



Original: **English**

No.: **ICC-01/04-02/06**

Date: **11 January 2021**

TRIAL CHAMBER VI

Before: Judge Chang-ho Chung, Presiding Judge
Judge Robert Fremr
Judge Olga Herrera Carbuccion

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public

**Public redacted version of “Defence Submissions on Reparations”, 18 December
2020, ICC-01/04-02/06-2634-Conf**

Source: Defence Team of Mr Bosco Ntaganda

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

Me Stéphane Bourgon, *Ad.E.*
Me Mélissa Beaulieu Lussier

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of Applicants

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

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Mr Philipp Ambach

Trust Fund for Victims

Mr Pieter de Baan

TABLE OF CONTENTS

INTRODUCTION.....	5
CONFIDENTIALITY.....	6
PROCEDURAL BACKGROUND.....	6
SCOPE OF THESE DEFENCE SUBMISSIONS.....	10
SUBMISSIONS	
I. <u>No Type of Harm Should Be presumed</u>	14
A. Presumptions concerning the extent of the harm suffered.....	16
B. Presumptions regarding the resumption of actions following the death of a victim.....	17
C. The use of presumptions to establish the causal link.....	18
D. Burden of proof and available evidence.....	23
II. <u>Children born out of rape should not be presumed to have suffered harm</u>	26
A. Transgenerational Harm.....	26
B. Children born out of rape/intergenerational harm.....	29
III. <u>Modalities and forms of reparations</u>	31
IV. <u>LRV2's erroneous submission that all persons in an affected community should be presumed to be victims</u>	33
V. <u>Other issues regarding Experts Reports</u>	34
VI. <u>Over-compensation or double-compensation</u>	37
VII. <u>Indirect victims</u>	40
VIII. <u>Access to the application forms</u>	41

IX.	<u>Methodology for the assessment of victims' eligibility and judicial review..</u>	42
X.	<u>Scope of liability and degree of participation of Mr Ntaganda.....</u>	43
XI.	<u>Type of Harm.....</u>	44
CONCLUSION.....		46

Further to the Single Judge's Order setting deadlines in relation to reparations issued on 5 December 2019 ("Order Setting Deadlines")¹ and the Decision on Request for an Extension of Time for Filing of Experts' Report issued by Trial Chamber VI ("Chamber") on 20 July 2020 ("Decision on Extension of Time – Experts' Report"),² Counsel representing Mr Ntaganda ("Defence") hereby submit this:

Defence Submissions on Reparations

("Defence Submissions")

INTRODUCTION

1. From the delivery of the Sentencing Judgment³ and the beginning of the reparations process, Mr Ntaganda has expressed his willingness to contribute to the expeditiousness and effectiveness of the proceedings and to be an active participant therein.

2. For many years now, the region of Ituri has been torn apart by wars starting in 1996⁴ with the First Congo War ending in 1997⁵ and the Second War of Congo beginning mid-1998.⁶ Against this backdrop, establishing the causal link between the harm suffered by victims and the actions of the UPC/FPLC troops Mr Ntaganda was a member of during two specific attacks – in November/December 2002 and February 2003 – that occurred 18 years ago, promises to be a particularly difficult, if not almost impossible, challenge. This endeavour is further compounded by the number of different actors involved in the devastation of Ituri and the protracted conflict that

¹ Order setting deadlines in relation to reparations, 5 December 2019, [ICC-01/04-02/06-2447](#) ("Order Setting Deadlines").

² Decision on Request for an Extension of Time for Filing of Experts' Report, 20 July 2020, [ICC-01/04-02/06-2553](#) ("Decision Extension of Time Experts' Report").

³ Sentencing Judgment, 7 November 2019, [ICC-01/04-02/06-2442](#), para.105 ("SJ").

⁴ *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, 5 April 2012, [ICC-01/04-01/06-2842](#).

⁵ Judgment, 8 July 2019, [ICC-01/04-02/06-2359](#) ("TJ"), para.8.

⁶ *Id.*, para.11.

continues to this day.⁷ Furthermore, determining the *quantum* of the reparations required to address this harm will necessarily raise similar challenges.

3. To be sure, Mr Ntaganda cannot be held responsible and/or be ordered to repair every ill, which took place in Ituri during the past two decades.

4. Consequently, the Defence deems it appropriate to reiterate yet again, that only persons who have suffered harm as a result of crimes for which Mr Ntaganda has been convicted can be eligible as victims to receive reparations.⁸

5. In addition, taking into consideration the ongoing appeals proceedings, the Defence also deems it appropriate to recall and underscore the risks associated with moving too quickly in the reparations process. This is paramount not only for the well-being of potential reparations beneficiaries and to avoid raising their expectations prematurely but also to avoid the expenditure of scarce resources in endeavours, which might reveal unnecessary following the Appeals Chamber's upcoming Judgment.

CONFIDENTIALITY

6. The Defence Submissions are filed confidentially pursuant to Regulation 23*bis*(2) of the Regulations of the Court, as they respond to documents bearing the same classification.

PROCEDURAL BACKGROUND

7. On 8 July 2019, Trial Chamber VI issued the Trial Judgment pursuant to Article 74 of the Rome Statute ("Statute"), finding Mr Ntaganda guilty of eighteen counts of crimes against humanity and war crimes.

⁷ Registry First Report on Reparations, 30 September 2020, [ICC-01/04-02/06-2602-Anx1](#) ("Registry First Report").

⁸ *The Prosecutor v. Germain Katanga*, Order for Reparations pursuant to Article 75 of the Statute, 24 March 2017, [ICC-01/04-01/07-3728-tENG](#), para.37 ("*Katanga* Reparations Order"); Decision on issues raised in the Registry's First Report on Reparations, 15 December 2020, [ICC-01/04-02/06-2630](#), para.11 ("15 December Decision").

8. On 25 July 2019, the Single Judge issued the “Order for preliminary information on reparations” inviting the Registry to submit preliminary observations on the reparations proceedings by 5 September 2019 and also invited the Parties as well as the Trust Fund for Victims (“TFV”) to file their respective responses to the Registry Preliminary Observations by 19 September 2019.⁹

9. On 5 September 2019, the Registry filed its Preliminary Observations.¹⁰

10. On 3 October 2019, the Legal Representatives of Victims (“LRV”),¹¹ the Defence,¹² the Prosecution¹³ and the TFV¹⁴ responded to the Registry Preliminary Observations.

11. On 5 December 2019, the Single Judge issued the “Order setting deadlines”, inviting the parties and participants to submit their observations on reparation proceedings.¹⁵

⁹ Order for preliminary information on reparations, 25 July 2019, [ICC-01/04-02/06-2366](#).

¹⁰ Registry’s observations, pursuant to the Single Judge’s “Order for preliminary information on reparation” of 25 July 2019, ICC-01/04-02/06-2366, 5 September 2019, [ICC-01/04-02/06-2391](#) (“Registry Preliminary Observations”).

¹¹ Joint Response of the Legal Representatives of Victims to the Registry’s Observations on Reparations, 3 October 2019, [ICC-01/04-02/06-2430](#).

¹² Response on behalf of Mr. Ntaganda to Registry’s preliminary observations on reparations, 3 October 2019, [ICC-01/04-02/06-2431](#).

¹³ Prosecution Response to the Registry’s Observations, pursuant to the Single Judge’s “Order for Preliminary Observations on reparations” (ICC-01/04-02/06-2391-Anx1), 3 October 2019, [ICC-01/04-02/06-2429](#).

¹⁴ Trust Fund for Victims’ response to the Registry’s Preliminary Observations pursuant to the Order for Preliminary Information on Reparations, 3 October 2019, [ICC-01/04-02/06-2428](#).

¹⁵ [Order Setting Deadlines](#).

12. On 28 February 2020, the Registry,¹⁶ the Defence,¹⁷ the LRVs,¹⁸ the Prosecution¹⁹ and the TFV²⁰ filed their respective submissions on reparations.

13. On 2 and 6 March 2020, the Government of the Democratic Republic of the Congo (“DRC”),²¹ and the International Organization for Migration²² respectively submitted their observations on reparations.

14. On 14 May 2020, the Chamber appointed four experts (“Appointed Experts”) for the purposes of the reparations proceedings and instructed them to submit by 28 August 2020 a report on four issues identified by the Chamber (“Decision Appointing Experts”).²³

15. On 26 June 2020, the Chamber issued the “First Decision on Reparations Process” whereby it instructed the Registry to prepare a report to the Chamber by 30 September 2019, and every three months thereafter.²⁴

16. On 20 July 2020, the Chamber granted the Appointed Experts request for an extension of time to submit their report setting 30 October 2020 as the new deadline for

¹⁶ Registry’s Observations on Reparations, 28 February 2020, [ICC-01/04-02/06-2475](#), with Public Annex 1, [ICC-01/04-02/06-2475-Anx1](#) (“28 February 2020 Registry Submissions”).

¹⁷ Defence submissions on reparations, 28 February 2020, [ICC-01/04-02/06-2479-Conf](#), (“28 February 2020 Defence Submissions”).

¹⁸ Submissions on Reparations on behalf of the Former Child Soldiers, 28 February 2020, [ICC-01/04-02/06-2474](#) with one public annex, (“28 February 2020 LRV1 Submissions”); Submissions by the Common Legal Representative of the Victims of the Attacks on Reparations, 28 February 2020, [ICC-01/04-02/06-2477-Conf](#) (“28 February 2020 LRV2 Submissions”). A corrigendum version was filed on 20 November 2020, [ICC-01/04-02/06-2477-Conf-Corr](#) with Conf. Annex 1, [ICC-01/04-02/06-2477-Conf-Corr-Anx1](#).

¹⁹ Prosecution’s Observations on Reparations, 28 February 2020, [ICC-01/04-02/06-2478](#).

²⁰ Trust Fund for Victims’ observations relevant to reparations, 28 February 2020, [ICC-01/04-02/06-2476](#), (“TFV’s Observations”).

²¹ Annex to Transmission des Observations de la République Démocratique du Congo, 2 March 2020, [ICC-01/04-02/06-2480-Conf-Anx](#) (notified on 3 March 2020).

²² Submission of observations on the issues identified under paragraph 9 (c) (i), (ii), and (iii) pursuant to the “Order setting deadlines in relation to reparations”, 6 March 2020, [ICC-01/04-02/06-2483-Conf](#).

²³ Decision appointing experts on reparations, 14 May 2020, [ICC-01/04-02/06-2528-Conf](#) (“Decision Appointing Experts”).

²⁴ First Decision on Reparations, 26 June 2020, [ICC-01/04-02/06-2547](#) (“First Decision”).

the submission of the experts' report and consequently, 18 December 2020 for the filing of the parties and TFV's submissions.²⁵

17. On 3 September 2020, by way of electronic correspondence, Victims Participation and Reparations Section ("VPRS") requested the Chamber further guidance in relation to its eligibility assessment of potential beneficiaries for reparations, more particularly for participating victims.²⁶

18. On 11 September 2020, the Defence submitted a request seeking clarifications and/or further guidance following the "First Decision on Reparations Process" and a Request seeking an extension of time to submit observations on the Registry 30 September Report ("Defence Request for Clarifications").²⁷

19. On 29 September 2020, the Chamber rejected the Defence Request for Clarifications in part, granting only the request to postpone the deadline for the filing by the Defence and the LRVs of observations to the Registry 30 September Report until 30 October 2020.²⁸

20. On 30 September 2020, pursuant to the "First Decision on Reparations Process", the Registry filed its First Report on Reparations.²⁹

21. On 30 October 2020, the Defence³⁰ and the LRVs³¹ filed their respective observations on the Registry First Report.

²⁵ [Decision Extension of Time Experts' Report](#).

²⁶ Email from VPRS to the Trial Chamber VI Communications, 3 September 2020, at 17:57.

²⁷ Defence request seeking clarifications and/or further guidance following the "First Decision on Reparations Process" and Request seeking an extension of time to submit observations on the Registry 30 September Report, 11 September 2020, [ICC-01/04-02/06-2578](#) ("Defence Request for Clarifications").

²⁸ Decision on the Defence request seeking clarifications and/or further guidance following the 'First Decision on Reparations Process' and Request seeking an extension of time to submit observations on the Registry 30 September Report, 29 September 2020, [ICC-01/04-02/06-2601](#).

²⁹ [Registry First Report](#).

³⁰ Defence Observations on the Registry First Report on Reparations, 30 October 2020, [ICC-01/04-02/06-2622-Conf](#) ("30 October Defence Observations").

³¹ Observations of the Common Legal Representative of the Former Child Soldiers on the "Registry's First Report on Reparations", 30 October 2020, [ICC-01/04-02/06-2620-Conf](#); Observations of the Common Legal Representative of the Victims of the Attacks on the Registry's First Report on Reparations, 30 October 2020, [ICC-01/04-02/06-2621](#).

22. On 2 and 3 November 2020, the Registry filed confidential redacted versions of the Experts' Reports.³²

23. On 9 November 2020, the Legal Representatives for the Victims of the Attacks ("LRV2") submitted a request to the Chamber seeking an Order addressed to the Registry to collect information pertaining to reparations.³³

24. On 18 November 2020, the Registry submitted observations, opposing the LRV2 Request for an Order.³⁴

25. On 20 November 2020, the Defence responded to the LRV2 Request for an Order, opposing the same.³⁵

26. On 15 December 2020, the Chamber issued its Decision on the issues raised by the Registry's First Report on Reparations.³⁶

SCOPE OF THESE DEFENCE SUBMISSIONS

27. Further to Single Judge's 25 July 2019 Order for preliminary information on reparations, the submission of the Registry's (initial) observations on 5 September 2019 and the LRVs, Defence, Prosecution and TFV's responses thereto on 3 October 2019; and in accordance with the Single Judge's 5 December 2019 Order setting deadlines in relation to reparations, Mr Ntaganda submits that the purpose of these Defence Submissions is to (i) make submissions on the reports/information presented; (ii) make

³² Registry Transmission of Appointed Experts' Reports, 30 October 2020, [ICC-01/04-02/06-2623](#) and [Annex 1](#) submitted on 2 November 2020 ("Joint Experts' Report") and [Annex II](#) submitted on 3 November 2020 ("Dr Gilmore's Report").

³³ Request of the Common Legal Representative of the Victims of the Attacks for an Order to the Registry to collect information pertaining to reparations, 9 November 2020, [ICC-01/04-02/06-2624](#) ("LRV2 Request for an Order").

³⁴ Registry's Observations on the "Request of the Common Legal Representative of the Victims of the Attacks for an Order to the Registry to collect information pertaining to reparations" of 9 November 2020, ICC-01/04-02/06-2624, 18 November 2020, [ICC-01/04-02/06-2627](#).

³⁵ Defence response to "Request of the Common Legal Representative of the Victims of the Attacks for an Order to the Registry to collect information pertaining to reparations", 9 November 2020, ICC-01/04-02/06-2624, 20 November 2020, [ICC-01/04-02/06-2628](#).

³⁶ [15 December Decision](#).

submissions on that of other participants; and (iii) present any other last arguments for the Chamber to consider before the rendering of its reparations order.³⁷

28. To be sure, this is an ambitious endeavour.

29. *First*, as mentioned in the Defence 28 February submissions on reparations: “Judging from [...] the panoply of recommendations found in the preliminary submissions of the Registry through the Victims Participation and Reparation Section (“VPRS”), and the submissions of the Legal Representatives of Victims (“LRVs”), the Trust Fund for Victims (“TFV”), the Prosecution and the Defence in response thereto, it has to be acknowledged that the ICC system of reparations is still very much in its development stage.”³⁸

30. Indeed, ten months later, the situation hasn’t changed in any significant manner as the positions put forward by the Registry, Parties and TFV are still very much apart regarding the implementation of the reparations process in this case. The submissions of the Appointed Experts Reports at the request of the Chamber on 2 and 3 November 2020, which provide a mix of recommendations going beyond the mandate of the Appointed Experts and which include personal and subjective information not normally found in Appointed Experts Reports, further compounds the situation.

31. *Second*, whereas the Chamber issued its First decision on the reparations process on 26 June 2020 and more recently a Decision on issues raised in the Registry’s First Report on Reparations, many issues raised by the Defence since filing its 3 October 2019 response to the Registry’s (initial) observations on reparations have yet to be addressed by the Chamber. This includes *inter alia* issues raised in the Defence request for clarification and/or further guidance filed on 11 September 2020, which was rejected by the Chamber.

³⁷ [Order Setting Deadlines](#), para.9 (f).

³⁸ [28 February 2020 Defence Submissions](#), para.12 (footnotes omitted)

32. *Third*, in light of the foregoing and considering on the one hand, what can be expected from the Chamber's reparations order based on the 3 March 2015 *Lubanga* Appeals Decision on Reparations³⁹ and the totality of submissions before the Chamber at this stage on the other hand, the Defence is at a loss to provide *other last arguments* it wishes the Chamber to consider before the rendering of its reparations order.

33. Indeed, the Defence respectfully submits that a number of issues have yet to be resolved and/or adjudicated with a view to allowing the Chamber to issue a reparations order that meets the five *Lubanga* criteria.

34. From the Defence perspective, bearing in mind Mr Ntaganda's express will to play a significant role in the reparations process, such issues include *inter alia*: (i) the Chamber pronouncing on the VPRS recommendation - systematically opposed by the Defence – to apply the three-group system used to authorize alleged victims to participate in the proceedings for the purpose of assessing and determining certified reparations beneficiaries, involving the Defence only for C-group requests for reparations; and (ii) the Chamber pronouncing as to when and how the Defence will be provided with the *dossiers* of the potential beneficiaries requesting reparations and given an opportunity to provide observations thereon.

35. Accordingly, the Defence hereby incorporates, by reference, in these Defence Submissions, its earlier submissions addressing these and many other issues, including 3 October Defence Response / 28 February 2020 Defence Submissions / 21 April 2020

³⁹ *The Prosecutor v. Thomas Lubanga Dyilo*, Order for Reparations, [ICC-01/04-01/06-3129-AnxA](#), para.1 (“[a]n order for reparations under article 75 of the Statute must contain, at a minimum, five essential elements: 1) it must be directed against the convicted person; 2) it must establish and inform the convicted person of his or her liability with respect to the reparations awarded in the order; 3) it must specify, and provide reasons for, the type of reparations ordered, either collective, individual or both, pursuant to rules 97 (1) and 98 of the Rules of Procedure and Evidence; 4) it must define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted, as well as identify the modalities of reparations that the Trial Chamber considers appropriate based on the circumstances of the specific case before it; and 5) it must identify the victims eligible to benefit from the awards for reparations or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted (“*Lubanga* Order for Reparations”).

Defence Observations on COVID-19 measures / 11 September 2020 Defence Request / 30 October 2020 Defence Observations to Registry First Report.

36. In addition, these Defence Submissions address the issues on which the Chamber requested the Parties to provide observations, namely the presumption of harm and the presumption of harm for children born out of rape.

37. Regarding the use of presumptions to establish the harm suffered by victims as well as the causal nexus between the harm and the crimes Mr Ntaganda was convicted of, the Defence respectfully requests the Chamber to reject this approach. Indeed, considering *inter alia*, the nature of the crimes Mr Ntaganda was convicted of, the situation in Ituri and the passage of time, resort to presumptions to determine the type of harm or the existence of the required causal link should not be permitted with a view to striking a balance between the rights of the victims and that of the convicted person.

38. In the same vein, the phenomena of transgenerational harm – more particularly the harm suffered by children born out of rape – must be carefully scrutinized, in particular with regard to the required standard in order to establish the causal link and the burden of proof. Even though these victims could be considered as indirect victims in very specific circumstances, the harm they may have suffered should not be presumed.

39. These Defence Submissions also address the reports submitted by the experts appointed by the Chamber. Although Section V specifically addresses the Appointed Experts' Reports, the recommendations and assertions of the Appointed Experts are addressed throughout these Defence Submissions, where necessary and relevant.

40. In addition, these Defence Submissions address various topics of relevance to the issuance of the Chamber's reparations order, such as for example, the experts' unsupported assertion concerning the return of Thomas Lubanga in Ituri and its impact on the reparations process. Contrary to the Joint Experts' position, the Defence takes the view that Thomas Lubanga's return to Ituri and the recent alliance between the DRC

President and the UPC led by Mr Lubanga, are a favourable developments, not only for Ituri and the DRC but also for the reparations process.

41. Lastly, regarding the scope of these Defence Submissions, the Defence hereby reserves the right to make further submissions on any unforeseen issue addressed in the other parties' submissions.

SUBMISSIONS

I. No Type of Harm Should Be Presumed

42. The use of presumptions to establish the harm suffered as a result of the crimes for which Mr Ntaganda was convicted of was addressed by the Chamber in the First Decision on Reparations.⁴⁰

43. The Defence disagrees with the Joint Experts' who, like the LRV2,⁴¹ suggested that the "harm must be presumed for every person who was subjected to one of Mr Ntaganda's crimes. This is clearly the case for direct victims. The Experts submit that a presumption of harm should also apply to indirect victims."⁴²

44. Nonetheless, considering the passage of time and the protracted armed conflict in the DRC, the Defence acknowledges that victims can struggle to have access to supporting documents. However, while some experts have stated that presumptions may be used in order to "fill gaps in the evidence provided by individual claimants"⁴³ this is only possible as a result of the compilation of a number of documents combined with an extensive comprehension of the situation at the time of the events, notably with consideration to history and social dynamics.⁴⁴

⁴⁰ [First Decision](#), para.46.

⁴¹ [28 February 2020 LRV2 Submissions](#), para.48.

⁴² [Joint Experts' Report](#), para.16.

⁴³ N. Wühler and H. Niebergall, [Property Restitution and Compensation: Practices and Experiences of Claims Programs](#), IOM (2008), p.4.

⁴⁴ N. Wühler and H. Niebergall, [Property Restitution and Compensation: Practices and Experiences of Claims Programs](#), IOM (2008), p.4.

45. In this regard, the reasoning of the Appeals Chamber in *Kony et al.* concerning the importance of evidence in judicial proceedings is highly relevant and must be underscored:

“it is an essential tenet of the rule of law that judicial decisions must be based on facts established by evidence. Providing evidence to substantiate an allegation **is a hallmark of judicial proceedings**; courts do not base their decisions on impulse, intuition and conjecture or on mere sympathy or emotion. Such a course would lead to arbitrariness and would be antithetical to the rule of law.”⁴⁵

46. It must also be recalled that even if the standard of proof applicable to reparations is lower, *i.e.* balance of probabilities, the claimant bears the burden of proof. Indeed, it lies on the applicant to prove the facts that are adduced in support of his claim.⁴⁶

47. More concretely, the Appeal Chamber in the *Katanga* case touched upon the concept of ‘presumptions’ in the context of reparations proceedings, concluding that:⁴⁷

[I]n the absence of direct evidence in certain circumstances, for example, owing to difficulties in obtaining evidence, a trial chamber may resort to factual presumptions in its identification of the heads of harm. The Appeals Chamber considers that resort to factual presumptions in reparations proceedings is within a trial chamber’s discretion in determining “what is ‘sufficient’ for purposes of an applicant meeting the burden of proof”. However, the Appeals Chamber emphasises that, while a trial chamber has discretion to freely evaluate the evidence of harm in a particular case, **this discretion is not unlimited. A trial chamber must respect the rights of victims as well as the convicted person when resorting to presumptions.**

⁴⁵ *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, Judgment on the appeals of the Defence against the decisions entitled “Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, 25 February 2009, [ICC-02/04-179](#) (emphasis added).

⁴⁶ [Article 1315](#) of French Civil Code; articles [2803](#) and [2804](#) of the Quebec Civil Code; Supreme Court of Canada, *F.H. v. McDougall*, [2008], 3 S.C.R. 41, 2008 SCC 53. para.49; *In re B (Children)*, [2008] 3 W.L.R. 1, [2008] UKHL 35, para.15; *The Prosecutor v. Germain Katanga*, 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”, 8 March 2018, [ICC-01/04-01/07-3778-Red](#), para.47 (emphasis added) (“*Katanga Appeals Judgment*”).

⁴⁷ [Katanga Appeals Judgment](#), para.75 (emphasis added).

48. The danger arising from an (extensive) use of presumptions is the possible violation of the rights of the convicted person. The Trial Chamber must strike a balance between the right of the convicted person and the right of the victims. Indeed, the use of presumptions may prevent the Defense from effectively challenging decisions in relation to the eligibility of victims. As the Defence of Mr Katanga stated:

This [the use of presumptions] violates the requirement of fairness of the proceedings against the defendant and his right not to have imposed on him any reversal of the burden of proof or any onus of rebuttal, pursuant to article 67(1)(i) of the Statute.⁴⁸

49. Presumptions cannot simply be used to overcome deficiencies in the evidence in any given situation.

A. Presumptions concerning the extent of the harm suffered

50. The Joint Experts' submit that due to the difficulty to access evidence of the harm, the "form and extent of the harm suffered by former child soldiers and victims of the attacks should be presumed".⁴⁹

51. This is incorrect, if only because the extent of the harm significantly differs depending on the individual and can therefore not simply be presumed. Not all individuals will react the same way and experience the same harm as a result of the commission of a crime. Moreover, many factors can impact on the extent of the harm suffered.

52. For instance, Dr Gilmore emphasises in her report that victims of sexual violence "can suffer short-, medium-, and long-term harm"⁵⁰ and that the "consequences of harm arising from being a child soldier and suffering from sexual slavery can depend on the nature, duration and intensity of the violence experienced, witnessed or perpetrated, which can be mediated by the child's age (cognitive maturity) and personal

⁴⁸ Defence Document in Support of Appeal against the Reparations Order, 29 June 2017, [ICC-01/04-01/07-3747](#), para.20.

⁴⁹ [Joint Experts' Report](#), para.48.

⁵⁰ [Dr Gilmore's Report](#), para.51.

characteristics (degree of resilience, knowledge, skills and abilities), and by the social context of those around them.”⁵¹

53. It is thus evident that applying a blanket presumption to the extent of the harm suffered by former child soldiers and victims of the attacks would be a mistake and utterly unfair to the convicted person.

54. As for the use of presumptions on economic loss, the wide range of this type of harm equally warrants the rejection of using presumptions. Such harm can include loss of income, loss of opportunities, loss of pension. Although the Fund responsible for the compensation of the victims of the 11 September 2001 in the United States did use presumptions to establish the reparations awarded to the families of survivors, this was based on and resulted from consideration of extensive documentation provided by the applicants with regards to their economic loss.⁵²

55. In light of the foregoing, the Defence takes issue with and opposes the LRV2 proposition that a “presumption of harm is sufficient when the person establishes on the balance of probabilities that he or she was a victim of a crime within the parameters of the conviction, *i.e.* location, relevant time, attack of the UPC/FPLC.”⁵³

B. Presumptions regarding the resumption of actions following the death of a victim

56. This Chamber has previously stated that, albeit in the context of pronouncing on the participation of victims at trial, a presumption can be drawn when the applicant is: “the spouse of a deceased victim; an only surviving child of a deceased victim, where the child has reached the age of eighteen and the deceased victim was either unmarried or the victim's spouse is already deceased; or the parents of an unmarried deceased victim who either has no children or whose children are below the age of eighteen.”⁵⁴

⁵¹ *Id.*, para.52.

⁵² N. Wühler and H. Niebergall, [Property Restitution and Compensation: Practices and Experiences of Claims Programs](#), IOM (2008), p.209.

⁵³ [28 February 2020 LRV2 Submissions](#), para.47.

⁵⁴ *See, e.g.*, Fourth decision on victims’ participation in trial proceedings, 1 September 2015, [ICC-01/04-02/06-805](#), para.8; [Joint Experts’ Report](#), para.8, fn.10.

The Defence does not object the use of such a presumption in the above-mentioned situations.

C. The use of presumptions to establish the causal link

57. The Joint Experts' take the view that presumptions may be used to establish the required causal link between the harm suffered and the crimes for which the accused person was convicted of.⁵⁵ For the following reasons, the Defence disagrees with the Joint Experts' view, which must be disregarded.

58. *First*, the applicable standard to pronounce on the existence of the causal nexus required is well established in the jurisprudence of this Court, namely the "but/for standard" and a further requirement that the crimes for which the accused has been convicted must be the proximate cause to the harm suffered by the victim claiming reparations.⁵⁶ Nonetheless, the legal concepts of "but/for" relationship and "proximate cause" are broad ones that deserve careful consideration and clarification.

59. In the *Katanga* case, the Trial Chamber concluded that:⁵⁷

16. [i]n general terms, the proximate cause standard is a limitation placed by some courts on a person's liability for the consequences of his or her actions. This means that **the liability of the person who committed an act is limited to the causes that are closely connected to the result of that act and that are significant enough to justify a finding of liability.**

17. The standard is of particular importance when harm appears to have more than one cause. **The Chamber notes that, according to a wide range of case law, the chain of causation between an act and its result is broken when an event which the person who committed the initial act could not have reasonably foreseen occurs after the commission of the initial act and affects its result.** In other words, if the person who committed the initial act could not have reasonably foreseen the event in question, the initial act cannot be considered to

⁵⁵ [Joint Experts' Report](#), fn.64.

⁵⁶ *The Prosecutor v. Germain Katanga*, 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, 1 October 2018, [ICC-01/04-01/07-3804-Red-tENG](#), paras.15-16 ("*Katanga* Decision on Transgenerational Harm").

⁵⁷ [Katanga Decision on Transgenerational Harm](#), paras.16-17 (emphasis added, footnotes omitted).

be the proximate cause of the harm suffered by the victim and, consequently, the person who committed the initial act cannot be held liable for the harm in question. In other words, the rationale for applying the proximate cause standard is the need to place just and fair limits on the consequences of the crimes that can be attributed to the convicted person.

60. While the *Katanga* Trial Chamber's interpretation of the proximate cause standard was retained, it remains that the "but/for" relationship is the requirement, which must be examined first. Although the two standards appear complementary, these are two legal concepts that might very well yield particularly different results.

61. When paying closer attention to the concept of "but/for" relationship or sometimes referred to the "cause-in-fact" standard in some domestic jurisdictions,⁵⁸ it requires, when examining the chain of causality, that all events possibly related to the harm must be taken into consideration, regardless of whether or not they are the most relevant or immediate cause of the harm. The events considered must have had an impact or be one of the causes such that, if it had not happened, the prejudice would not have materialized. It follows that the "but/for" relationship may encompass a very wide range of causes engaging the liability of an infinite number of individuals.

62. Notably, the *Katanga* Trial Chamber did not rely on the "cause-in-fact" theory, which would have required taking into consideration all the events that could have had an impact on the prejudice, thereby extending the liability of individuals on a rather wide scale.⁵⁹ Hence, to be consistent with this Court's jurisprudence, one can argue that the "but/for" relationship is more akin to a probability test, *i.e.* without this event, it is more likely than unlikely that the prejudice has occurred⁶⁰ than a requirement to take into consideration every cause that might have had an impact on the occurrence of the harm.

⁵⁸ *France*, Cour de Cassation, Chambre civile 3, du 19 Février 2003, [00-13-253](#); *Imperial Tobacco Canada Ltée c. Conseil québécois sur le tabac et la santé*, 1^{er} March 2019 QCCA 358, paras.662,666.

⁵⁹ *Katanga Decision on Transgenerational Harm*, para.17, fn.37.

⁶⁰ *Barnett v Chelsea & Kensington Hospital* [1969] 1 QB 428; Dam, Cees Van, *European Tort Law*, 19 May 2013, Second Edition, Oxford University Press, pp.316-317.

63. As for the proximate cause theory, it can be defined as the cause that is the “most dominant cause or the most proximate cause”.⁶¹ Hence, the cause that links the person liable for the prejudice, which must not be too remote.

64. In the *Al Mahdi* Reparations Order, the Trial Chamber defined the legal concept of proximate cause as follows:⁶²

[c]ause that is legally sufficient to result in liability, and in assessing proximate cause the Chamber will consider, *inter alia*, whether it was reasonably foreseeable that the acts and conduct underlying the conviction would cause the resulting harm.

65. Considering the above the Defence posits that the required causal nexus should be determined pursuant to the following test: **without this event, it is more likely than unlikely that the prejudice would have occurred, but in addition it must have to be the more direct and dominant cause of the damage that was reasonably foreseeable.**

66. In more concrete terms, an applicant alleging to have suffered a prejudice due to the fact that he took up arms to avenge relatives that have been killed during the conflict would not fulfil the causal link requirement.

67. What is more, the Defence posits that the Joint Experts’ rejection of the *novus actus interveniens* theory in the current case – *i.e.* when a new cause occurs after the initial act and breaks the causal nexus – is legally incorrect.⁶³

68. For instance, a victim of an attempted murder who has however been injured by the act and died because of the lack of medical help⁶⁴ would not meet the causal nexus standard. In this case, in addition to expressing the erroneous view that no documentation should be provided to support this claim, the Joint Experts’ err by failing to consider the legal concept of the break impacting the causality link. Indeed, although the bodily harm suffered by the victim might be directly linked to a crime for which

⁶¹ Goldberg, John C. P., and Benjamin C. Zipursky, *Torts*, the Oxford Introductions to U.S. Law, Oxford University Press USA - OSO, 3 June 2010, pp.94,99.

⁶² *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Reparations Order, 17 August 2017, [ICC-01/12-01/15-236](#), para.44 (“*Al Mahdi* Reparations Order”).

⁶³ [Joint Experts’ Report](#), para.278.

⁶⁴ *Id.*, para.61.

Mr Ntaganda was convicted of, the poor state of the health care system in Ituri cannot be attributed to Mr Ntaganda. There is a break in the chain of causality and the resulting death due to the health care system cannot be attributed to the convicted person.

69. The same can be said about the long-term consequences of sexually transmitted diseases untreated due to the lack of medical care. The claimant could be compensated for the harm suffered, however he could not be for the consequences of the poor state of the health care system in Ituri that caused deterioration of his/her condition.

70. Another example is the additional trauma suffered by victims of Mr Ntaganda's crimes who are displaced again due to the on-going conflict.⁶⁵ The harm they suffered as a result of the commission of the crime of forced displacement could be compensated, but not the current consequences and new prejudice arising as a result of the continuing conflict. There is a new event that is intervening and breaking the chain of causality. The chain of causality is broken by new events.

71. What is more, in many domestic jurisdictions, reparations must repair the prejudice caused to redress the claimant, regardless of the condition in which this person is already in. The "thin skull rule" provides that the defendant is "liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition".⁶⁶ However, the corollary rule is the "crumbling skull" principle, which limits the liability of an individual:

The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway.⁶⁷

⁶⁵ *Id.*, para.97.

⁶⁶ [Athey v. Leonati](#), [1996] 3 SCR 451, para.34.

⁶⁷ [Athey v. Leonati](#), [1996] 3 SCR 451, para.35.

72. Nevertheless, in order for pre-existing conditions to be taken into account, they must be documented and sustained pursuant to the applicable standard with relevant and credible evidence.⁶⁸

73. This is of particular importance in this case considering that (i) sexual violence and gender-based crimes are not uncommon in armed conflict; and that (ii) a pre-existing condition of a deteriorating nature should be repaired to the same level as it was before the incident, without the need to put the claimant in a better position. Hence, victims already traumatized by prior events who are in a deteriorating position can only be put back to the position they were before the occurrence of the crime, and not in a better position. The establishment of the causal nexus is therefore of primordial importance, to place the state in which the victims was when the crime occurred.

74. It follows from the above that resort to presumptions is reductive of the complexity in establishing the causal link and the determination of the exact cause of the damage that must be redressed.

75. Consequently, the Defence posits that presumptions have no place in the determination whether the required causal link has been established, other than for the limited purpose of establishing certain facts. For example, when the United Nations Commission for Compensation (“UNCC”) facilitated the compensation of certain victims in Iraq and Kuwait, the UNCC allowed claimants to provide “documentation of their departure, and date of departure from either Iraq or Kuwait during a certain period of time, **and then** the causal link between their departure and the occupation of Kuwait was presumed.”⁶⁹ Hence, the claimants had to provide basic documentation to establish the fact that their departure was linked to the occupation. The presumption of fact relied upon by the UNCC is entirely different from presuming the causal link or the extent of the harm suffered by the victims as a result of their forced displacement.

⁶⁸ *Blackwater v. Plint*, [2005] 3 S.C.R. 3, 2005 SCC 58, para.82.

⁶⁹ Niebergall, *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, Chapter 8, Overcoming Evidentiary Weaknesses in Reparation Claims Programmes, p.134 (emphasis added).

D. Burden of proof and available evidence

76. The corollary of the above concerns the burden of proof that must be fulfilled. The Appointed Experts contend that “placing the burden of proof on victims to evidence each harm to satisfy a reparation claim may be too onerous for such vulnerable and often stigmatised victims.”⁷⁰ In response, while acknowledging that documents might be difficult for victims to obtain, the Defence submit that the burden of proof must always remain on the shoulders on the applicant.⁷¹ The claimant must provide evidence to demonstrate their harm on a balance of probability, as it is well-established by this Court.⁷²

77. In this regard, the Defence takes issue with the VPRS’s contention in its 28 February 2020 Observations that no documents are available, which is at best puzzling.⁷³ The Defence notes that in the context of the reparations proceedings in the *Katanga* case, which concerns the same conflict, took place in the same period, concurrently, and in the same geographical region, documents were available and were provided to the parties.⁷⁴ Allegations raised by victims, unsupported in the evidence adduced at trial, that documents were destroyed by UPC/FPLC forces have no merit and should be disregarded.

78. Indeed, the Trial Chamber in the *Katanga* case admitted medical reports, a medical certificate from NGOs, a hospital record and a forensic report to evidence bodily harm.⁷⁵ Significantly, despite the documents available, the *Katanga* Trial Chamber found that the causal nexus required was not established on a balance of probability because the documents did not specify that the injuries were caused during

⁷⁰ [Dr Gilmore’s Report](#), para.61; *See also*, [Joint Experts’ Report](#), para.48.

⁷¹ *See supra* para.46, fn.46.

⁷² *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2013 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, 3 March 2015, [ICC-01/04-01/06-3129](#), para.83; [Katanga Reparations Order](#), para.50; [Al Mahdi Reparations Order](#), para.44.

⁷³ [28 February 2020 Registry Submissions](#), para.23.

⁷⁴ [Katanga Reparations Order](#), para.111.

⁷⁵ [Katanga Reparations Order](#), para.111.

the attack on Bogoro.⁷⁶ The same reasoning should be applied in the current reparations proceedings.

79. The Defence also underlines, in addition to opposing the possibility to receive compensation for the following types of harm, *i.e.* destruction of social cohesion,⁷⁷ and fear of returning home until today,⁷⁸ that it would also be difficult, if not impossible, to provide evidence to substantiate this type of harm, even on a balance of probability.

80. With regard to the harm labelled as ‘damage to life plan’,⁷⁹ referred to in the LRV1 28 February Observations⁸⁰ and the Joint Experts’ Report,⁸¹ the Defence posits – considering the broad and uncertain foundation of this principle – that victims alleging such harm cannot receive pecuniary compensation. The IACHR landmark case of *Velásquez Rodríguez v. Honduras* established that reparations are aimed at restoring the situation prevailing and compensating for the consequences of the violation.⁸² The restitution principle of reparations does not allow to put the person in a better position than he or she could have been without the occurrence of the violation. The concept of life plan project is therefore too uncertain and unfair with regards to the convicted person, since it includes the impossible task of foretelling what could have been the life of a person.

81. Turning to the burden of proof for victims of sexual violence, while the difficulties encountered by these victims in order to come forward and disclose the sexual violence they experienced are acknowledged, the Defence maintains that these victims must nonetheless provide certain evidence. The Defence underscores in this regard that while Dr. Gilmore purportedly provides solutions to palliate these difficulties in her report.⁸³

⁷⁶ *Ibid.*

⁷⁷ [Joint Experts’ Report](#), paras.63,84.

⁷⁸ *Id.*, para.74.

⁷⁹ *Id.*, paras.104-105, fn.137.

⁸⁰ [28 February 2020 LRV1 Submissions](#), para.45.

⁸¹ [Joint Experts’ Reports](#), paras.35,68.

⁸² IACHR, *Case Velásquez Rodríguez v. Honduras*, [Judgment of July 21, 1989](#), para.26.

⁸³ [Dr Gilmore’s Report](#), para.81.

82. Furthermore, the Defence takes issue with Dr Gilmore's assertion that the passage of the time may make it difficult for victims to provide credible evidence. The Defence notes that, in many instances, judgements awarding reparations were issued many years after the occurrence of the facts. Sadly, this is not uncommon in the context of gross violations of human rights, since most of the time they are perpetrated by agents of the State or result from the State policies and/or omissions to take action, and are not addressed until the regime is changed. This was the case, for instance, in Guatemala, with the landmark case of *Plan de Sánchez Massacre v. Guatemala*. In this case, the events took place in 1981 and the Judgment was rendered in 2004.⁸⁴ The same applies to the *Case of the Members of the Village of Chichupac and neighbouring communities of the Municipality of Rabinal v. Guatemala*. Whereas the massacre took place in 1982, the judgment awarding reparations was only issued in 2016.⁸⁵ A similar situation arose in the case of *Rosendo Cantú v Mexico*; while the facts occurred in 2002, the Judgment awarding reparations was issued in 2010, following a petition filed before the IACHR in 2009. Yet, and significantly, the documentation provided in support of the claim was extensive.⁸⁶

83. Notably, in the *Katanga* case, the victims did provide mental health attestations for the children born in the aftermath of the attack on Bogoro from parents suffering from PTSD due to this attack.⁸⁷

84. What is more, in the *Bemba* case, the Trial Chamber held that a victim suffering from PTSD needs to be diagnosed by a qualified medical professional,⁸⁸ which must be updated. The need for such a diagnosis supports the Defence's claim to be provided with documentary evidence. It also supports the view that time does impact such diagnosis, which must be updated.

⁸⁴ IACHR, *Case of Plan de Sánchez Massacre v. Guatemala*, [Judgment](#), 29 April 2004.

⁸⁵ [Dr Gilmore's Report](#), fn.310, referring to IACHR, *Case of the Members of the Village of Chichupac and neighboring communities of the Municipality of Rabinal v. Guatemala*, Judgment, 30 November 2016.

⁸⁶ [Dr Gilmore's Report](#), fn.312, referring to IACHR, *Rosendo Cantú et al. v. Mexico*, [Judgment](#), 31 August 2010, paras.27-30.

⁸⁷ [Katanga Decision on Transgenerational Harm](#), paras.28-29.

⁸⁸ *The Prosecutor v. Jean Pierre Bemba Gombo*, [T-369](#), 17 May 2016, ICC-01/05-01/08, p.8, ll.16-19.

85. In light of the foregoing, the Defence submits: (i) the balance of probability standard is not too onerous for victims and must be met by providing the relevant documentation; and (ii) a statement provided by a victim is insufficient to establish, pursuant to the balance of probabilities standard, the type of harm suffered, particularly if the alleged harm is psychological in nature.

II. Children born out of rape should not be presumed to have suffered harm

86. Pursuant to the Chamber's request, the Defence hereby submits observations on the possibility for children born out of rape to see their harm presumed and thus to benefit from reparations in this case. For this purpose, a careful examination of the relevant literature and jurisprudence on the concept of transgenerational harm is required before turning to the specific case of children born out of rape.

A. Transgenerational Harm

87. Although the Chamber in the *Katanga* case did recognize the existence of the phenomena called transgenerational harm,⁸⁹ the Chamber noted that there is no absolute scientific certainty with regard to this concept,⁹⁰ with regard to the epigenetic change theory.⁹¹

88. The Defence for Mr Katanga argued that "[b]oth Bogoro and Kasenyi, [REDACTED], have been the objects of several attacks before and after the 24 February 2003 attack. Thus, even if some of the applicants did suffer from transgenerational harm, it could be linked to another attack."⁹² As to the *Katanga* Trial Chamber, it considered that: "the causal nexus between the harm and the attack on Bogoro has not been demonstrated to the standard of proof of a balance of probabilities."⁹³ The applications were thus rejected.

⁸⁹ [Katanga Decision on Transgenerational Harm](#), para.10.

⁹⁰ [Katanga Decision on Transgenerational Harm](#), paras.12-14.

⁹¹ [Katanga Appeals Judgment](#), para.260.

⁹² Defence Response to the OPCV and Legal Representative of Victims' Documents in Support of Appeal Against the Reparation Order, 5 September 2017, [ICC-01/04-01/07-3758-Red2](#), para.42.

⁹³ [Katanga Decision on Transgenerational Harm](#), paras.78.98.120 and 140.

89. What is more, in order to prove transgenerational harm, there must first be a diagnosis of psychological harm for the parents. Moreover, considering that a psychiatric diagnosis fluctuates and evolves with time, it must be reassessed on a rolling basis. Indeed, in the *Bemba* case, Dr Reicherter testified that: *first*, a clinical diagnosis could not be based on information collected years ago; and *second*, a diagnosis dated from 10 years had to be reassessed, even in the presence of indications that the mental trouble is a chronic one.⁹⁴

90. It follows that a precise psychological assessment is therefore necessary in order to establish a transgenerational harm due to the PTSD or stress disorder of one of the parents who suffered harm as a result of a crime for which the accused person was convicted of and that would have been transmitted to his/her offspring.

91. The Chamber also noted that:⁹⁵

Conversely, the Chamber considers that the farther the date of birth of the Applicant Concerned from the date of the attack on Bogoro, the more likely it is that other factors/events may have contributed to the suffering of the Applicants Concerned.

92. The Chamber further noted that the neuropsychiatrist who had examined the applicant alleging a transgenerational harm “found that a multifactorial etiology of the Applicant’s emotional disorder could not be ruled out” and that “[i]n other words, all of the causes of the pathology in question involve several factors.”⁹⁶

⁹⁴ *The Prosecutor v. Jean-Pierre Bemba Gombo*, [T-369](#), 17 May 2016, ICC-01/05-01/08, p.6, ll.10-13.

⁹⁵ [Katanga Decision on Transgenerational Harm](#), para.30 (“Conversely, the Chamber considers that the farther the date of birth of the Applicant Concerned from the date of the attack on Bogoro, the more likely it is that other factors/events may have contributed to the suffering of the Applicants Concerned. In the light of this, the Chamber notes that, during the medical examination of one of the Applicants Concerned, the neuropsychiatrist found that a multifactorial etiology of the Applicant’s emotional disorder could not be ruled out. In other words, all of the causes of the pathology in question involve several factors. The Chamber also notes that the Legal Representative concedes that the parents’ suffering “is combined with other anxieties such as those triggered by insecurity in the region as well as other contextual factors”. In that regard, the Chamber recalls the principles applicable to causal nexus, in particular the proximate cause standard, which is that the crime must be sufficiently related to the harm to be considered the cause of that harm.”)

⁹⁶ *Id.*, para.30.

93. In addition to this factual conclusion, the Chamber concluded bearing in mind the causal nexus required, that it was possible that other events predating the 2003 Bogoro attack had contributed to the suffering of the applicants.⁹⁷

94. Accordingly, the Chamber considered that the causal link was not established by the Legal Representative of the Victims between the psychological harm suffered by the applicants and the suffering of their parents during the 2003 Bogoro attack.⁹⁸

95. The Chamber reiterated, on this precise matter, that the burden to demonstrate the existence of a prejudice, and a causal nexus between the harm suffered and the crime lies on the claimant.⁹⁹ This, in and of itself, excludes any possibility for the use of presumptions.

96. As conceded by the Legal Representative following a neuropsychiatrist examination, the degree of probability of the existence of a nexus between the harm suffered by children born after an attack due to the trauma experienced by the parent in the *Katanga* case, differs depending on the child.¹⁰⁰ This further support the rejection of any presumption concerning the causal nexus required in relation to the transgenerational harm.¹⁰¹

97. Lastly, the Defence deems it appropriate to respectfully underscore that the Joint Experts' are *not* medical experts, even though Dr. Gilmore is.¹⁰²

98. Their opinion concerning the transmission of harm is purely based on academic literature, and not personal knowledge or expertise.

⁹⁷ *Id.*, para.31.

⁹⁸ *Id.*, para.56.

⁹⁹ *Id.*, para.32, referring to [Katanga Reparations Order](#), paras.162-163,166 (footnotes omitted).

¹⁰⁰ Transmission du « Rapport d'expertise sur l'évaluation de l'état psychique des enfants victimes de l'attaque de Bogoro du 24 février 2003 », 31 May 2016, [ICC-01/04-01/07-3692-Red2](#), para.32.

¹⁰¹ [Dr Gilmore's Report](#), paras.80-81.

¹⁰² Annex 1 to the Registry List of Proposed Experts on Reparations Pursuant to Trial Chamber VI's Order of 5 December 2019, [ICC-01/04-02/06-2472-Anx1-Conf](#).

B. Children born out of rape/intergenerational harm¹⁰³

99. Turning now to the specific case of children born out of rape in this case, the Defence posits that determining the existence of the required causal link by way of presumption should be rejected by the Chamber.

100. In her report, Dr Gilmore elaborates on the concept of intergenerational harms suffered by victims of armed conflicts. Notably, the language used therein is quite equivocal. At the very beginning, Dr Gilmore states that: “[r]esearch suggests that the noxious effects of trauma **may** be psychologically transmitted from one generation to the next”.¹⁰⁴

101. Then, addressing the types of harm prone to claims of intergenerational harm, Dr Gilmore’s refers to examples that reveal the hypothetical nature of such harm including but not limited to:

- children also face stigma and social exclusion that **can** result in poverty;¹⁰⁵
- [c]ombined with the psychological issues these children **can** face, such factors **can** lead to poor health;¹⁰⁶
- Children **can** also struggle to reconcile their affection, attachment and loyalty to their fathers;¹⁰⁷
- **may** lead to problems in their relationships;¹⁰⁸ and
- [s]ome girls and women **may** neglect, harm or kill the child born out of their rape who can be a constant reminder of the violation.¹⁰⁹

102. While possibility that children born out of rape might experience harm as a result of this situation, the uncertainty associated with the extent of such harm and even more

¹⁰³ [Dr Gilmore’s Report](#), para.54.

¹⁰⁴ *Id.*, para.53 (emphasis added).

¹⁰⁵ *Id.*, para.54 (emphasis added).

¹⁰⁶ *Id.*, para.54 (emphasis added).

¹⁰⁷ *Id.*, para.55 (emphasis added).

¹⁰⁸ *Ibid.* (emphasis added).

¹⁰⁹ *Ibid.* (emphasis added).

so with respect to the required causal link with the crimes Mr Ntaganda was convicted of, militates strongly against the use of presumptions.

103. What is more, the examples of harms mentioned by Dr Gilmore do not necessarily apply to every children born out of rape, quite the opposite. Indeed as she concedes in her report, there are many factors that can influence the harm a person may suffer.¹¹⁰ Consequently, any intergenerational harm suffered by children born out of rape must be established pursuant to the balance of probability standard. That a child born out of rape “may” or “can” experience harm as a result certainly does not justify presuming such harm.

104. It is noteworthy in this regard that some of the examples given by Dr Gilmore are based on one interview. That children born out of rape *can* be more at risk to enrol in armed groups because they have been marginalised¹¹¹ is one such example. Indeed, the prospect of finding the existence of a causal link between the rape of the mother and the harm suffered by the child who later enrolls in an armed group is at best remote and almost impossible to reconcile with the standard of the definition of “proximate cause”.¹¹²

105. The *Katanga* precedent clearly demonstrates that finding the existence of such causal link is very far from being obvious, especially in a region where protracted armed conflicts are ongoing.

106. Hence, the absence of certainty in relation to the transgenerational or intergenerational harm must be carefully considered when attempting to determine the existence of a causal link between the harm and the crimes the convicted person has been convicted of. Resorting to presumptions for this matter would seriously undermine the rights of the convicted person.

¹¹⁰ *Id.*, para.25.

¹¹¹ *Id.*, para.57.

¹¹² *Contra id.*, paras.54,57.

107. In light of the foregoing, the Defence submits that children born out of rape could only be considered as indirect victims of the crime of rape of their mother, if both the harm is proved and the causal link requirement is met, subject to judicial review. This is something envisaged in Peru for instance.¹¹³

III. Modalities and forms of reparations

108. As a preliminary matter, the Defence underscores that the Standard reparations package and Standard compensation amount suggested by the Joint Experts' are based on presumed harms and is – consequently – erroneous in the Defence's opinion.¹¹⁴ The Joint Experts' went as far as suggesting that the victims should be awarded compensation regardless of the crime.¹¹⁵ As such, they are *ipso facto* erroneous and inapplicable.¹¹⁶ Strikingly, the Joint Experts' go as far as suggesting that the victims should be awarded compensation regardless of the crime.¹¹⁷ What is more, the amount suggested by the Joints Experts – a standard amount of 2,000 USD, is unsupported by analysis based on the cost of living, cost of material or other in the Ituri region.¹¹⁸

109. It is also significant that the Appointed Experts, in both reports, rely heavily on the jurisprudence of the Inter-American Court of Human Rights ("IACHR") and other similar jurisprudence to suggest the amount of liability of Mr Ntaganda.¹¹⁹ A clear distinction exists between reparations proceedings before the International Criminal Court ("ICC") and complaints submitted before human rights courts. First and foremost, the role of the IACHR is to sanction States for gross human rights violations against its nationals whereas reparations proceedings before the ICC, following the conclusion of a criminal trial, are directed specifically at the convicted person. Orders

¹¹³ *Id.*, fn.366.

¹¹⁴ [Joint Experts Report](#), para.172, fn.218.

¹¹⁵ *Id.*, para.173, fn.221

¹¹⁶ *Id.*, para.172, fn.218.

¹¹⁷ *Id.*, para.173, fn.221.

¹¹⁸ *Id.*, para.181.

¹¹⁹ *Id.*, paras.256-258; [Dr Gilmore's Report](#), paras.69-77,163-165 (footnotes omitted).

to repair the harm caused to victims should not and cannot be applied in the same way for an individual as for the State.

110. Furthermore, while the prioritization of HIV affected victims by the experts is certainly laudable,¹²⁰ the determining criteria underlying reparations order should always be the reparation of the prejudice suffered by the victims, which is directly linked to the crimes the accused was convicted of. Accordingly, and unless the medical evidence can be submitted to support the conclusion that the victim contracted HIV as a result of after being raped by a UPC/FPLC member in a location confirmed in the Judgment and during the period covered by the charge of rape, such victim cannot be compensated.

111. Notably, the Joint Expert's proposal in this regard is more akin to a national program of HIV treatment than to a judicial reparations process. This is all more the case considering that the number of applicants having claimed suffering from HIV appears to be very limited.¹²¹ The purpose of the ICC reparations proceedings is *not* to replace governmental or non-governmental programs and actions. Dr Gilmore's statement – when referring to the *Bemba* experts report who suggested the similar type of reparations for HIV-affected persons as the Joint Experts' did – that “the ICC is not an aid agency, reparations should support victim agency rather than make them dependant”¹²² is highly relevant in this regard. What is more, Dr Gilmore – who unlike the Defence was granted access to application forms – also stated that “it may be difficult to identify [the victims] who had HIV from the rape Mr Ntaganda is convicted of and not subsequent contracted”.¹²³ The Defence obviously shares her view.

112. That said, the Defence disagrees with the four-category system suggested by Dr Gilmore.¹²⁴ First, although the Defence acknowledges that certain aggravating factors exists, such as the seriousness of the injuries and the long-term effect of the harm,

¹²⁰ [Dr Gilmore's Report](#), para.170.

¹²¹ *Id.*, para.85.

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Id.*, para.84.

may impact the amount of reparations awarded, the amount should remain realistic and reasonable and must not be out of reach either for Mr Ntaganda or the TFV.

113. The Defence also posits that the more complex a system of reparations is, the less satisfying the results are likely to be. Indeed, the over-categorisation and compartmentalization of victims might very well lead to more victims ‘falling within the cracks of the system’ and be excluded as beneficiaries.

114. Concerning the symbolic measures proposed by Dr Gilmore’s report, the Defence must underline that, although it does not oppose to the general principle behind this section of the report, Mr Ntaganda individually cannot be liable to change the local culture and bear the burden of reconciling all communities.¹²⁵

115. Lastly, taking into consideration the Second Registry Report now due on 15 January 2021 – which should include the number of potential Category I and II beneficiaries¹²⁶ – the Defence deems it important to underscore that in the absence of a clear number of potential beneficiaries, let alone certified beneficiaries, at this stage, it is simply not possible to evaluate the final amount Mr Ntaganda is responsible for. For this purpose, the number of certified beneficiaries and the type of modalities of reparations must first be determined. The present situation is compounded by the fact that Mr Ntaganda’s appeal is still pending before the Appeals Chamber.

IV. LRV2’s erroneous submission that all persons in an affected community should be presumed to be victims

116. The Defence takes issue with the LRV2 suggestion “that the number of potential beneficiaries for the purposes of setting a reparations award should be estimated on the

¹²⁵ *Id.*, Section 3.

¹²⁶ [15 December Decision](#), paras.64-65.

basis of the number of persons residing or otherwise present in the affected communities at the time of the events.”¹²⁷

117. The Defense reiterates its earlier submissions in response to the LRV2¹²⁸ that, in the *Al Mahdi* case, the Trial Chamber ordered collective reparations for the community of Timbuktu and clearly stated that even if it was not possible to have the name of all the inhabitant of the town during the unfolding of the attacks, it was still able to set an amount for the cost of repair.¹²⁹

118. This position is untenable unless the scope and type of harm *is presumed*, which, as previously argued above, should not be allowed in this case.

V. Other issues regarding Experts Reports

119. As a preliminary matter concerning the two expert reports, the Defence underscores that an expert report should be as objective as possible, aiming at assisting the Chamber with knowledge outside of the realm of the judges that requires technical or unique expertise remote from the law or common sense.¹³⁰ The two reports submitted by the Appointed Experts fails to achieve this aim in some regards.

120. The two expert reports, although helpful in some regard, contain personal opinions and assumptions that are misplaced as well as factual and legal mistakes,¹³¹ which evidently exceed what is expected from experts. The experts also address issues that no require any special expertise and in respect of which the Chamber did not require assistance. Consequently, the Defence posits that the Chamber should exercise the utmost caution in assessing the reliability and the weight to be attributed to both

¹²⁷ Request of the Common Legal Representative of the Victims of the Attacks for an Order to the Registry to collect information pertaining to reparations, 9 November 2020, [ICC-01/04-02/06-2624](#), para.17, referring to [LRV2 28 February 2020 Submissions](#), para.71.

¹²⁸ Defence response to “Request of the Common Legal Representative of the Victims of the Attacks for an Order to the Registry to collect information pertaining to reparations”, 9 November 2020, ICC-01/04-02/06-2624, 20 November 2020, [ICC-01/04-02/06-2628](#), para.19.

¹²⁹ [Al Mahdi Reparations Order](#), para.141.

¹³⁰ [28 February 2020 Defence Submissions](#), para.121.

¹³¹ [Joint Experts’ Report](#), para.200.

reports. The Defence also notes that redactions have been applied to certain information that might have been material to the Defence, and that some of the material referred to by the Appointed Experts was not available / made available only few days before this day to the Defence.

121. *First*, the reports contain factual mistakes that must be redressed, if only for the sake of accuracy. Indeed, contrary to the Joint Experts' assertion,¹³² Prosecution witness P-0108 was not a child soldier in the proceedings against Mr Ntaganda but was rather an adult. Furthermore, again contrary to assertions in the Joint Experts' Report,¹³³ it is incorrect to say that three girls under 15 years of age testified before this court. With regard to the three girls under 15 years old that were raped – victims of counts 6 and 9 – two of them never testified.¹³⁴

122. *Second*, the Joint Experts' claim that Mr Lubanga's return could impact the victims in his case, as they could try to withdraw from reparations proceedings following undue pressure is pure speculation.¹³⁵ This claim, unsupported by any evidence, relies solely on personal bias assumptions on the part of the experts. The Defence contends that assertions based on personal belief and opinion have no place in an expert report. Notably, as evidenced by the recent demonstration of support by the UPC and Thomas Lubanga to the DRC President,¹³⁶ the reality is entirely different.

123. *Third*, the Joint Experts' Report inappropriately refers to and rests on interviews with LRVs in support of some of their positions. The LRVs, like the Defence, are parties to reparations proceedings. Even though the LRVs represent victims who participated in the proceedings against Mr Ntaganda, *i.e.* potential beneficiaries, interviews

¹³² [Joint Experts' Report](#), para.90; DRC-OTP-P-0108, [T-185](#), 43:15-16 [REDACTED].

¹³³ *Id.*, para.86. [Judgment](#), para.410, fn.1170; para.411, fns.1171-1172.

¹³⁴ *Id.*, para.86. [Judgment](#), para.410, fn.1170; para.411, fns.1171-1172.

¹³⁵ *Id.*, para.138.

¹³⁶ [RDC : le parti politique de Thomas Lubanga apporte son soutien à l'Union Sacrée de la nation initiée par Tshisekedi](#), actualite.cd, 10 December 2020; [Ituri : Des Militants De L'UPC Et L'UDPS Ont Marché Pour Soutenir L'Union Sacrée De La Nation À Bunia](#), congoactuel.com, 16 December 2020.

conducted by the experts with the LRVs without involving and/or informing the Defence reveals a lack of impartiality and objectivity.¹³⁷

124. *Fourth*, in their report, the Joint Experts' use certain terms such as "rape as a weapon of war" and "snake children",¹³⁸ referring to the Sentencing Judgment whereas there is no mention either in the Sentencing Judgment or in the evidence in support of the cited paragraph.¹³⁹

125. *Fifth*, in her report, Dr Gilmore mistakenly assumes that Mr Ntaganda is working during his time spent in detention and asserts on this basis that the money he is receiving should be directed at the compensation of victims of the crimes he was convicted of.¹⁴⁰ Not only Mr Ntaganda was and is still considered indigent, the erroneous assumption in Dr Gilmore's report is revealing.

126. *Sixth*, Dr Gilmore's report section on attack of healthcare¹⁴¹ clearly exceeds the scope of the Trial Judgment on the destruction of health care system by the UPC/FPLC. The Defence reiterates that crimes for which Mr Ntaganda was convicted are temporally limited and must be put in the broader context of the protracted war in Ituri, starting as early as 1996. As way of illustration, Mr Ntaganda has not been convicted of killing, assaulting or sexually assaulting health care practitioners.¹⁴² He cannot, therefore, be held liable to repair the entire system of health care, affected by years and years of armed conflict and lack of assistance by the State. The proposed reparations in this regard should, as a result, be disregarded.¹⁴³

¹³⁷ *Id.*, paras.178, fns.230-235; para.218, fn.273.

¹³⁸ *Id.*, para.65.

¹³⁹ [SJ](#), para.105 referring to DRC-OTP-2059-0058-R02, DRC-OTP-2059-0080-R03, DRC-OTP-2059-0069-R04, **P-0938:T-114**, pp.6-9, 10, 12; **P-0113:T-118**, pp.53,65,67.

¹⁴⁰ [Dr Gilmore's Report](#), para.90.

¹⁴¹ *Id.*, Section IV. Dr Gilmore notes herself that Mr Ntaganda was found guilty for a very small part of the victimization, *see* para.160.

¹⁴² *Id.*, para.155.

¹⁴³ *Id.*, para.172.

VI. Over-compensation or double-compensation

127. As a preliminary matter, the Defence takes issue with the Joint Experts' perplexing conclusion that victims of crimes Mr Ntaganda was convicted of never received any assistance from NGOs or the TFV.¹⁴⁴ The experts having noted that victims of the crime of Mr Lubanga was convicted of did receive assistance from the TFV and considering that most victims in *Lubanga* are also victims of crimes Mr Ntaganda was convicted of, the Joint Experts' conclusion is bewildering.

128. Open-source material from the TFV establishes that it has already implemented many programs in the DRC, in particular for the benefit of former child soldiers and victims of sexual violence.¹⁴⁵

129. Both the LRVs¹⁴⁶ and the Joint Experts'¹⁴⁷ opine that humanitarian assistance does not constitute reparations.

130. However, the Defence reiterates its prior submissions that double-compensation should be avoided, if only to ensure that certified beneficiaries who have not yet received any reparations will be compensated. Indeed, victims who have already benefited from TFV, State or NGO's reparations or assistance programs should not be compensated twice for the same object for which these measures have been put implemented. The situation is different if these victims suffered harm not previously repaired by such programs.

¹⁴⁴ [Joint Experts' Report](#), para.44.

¹⁴⁵ In all [TFV Annual Reports](#) since November 2009. See e.g., [TFV Annual Report 2016](#), Annex 1. List of Projects in Democratic Republic of Congo; [TFV Program Progress Report 2015](#), TFV/DRC/2007/R1/022, p.28: "AMAB continued working in Bunia and in its surrounding 15 sites to provide psychological care and promoting reintegration of 300 women and men victims of sexual violence in their families and communities, and the reintegration of 50 children born from rape. Around 98% of total beneficiaries of this project are women who are victim survivors of sexual violence. In addition, **AMAB supports and provides literacy courses to at least 450 men and women victims of war crimes and crimes against humanity committed in Ituri between 2002 and 2005**" (emphasis added); [TFV Program Progress Report 2013](#), pp.30-31: "14 active DRC projects (out of 16 approved)" for an estimation of "72,735 direct beneficiaries."

¹⁴⁶ [Joint Experts' Report](#), para.280.

¹⁴⁷ *Id.*, paras.279-280.

131. That being said, establishing who might already have benefited from awards or assistance is not a simple task. However, with the aim of implementing a fair reparations process, this is a factor that must be taken into consideration as much for the Trial Chamber, in setting the amount of Mr Ntaganda's liability, as for the TFV during the implementation phase.

132. The Defence notes that this argument finds echo in the *Katanga* Reparations Order, as well as in the *Lubanga* Reparations Order:

The Chamber recalls that, in selecting the projects, the TFV may take account of the awards or benefits received by victims from other bodies so as to guarantee that reparations are not applied unjustly or in a discriminatory manner.¹⁴⁸

The Chamber is, however, alive to the difficulties involved in ascertaining every benefit the victims received from other organizations. It hereby invites the TFV to take account only of the most significant activities undertaken in Bogoro.¹⁴⁹

133. Notably, this was also the TFV's position in the *Katanga's* reparations proceedings.¹⁵⁰

134. What is more, reparations proceedings before the ICC is a process linked to the liability of an convicted person. Thus, the aim of the ICC reparations process is very different from the mandate of an NGO or the role and duties of a State and should not be construed in such a broad way. It must also be underscored that the fact that victims have received any benefits does not exonerate the DRC from its obligation to compensate the victims of the armed conflict taking place on its territory, on the basis of their domestic legislation and international obligations.¹⁵¹

¹⁴⁸ [Lubanga Order for Reparations](#), para.9.

¹⁴⁹ [Katanga Reparations Order](#), paras.319-320 (footnote omitted). See also, fn.463.

¹⁵⁰ *The Prosecutor v. Germain Katanga*, TFV's Observations on Reparations Procedure, [ICC-01/04-01/07-3548](#), para.23.

¹⁵¹ Requête des victimes sollicitant par l'entremise de la Chambre l'intervention de la République Démocratique du Congo au processus des réparations, 24 March 2016, [ICC-01/04-01/07-3674](#), paras.20-22-23 ("24 March 2016 Victims' Request"). See also [Joint Experts' Report](#), para.274.

135. For the purpose of identifying the projects previously or currently carried out by the TFV in Ituri, the Chamber may have to consider asking the TFV directly. The Chamber could also consider requesting the Registry, the DRC authorities and/or the LRVs to identify awards that have already been allocated to victims, in particular concerning psychological and medical support afforded to victims of gender based-violence and former child soldiers, schooling opportunities for child soldiers, girls affiliated with armed groups and child mothers, any material support to impacted communities (reconstruction of Sayo Health Center),¹⁵² material support to disabled persons (prostheses, physiotherapy, physical rehabilitation, etc.), or material support to victims of the attacks (reconstruction of the houses, business premises, etc).

136. Regarding the Sayo Health Center in particular, the Defence takes issue with the Joint Experts' suggestion to renovate and improve the health center, noting that only minor surgery can presently be performed. In this regard, the Defence underscores that the Trial Chamber could not establish the exact extent of the destruction caused by the UPC/FPLC.¹⁵³ Hence, Mr Ntaganda should not be held liable to provide the community with a health center that exceeds the state of the center, prior to the attack. In the absence of evidence establishing that the Sayo Health Center was performing more than minor surgery before the November 2002 operation in Mongbwalu, Mr Ntaganda should not be held responsible to pay for repair to the extent suggested by the Joint Experts' and Dr Gilmore.¹⁵⁴

137. The Trial Chamber, through the Registry, may also consult with the DRC authorities in order to identify whether the State has already compensated in any way the victims of the two operations.

¹⁵² [Joint Experts' Report](#), para.200.

¹⁵³ [SL](#), para.153: **"it is not clear on the basis of the evidence whether the weapon used destroyed the health centre in full or merely damaged it"** (emphasis added).

¹⁵⁴ [Joint Experts' Report](#), paras.200-201. [Dr Gilmore's Report](#), paras.166-175.

138. Lastly, the Defence does not agree with the TFV proposition to award symbolic compensation for victims who have already received benefits as a result of the *Lubanga* reparations proceedings.¹⁵⁵

VII. Indirect victims

139. Further to the 15 December Decision on the issues raised by the Registry in its First Report on Reparations regarding the definition of “extended family”,¹⁵⁶ the Defence wishes to clarify the extent of its submissions.

140. As previously submitted and acknowledged by the Prosecution, LRV1 and the Registry, the categories of indirect victims identified by the Appeals Chamber in *Lubanga* case should find application in the present case.¹⁵⁷ The Defence agreed with this principle, apart from the second category defined as: “[a]nyone who attempted to prevent the commission of one or more of the crimes under consideration”, which should not be considered as indirect victims in this case.¹⁵⁸

141. In addition, the Prosecution, the LRV2 and the Joint Experts’ submit that the definition of “family member”, in accordance to the sociocultural perception of the family unit in Ituri, should not be limited to the nuclear family, but should also include “remote” family members.¹⁵⁹ *A contrario*, the Defence submit that “family members” can be qualified as indirect victims only if they are “close family members”, such as spouses and children.¹⁶⁰ This category should be limited to person demonstrating a “close personal relationship” with the direct victim.¹⁶¹ The Defence accepts and acknowledges that the definition of “family member” must be culturally adapted, including not only

¹⁵⁵ [TFV’s Observations](#), para.115.

¹⁵⁶ [15 December Decision](#), para.55.

¹⁵⁷ Prosecution’s Observations on Reparations, 28 February 2020, [ICC-01/04-02/06-2478](#), para.6; Observations of the Common Legal Representative of the Former Child Soldiers on the “Registry’s First Report on Reparations”, 30 October 2020, [ICC-01/04-02/06-2620-Red-Conf](#), para.26; Registry First Report on Reparations, 1 October 2020, [ICC-01/04-02/06-2602-Conf-Anxl](#), para.14.

¹⁵⁸ [Defence submissions](#), paras.18,21,23.

¹⁵⁹ [Prosecution’s Observations](#), para.6; [28 February 2020 LRV2 Submissions](#), para.36; [Joint Experts’ Report](#), paras.19,61.

¹⁶⁰ [Defence submissions](#), para.22.

¹⁶¹ *Ibid.*

the nuclear family.¹⁶² Nevertheless, the “extended” or “remote” family must be defined for the purpose of this case, and not encompass an unlimited number of individuals following a broad definition.

142. In this respect, the Defence contends that the definition provided by the ECCC in the *Kaing Guek Eav* case is appropriate to define the concept of extended family:¹⁶³

Although the immediate family members of a victim fall within the scope of Internal Rule 23(2) (b), direct harm may be more difficult to substantiate in relation to more attenuated familial relationships. The Chamber nevertheless considers that harm alleged by members of a victim’s extended family may, in exceptional circumstances, amount to a direct and demonstrable consequence of the crime where the applicants are able to prove both the alleged kinship and the existence of circumstances giving rise to special bonds of affection or dependence on the deceased.¹⁶⁴

143. The definition of what constitutes “extended family members” must be construed as strictly as possible. The indirect victim must still be able to establish the harm suffered, as established in the *Katanga* Reparations Order, indirect victims are eligible for reparations, however they must establish they have personally suffered the harm and that he or she had “a close personal relationship with the direct victim.”¹⁶⁵

VIII. Access to the application forms

144. The Defence reiterates, yet again,¹⁶⁶ that in order to respect the rights of the convicted person and allow Mr Ntaganda to play a meaningful role in the reparations process, access to the application forms and documents submitted in support thereof should be granted to the Defence as soon as possible.

¹⁶² [28 February 2020 LRV2 Submissions](#), paras.36,52.

¹⁶³ ECCC, E188, [Judgement](#), Case 001/18-07-2007/ECCC/TC, para.643.

¹⁶⁴ ECCC, E188, [Judgement](#), Case 001/18-07-2007/ECCC/TC, para.643.

¹⁶⁵ [Katanga Reparations Order](#), para.113.

¹⁶⁶ [30 October Defence Observations](#), para.77.

145. In support of this submission, the Defence respectfully refers to the separate opinion of Judge Ibáñez Carranza in the *Lubanga* case, who clarified the extent of the right of the convicted person in the context of the reparations proceedings:¹⁶⁷

During reparations proceedings, the convicted person has the ability to present a defence in respect of the victims' claims, as much as the victims are able to have their rights respected.

146. To be sure, unless Mr Ntaganda is granted access to the potential beneficiaries' application forms, it is difficult, if not impossible for him to challenge the victims' claims and/or play a meaningful role in the reparations process.

147. Now that the Registry has been ordered to issue a final list of participating victims who may potentially be eligible for reparations (category I) as well as the victims potentially eligible for reparations in the *Lubanga* case (category II) by 15 January 2021,¹⁶⁸ the Defence submits that the application forms of those victims should – at a minimum – be transmitted for the purpose of verification and possible challenge by the Defence.

148. The Defence notes in this regard that the Registry's timeline forecasted transmission of the applications to the Defence before the delivery of the Reparations Order.¹⁶⁹

IX. Methodology for the assessment of victims' eligibility and judicial review

149. The Defence reiterates its prior submissions on this matter.¹⁷⁰

150. Although the TFCV's recommendations concerning the eligibility of a victim may possibly be subject to some form of judicial control, the Defence underscores that the TFCV remains an administrative body, not a judicial one.¹⁷¹ Accordingly, any system put

¹⁶⁷ *The Prosecutor v. Thomas Lubanga Dyilo*, Separate Opinion of Judge Luz del Carmen Ibáñez Carranza, 16 September 2019, [ICC-01/04-01/06-3466-AnxII](#), para.37 ("Judge Ibáñez Carranza Separate Opinion").

¹⁶⁸ [15 December Decision](#), p.27.

¹⁶⁹ [Registry 28 February Observations](#), para.28.

¹⁷⁰ [28 February 2020 Defence Submissions](#), paras.79-108.

¹⁷¹ *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable', 18 July 2019, [ICC-01/04-01/06-3466-Red](#), para.162,332; [Judge Ibáñez Carranza Separate Opinion](#), para.24.

in place by the Chamber must provide a possibility for the Defence to challenge any decisions taken by the TFV.¹⁷²

151. Moreover, it is paramount for the purpose of safeguarding the rights of the convicted person and ensuring fair reparation proceedings that the screening of potential beneficiaries must be completely objective. As noted by Judge Ibáñez Carranza in her separate opinion in the *Lubanga* case:¹⁷³

ix. The determination of the harm and the eligibility of victims is not a subjective process. To the contrary, it is **completely objective**. The process should be implemented in a multidisciplinary and scientific manner. It should involve a team of forensic and specialised professionals, such as physicians, psychologists, psychiatrists, anthropologists, archaeologists, to be in charge of searching and screening victims with technical certainty. [...]

X. Scope of liability and degree of participation of Mr Ntaganda

152. The Appeals Chamber in *Lubanga* case has already stated that the scope of liability of a convicted person must take into consideration the mode of responsibility held against an convicted person.¹⁷⁴

153. Moreover, the cost of repairs and the scope of the liability of the convicted person must take into consideration many factors, including the degree of participation of the convicted person and the mode of liability held against him. More particularly, in light of the Second Operation, Mr Ntaganda was convicted as an indirect co-perpetrator pursuant to Articles 25(3)(a) and 25(3)(f). He was not physically present on the crime scene and the Chamber found that he has not really contributed to the planification of this attack.¹⁷⁵ The Chamber did recognize that the degree of participation of Mr Ntaganda was lesser for the Second Operation than for the First Operation.¹⁷⁶

¹⁷² *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable', 18 July 2019, [ICC-01/04-01/06-3466-Red](#), paras.202,256. See also [Lubanga Order for Reparations](#), paras.167-168.

¹⁷³ [Judge Ibáñez Carranza Separate Opinion](#), p.8, ix.

¹⁷⁴ [Lubanga Order for Reparations](#), para.118; [Katanga Reparations Order](#), para.264.

¹⁷⁵ [SJ](#), paras.36,67.

¹⁷⁶ *Id.*, paras.34,67.

154. This factor should therefore be reflected in the scope of liability of Mr Ntaganda with regards to applications in relation to crimes committed during the Second Operation.

XI. Type of Harm

155. The Defence takes issue with certain types of harm put forward by the Joint Experts' and the LRVs.

156. *First*, although the Joint Experts' note that the harm suffered by child soldiers in the *Ntaganda* case is the same as in the *Lubanga* case, they suggest that it with a view to including new types of harm such as "damage to life plan" and "transgenerational harm".¹⁷⁷ The Defence has already addressed these *new* types of harm that have no proper foundation and which should be rejected. In addition, the Defence deems it appropriate to underscore the unfairness of adding these new types of harm *vis-à-vis* the victims of Mr Lubanga.

157. *Second*, the Defence takes issue with the Joint Experts' suggestion to compensate "harm to the family unit".¹⁷⁸ Harms underlying the "harm to the family unit" include, *inter alia*, psychological harm, interruption of schooling, loss of valuables – all of which can individually be compensated. The concept of family unit is too immaterial to be compensated.

158. *Third*, the same reasoning applies to the harm due to destruction of social cohesion,¹⁷⁹ which the Defence also opposes.

159. *Fourth*, the Defence takes issue with the fear of returning home until today.¹⁸⁰ Indeed, as explained above, the protracted armed conflict clearly had an impact on the victims' fear to go back home between 2002-2003 and 2020.

¹⁷⁷ [Joint Experts' Report](#), para.115.

¹⁷⁸ *Id.*, para.37.

¹⁷⁹ *Id.*, para.53.

¹⁸⁰ *Id.*, para.74.

160. Lastly, in light of the foregoing, the Defence submits that, the harms suffered by victims as a result of the crimes Mr Ntaganda was convicted of should be limited to:

- 'murder': close family members of the persons killed in Mongbwalu, Nzebi, sayo and Kilo in the context of the First Operation and in Kobu, Sangi and Bambu in the context of the Second Operation who have suffered, for instance, of psychological harm, economic loss (loss of family income, funeral expenses, ect.);
- 'attack against a civilian population as such or against individual civilians not taking direct part in hostilities': civilians who were present in Mongbwalu and Sayo in the context of the First Operation and in Bambu, Jitchu and Buli in the context of the Second Operation and suffered from attacks on these villages. It should be noted that Lendus combatants lived in the affected villages, and it should be carefully scrutinized if the claimant did participate in hostilities or not;
- 'rape': civilians who were raped in Mongbwalu and Kilo in the context of the First Operation and in Kobu, Sangi and Buli in the context of the Second Operation and children under the age of 15 that were incorporated into the UPC/FPLC during the period on or about 6 August 2002 and 31 December 2003 in Ituri, who suffered long-term psychological damage, stigma and marginalisation, physical injuries, economic loss (loss of income, loss of opportunity);
- 'sexual slavery': civilians who were sexually enslaved in Kobu and Buli in the context of the Second Operation and children under the age of 15 that were incorporated into the UPC/FPLC during the period on or about 6 August 2002 and 31 December 2003 in Ituri who suffered long-term psychological damage, stigma and marginalisation, physical injuries, economic loss (loss of income, loss of opportunity);

- ‘persecution’: civilians that were present in Mongbwalu, Nzebi, Sayo and Kilo in the context of the First Operation and in Nyangaray, Lipri, Tsili, Kobu, Bamby, Sangi, Gola, Jitchu and Buli in the context of the Second Operation who have suffered of psychological harm and trauma, economic loss;
- ‘pillaging’ : civilian had their property pillaged in Mongbwalu and Sayo during the First Operation and in Kobu, Lipri, Bambu and Jitchu during the Second Operation and who have suffered material loss (cattle, hardware, farm tools, building materials);
- ‘forcible transfer of population’: civilians who were present in Mongbwalu during the First Operation and in Lipri, Tsili, Kobu and Bambu during the Second Operation and who have suffered psychological harm, loss of home, loss of income;
- ‘crimes related to child soldiers’: children that were under the age of 15 years that were conscripted or enlisted in the UPC/FPLC on or about 6 August 2002 and 31 December 2003 and were used to participate actively in hostilities on or about 6 August 2002 and on or about 30 May 2003, who have suffered from psychological harm, separation from families, interruption and loss of schooling, physical injuries;
- ‘directing attack against protected objects’; and
- ‘destroying the enemy propriety’: civilians that had their property destroyed in Monbwalu and Sayo during the First Operation and in Lipri, Tsili, Kobu, Jitchu, Buli and Sangi during the Second Operation and have suffered from material loss (destruction of houses, business premises).

CONCLUSION

161. The Reparations Order to be issued by the Chamber pursuant to Article 75 of the Rome Statue in the case of Mr Ntaganda, will be the fourth to be issued at the ICC. The

related jurisprudence, although it is developing rapidly, is still very much in its early phase. Accordingly, it is essential and critical to set the legal basis and objectives of the reparation process.

162. In this regard, the Defence takes the view – even though reparations proceedings are distinct from criminal proceedings – that reparations are nonetheless closely linked to the criminal process and criminal liability, as the person liable to repair the victims is the convicted person. This is why reparations proceedings should be narrowly oriented towards the goal of repairing victims that have suffered as a result of the crimes Mr Ntaganda was convicted of, based on harm established on a balance of probability that meets the strict criteria to establish the required causal link. This, of course, is without prejudice for the Government of the DRC’s responsibility to protect and repair its nationals.

163. Nevertheless, the nature of reparations proceedings before the ICC should not be construed as a process to rehabilitate an entire region affected by armed conflict, as a national reparations program would do or what could be anticipated from a truth and related transitional mechanisms.

164. That said, the right to reparations is a human right, and reparations proceedings must focus on restoring human dignity and affected communities. The conflicts in Ituri over the past two decades have left thousands of persons with trauma, loss, and suffering. The TFV has, so far, accomplished extensive work in DRC pursuant to its assistant mandate (Regulation 47 of the Regulations of the Trust Fund for Victims).¹⁸¹ The TFV has a mandate that surpasses the ethnic dimension of the conflict. More importantly, the region of Ituri is still under continuous threat of violence, and every action or program implemented by an international organisation or NGO, should be mindful of the ethnic cleavage that still prevails. Compensating Lendu victims, in most

¹⁸¹ [Rules of Procedure and Evidence](#), Article 98(5); [Regulations of the Trust Fund for Victims](#), Regulation 47.

part, can sparks more violence than alleviate tension in Ituri. This is why the TFV is in good position to assist the victims in a neutral and impartial way.

165. In conclusion, the Defence respectfully submits that in adopting the principles to be applied in the current reparations proceedings, the Chamber should give due consideration to the above observations.

RESPECTFULLY SUBMITTED ON THIS 11TH DAY OF JANUARY 2021

A handwritten signature in black ink, appearing to read 'StB-'.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands