*”.¹⁸⁹

96. The Defence requests the Chamber to identify beneficiaries in the present case based on the same standard of balance of probabilities,¹⁹⁰ while the Prosecution states that “*it may generally be appropriate to require proof on the ‘balance of probabilities’, as in the prior cases*”.¹⁹¹ The Legal Representative agrees in principle that the eligibility for reparations should be proved, on the balance of probabilities.¹⁹² She recalls that said standard has been interpreted and applied before the Court as follows:

- (a) Victims are required to provide “*relevant supporting documentation*” for their reparation claim only “*to the extent possible*”.¹⁹³ A person may be found to be eligible for reparation even if he or she has not supplied any documentation and has not given any reason for his or her inability to provide supporting documentation.¹⁹⁴

¹⁸⁶ See the *Lubanga* Reparations Order, *supra* note 110, para. 22.

¹⁸⁷ See the *Lubanga* Reparations Appeals Judgment, *supra* note 33, para. 81.

¹⁸⁸ *Idem*, para. 83. See also the *Katanga* Reparations Order, *supra* note 38, paras 45-51; the *Lubanga* Reparations Order, *supra* note 110, para. 22; and the *Al Mahdi* Reparations Order, *supra* note 28, para. 44.

¹⁸⁹ See the *Katanga* Reparations Order, *supra* note 38, para. 50.

¹⁹⁰ See the “Response on behalf of Mr. Ntaganda to Registry’s preliminary observations on reparations”, *supra* note 58, para. 24; and the “Public Redacted Version of “Defence submissions on reparations”, 28 February 2020, ICC-01/04-02/06-2479”, *supra* note 58, paras. 31-32.

¹⁹¹ See the “Prosecution’s Observations on Reparations”, *supra* note 49, para. 15.

¹⁹² See the CLR1 Reparations Submissions, *supra* note 39, para. 53.

¹⁹³ See Rule 94 of the [Rules of Procedure and Evidence](#); and the *Lubanga* Reparations Award Appeals Judgment, *supra* note 39, paras. 183 and 202.

¹⁹⁴ See the *Lubanga* Reparations Award Appeals Judgment, *supra* note 39, para. 204.

- (b) Indirect proof such as inferences of fact and circumstantial evidence' may be the only relevant and available proof supporting a victim's claims,¹⁹⁵ and statements signed by witnesses may be accepted instead of official certificates.¹⁹⁶
- (c) No general requirement of extrinsic corroboration applies.¹⁹⁷ In assessing whether an applicant meets the burden of proof on the balance of probability a Chamber is "*not limited to the evidence submitted by the victim in question [...] corroboration may come from extrinsic evidence, including the testimonial and documentary evidence entered into the record and the statements of other victims in their requests*".¹⁹⁸
- (d) In assessing eligibility, the coherence and credibility of the victims' accounts should be considered,¹⁹⁹ including the level of detail of the facts described, the references to relevant information,²⁰⁰ and whether statements made by a potentially eligible victim in the dossier are consistent with one another.²⁰¹ However, "*the mere fact that an application for reparations contains slight discrepancies does not, on the face of it, cast doubt on its credibility*".²⁰²

97. Accordingly, the Legal Representative considers that, in order to be eligible for reparations linked to sexual violence crimes, it would suffice for a former child soldier to credibly and coherently state that they have been victims of rape or sexual slavery perpetrated by UPC/FPLC members within the temporal and geographical parameters of Mr Ntaganda's conviction. In the Legal Representative's view, the victims' coherent

¹⁹⁵ See the *Katanga* Reparations Order, *supra* note 38, para. 61. See also the "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06" (Pre-Trial Chamber II), [No. ICC-02/04-101](#), 10 August 2007, para. 15.

¹⁹⁶ See e.g. the *Katanga* Reparations Appeals Judgment, *supra* note 51, para. 54.

¹⁹⁷ See the *Lubanga* Reparations Award Appeals Judgment, *supra* note 39, para. 203.

¹⁹⁸ *Ibid.*

¹⁹⁹ *Idem*, paras. 199 and 200.

²⁰⁰ See the *Lubanga* Reparations Award Decision, *supra* note 52, para. 64.

²⁰¹ *Idem*, para. 63.

²⁰² *Idem*, paras. 63-64; and the *Lubanga* Reparations Award Appeals Judgment, *supra* note 39, paras. 184 *et seq.*

and credible account, coupled with the Chamber's findings beyond reasonable doubt that "[f]emale members of the UPC/FPLC were regularly raped and subjected to sexual violence [...] by male UPC/FPLC soldiers and commanders" and that this amounted to a "common practice",²⁰³ would be sufficient for them to meet the balance of probabilities standard of proof.

98. The Legal Representative also notes, however, that the Court's founding texts do not provide for the standard of proof to be applied in reparations proceedings, and that the Appeals Chamber has recently indicated that a standard of proof lower than the balance of probabilities standard may apply in appropriate cases.²⁰⁴ In particular, the Appeals Chamber noted that "*fact finders in other mass claims programs have 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*".²⁰⁵

99. Against this background, the Legal Representative submits that a lower standard of proof could be applied to victims of sexual violence.²⁰⁶ In such cases, as noted by Dr Gilmore "*requiring a corroborating witness or supporting medical evidence may be impossible for most victims, due to stigma, the passage of time and ongoing insecurity*",²⁰⁷ as "*most victims did not come forward soon after the rape, or where held in sexual slavery, or*

²⁰³ See the Judgment, *supra* note 1, para. 407.

²⁰⁴ See the *Lubanga* Reparations Award Appeals Judgment, *supra* note 39, footnote 376.

²⁰⁵ *Ibid.* and the *Lubanga* Reparations Order, *supra* note 110, footnote 37, referring to LEWIS (P.) and FRIMAN (H.), "Reparations to Victims", in LEE (R.S.) (Ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational, New York, 2001, p. 486. See also *e.g.* the "Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence", *supra* note 76, p. 14 and footnote 34; HOLTZMANN (H.M.) and KRISTJANSDDOTTIR (E.), "Procedures for Conducting the Claims Process", in HOLTZMANN (H.M.) and KRISTJANSDDOTTIR (E.) (Eds.), *International Mass Claims Processes: Legal and Practical Perspectives*, Oxford University Press, Oxford, 2007, pp. 213 *et seq.*; and OETTE (L.), "Responses of Regional Human Rights Courts and Commissions to Mass Violations", in FERSTMAN (C.), GOETZ (M.) and STEPHENS (A.) (Eds.), *op. cit.*, *supra* note 22, p. 308.

²⁰⁶ See the "First Decision on Reparations Process", *supra* note 6, para. 46. See also *e.g.* the "Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence", *supra* note 76; and the "Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence", *supra* note 76, p. 14.

²⁰⁷ See the Gilmore Report, *supra* note 15, para. 81.

*they could not due to attacks on healthcare or stigma, as well as cost and feasibility of obtaining such evidence, this may not exist in such cases and places an onerous burden on victims”.*²⁰⁸

100. The particular stigma associated with sexual violence in the Iturian context may have dissuaded victims not only from seeking medical or psychological assistance, but also from disclosing their victimisation to any other person, hence their inability to provide supporting statements by corroborating witnesses. The Legal Representative recalls in this context the Chamber’s analysis set out in the Judgment:

*“in assessing the evidence and credibility of the witnesses who are allegedly victims of rape and sexual slavery, the Chamber found that cultural or communal stigmatisation, shame and fear, as well as the general lack of trust in authorities, were factors which can explain the difficulties faced in coming forward, especially in a conflict or post-conflict area like Ituri. Accordingly, the Chamber considered delayed reporting of instances of rape, including after conversations with a counsellor or therapist, to be an understandable consequence of the victims’ alleged experience, and therefore found that late reporting does not, as such, affect the relevant witness’s general credibility”.*²⁰⁹

101. The Legal Representative submits therefore that a more flexible standard of proof than the balance of probabilities – such as the ‘plausibility test’ discussed *supra* or the *prima facie* standard applied to authorise victims to participate in the proceedings – could apply to cases of rape and sexual slavery. Singling out such crimes for differential treatment would be consistent with the approach put forward by the UN Office of Drugs and Crimes, that recommended as follows:

“Evidentiary rules should, where possible, reflect the specific nature of sexual and gender-based violence. Specific evidentiary rules in judicial and administrative proceedings may need to be adopted for cases involving sexual and gender-based violence. Victims may encounter significant challenges in meeting stringent evidentiary requirements, including in cases in which acts of sexual and gender-based violence are committed in armed conflict or in territory controlled by a terrorist group, or as a result of the time that has passed since the commission of the crime and the destruction of evidence. These concerns

²⁰⁸ *Idem*, footnote 374.

²⁰⁹ See the Judgment, *supra* note 1, para. 88 (references omitted).

*should be taken into account when establishing the required standard of proof, without prejudice to the rights of the accused”.*²¹⁰

b) Eligibility of unmarried partners as indirect victims

102. The Appointed Experts recommended that, in assessing the eligibility for reparations of family members of direct victims, “the Court should take into account the concept of family in the DRC”.²¹¹ The Legal Representative fully agrees with this recommendation, and with the Appointed Experts’ conclusion that:

*“the cultural understanding and the social structures in the DRC should determine the concept of family relevant for reparation purposes in the case of Mr. Ntaganda. Accordingly, ‘family’ in the DRC tends to include both the immediate, or nuclear, family and the extended family”.*²¹²

103. As recently confirmed by the Chamber, the concept of family “must be assessed in the specific cultural context, bearing in mind the local, social and familiar structures”.²¹³ Accordingly, the Legal Representative invites the Chamber to consider the social and practical realities of marriage in Ituri. In particular, it is relatively common that those of her clients who entered stable, marriage-like relationships never formalised said relationships by way of a formal wedding due to practical constraints. The costs associated with such a wedding, including the ceremony, legally required dowry²¹⁴ and administrative fees, are often prohibitive, particularly for the significant portion of the former child soldiers who live in destitute conditions.²¹⁵ This reality, which is often due, at least in part, to the crimes the former child soldiers were subjected to, should not be a reason to penalise them.

²¹⁰ See the UNODC Handbook, *supra* note 136, p.189 (references omitted).

²¹¹ See the Bonneau *et al.* Report, *supra* note 14, paras. 18-20.

²¹² *Idem*, para. 19.

²¹³ See the “Decision on issues raised in the Registry’s First Report on Reparations”, *supra* note 14, para. 53.

²¹⁴ See [article 426 of the Code de la Famille](#) of the Democratic Republic of the Congo. See also BATAM-NTIVASSAO (P. L.), “[De la problématique de la fixation du taux de la dot en droit positif congolais de mariage: critiques et perspectives](#)”, in *JuriAfrique Magazine*, dated 1 October 2019.

²¹⁵ In this sense, see *e.g.*, NAPPA (J.), SCHOU MAKER (B.), PHONGI (A.) and FLAHAUX (M.-L.), « Economic Hardship and Transformation of Unions in Kinshasa », *Population-E*, 2019/3, Vol. 74, pp. 273-298 and BAUMARD (M.), “[A Kinshasa, on se marie moins et plus tard faute d’argent](#)”, in *Le Monde Afrique*, dated 5 November 2019.

104. The Legal Representative submits that, within the present reparations proceedings, the same entitlements should be recognised to legally married spouses of direct victims and to persons who live, or have lived with them as husband and wife at the relevant time. Both the Inter-American Court of Human Rights and the European Court of Human Rights have treated unmarried partners and legally married spouses equally for the purposes of reparations.²¹⁶ The Chamber should apply the same approach, and it should be open to the applicant to prove said relationship not only by way of a formal marriage record, but also through testimonial or any other suitable evidence.

105. The terminology used to describe said relationship is also important. The Bonneau *et al.* Report consistently refers to the “*spouse*” of the direct victim as entitled to certain prerogatives within the present reparations proceedings.²¹⁷ The Chamber has also, in the past, referred to the “*spouse*” of a victim and to whether the victim was “*married*” or “*unmarried*” for the purposes of participation.²¹⁸ The Legal Representative submits that it would be preferable, in order to encompass the cases discussed *supra*, to refer to “*partners*” rather than “*spouses*”.²¹⁹ The Guidance Note of the Secretary-General on Reparations for Conflict-Related Sexual Violence adopts this terminology, nothing that “*victims of conflict-related sexual violence include [...] family members, such as children or partners [...]*”.²²⁰

c) *Eligibility of victims benefitting from reparations in Lubanga*

106. The Legal Representative recalls that, as noted *supra*, child soldiers found to be eligible for reparations in the *Lubanga* case may also be entitled to reparations in the

²¹⁶ See *e.g.* ECtHR, *Taniş et al. v. Turkey*, n° 65899/01, [Judgment](#), 2 August 2005; and IACtHR, *Ituango Massacres v. Colombia*, [Preliminary Objection, Merits, Reparations and Costs Judgment](#), 1 July 2006.

²¹⁷ See *e.g.* the Bonneau *et al.* Report, *supra* note 14, paras. 20, 23, 183, 205, 250, and 283.

²¹⁸ See *e.g.* the “Fourth decision on victims’ participation in trial proceedings” (Trial Chamber VI), No. ICC-01/04-02/06-805, 1 September 2015, footnote 10.

²¹⁹ See *e.g.* the CLR1 Reparations Submissions, *supra* note 39, para. 25. See also the Gilmore Report, *supra* note 15, pp. 137 and 139.

²²⁰ See the “Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence”, *supra* note 76, p. 3.

present case.²²¹ Contrary to what the Defence suggests, this would not result in child soldier beneficiaries receiving “double reparations”²²² or “cumulative benefits”²²³ that somehow exceed the harm they suffered as a result of Mr Ntaganda’s crimes.

107. As acknowledged by the Appeals Chamber in the *Lubanga* case, reparations implemented by the Court cannot achieve *restitutio in integrum*, as it will often be impossible to restore the victim to his or her circumstances before the crimes were committed, or rectify such a situation.²²⁴ The time elapsed since the crimes, the limited resources available and the difficulties in implementing reparation plans will make it impossible in practice to deliver integral reparations to the former child soldiers. Hence, reparation awards targeting the harm suffered by former child soldiers, a type of harm that cannot be fully redressed, will remain within the scope of liability relevant to the present proceedings.²²⁵

108. Further, the projects developed to implement reparations in the *Lubanga* and the *Ntaganda* cases should aim to complement each other.²²⁶ The Legal Representative agrees with the recommendation of the Appointed Experts that:

*“former child soldiers who [...] were already found to be eligible for reparations in the Lubanga case [...] are still entitled to reparation in the present case and that this will not lead to ‘over compensation’. In addition, the Experts believe that some of the former child soldiers’ harms, which were not recognised as such in the Lubanga case, should be addressed in the present case, such as the loss of life plan, and the transgenerational harm suffered by children of the former child soldiers, in particular the harms suffered as a consequence of sexual violence”.*²²⁷

²²¹ See *supra*, paras. 23 *et seq.*

²²² See the “Response on behalf of Mr. Ntaganda to Registry’s preliminary observations on reparations”, *supra* note 58, para. 20.

²²³ See the “Defence Submissions on Reparations”, *supra* note 58, para. 61.

²²⁴ See the *Lubanga* Reparations Order, *supra* note 110, para. 67(1).

²²⁵ See e.g. the CLR1 Reparations Submissions, *supra* note 39, para. 55.

²²⁶ *Idem*, para. 67.

²²⁷ See the Bonneau *et al.* Report, *supra* note 14, para. 211.

d) *Eligibility of victims benefitting from programmes under the TFV's assistance mandate*

109. The former child soldiers have received, to date, no assistance from public authorities in the DRC or from the TFV.²²⁸ In 2020, however, the TFV launched a long-overdue new cycle of the assistance mandate in the DRC, after several years of disengagement.²²⁹ For the avoidance of doubt, the Legal Representative emphasises that the fact that a former child soldier may benefit from programmes implemented by the TFV under its assistance mandate does not impact his or her eligibility for reparations in the present proceedings.

110. As confirmed by the Appointed Experts, as well as the experts appointed as part of the *Bemba* reparations proceedings, such assistance “*would not have been a form of reparation, [...] [i]t would have been provided to victims either as humanitarian assistance or as a way to help them with their most urgent needs*” and “*important authority and jurisprudence confirm that humanitarian assistance or other types of help to victims in times of conflict or displacement should not be confused with reparation*”.²³⁰

Respectfully submitted,



Sarah Pellet

Common Legal Representative of the Former Child Soldiers

Dated this 18th Day of December 2020

At The Hague, The Netherlands

²²⁸ *Idem*, para. 44.

²²⁹ See the “Report to the Assembly of States Parties on the projects and the activities of the Board of Directors of the Trust Fund for Victims for the period 1 July 2019 to 30 June 2020”, [ICC-ASP/19/14*](#), 16 September 2020, paras. 58-59, and pp. 29-31. See also [The Trust Fund for Victims Launches Ten New Assistance Projects in the Democratic Republic of the Congo](#), 28 July 2020.

²³⁰ See the *Bonneau et al.* Report, *supra* note 14, para. 280; and the *Bemba* Expert Report, *supra* note 45, para. 244.