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APPEALS CHAMBER

Before:

**Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung**

SITUATION IN UGANDA

**IN THE CASE OF
*THE PROSECUTOR v. DOMINIC ONGWEN***

PUBLIC

With Public Annexes A and C

**Public Redacted Version of “Defence Omnibus Response to the Submissions on
Reparations”, filed on 7 March 2022**

Source: Defence for Dominic Ongwen

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:**The Office of the Prosecutor**

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I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') hereby submits this omnibus response to the observations submitted on reparations to Trial Chamber IX ('Chamber'). The Defence shall cover the observations in five (5) categories: 1) the *amici curiae* observations;¹ 2) the observations of the Legal Representatives for Victims ('LRV')² 3) Common Legal Representative of Victims ('CLVR')³ (collectively 'Legal Representatives'); 5) the Office of the Prosecutor ('Prosecution');⁴ and 5) the Government of Uganda.⁵

II. CONFIDENTIALITY

2. The Defence files this omnibus response as confidential, *ex parte*, as it discusses issues dealing with [REDACTED]. Annex B is classified confidential, *ex parte*, [REDACTED].

III. SUBMISSIONS ON THE AMICI CURIAE OBSERVATIONS

A. Violations of Regulation 36(3) of the Regulations of the Court

3. The Chamber granted *amici curiae* 20 pages for submissions on reparations.⁶
4. Regulation 36(3) of the Regulations of the Court ('RoC') stipulates that all documents filed with the Court shall have 1.5 line spacing in the body of the text and single spacing in the footnotes. This requirement applies to the main pleading.
5. The Defence notes that Doc 1971, Doc 1973 and Doc 1974 violate Regulation 36(3) of the RoC. Doc 1971 is 20 pages with the incorrect spacing. If the proper spacing is applied, there

¹ Trial Chamber IX, *Submission of amicus curiae observations*, [ICC-02/04-01/15-1925](#) ('Doc 1925'); *Amicus Curiae brief pursuant to article 75 of the Statute and Rule 103 of the Rules of Procedure and Evidence*, [ICC-02/04-01/15-1971](#) ('Doc 1971'); *Joint Submission by the United Nations on Reparations pursuant to Rule 103 of the Rules of Procedure and Evidence*, [ICC-02/04-01/15-1972](#) ('Doc 1972'); *Submissions on Amicus Curiae Observations on Reparations*, [ICC-02/04-01/15-1973](#) ('Doc 1973'); *Amicus Curiae observations by the International Center for Transitional Justice and the Uganda Victims Foundation, pursuant to article 75 of the Statute and Rule 103 of the Procedure and Evidence* [sic], [ICC-02/04-01/15-1974](#) ('Doc 1974'); *Public Order for Submission of Reparation* [sic], [ICC-02/04-01/15-1980](#) ('Doc 1980').

² Trial Chamber IX, *Victims' Preliminary Submissions on Reparations*, [ICC-02/04-01/15-1921](#) ('LRV Observations') and *Victim's Further Submissions on Reparations*, [ICC-02/04-01/15-1977](#), ('LRV Second Observations').

³ Trial Chamber IX, *Common Legal Representative of Victims' Submissions on Reparations*, [ICC-02/04-01/15-1923-Red](#) ('CLRV Observations').

⁴ Trial Chamber IX, *Prosecution's Observations on Reparations*, [ICC-02/04-01/15-1976](#) ('OTP Observations').

⁵ Trial Chamber IX, *The Government of the Republic of Uganda's Submissions on Reparations*, [ICC-02/04-01/15-1978](#) ('GoU Observations').

⁶ Trial Chamber IX, *Order for Submissions on Reparations*, [ICC-02/04-01/15-1820](#), para. 5(iii).

is no question that it will exceed the 20-page limit issued by the Chamber. Doc 1974 is 18 pages, and should the proper spacing be applied, it shall most likely violate the 20-page limit issued by the Chamber. Finally, Doc 1973 is 14 pages. If the proper spacing is applied, it will more likely fall within the 20-page limit issued by the Chamber, but the Defence cannot know for certain. Regardless, Doc 1973 violated Regulation 36(3) of the RoC.

6. As these *amici curiae* violated Regulation 36(3) of the RoC, the Defence respectfully requests the Chamber to disregard the submissions in Doc 1971, Doc 1973 and Doc 1974.

B. The Chamber should disregard Doc 1980

7. Doc 1980 was submitted by the Amuria District Development Agency ('ADDA'). In its submissions, it claimed that Sinia Brigade, under the command of Mr Ongwen, attacked and was responsible for the Lwala Girls Senior Secondary School attack.⁷ It further stated that Sinia Brigade, under the command of Mr Ongwen, was the most active brigade in the Teso sub-region from June 2003 to December 2004.⁸ The Chamber should disregard the *amicus curiae* submissions of the ADDA as it is beyond the scope of the charges and convictions as the people of Teso are from eastern Uganda.⁹
8. Mr Ongwen was not charged with or convicted for crimes allegedly committed in eastern Uganda in the Teso sub-region. The crimes for which Mr Ongwen was convicted happened in northern Uganda, not eastern Uganda.¹⁰ Furthermore, in relation to Counts 61-70, these counts are restricted to persons from northern Uganda.¹¹ Finally, during trial, there was "no [reliable] evidence attributing the abduction of the girls from Lwala Girls School to Dominic Ongwen."¹²
9. The Defence requests the Chamber to disregard the submission in Doc 1980 as being beyond the scope of reparations in this proceeding.

⁷ Doc 1980, section 4.2(a).

⁸ Doc 1980, section 4.2(a)(i).

⁹ Trial Chamber IX, *Joint Prosecution and Defence submission on agreed facts*, [ICC-02/04-01/15-487-AnxA-Red](#), section A.5 and *Decision on Joint Agreed Facts Submission*, [ICC-02/04-01/15-500](#), p. 3.

¹⁰ See Counts 1-49, taking place in Pajule, Odek, Lukodi and Abok. Counts 50-60 are individualized counts against specified persons.

¹¹ Pre-Trial Chamber II, *Decision on the confirmation of charges against Dominic Ongwen*, [ICC-02/04-01/15-422-Red](#), p. 99, paras 119-120 and p 102, paras 126-127.

¹² Trial Chamber IX, Trial Judgment, [ICC-02/04-01/15-1762-Red](#) ('Judgment'), para. 313.

C. The Chamber should disregard Doc 1973

10. The Chamber should disregard the observations in Doc 1973 [REDACTED].¹³
11. Article 12(1)(a) of the Code states, “Counsel shall not represent a client in a case: (a) [i]f the case is the same or substantially related to another case in which counsel or his or her associates represents or formerly represented another client and the interests of the client are incompatible with the interests of the former client, unless the client and the former client consent after consultation [...].”
12. Article 16(1) of the Code states, “Counsel shall exercise all care to ensure that no conflict of interest arises. Counsel shall put the client’s interests before counsel’s own interests or those of any other person, organization or State, having due regard to the provisions of the Statute, the Rules of Procedure and Evidence, and this Code.” By virtue of Article 7(4) of the Code, staff members of Counsel are bound to this code.¹⁴
13. Regulation 4 of The Advocates Act of Uganda states, “An advocate shall not accept instructions from any person in respect of a contentious or noncontentious matter if the matter involves a former client and the advocate as a result of acting for the former client is aware of any facts which may be prejudicial to the client in that matter.”¹⁵
14. [REDACTED].¹⁶ [REDACTED].¹⁷ [REDACTED].¹⁸ [REDACTED].
15. [REDACTED].¹⁹
16. [REDACTED].²⁰ [REDACTED].
17. [REDACTED].

¹³ See Article 16(1) of the Code, [ICC-ASP/4/Res.1](#).

¹⁴ See Article 7(4) of the Code, [ICC-ASP/4/Res.1](#).

¹⁵ See Regulation 4 of The Advocates Act, Statutory Instrument 267–2, The Advocates (Professional Conduct) Regulations., attached as Annex C.

¹⁶ See Confidential, *ex parte*, Annex B,

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ See [REDACTED].

D. Doc 1972 – Observations from the United Nations

i. Identification documents for children born in the LRA

18. The Defence disagree with the representations made in Doc 1972 about some of the hardships faced by children born in the LRA. While the Defence does not deny that some children face stigmas related to being born in the bush, and have problems related to family-land issues,²¹ access to identification cards is not one of them.²²
19. The Defence has dealt with this issue, and has been able to secure passports for children born in the bush.²³ There are normal bureaucratic and simple methods of getting a birth certificate for children born in the LRA, and then securing any further identification necessary for school-aged children. The problem does not arise from their birth in the bush, but from a government which does not process its paperwork expeditiously (or even at all). The problem, in this regard, relates to the Government of Uganda and not being born in the bush.

ii. The recruitment and use of child soldiers

20. The Defence notes the hardships listed in Doc 1972 about what child soldiers endure after being abducted²⁴ and the “long-term psychological impact, including depression, dissociation, suicidal or violent behaviour that tend to persist, potentially for the remainder of the individual’s life.”²⁵
21. The Defence disputes the assertions that persons aged 15-17 years should qualify for reparations.²⁶ The Rome Statute is clear, as is the Judgment, of the age in which someone qualifies as a child soldier. The authors of Doc 1972 fail to give a legal justification for departing from the standard created in the Rome Statute. While it is regrettable that the ICC Member States have not changed the age-limit of a child soldier from 15 to 18 years, the Chamber cannot provide assistance through reparations to these persons.

²¹ Doc 1972, paras 16-17.

²² Doc 1972, paras 18 and 40.

²³ The Defence was able to get passports for six (6) of Mr Ongwen’s children who were born in the bush (*noting* that two children of P-0214, one of D-0013, and three (3) of Ms Dilish Abang have all visited Mr Ongwen at the ICC-DC).

²⁴ Doc 1972, paras 19-21.

²⁵ Doc 1972, para. 20 (*citing* Trial Chamber VI, *Reparations Order*, [ICC-01/04-02/06-2659](#), para. 164).

²⁶ Doc 1972, para. 22.

iii. Access to land

22. Doc 1972 raises the issue of access to land in Uganda, specifically for women.²⁷ Doc 1972 states though that this issue is not limited to victims of SGBC, but is a general issue of gender-based discrimination in northern Uganda.²⁸ While troubling, the Defence asserts that the Chamber cannot resort to this type of reparations. This type of action is the sole dominion of the Government of Uganda, and to act upon it as the United Nations requests, would be *ultra vires* of the Chamber's power and authority.

E. Doc 1925 – Observations from ARLPI

23. The Defence takes this opportunity to discuss a few brief issues it takes with Doc 1925. Generally speaking though, the Defence feels that this *amicus curiae* offered the most insightful information from the *amici* about how to handle reparations.

i. Livestock Compensation

24. The Defence does not necessarily disagree with individual reparations for women who suffered SGBC as a direct result of the charges for which Mr Ongwen was convicted.²⁹ This would include counts 50-68, but not actions which happened in or around the attacks at IDP camps. The Defence also worries about a floodgate of applications from persons seeking individualised reparations, and tight controls may be applied when determining whether a person qualifies as a victim.

ii. Financial Compensation

25. The Defence disagrees with Doc 1925 as to the breadth of the inclusion for individualised cash reparations.³⁰ As discussed further in Section V(C), the Defence asserts that cash reparations should be limited to SGBC only.

iii. Reconciliation ceremonies (mato oput)

26. The Defence agrees with this part of the observations and welcomes ARLPI's assistance with these traditional ceremonies.³¹

²⁷ Doc 1972, paras 17 and 45.

²⁸ Doc 1972, para. 45.

²⁹ See Section IV(F)(ii) below for SGBC which the Defence argues should not be attributed to Mr Ongwen.

³⁰ Doc 1925, p. 8, subparagraph 2.

IV. SUBMISSIONS ON THE OBSERVATIONS FROM THE LRV

A. The Regulation 36(3) of the RoC violation should be corrected

27. The Defence notes that the LRV Second Observations submitted on 7 February 2022 do not comply with Regulation 36(3) of the RoC.³² The Defence requests an order from the Chamber to resubmitted this pleading with the correct spacing. The Defence makes this request, which is different from those above, as the LRV is a Party to the reparations proceedings and said resubmission would not run afoul of the 50-page limit set by the Chamber.

B. The right to the truth

28. The LRV submits that since Mr Ongwen chose not to testify in his defence, information regarding some of the victims who were allegedly abducted by the LRA as a political organisation with a military wing, and more specifically Mr Ongwen's Sinia Brigade, was concealed.³³ The Defence disagrees with this concept for being legally flawed because it is an outright affront to the legally enshrined right of the accused not to be forced to testify pursuant to Article 67(1)(g) of the Rome Statute. The Defence also reminds the Chamber that it denied the Defence's Rule 135 requests so Mr Ongwen could not make an informed choice as to whether or not to testify.³⁴ Furthermore, as acknowledged by the Chamber, Mr Ongwen was himself a victim. Most of the policies regarding a wide range of issues, including abductions, were established before his abduction. He cannot be held liable for the crimes committed by the entire LRA as an organization and neither can he be compelled to reveal information regarding abductions for which he had no control as this was a standing rule which emanated from Joseph Kony.³⁵
29. Finally, the Defence notes that this is an issue which the victims should have brought forward during the sentencing phase of the proceedings. It should have noted this principle and requested such measures as a potential mitigating circumstance related to the sentencing of

³¹ Doc 1925, p. 10, subparagraph 5.

³² See LRV Second Observations, paras 1-2 and 9-37 (*noting* these paragraphs do not have 1.5 spacing).

³³ LRV Observations, para. 29.

³⁴ See Trial Chamber IX, *Defence Request for a Stay of the Proceedings and Examinations Pursuant to Rule 135 of the Rules of Procedure and Evidence*, ICC-02/04-01/15-620-Conf; *Defence Request for a Stay of Proceedings and for Trial Chamber IX, pursuant to Rule 135 of the Rules of Procedure and Evidence, to Order a Medical Examination of Mr Ongwen*, ICC-02/04-01/15-1405-Conf-Exp; and *Defence Urgent Request to Order a Medical Examination of Mr. Ongwen*, ICC-02/04-01/15-1595-Conf.

³⁵ Judgment, paras 2228, 2281 and 2586.

Mr Ongwen. The LRV, by waiting until after the sentence was pronounced, has deprived Mr Ongwen of potential mitigating circumstances in his sentence.³⁶

C. Principle of confidentiality and access to information on reparations

30. The LRV posits that confidentiality at all stages of the reparation process is essential to encourage victims to come forward, to have faith and engagement in the process and to protect them from further harm.³⁷ First and foremost, the Defence maintains that it must be involved at all stages of the reparations process and that the process needs to be as transparent and public as possible in order to scrutinize those who are entitled to reparations and those who are not and consequently to weed out fake applicants.
31. The Defence notes that this case has been ongoing since 2015 and, during the entire proceedings, outreach programmes have been organised by the Court to inform the victims about the entire process of the proceedings. The Defence takes issue with the suggestion that there should be outreach meetings to inform the public in northern Uganda to come forward and claim for reparations³⁸ as this will cause a flood gate of the applications, all of which must be screened and verified for veracity and qualification as a victim.

D. Identification documents

32. It is the Defence's position that victims who have reached the age of 18 years old should only use official identification documents, as opposed to being allowed to use unofficial documents.³⁹ These unofficial documents will invite issues of impersonation for those otherwise ineligible.⁴⁰ As stated earlier, these proceedings have been ongoing since early 2015, and victim applications for participation were due by 7 October 2016.⁴¹ More than five (5) years have passed since the applications were due, and more than one (1) year since the Judgment. With respect, official identification documents should have been secured during the previous seven (7) years since Mr Ongwen surrendered himself to the ICC. The Chamber should depart from the *Ntaganda* position posited by the LRV as securing official identification is nowhere near as hard in Uganda as it is in the DRC.

³⁶ The Defence notes this without conceding any points it made for its appeal against the sentence. This is done in the abstract as Mr Ongwen was held captive in the LRA from the end of 1987 to 27 December 2014 and he may have come across information about persons after the temporal jurisdiction of the case.

³⁷ LRV Observations, para. 37.

³⁸ LRV Observations, para. 38.

³⁹ See LRV Observations, para. 45.

⁴⁰ For example see UGA-OTP-0258-0036 (noting that potential witnesses were masquerading as others).

⁴¹ See Trial Chamber IX, *Decision Setting the Commencement Date of the Trial*, [ICC-02/04-01/15-449](#), para. 10.

E. Children born out of rape

33. The LRV posits that children borne out of rape should be considered direct victims.⁴² The Defence disagrees with this position. The Defence submits that these persons are not victims of rape or sexual slavery. To be considered as a direct victim, a victim must demonstrate that they have suffered direct harm as a result of one of the crimes for which Mr Ongwen was convicted.
34. There must be a causal link, other than being born out of rape, to demonstrate that a child is a victim of the crimes for which Mr Ongwen was convicted. Being born is a precious gift. Regardless of how a child was conceived, parents should love and care for that child. Saying that a child is a victim without any other proof of victimisation needlessly stigmatises that child.

F. Presumptions

35. The Defence disagrees with the LRV on the issue of proof of harm.⁴³ This has to be proven rather than being a factual presumption. Furthermore, there must be some proof of SGBC other than being abducted by the LRA. The LRV states that files from GUSCO and other reception centres may not be available to the alleged victims, and that the files may have been misplaced or destroyed.⁴⁴ Much to the contrary, the Prosecution collected thousands upon thousands of records from GUSCO and other reception centres. The LRV is free to consult these records through eCourt and attempt to verify the stories of its clients, which is, by all reason, the job of the LRV.

i. Intergenerational harm

36. The Defence disagrees with the position that victims who were not yet born at the time of the attacks could be potential victims of intergenerational harm.⁴⁵ The alleged victim must be required to prove a demonstrable nexus between the harm suffered by the victim and the intergenerational harm.

⁴² LRV Observations, paras 42-43.

⁴³ LRV Observations, para. 47.

⁴⁴ See LRV Observations, para. 48.

⁴⁵ LRV Observations, para. 52.

37. The Defence refutes that because an IDP camp was attacked, the children born after the attack suffered intergenerational harm from Mr Ongwen. The LRV submits that damages caused as a result of displacement of persons to IDP camps should be attributed on Mr Ongwen.⁴⁶ As was discerned from the evidence during trial, this was a government policy and project for which Mr Ongwen cannot be held liable. This was something which, quite frankly, was a problem caused by the Government of Uganda and not caused by Mr Ongwen.⁴⁷ These policies existed before the attacks on the IDP camps, and even if one disagrees with the blame placed upon the Government of Uganda, using this as intergenerational harm would hold Mr Ongwen liable for the acts of the entire LRA.
38. The Defence asserts that the Chamber must narrowly define intergenerational harm to that which can be directly attributed to Mr Ongwen and not the LRA or Government of Uganda. With respect, using a broad definition as the LRV requests would demonstrate that Mr Ongwen was prosecuted for crimes committed by the entire LRA under Kony.

ii. Presumption of SGBV

39. The LRV requests the Chamber to presume that SGBV occurred after attacks (which are unrelated to SGBC convicted for in Counts 61-68).⁴⁸ The LRV, in its observations, fails to cite to any official documentation.⁴⁹ The Defence submits that this cannot be a presumption as the Chamber heard very little evidence about this type of action during the attacks on the camps and the early aftermath⁵⁰ and as this was not widespread nor condoned by the LRA. Should the Chamber accept such a presumption, which the Defence vehemently opposes, then the Chamber should require heightened levels of proof, such as contemporaneous medical reports or other medical documentation demonstrating said accusations.⁵¹

⁴⁶ LRV Observations, paras 55-58.

⁴⁷ See Expert Report of D-0139, UGA-D26-0015-1172.

⁴⁸ LRV Observations, para. 64(v).

⁴⁹ *Ibid.*

⁵⁰ Judgment, paras 1471-1472 and 1816-1817.

⁵¹ By other medical documentation, the Defence notes that a person may have spoken to a psychiatrist or psychologist about said problems. Again though, said documentation must be contemporaneous and not made after the charges against Mr Ongwen were levied by the Prosecution to ensure that said documents are not made for the purpose of collecting reparations.

iii. Loss of unborn children

40. The LRV contends that several women suffered miscarriages as a result of charged attacks.⁵² The LRV contends that there should be a presumption that there are several women who suffered miscarriages as a result of accidental falls in the course of running for safety.⁵³ The Defence notes that nowhere in the evidence was this proved, and that if presumed, will definitely create a floodgate of applications for reparations. In fact, the word “miscarriage” appears only once in the Judgment, and that was in relation to P-0214.⁵⁴ The word “unborn” does not appear at all in the Judgment. The Defence has serious concerns that any miscarriage around the time of an attack will be alleged to have been caused by the attack, even though the reasons for the miscarriage may have been caused by something else, or the miscarriage may have happened before or after an attack.
41. As argued in the section above, should victims allege that they suffered a miscarriage as a direct result of an attack, the Chamber must require contemporaneous medical records demonstrating with clear and convincing evidence that said person: 1) was pregnant around the time of the attack, 2) lived in one of the IDP camps on the day of the attack, and 3) suffered a miscarriage within 24 hours after the attack on the IDP in which they lived.

G. Estimated total number of direct and indirect victims from the LRV

42. The LRV submits that they have worked with their intermediaries in the communities in the three locations of Abok, Lukodi and Odek, together with the former IDP camp leaderships, to generate an estimate of the number of victims and that they will submit this information within a period of a month.⁵⁵ The Defence recalls its submissions in this regard that the total number of victims may not be ascertained. Furthermore, the Defence interprets the LRV’s position of submitting this information in a month’s time to circumvent this Chamber’s decision,⁵⁶ which gave a deadline. The LRV did not seek a formal extension of time, thus violating Mr Ongwen’s fair trial rights and causing him prejudice since he will not have a right of reply.

⁵² LRV Observations, para. 64(ix).

⁵³ *Ibid.*

⁵⁴ Judgment, fn. 5697.

⁵⁵ Trial Chamber IX, *Victim’s Further Submissions on Reparations*, [ICC-02/04-01/15-1977](#), paras 12-13 (‘LRV Second Observations’).

⁵⁶ Trial Chamber IX, *Decision on the Victims’ Request for an extension of the time limit to submit their observations on reparation proceedings*, [ICC-02/04-01/15-1910](#), paras 10-11.

H. Types and Modalities of Reparations

43. The LRV submits that victims suffered various harms and proposes various amounts for each harm suffered as form of individual compensation.⁵⁷ The Defence notes that this is problematic for the obvious reason that ascertaining the genuine beneficiaries will be an uphill and impossible task, not to mention that it would significantly delay the distribution of reparations. This is exacerbated by the fact that some of the atrocities carried out as a result of the attacks was as a result of the UPDF.⁵⁸ The Defence therefore reiterates the fact that the collective reparations should be considered by the Chamber.
44. The Defence disagrees with the LRV's suggestion of adopting an overly broad meaning of family to include extended family regarding indirect victims.⁵⁹ "Victim" also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation.⁶⁰ There is no need to extend the definition. Furthermore, those forced to witness acts cannot be considered victims as previously noted in the Defence submissions.
45. The Defence submits that "family members" can be qualified as indirect victims only if they are "close family members", such as spouses and children. This category should be limited to persons demonstrating a "close personal relationship" with the direct victim. The Defence accepts and acknowledges that the definition of "family member" must be culturally adapted to go beyond the western notion of a nuclear family. Nevertheless, the "extended" or "remote" family must be defined for the purpose of this case, and not encompass an unlimited number of individuals based on a broad definition.
46. 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:

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,

⁵⁷ LRV Second Observations, section VI.

⁵⁸ See Defence explanations of Prosecution and Defence witnesses on this issue at Trial Chamber IX, 'Corrected Version of "Defence Closing Brief", filed on 24 February 2020', [ICC-02/04-01/15-1722-Conf-Corr](#), paras 425-429.

⁵⁹ LRV Observations, para. 44.

⁶⁰ UNGA, *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, 16 December 2005, UN Doc. [A/RES/60/147](#), para. 8.

*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.*⁶¹

47. 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 that they have personally suffered the harm and that he or she had “a close personal relationship with the direct victim.”⁶²

V. SUBMISSIONS ON THE OBSERVATIONS FROM THE CLRV

48. The CLRV states that they have so far identified 1,351 potential additional beneficiaries.⁶³ The Defence once again recalls the principle that the reparations process must not “prejudice or be inconsistent with the rights of the convicted person to a fair and impartial trial”.⁶⁴ In order to ensure fairness to the convicted person and ensure that reparations awarded are proportional to the harm suffered by victims for which the convicted person is accountable, it is essential for the Defence to be provided with a genuine opportunity to challenge all applications submitted by participating victims and new potential beneficiaries alike.
49. The Defence therefore maintains that in order to respect the rights of the convicted person and allow Mr Ongwen 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.
50. In support of this submission, the Defence respectfully refers to the Separate Opinion of Judge Ibáñez Carranza in the *Lubanga* case, which clarified the extent of the right of the convicted person in the context of the reparations proceedings:

⁶¹ ECCC, Trial Chamber, *Judgement*, Case No. 001/18-07-2007/ECCC/TC, 26 July 2010, para. 643.

⁶² Trial Chamber II, *Order for Reparations pursuant to Article 75 of the Statute*, [ICC-01/04-01/07-3728-tENG](#) (‘Katanga Reparations Order’), para.113.

⁶³ CLRV Observations, para. 24.

⁶⁴ Appeals Chamber, *Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2*, [ICC-01/04-01/06-3129-AnxA](#) (‘Lubanga Reparations Order’), para. 49. See also [ICC-01/04-01/06-3129](#), para. 107 (citing Regulation 50 of the [Regulations of the Trust Fund for Victims](#)).

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.⁶⁵

51. For purposes of confirmation, unless Mr Ongwen is granted access to the potential beneficiaries' application forms, it is impossible for him to challenge the victims' claims and/or play a meaningful role in the reparations process. Without granting access to the Defence to these applications/forms, the Chamber would be denying Mr Ongwen's right to challenge evidence brought against him, thus violating his right pursuant to Article 67(1)(e) of the Rome Statute.
52. The Defence disagrees and takes issue with the CLRV suggestion that "victims already authorized to participate in the proceedings are eligible for reparations without being required to complete a new application form since they fall within the scope of the Judgment."⁶⁶ The Defence recalls the principle that "[r]eparations are entirely voluntary and the informed consent of the recipient is necessary prior to any award of reparations, including participation in any reparations programme."⁶⁷ The corollary to this principle militates in favour of a form-based approach, which requires every participating victim and new victim to submit an application for reparations, expressing clearly their will to benefit from reparations awarded.

A. Scope of liability and degree of participation of Mr Ongwen

53. The Appeals Chamber in the *Lubanga* case already stated that the scope of liability of a convicted person must take into consideration the mode of responsibility held against a convicted person.⁶⁸ This factor should therefore be reflected in the scope of liability of Mr Ongwen with regards to applications in relation to crimes committed during the various attacks for which he was convicted.
54. The Defence takes issue with the fact that reparations should be granted for the entire northern and some parts of eastern Uganda for all the crimes committed by the LRA.⁶⁹

⁶⁵ Appeals Chamber, *Separate Opinion of Judge Luz del Carmen Ibáñez Carranza*, [ICC-01/04-01/06-3466-AnxII](#), para.37 ("Judge Ibáñez Carranza Separate Opinion")

⁶⁶ CLRV Observations, para. 30.

⁶⁷ Lubanga Reparations Order, para. 30 (citing [The Paris Principles – Principles and Guidelines on Children Associated with Armed Forces or Armed Groups](#), section 3.8).

⁶⁸ Lubanga Reparations Order, para. 118 and Katanga Reparations Order, para. 264.

⁶⁹ CLRV Observations, para. 23.

55. The Defence submits that the reparations proceedings should be narrowly oriented towards the goal of repairing victims that have suffered as a result of the crimes for which Mr Ongwen was convicted. This should be based on harm established on a balance of probability that meets the strict criteria to establish the required causal link.⁷⁰ This, of course, is without prejudice for the Government of the Uganda's responsibility to protect and repair its nationals for crimes committed by the LRA as an organisation.
56. The nature of the reparations proceedings before the ICC should not be construed as a process to rehabilitate an entire region affected by armed conflict. This would be the object of a national reparations programme or could be the result of a truth commission and/or related transitional mechanisms.
57. The Defence emphasises that the fact that victims may receive some benefits arising from the Court proceedings does not exonerate the Government of Uganda 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.

B. Transgenerational harm

58. Although the Chamber in the *Katanga* case did recognise the existence of the phenomena called transgenerational harm,⁷¹ the Chamber noted that there is no absolute scientific certainty regarding this concept,⁷² with regard to the epigenetic change theory.⁷³
59. 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.⁷⁴

⁷⁰ But, *see above* where the Defence argues that specific victims should be required to meet a more stringent test.

⁷¹ Trial Chamber II, *Public Redacted Version of 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*, [ICC-01/04-01/07-3804-Red-tENG](#), para. 10.

⁷² *Ibid*, paras 12-14.

⁷³ Katanga Appeals Judgment, para.260.

⁷⁴ Trial Chamber III, [ICC-01/05-01/08-T-369-Red](#), p. 6, lns 10-13.

60. 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 and that would have been transmitted to his/her offspring.
61. The phenomena of transgenerational harm – more particularly the harm suffered by children born out of rape – must therefore 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.
62. With regard to 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. The Defence has discussed this above in Section IV(E), and refers the Chamber to those arguments.

C. Manner of reparations

63. The CLRVs states that the victims of attacks expressed a preference to be given cash money individually.⁷⁵ While the Defence notes the concerns of the CLRV's clients, it also notes the multitude of problems which would be caused by attempting to monetize the individual harms to individual persons. The Defence foresees arguments arising between brothers, neighbours and clans as to why some persons received different monetary funds than others. It would require countless hours to determine the exact amounts, including interviews and verifications of story. With respect, individual cash reparations, for almost all of the victims, are not feasible.
64. The Defence agrees though with the CLRVs that collective reparations would not be appropriate for the five (5) former wives of Mr Ongwen and their children.⁷⁶ The Defence endorses that individual reparations are appropriate for these and other identifiable victims of sexual and gender based crimes.

⁷⁵ CLRV Observations, para. 74.

⁷⁶ CLRV Observations, para. 78.

VI. RESPONSE TO THE OBSERVATIONS FROM THE PROSECUTION

65. The Prosecution opposes the Defence request for a stay of proceedings pending the determination of Mr Ongwen's appeal against conviction and sentence. However, it acknowledges the Defence's position that the expectations of the victims should not be unnecessarily raised which in essence is a tacit admission that reparation proceedings should only proceed after Mr Ongwen's conviction and sentence have been upheld.
66. The Prosecution submits that the Chamber adopt a specific principle recognising the unique and vulnerable position of all child victims in this case.⁷⁷ Alongside this, the Defence further reiterates its position that Mr Ongwen's victimhood should be considered and adopted as one of the principles. Furthermore, the Defence should be involved at all stage of the reparations proceedings.
67. The Defence maintains that children born out of rape and sexual slavery should not qualify as *direct* victims. The Defence has outlined its position above at Section IV(E) and refers to those comments.

A. Mr Ongwen's liability

68. Regarding Mr Ongwen's liability, the Prosecution opines Mr Ongwen's liability for reparations will be substantial and higher than Ntaganda's liability of \$30 million USD, even if limited to his participation in the crimes.⁷⁸
69. The Defence highlights that the Prosecution's estimate of a substantially higher liability than Mr Ntaganda is based solely on speculation. The Prosecution proposes no budget, no financial estimates, and fails to mention external factors that are relevant to determine Mr Ongwen's actual liability. The Defence requests the Chamber to disregard this estimate for its lack of foundation.

VII. RESPONSE TO THE OBSERVATIONS FROM THE GOVERNMENT OF THE REPUBLIC OF UGANDA

70. As a preliminary matter, the Government of Uganda demands that the Chamber corrects the record in as far as the Chamber's finding to the effect that the war in the north had certain

⁷⁷ OTP Observations, paras 14-15.

⁷⁸ OTP Observations, para. 39.

political advantages for the Ugandan Government.⁷⁹ The Defence submits that this request, besides being wholly inappropriate at this time, has no place in reparations. Furthermore, this aspect and other aspects regarding the omissions and commissions of alleged offences committed by the Government of Uganda, which prolonged the war, must be considered during these reparation proceedings.

A. Response to the proposed principles

71. Concerning the definition of a victim, as the current jurisprudence of the Court stands, the Government of Uganda is of the view that the Chamber should depart from the requirement of the harm being “tied” to a conviction as it considers this requirement to be inconsistent with the definition of the word victim in Rule 85 of the Rules of Procedure and Evidence (‘Rules’).⁸⁰ This argument, together with the others of modifying the notion of harm, causal link and liability are untenable and we ask the Chamber to disregard them in their entirety.
72. Pursuant to Rule 85 of the Rules, both natural and legal persons may qualify as victims. To be eligible for reparations, victims need to meet the following criteria:
 - a. their identity as a natural person, or its creation or registration as a legal entity, must be established;
 - b. they must have suffered or sustained harm;
 - c. the crime from which the harm arises must be one for which the defendant was convicted; and
 - d. there must be a direct causal nexus between the crime and the harm.⁸¹
73. The Defence therefore asserts that only victims who fulfil the criteria stated in the immediate forgoing paragraph should qualify for reparations and **not** the untenable formulation proposed by the Government of Uganda.⁸²

⁷⁹ GoU Observations, para. 3.

⁸⁰ GoU Observations, para. 7.

⁸¹ See, *inter alia*, Katanga Reparations Order, paras 36-37; Trial Chamber VI, *Decision on issues raised in the Registry’s First Report on Reparations*, [ICC-02/04-02/06-2630](#), para. 11; and Pre-Trial Chamber I, *Corrigendum to the “Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of the Congo by a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 to a/0110/06, a/0188/06, a/0128/06 to a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06, a/0227/06 to a/0230/06, a/0234/06 to a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06 and a/0241/06 to a/0250/06”*, [ICC-01/04-423-Corr-tENG](#), para. 140.

⁸² GoU Observations, paras 9-11 and 13.

74. Regarding the definition of indirect victims, the Government of Uganda suggests that the Chamber should include it (the Government of Uganda), as well and many other Ugandans who suffered “harm in intervening to assist victims in distress or to prevent victimization.”⁸³
75. Indirect victims are those who suffer harm as a result of the harm suffered by the direct victims.⁸⁴ Accordingly, they must establish that, “as a result of their relationship with the direct victim, the loss, injury, or damage suffered by the latter gives rise to harm to them.”⁸⁵ It follows that the harm suffered by indirect victims must arise out of the harm suffered by direct victims, brought about by the commission of the crimes for which the defendant was convicted.⁸⁶ The Government of Uganda is not a victim in this case. On the contrary, it is a protagonist in the war, responsible for many of the harms suffered by victims, especially in the IDP camps. Its armed forces have been implicated in committing some of the atrocities for which Mr Ongwen was convicted.⁸⁷
76. The Defence respectfully requests the Chamber to disregard all observations from the Government of Uganda related to direct and indirect victims as baseless and – to some extent – self-serving.

B. Liability

77. The Defence vehemently opposes the Government of Uganda’s premise that Mr Ongwen should be blamed and forced to pay for all the crimes committed by the LRA.
78. In its observations, the Government of Uganda notes that since not all LRA commanders have been apprehended and charged, the Chamber should consider the total harm for which the LRA is culpable and award reparations on this alleged culpability and not specifically for the crimes which Mr Ongwen was convicted.⁸⁸ Essentially, the Government of Uganda is seeking a “blank cheque” from the Chamber, attempting to get the international community to pay further for its own actions and those actions allegedly committed by the LRA.
79. The Defence submits that the Chamber should not depart from the well-established jurisprudence of the Court regarding this matter. The Government of Uganda failed to give

⁸³ GoU Observations, para. 14.

⁸⁴ Lubanga Decision on Indirect Victims, ICC-01/04-01/06-1813, para. 44.

⁸⁵ Lubanga Decision on Indirect Victims, ICC-01/04-01/06-1813, para. 49.

⁸⁶ Decision on the First Report, ICC-01/04-02/06-2630, para. 56.

⁸⁷ *For example see* ICC-02/04-01/15-T-125-CONF-ENG, pp 49-50.

⁸⁸ GoU Observations, paras 17-21.

one logical reason why the Chamber should depart from well-established jurisprudence. The Chamber, the ICC and the international community cannot be made to pay for the entirety of the war in Uganda, which is what the Government of Uganda appears to request.

80. Finally, to follow the Government of Uganda's recommendation on the breadth of liability would be tantamount to convicting Mr Ongwen for the crimes committed by all parties to the conflict from 1 July 2002 to 31 December 2005. Mr Ongwen was not found culpable for every alleged crime during this period, and limits have been set by Pre-Trial Chamber II. He can only be required to pay for those which he was convicted. With the utmost respect to the Chamber, following the Government of Uganda's recommendation would tell the international community that the case against Mr Ongwen was not against him, but against the entire LRA.⁸⁹
81. The Defence requests the Chamber to dismiss the vexatious arguments of the Government of Uganda on liability and to apply the standard already argued by the Defence.

C. Estimated number of direct and indirect victims of the crimes for which Mr Ongwen was convicted who may be potentially eligible for reparations

82. The Government of Uganda suggests that since the LRA permeated the entire northern and part of eastern Uganda, then the entire population of those regions should be eligible for reparations.⁹⁰ This submission is at variance with the cardinal principle that reparations are awarded to victims of crimes for which the accused has been convicted.
83. Pre-Trial Chamber II limited the geographical scope of the case against Mr Ongwen to northern Uganda.⁹¹ Regardless of the intentions or desires of the Government of Uganda, the Chamber is bound by the counts for which Mr Ongwen was convicted, and eastern Uganda is excluded from those boundaries.

VIII. CONCLUSION

84. The Defence respectfully submits this response for Trial Chamber IX's consideration for the reparations proceedings.

⁸⁹ ICC-02/04-01/15-T-26, p. 17, lns 4-6.

⁹⁰ GoU Observations, para. 30.

⁹¹ Pre-Trial Chamber II, *Decision on the confirmation of charges against Dominic Ongwen*, [ICC-02/04-01/15-422-Red](#), p. 71-104.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 7th day of March, 2022
At Kampala, Uganda