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TRIAL CHAMBER II

Before:

**Judge Chang-ho Chung, Presiding Judge
Judge Péter Kovacs
Judge Maria del Socorro Flores Liera**

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public

Public Redacted Version of “Defence further submissions on transgenerational harm and the estimated total number of potential beneficiaries”, dated 30 January 2023, ICC-01/04-02/06-2823-Conf

Source: Defence Team of Mr Bosco Ntaganda

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Further to the Appeals Chamber’s “Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled “Reparations Order””, dated 12 September 2022 (“Appeal Judgment”),¹ the “Order for the implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled “Reparations Order”” issued by Trial Chamber II (“Trial Chamber”) on 25 October 2022 (“Implementation Order”)² and the Trial Chamber’s “Decision on the Registry submission in compliance with the “Order for the implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled ‘Reparations Order’”³ dated 25 November 2022 (“25 November Decision”), Counsel for the Convicted Person (“Defence”) hereby submits this:

**Defence further submissions on transgenerational harm
and the estimated total number of potential beneficiaries**

“Defence Submissions”

INTRODUCTION

1. The original Reparations Order in the present case, was overturned in significant part on appeal in September 2022, in the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled ‘Reparations Order’ (“Appeal Judgment”).⁴ In particular, the Trial Chamber VI was found to have erred in its approach to the assessment of transgenerational harm, and on the estimated total number of potential beneficiaries of reparations.

2. In seeking to address the errors identified on appeal, the current Trial Chamber issued its Implementation Order on 25 October 2022, instructing the parties, participants and if available, the Appointed Experts, to provide further submissions and information on issues related to transgenerational harm.⁵ In addition, the Chamber instructed the parties in its 25 November Decision to provide additional information regarding the estimated total number of

¹ Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled “Reparations Order”, 12 September 2022, ICC-01/04-02/06-2782 (“Appeal Judgment”).

² Order for the implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled “Reparations Order”, 25 October 2022, ICC-01/04-02/06-2786 (“Implementation Order”).

³ Decision on the Registry submission in compliance with the “Order for the implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled ‘Reparations Order’”, 25 November 2022, ICC-01/04-02/06-2794 (“25 November Decision”).

⁴ Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled “Reparations Order”, 12 September 2022, ICC-01/04-02/06-2782 (“Appeal Judgment”).

⁵ Implementation Order, disposition.

potential beneficiaries of reparations in the present case. Pursuant to that instruction, the Defence files the submissions below.

3. Although the Implementation Order also initially instructed the parties, participants and if available, the Appointed Experts, to provide further submissions and possible evidence, on the issues relevant to the assessment of “[...] the actual damage and harm caused to the health centre in Sayo, the individual victims, and the community as a whole for loss of adequate healthcare provision [...]”,⁶ the filing date for these submissions was postponed following the Defence request for disclosure submitted on 16 January 2023.⁷

CONFIDENTIALITY

4. These Defence Submissions are classified confidential pursuant to Regulation 23*bis* RoC, given that they refer to confidential filings. A public redacted version will be prepared and filed at the earliest opportunity.

SUBMISSIONS

I. Transgenerational Harm

5. In the Implementation Order, the Trial Chamber asks the following questions:⁸

- i. The scientific basis for the concept of transgenerational harm;
- ii. The evidence needed to establish it;
- iii. What the evidentiary requirements are for an applicant to prove this type of harm;
- iv. The need, if any, for a psychological examination of applicants and parents;
- v. The need, if any, to exercise caution in assessing applications based on transgenerational harm; and
- vi. Whether Mr Ntaganda is liable to repair such harm in the specific context of the crimes for which he has been convicted, taking into consideration the impact, if any, that the protracted armed conflict in the DRC may have had on the assessment as whether the trauma associated with TGH was caused by Mr Ntaganda.

⁶ Implementation Order, para.42.

⁷ Request on behalf of Mr Ntaganda for disclosure of material relied upon in the Gilmore Expert Report, 16 January 2023, ICC-01/04-02/06-2812-Conf; Email sent by Trial Chamber II on 17 January 2023 temporarily postponing submissions on the Sayo Health Centre.

⁸ Implementation Order, para.40.

6. The Trial Chamber directed these questions to “the parties and participants, including the VPRS, the TFV and, **if available**, the Appointed Experts”.⁹

7. The Appeals Chamber recognised in September 2022 that “the concept of transgenerational harm is indeed novel and evolving”.¹⁰ There is no doubt that the concept is unsettled from a scientific and medical perspective. Even a peripheral review of recent medical and psychological literature reveals the nascent state of understanding and research on transgenerational and intergenerational harm and trauma, and the scepticism and uncertainty about its scope, existence, and transmission, even among experts in the field.¹¹ Importantly, there is no prior practice of reliance on transgenerational harm as a basis for reparations at the International Criminal Court.¹² It is also noteworthy that reparations for transgenerational harm were not ordered either by the trial chamber or the Appeals Chamber in the Lubanga reparation orders, directly associated with the present case.¹³ Presumably for this reason, the Appeals Chamber considered it appropriate for the Trial Chamber “to request submissions from the parties **and, e.g. experts**”.¹⁴ Given the number of outstanding questions that remain, and having reviewed the material available in the case record, and the parties’ submissions thereon, the Appeals Chamber considered it necessary for the Trial Chamber to solicit and consider additional expert submissions. This conclusion was informed by its earlier finding that it would have expected Trial Chamber VI to have fully considered the issue of transgenerational harm at the reparations stage on the basis of, *inter alia*, “**expert evidence**”.¹⁵

⁹ Implementation Order, disposition (emphasis added).

¹⁰ Appeal Judgment, para.490.

¹¹ See, e.g., S. G. Matthews, D. I. W. Phillips, Minireview: Transgenerational Inheritance of the Stress Response: A New Frontier in Stress Research, *Endocrinology*, January 2010, 151(1); C.S.M. Cowan, B.L. Callaghan, J.M. Kan, R. Richardson, The lasting impact of early-life adversity on individuals and their descendants: potential mechanisms and hope for intervention, *Genes, Brain and Behaviour*, January 2016, 15(1); S. Alhassen et al., Intergenerational trauma transmission is associated with brain metabotranscriptome remodeling and mitochondrial dysfunction, *Communications Biology*, 2021, 4; J. Svorcova, Transgenerational Epigenetic Inheritance of Traumatic Experience in Mammals, *Genes*, 2023, 14(1); B. Horsthemke, A critical view on transgenerational epigenetic inheritance in humans, *Nature Communications*, 30 July 2018, 9; M. Fargas-Malet, K. Dillenburger, Intergenerational Transmission of Conflict-Related Trauma in Northern Ireland: A Behavior Analytic Approach, *Journal of Aggression, Maltreatment & Trauma*, 20 March 2016, 25(4); U. Iyengar et al., Unresolved trauma in mothers: intergenerational effects and the role of reorganization, *Frontiers in Psychology*, September 2014, 5(966); P. Fossion et al., Transgenerational transmission of trauma in families of Holocaust survivors: The consequences of extreme family functioning on resilience, Sense of Coherence, anxiety and depression, *Journal of Affective Disorders*, January 2015, 171; S. Ridhuan et al., Advocating for a Collaborative Research Approach on Transgenerational Transmission of Trauma, *Journal of Child and Adolescent Trauma*, 3 June 2021, 14.

¹² Appeal Judgment, para.478.

¹³ *Prosecutor v. Thomas Lubanga*, Decision establishing the principles and procedures to be applied to reparations, 7 august 2012, ICC-01/04-01/06-2904; *Prosecutor v. Thomas Lubanga*, Order for Reparations (amended), 3 March 2015, ICC-01/04-01/06-3129-AnxA.

¹⁴ Appeal Judgment, para.497.

¹⁵ Appeal Judgment, para.484.

8. The Trial Chamber's consideration of expert submissions on transgenerational harm was not optional. Other conclusions from the Appeals Chamber are framed as *suggestions* to the Trial Chamber. For example, "the Appeals Chamber considers it appropriate for the Trial Chamber to **consider whether it needs to** address such issues as [...]"¹⁶ In the case of submissions from experts on transgenerational harm, the Appeals Chamber's direction is mandatory; expert submissions should be sought.

9. None of the Appointed Experts have held themselves out as having expertise in the area of transgenerational harm or trauma.¹⁷ Nor were they recognised by the Trial Chamber as having this expertise when appointed.¹⁸ The Defence has previously noted that the Joint Experts are not medical experts and that their opinion regarding the transmission of harm is based on academic literature rather than personal knowledge or expertise.¹⁹ As such, the Appeals Chamber's direction that the Trial Chamber seek expert submissions on the concept of transgenerational harm, necessarily meant submissions from **additional** experts. This conclusion is reinforced by the Appeals Chamber's own differentiation between the "appointed experts"²⁰ in the case, and "experts" on transgenerational harm.²¹

10. The Trial Chamber has not sought any additional expert evidence. This failure risks undermining any subsequent reparations award in the *Ntaganda* case to the extent that it seeks to address alleged transgenerational harm.

11. With no expert evidence, and no new material in the record of the case, the parties and participants' submissions will necessarily be limited to a reiteration or reframing of their prior filings, in an attempt to provide answers to the questions raised by the Appeals Chamber.²² The problem in relying on non-expert opinions, however, is demonstrated by the case record itself. The submissions and findings on transgenerational harm are comprised of a wealth of conflicting and inconsistent information and opinions. For example, the parties, participants,

¹⁶ Appeal Judgment, para.495.

¹⁷Annex 4 to Registry List of Proposed Experts on Reparations Pursuant to Trial Chamber VI's Order of 5 December 2019, 19 February 2020, ICC-01/04-02/06-2472-Conf-Anx34; Annex 14 to Registry List of Proposed Experts on Reparations Pursuant to Trial Chamber VI's Order of 5 December 2019, 19 February 2020, ICC-01/04-02/06-2472-Conf-Anx34; Annex 27 to Registry List of Proposed Experts on Reparations Pursuant to Trial Chamber VI's Order of 5 December 2019, 19 February 2020, ICC-01/04-02/06-2472-Conf-Anx34; Annex 34 to Registry List of Proposed Experts on Reparations Pursuant to Trial Chamber VI's Order of 5 December 2019, 19 February 2020, ICC-01/04-02/06-2472-Conf-Anx34; Experts Report on Reparations, 2 November 2020, ICC-01/04-02/06-2623-Conf-Anx1-Red ("Joint Experts Report"), paras 6-8.

¹⁸ Decision appointing experts on reparations, 14 May 2020, ICC-01/04-02/06-2528-Conf.

¹⁹ Appeal Judgment, para.475 citing Defence Submissions on Reparations, 18 December 2020, ICC-01/04-02/06-2634-Conf, paras.97-98 ("Defence Final Submissions").

²⁰ Appeal Judgment, paras.61,86,103,112,121,160-161,168,192-193,197,212,249,300,307.

²¹ Appeal Judgment, para.497.

²² Appeal Judgment, para.495.

Appointed Experts and Trial Chamber VI refer interchangeably to “transgenerational harm”, “transgenerational trauma”,²³ “intergenerational harm”²⁴ and “intergenerational trauma”.²⁵ This is not a mere labelling issue, with “trauma” being a term of art, which itself falls into the much broader category of “harm”.

12. Beyond mere nomenclature, as described further below, the parties, experts and former trial chamber(s) have very different and often conflicting understandings of what is meant by transgenerational harm, its scientific basis, and how it can be demonstrated. The Defence has previously noted its regret as to the Trust Fund for Victims (“TFV”)’s unwillingness to even put forward its understanding of the eligibility criteria for transgenerational harm applications,²⁶ although its caution in doing so is entirely understandable; all parties and participants are working in the dark.²⁷ This is highly significant considering that the TFV has previously submitted, albeit in a filing that is now moot, that the number of transgenerational harm victims could be as high as 14,000.²⁸ As such, without any new information, the Trial Chamber remains without a sufficiently reliable basis to make findings on questions that the Appeals Chamber held needed to be addressed.

13. In addition, should the new *Ntaganda* reparations order include an award on the basis of transgenerational harm, it will be the first at the Court to do so. However, if the Trial Chamber is relying on the submissions from non-experts on this complicated and uncertain scientific concept, it risks making this award in a manner inconsistent with the current (or emerging) scientific thinking and literature. Despite the best efforts of the Trial Chamber, the parties and participants to educate themselves, without the necessary expertise, the *Ntaganda* reparations order will again be exposed to criticism - and potential revision - on the basis that it was made in a manner inconsistent with the emerging science.

14. With these concerns as its starting point, the Defence makes the following additional submissions on the Trial Chamber’s questions below.

(i) The scientific basis for the concept of transgenerational harm

²³ Reparations Order, 8 March 2021, ICC-01/04-02/06-2659 (“Reparations Order”), paras.75,182.

²⁴ See, e.g., Observations on the Appointed Experts’ Reports and further submissions on reparations on behalf of the Former Child Soldiers, 18 December 2020, ICC-01/04-02/06-2632, para.53.

²⁵ See, e.g., Gilmore Expert Report, paras.53-57.

²⁶ Defence observations on the Trust Fund for Victims’ Fourth Update Report on the Implementation of the Initial Draft Implementation Plan, 7 April 2022, ICC-01/04-02/06-2755, para.42.

²⁷ Annex 1 to Trust Fund for Victims’ Fourth Update Report on the Implementation of the Initial Draft Implementation Plan, 25 March 2022, ICC-01/04-02/06-2751-Conf-Anx1, para.33.

²⁸ Annex 1 to Trust Fund for Victims’ second submission of Draft Implementation Plan, 24 March 2022, ICC-01/04-02/06-2750-Conf-Anx1 (“updated Draft Implementation Plan”), paras.94.

15. The *Katanga* Trial Chamber defined transgenerational harm as “a phenomenon, whereby social violence is passed on from ascendants to descendants with traumatic consequences for the latter”.²⁹ The Trial Chamber noted, however, that uncertainty remained as to how harm is transmitted between generations, with two emerging schools of scientific thought, which each advance a different explanation for the transgenerational transmission of trauma.

16. On one hand, some experts subscribe to the “epigenetic transmission theory in neuropsychiatry [which] is based on the study of parent-to-child transmission of epigenetic marks that retain a memory of traumatic events experienced by the parents”.³⁰ Leading researchers into epigenetic transmission have noted, however, that “[d]espite more than 500 studies published, however we are still unable to sufficiently explain exactly how the unconscious trauma of a PTSD parent can be genetically transmitted to a child and to verify this idea with sufficient empirical evidence”.³¹ Dr Gilmore spoke of this “increasing psychological research” in equivocal terms, noting that “[r]easearch suggests that the noxious effects of trauma may be psychologically transmitted from one generation to the next, as evidence for example by the increase in depressive and anxiety disorders found among survivors of the Holocaust.”³²

17. Other researchers have developed a “social transmission theory” that focuses instead on the impact of upbringing and emotional learning on a child’s emotional development.³³ According to this theory, a parent exposed to trauma or suffering from psychopathology would considerably increase the likelihood that the child would have “disorganized attachment” and exhibit the same symptoms of trauma as the parent.³⁴

18. Both theories are a matter of “scientific debate”.³⁵

19. None of the parties or participants to these proceedings or the Appointed Experts have explicitly indicated, which of these two competing theories should be adopted, nor do they have the expertise to do so. The Defence has no information or expertise to offer in this regard.

²⁹*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, 19 July 2018, ICC-01/04-01/07-3804-Red-tENG (“*Katanga* Transgenerational Harm Decision”) para.10.

³⁰ *Katanga* Transgenerational Harm Decision, para.11.

³¹ *Katanga* Transgenerational Harm Decision, para.12.

³² Gilmore Expert Report, para.53 (emphasis added).

³³ *Katanga* Transgenerational Harm Decision, para.11.

³⁴ *Katanga* Transgenerational Harm Decision, para.13.

³⁵ *Katanga* Transgenerational Harm Decision, para.14.

20. Importantly, the Appeals Chamber directed the Trial Chamber to “consider the issue of **scientific certainty** as to the concept of transgenerational harm and whether it is appropriate to award reparations therefor at this Court”.³⁶ There is no scientific certainty as to how and why transgenerational harm manifests. The fact that it was defined by the *Katanga* Trial Chamber as “a phenomenon”, and its general features described, does not give rise to the “scientific certainty” required by the Appeals Chamber.

21. The LRV1 has previously submitted that the existing theories does not make the concept uncertain, but rather “reinforces its very existence and provides explanations for two distinct ways traumas are transmitted from one generation to another, both of which exist in parallel and therefore complement each other, therefore rendering the generational transmission more likely to happen – and not the contrary”.³⁷ The Appeals Chamber’s question is not directed to the likelihood or otherwise of generational transmission, rather it is asking about “scientific certainty” about how trauma is allegedly transmitted. The current status of the literature and knowledge, which is developing around two opposing theories, precludes any such certainty. Without further expert submissions and a far greater understanding of this phenomenon, transgenerational harm is not an appropriate basis for an award of reparations in this case.

(ii) The evidence needed to establish it; what the evidentiary requirements are for an applicant to prove this type of harm

22. The lack of a certain scientific basis for transgenerational harm gives rise to further problems in its application as a basis for reparations.

23. Making submissions on the evidentiary criteria for establishing transgenerational harm requires a clear understanding of what “transgenerational harm” means. The understanding exhibited by the parties and participants in the record of the case differs significantly. It varies from physical parent-to-child transmission of epigenetic marks that retain a memory of traumatic events experienced by the parents,³⁸ through to the lower social status experienced by former child soldiers, which then leads to traumatic consequences for their own children.³⁹ In the LRV2’s more recent submissions on the Updated Draft Implementation Plan (“DIP”), after noting that the TFV’s proposals regarding transgenerational harm continue to lack clarity

³⁶ Appeal Judgment, para.494.

³⁷Response of the Common Legal Representative of the Former Child Soldiers on Mr Ntaganda and the Victims of the Attacks’ Appeals against the Reparations Order (ICC-01/04-02/06-2659), 9 August 2021, ICC-01/04-02/06-2700, para.67.

³⁸ Reparations Order, para.73; Gilmore Expert Report, para.53; Katanga Transgenerational Harm Decision, para.11.

³⁹ Joint Experts Report, paras.111-113.

and specificity in the updated DIP, the LRV2 submitted that transgenerational harm is not limited to psychological trauma, but encompasses other losses of behavioural skills and capacities that can lead to the loss of socio-economic opportunities.⁴⁰ This type of harm will have very different evidentiary criteria from those needed to establish the physical transmission of PTSD stemming from epigenetic modifications, discussed in *Katanga*.⁴¹

24. What is clear, however, is that Trial Chamber VI's approach was flawed. The Trial Chamber found that "children of the direct victims may have suffered transgenerational trauma regardless of the date that they were born, if they can show that their harm is a result of the crimes for which Mr Ntaganda was found guilty" and that children born out of rape "may also have suffered transgenerational harm as indirect victims".⁴² Essentially, therefore, the Trial Chamber found an entitlement to reparations for transgenerational harm if the victim could show (i) he or she is a child of a direct victim; and (ii) the harm suffered by the direct victim resulted from crimes for which Mr Ntaganda has been found guilty.

25. The Appeals Chamber's criticism of the Trial Chamber's approach centred on the lack of reasoning, and in particular Trial Chamber's failure to specify the type of evidence that must be submitted or elaborate on how the harm must be proven.⁴³ These errors cannot be circumvented by the kinds of arguments submitted by the LRVs on appeal, namely that because the reparations are **collective**, the Trial Chamber was not required to adopt any specific criteria for evidentiary purposes.⁴⁴ The Appeals Chamber in *Katanga* has already rejected an LRV submission that "harm concerning a parent should, without more, result in a finding of harm for the children based on its transgenerational nature."⁴⁵

26. Of course, whether reparations are individual or collective, any potential award based on the basis of transgenerational harm requires sufficient proof of the causal nexus between the alleged harm to the applicant and the harm for which the Defendant was convicted. As held in *Katanga*:⁴⁶

⁴⁰ Observations of the Common Legal Representative of the Victims of the Attacks on the Trust Fund for Victims' Updated Draft Implementation Plan, 18 May 2022, ICC-01/04-02/06-2764, paras.15- 16.

⁴¹ *Katanga* Decision on Transgenerational Harm, paras.10-12.

⁴² Reparations Order, para.182.

⁴³ Appeal Judgement, para.481.

⁴⁴ Response of the Common Legal Representative of the Victims of the Attacks to the Defence's Appeal Brief (ICC-01/04-02/06-2675), 9 August 2021, ICC-01/04-02/06-2701, para.89.

⁴⁵ *Prosecutor v. Germain Katanga*, Public redacted Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute", 9 March 2018, ICC-01/04-01/07-3778-Red, para.236.

⁴⁶ *Katanga* Decision on Transgenerational Harm, para.184.

Even where those Applicants are, in all likelihood, suffering from transgenerational psychological harm, the point must be made, as the Defence has, that no evidence is laid before the Chamber to establish on a balance of probabilities the causal nexus between the trauma suffered and the attack on Bogoro.

27. This requirement places just and fair limits on the consequences of crimes that can be attributed to the convicted person.⁴⁷ While the uncertainties regarding transgenerational harm make it impossible to offer definitive evidential requirements, the Defence notes that the Trial Chamber in *Katanga* assessed documents including mental health certificates and then noted that “the closer the date of birth of the Applicant to the date of the Attack, the more likely it is that the Attack had an impact on the Applicant concerned, especially if no other traumatic events occurred.”⁴⁸ Similarly, Dr Gilmore recognised the need for evidential criteria in the determination of this category of victims, noting that “where they are born when their mothers were in the UPC, or civilians within 42 weeks since the rape are eligible and should be assisted to apply.”⁴⁹

28. This reasoning indicates, at a minimum, that it is insufficient to set the criteria for victims as being only that (i) they are a child of a direct victim; and (ii) the harm suffered by the direct victim resulted from crimes for which Mr Ntaganda has been found guilty. The necessary fact intensive enquiry required to determine whether a causal nexus exists between the trauma suffered by the applicant and the crimes for which Mr Ntaganda was convicted cannot be circumvented on the basis that the ultimate reparations are collective. Basic facts must be obtained, namely the date of birth of the child, and other potentially traumatic events that have affected the both the direct victim and the applicant in the relevant timeframe.

29. Importantly, the requirement for at least basic facts and the demonstration of a causal nexus to the crimes for which Mr Ntaganda was convicted, precludes reliance on a presumption of transgenerational harm for family members. Notably, the Appeals Chamber criticised the previous Trial Chamber for having given “no indication of any caution the TFV would need to exercise in **assessing applications** claiming reparations as a result of transgenerational harm”,⁵⁰ and refers elsewhere in the Judgment to future decisions on evidentiary criteria and the “**assessment**” of applications.⁵¹ The Appeals Chamber accordingly anticipated a process of

⁴⁷ Katanga Decision on Transgenerational Harm, para.17.

⁴⁸ Katanga Decision on Transgenerational Harm, para.29.

⁴⁹ Gilmore Expert Report, para.80.

⁵⁰ Appeal Judgment, para.479.

⁵¹ See, e.g., Appeal Judgment, para.497.

individual assessment of applicants, rather than the application of a presumption to particular categories of family members of direct victims.

30. The LRV1 has suggested that “scientifically establishing the presence of transgenerational trauma and post-traumatic stress for each and every victim of the crimes referred to would be completely unrealistic” and that he “fails to see how the recognition of such harm would prejudice the Defence and his client”.⁵² To be clear, the prejudice arises from the obliteration of the need to demonstrate a nexus between an applicant, who is not the direct victim, and the crimes found to have occurred in this case. Neither the *Katanga* nor *Lubanga* Trial Chambers circumvented this central requirement by recognising a presumption of harm, nor does the uncertainty of the concept of transgenerational harm reasonably allow for it.

31. By way of a concrete example, a presumption of transgenerational harm could allow for the award of reparations to an applicant whose parent had been a child soldier in 2002, regardless of the length of time that had passed between 2002 and the applicant’s birth, or the relationship between the parent and applicant, and in the absence of any indication of psychological or mental harm to the applicant. Reparations could also be awarded where an applicant had experienced repeated and severe traumatic episodes that were entirely unrelated to his or her parent’s former status as a child soldier. These examples would fall far outside the “just and fair limits on the consequences of crimes” recognised as being necessary in previous ICC cases.

32. Further observations on the causal nexus in the context of the conflict in Ituri are offered below.

(iii) The need, if any, for a psychological examination of applicants and parents

33. The Defence has previously submitted that in order for transgenerational harm to be established, there must first be a diagnosis of psychological harm for the parents. Given that a psychiatric diagnosis fluctuates and evolves over time, it must also be reassessed on a rolling basis. In *Bemba*, Dr Reicherter testified that a clinical diagnosis could not be based on information collected years ago, and a diagnosis dated from 10 years ago had to be reassessed, even in the presence of indications that the mental harm is chronic.⁵³ It follows that a precise psychological assessment is therefore necessary in order to establish a transgenerational harm

⁵² Response of the Common Legal Representative of the Former Child Soldiers on Mr Ntaganda and the Victims of the Attacks’ Appeals against the Reparations Order (ICC-01/04-02/06-2659), 9 August 2021, ICC-01/04-02/06-2700, para.68.

⁵³ *Prosecutor v. Jean-Pierre Bemba Gombo*, 17 May 2016, ICC-01/05-01/08-T-369, pp.6-8.

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.⁵⁴

34. For this reason, victims in *Katanga* provided psychiatric expertise in support of their applications,⁵⁵ and the expert in *Lubanga* observed that while post-traumatic stress disorder can be transmitted to children, “PTSD must be demonstrated by way of medical examination”.⁵⁶ Similarly, in *Bemba*, an expert stated that “a clinical diagnosis must be recent, given that this type of diagnosis is evolving, even in cases where the chronic outcome had been confirmed”.⁵⁷ The Defence repeats and relies on these earlier submissions, and the consistent prior practice of the Court in this regard.

35. The LRV has previously submitted that the need for medical diagnosis appears “in total contradiction” with the reasoning underpinning the use of a presumption, and the evidentiary threshold at the reparations stage.⁵⁸ The Defence position on the inapplicability of presumptions for transgenerational harm is set out above.

(iv) Whether Mr Ntaganda is liable to repair such harm in the specific context of the crimes for which he has been convicted, taking into consideration the impact, if any, that the protracted armed conflict in the DRC may have had on the assessment as whether the trauma associated with transgenerational harm was caused by Mr Ntaganda; The need, if any, to exercise caution in assessing applications based on transgenerational harm

36. For the reasons set out above, an applicant is required to establish a causal nexus between the alleged transgenerational harm, and the crimes for which Mr Ntaganda was convicted in this case.⁵⁹ It is not the case that simply because the applicant is a family member of a direct victim, Mr Ntaganda is automatically liable for **any and all** psychological or other harm exhibited by the applicant.

⁵⁴ Defence Final Submissions, paras.89-90.

⁵⁵ Katanga Decision on Transgenerational Harm, paras.28-29; See *Prosecutor v. Germain Katanga*, 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.

⁵⁶ *Prosecutor v. Thomas Lubanga*, 07 April 2009, ICC-01/04-01/06-T-166, p.50:1-8.

⁵⁷ Defence Appellant Brief against the 8 March Reparations Order, 7 June 2021, ICC-01/04-02/06-2675 (“Defence Appellant Brief”) citing *Prosecutor v. Jean-Pierre Bemba Gombo*, 17 May 2016, ICC-01/05-01/08-T-369, p.6:8-13.

⁵⁸ Response of the Common Legal Representative of the Former Child Soldiers on Mr Ntaganda and the Victims of the Attacks’ Appeals against the Reparations Order (ICC-01/04-02/06-2659), 9 August 2021, ICC-01/04-02/06-2700, para.68.

⁵⁹ Katanga Decision on Transgenerational Harm, para.17.

37. This is not only logical, it follows from the Court's practice. In *Katanga*, the Trial Chamber considered in 2018 that "the farther the date of birth of the Applicant 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."⁶⁰ In the same way, the Applicants in the *Ntaganda* case, by virtue of being in Ituri Province, have suffered through one of the worst and most protracted conflicts of modern times. This conflict necessarily gives rise to intervening factors and events.

38. The record of the case is replete with detailed submissions on the length, severity, and constant threats posed by this ongoing conflict. The TFV has recognised that in Ituri province "where recurrent violent conflict has taken place for over 20 years, the quasi-totality of its inhabitants have been victims in one form or another of crimes".⁶¹ From 1999 onwards, Ituri was in a state of conflict, centered around opposing rebel factions struggling for political power, with competition for natural resources, a political vacuum, and foreign involvement fueling the violence.⁶²

39. The crimes for which Mr Ntaganda was convicted occurred between approximately 6 August 2002 until 31 December 2003,⁶³ an objectively short period in the context of the decades of violence. The inter-ethnic conflict that took place **before** August 2002 was horrific in scope, with 7,000 people having been killed and 100,000 displaced by the fighting by November 1999.⁶⁴ After the UPC was chased from Bunia in March 2003 the killings and violence only increased, with the FNI carrying out one of the largest massacres of 2002-2003 against civilians during this period.⁶⁵

40. The Registry has recognised that since the years 1999-2004, there have been two additional and significant waves of violence, in 2018 and from 2019 until now, with the Registry describing the coordination, sheer scale and brutality of the attacks,⁶⁶ and consistent deterioration.⁶⁷ In January 2020, the United Nations issued a report through its Joint Human

⁶⁰ Katanga Decision on Transgenerational Harm, paras.29-30.

⁶¹ Corrigendum to Annex A to the Initial Draft Implementation Plan with Focus on Priority Victims, 14 June 2021, ICC-01/04-02/06-2676-Conf-AnxA-Corr, para.80.

⁶² Judgment, 8 July 2019, ICC-01/04-02/06-2359 ("Trial Judgment"), para.13.

⁶³ Trial Judgment, para.33.

⁶⁴ *Prosecutor v. Thomas Lubanga*, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, para.79.

⁶⁵ DRC-OTP-0126-0073; DRC-OTP-2078-0393, para.15. See further Defence Final Brief, 8 November 2018, ICC-01/04-02/06-2298-Anx1-Corr-Red, para.216.

⁶⁶ Registry's Report on the Security Situation in the Democratic Republic of the Congo, 6 September 2019, ICC-01/04-02/06-2391-Conf-Anx2.

⁶⁷ Annex 1 to Registry's Observations on Reparations, 28 February 2020, ICC-01/04-02/06-2475-AnxI ("Registry's Observations on Reparations"); Registry's Updated Security Assessment, 1 October 2020, ICC-01/04-02/06-2602-Conf-AnxV; Registry's Report on Security and Political Dynamics, 15 January 2021, ICC-01/04-02/06-2639-Conf-AnxIII.

Rights Office (UNJHRO) in the DRC, expressing concern that the crimes being committed in Ituri by Lendu armed groups against Hema civilians were of the scale that could amount to crimes against humanity or even genocide.⁶⁸

41. It is difficult to imagine a situation where it is more likely than that harm suffered by an applicant is the result of intervening factors and events. It is impossible to accept that an applicant was a victim of the crimes for which Mr Ntaganda was convicted, but has otherwise lived a life free from trauma, displacement, stress or actual violence. In these circumstances, assessing transgenerational harm, a novel and uncertain head of damage, becomes an even more difficult and imprecise task. Importantly, it makes the causal link all but impossible to establish. The facts and context of the Ituri conflict preclude a credible assessment of transgenerational harm in the *Ntaganda* case.

42. Further militating against issuing reparations on this basis, is the fact that pursuant to the Trial Chamber’s eligibility assessment mechanism, the eligibility of new potential victims is to be determined by the TFV almost in a vacuum, and without the assistance of professionals or experts qualified to assess claims of transgenerational harm.

43. For all these reasons, the Defence submits that Mr Ntaganda should not be liable to pay reparations for alleged transgenerational harm. Should applications still be assessed on this basis, caution must be exercised in the assessment of such claims in many ways. The Appeals Chamber criticised the previous Trial Chamber for having given “no indication of any caution the TFV would need to exercise in assessing applications claiming reparations as a result of transgenerational harm”⁶⁹ In particular, the Defence notes that as at 25 March 2025, [REDACTED] claiming reparations on the basis of transgenerational harm suffered,⁷⁰ giving rise to automatic caution and scrutiny to applications that are subsequently filed.

II. The estimated total *number* of potential beneficiaries

44. In its 25 November Decision, the Trial Chamber rejected the arguments put forward by the Defence and approved the list of individuals included in the sample the Registry was directed to assemble. The Trial Chamber further directed “[...] the parties, the TFV, the Registry, and the Office of the Prosecutor, to further complement their submissions due within

⁶⁸ Rapport public sur les conflits en territoire de Djugu, province de l’Ituri, décembre 2017 à septembre 2019, available at: <https://www.ohchr.org/sites/default/files/Documents/Countries/RDC/RDCRapportpublicDjugu.pdf>

⁶⁹ Appeal Judgement, para.479.

⁷⁰ Annx1 to Trust Fund for Victims’ Fourth Update Report on the Implementation of the Initial Draft Implementation Plan, 25 March 2022, ICC-01/04-02/06-2751-Conf-Anx1, para.33.

sixty days from the notification of the Order, providing any additional information or documentation they might have as to the estimated total number of potential beneficiaries of reparations in the present case, along with an explanation of the methodology used to provide such estimate.”⁷¹

45. As a preliminary matter regarding the estimated total number of potential beneficiaries of reparations in this case, the Defence deems it important to underscore, as held by the Appeals Chamber, that “ [...] in the circumstances of the present case, one of the most fundamentals parameters for setting the amount of the reparations award is the number of victims that it is intended to compensate.”⁷² Indeed, “[...] without establishing even a concretely estimated number of victims, it is difficult to know how the Trial Chamber was in a position to proceed to determine the overall amount of the award to be made.”⁷³

46. As Trial Chamber VI proceeded to determine the amount of the award “[...] it is clear that if it under-estimated the number of potentially eligible victims, the amount of the award would be likely to be insufficient to meet their needs; yet, if it over-estimated the number of potentially eligible victims, the amount awarded would be likely to be *unfair to the convicted person*.”⁷⁴ “[E]ven where a cost per victim is not particularised for a certain type of harm, there is an obvious link between the number of victims and the cost to repair the harm suffered.”⁷⁵

47. The Appeals Chamber’s understanding of Trial Chamber VI’s finding regarding the estimated total number of beneficiaries – *i.e.* (i) “thousands of victims may be eligible for reparations in the present case”; (ii) “it was impossible to predict in advance how many victims may ultimately come forward to benefit from collective reparations with individualised components during the implementation stage”; and (iii) “it was clear that there was ‘still a significant number of as yet unidentified potentially eligible victims, for which no reliable figures are available’”⁷⁶ - is revealing. As held by the Appeals Chamber in *Lubanga*, “[c]learly, it makes a difference whether the crimes for which the conviction was entered resulted in the victimisation of one hundred, one thousand or one hundred thousand individuals.”⁷⁷

⁷¹ Implementation Order, para.37.

⁷² Appeal Judgment, para.157.

⁷³ Appeal Judgment, para.163

⁷⁴ Appeal Judgment, para.164 (emphasis added).

⁷⁵ Appeal Judgment, para.161.

⁷⁶ Appeal Judgment, para.144, referring to Reparations Order, para.246.

⁷⁷ Appeal Judgment, para.165, referring to 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.89.

48. Although Trial Chamber VI referred to estimates ranging from “at least approximately 1,100” to “a minimum of 100,000”,⁷⁸ “it did not analyse in any way the reliability or basis for these estimates – simply setting them out as submitted”⁷⁹ thereby failing “in its duty to establish an actual, or estimated, number of victims of the award that was as concrete as possible and based upon a sufficiently strong evidential basis.”⁸⁰ The Appeals Chamber ruled that what was required in those circumstances “[...] was a determination of the issue by the Trial Chamber on the basis of all the facts and information that it had before it **and/or deemed necessary to obtain.**”⁸¹

49. The Appeals Chamber thus found that Trial Chamber VI erred in failing: “(i) to make an appropriate determination in relation to the number of potentially eligible or actual victims of the award; and/or (ii) to provide a reasoned decision in relation to its conclusion about that number; and (iii) to provide any reasoning in relation to the uncertainties that it stated it had resolved in favour of the convicted person.”⁸² Consequently, the Appeals Chamber deemed it appropriate to reverse the findings of Trial Chamber VI on this matter and “to remand to it the issue of how many victims are likely to come forward to benefit from reparations in the present case.”⁸³

50. In light of the foregoing, the crux of the matter on remand is how, at this stage, the Trial Chamber can determine with a sufficient degree of precision, the total number of potential beneficiaries likely to come forward during the implementation phase.

51. First, the Trial Chamber may consider the information available in terms of numbers as it has evolved since the Reparations Order was issued by Trial Chamber VI. What has not changed or changed very little during this period is the following: 2121 participating victims; 1837 participating victims of the attacks; 284 participating victims of crimes against child soldiers; 45 potential victims of the attacks assessed as eligible by the TFV (drawn from the 1837 participating victims of the attacks); 24 potential victims of crimes against child soldiers assessed as eligible by the TFV (drawn from the 284 participating victims of crimes against child soldiers);⁸⁴ 661 participating victims of the attack assessed by the Registry as being

⁷⁸ Reparations Order, para.246.

⁷⁹ Appeal Judgment, para.167.

⁸⁰ Appeal Judgment, para.168.

⁸¹ Appeal Judgment, para.169 (emphasis added).

⁸² Appeal Judgment, para.172.

⁸³ Appeal Judgment, para.174.

⁸⁴ Registry submission in compliance with the “Order for the implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled ‘Reparations Order’” (ICC-01/04-02/06-2786), 8 November 2022, ICC-01/04-02/06-2788 (“Registry Submissions on Sample”), para.14.

beyond the scope of the Trial Judgment;⁸⁵ 53 new potential beneficiaries having filled out a long forms in the context of the VPRS mapping exercise; 39 new potential beneficiaries who have never been in contact with the Court;⁸⁶ and the Registry's estimate that approximately 1,100 individuals may qualify as new potential victims of the attacks.⁸⁷

52. What has changed during this period includes the number of victims of crimes against child soldiers found eligible by the TFV in *Lubanga* and confirmed by the Trial Chamber. According to the latest figures available to the Defence, there are a maximum of 2,479 victims of crimes against child soldiers in *Lubanga*, who are also eligible for reparations in this case.⁸⁸ In addition, as of May 2022, the Registry has mapped out 780 new potential victims, believed to be included in the Registry's earlier estimate of 1,100 new potential victims of the attacks.⁸⁹

53. Second, further to the Appeal Judgment, the Trial Chamber decided to consider a sample of potential beneficiaries, the intended composition of which was set out in the Implementation Order. Notably, the Appeals Chamber found that Trial Chamber VI had erred in estimating the total number of beneficiaries without the Defence having reviewed victims' applications, or the Trial Chamber reviewing a sample thereof.

54. After reviewing the relevant statutory provisions and previous jurisprudence, the Appeals Chamber found *inter alia*, that (i) "the Statute and the Rules attach significant weight to application for reparations";⁹⁰ (ii) "the information [in applications] may be crucial to assess the types of harm alleged and it can assist a chamber in making findings as to that harm";⁹¹ (iii) "the application for reparations thus not only trigger the reparations proceedings, but they are also an important source of information for the trial chamber's determination of the award. In particular, information contained in applications for reparations "may be crucial to assess the types of harm alleged, which, in turn, is relevant to the determination of "the appropriate modalities for repairing the harm caused with a view to, ultimately, assessing the costs of the identified remedy"";⁹² (iv) "in sum, while there may be instances where it is appropriate to proceed without ruling on any applications, there may be cases in which the evidential basis

⁸⁵ Annex I to Registry's Second Report on Reparations, 15 January 2023, ICC-01/04-02/06-2639-AnxI, para.9.

⁸⁶ Registry Submissions on Sample, para.14.

⁸⁷ Registry's Observations on Reparations, para.25.

⁸⁸ *Prosecutor v. Thomas Lubanga*, Notification of 832 administrative decisions from the Trust Fund for Victim's Board of Directors pursuant to Trial Chamber II's "Ninth Decision on the TFV's administrative decisions on applications for reparations and additional matters", 17 June 2022, ICC-01/04-01/06-3536-Red, 3 October 2022, ICC-01/04-01/06-3542, para.9.

⁸⁹ Registry Observations on the Trust Fund for Victims' Draft Implementation Plan, 18 May 2022, ICC-01/04-02/06-2766, para.19.

⁹⁰ Appeal Judgment, para.331.

⁹¹ Appeal Judgment, para.332.

⁹² Appeal Judgment, para.334.

other than that contained in the applications for reparations will be insufficient. In those latter circumstances, a trial chamber is required to rule upon applications for reparations to determine whether relevant alleged facts have been established to the applicable standard”,⁹³ and (v) “in the absence of a sufficiently strong evidential basis coming from sources other than applications, ruling upon applications is the fairest and most transparent manner in which to make an order for reparations.”⁹⁴

55. In the instant case, the Appeals Chamber concluded that the Trial Chamber erred by failing to rule on at least a sample of applications and that this error necessarily materially affected the Impugned Decision.⁹⁵

56. The obvious problem in this case is that ruling on a sample of applications is not, in and of itself, a ‘cure all’ remedy, considering the makeup of the sample put together by the Registry on the instructions of the Trial Chamber. The Defence has already had the opportunity of challenging the composition of the sample as being biased, *not* representative and incapable of addressing the ultimate issue on remand - which the Trial Chamber unequivocally rejected⁹⁶ – and these arguments will not be repeated here. They will be kept for the appeal on the merits later, if necessary. That said, assuming *arguendo* that the sample was representative, the Defence respectfully submits that it might be used to draw conclusions to assess the types of harm alleged, and could assist in making findings as to that harm in respect of participating victims, and even possibly new potential victims not yet identified. For example, a conclusion could be drawn that 50% of the potential victims from the sample suffered from physical harm and that this percentage applies to the totality of potential victims in the case. No conclusion could be drawn however concerning the total number of potential beneficiaries in the case, whether from a qualitative or quantitative / statistical analysis.

57. The significant differences between the sample of applications analysed and relied upon in *Lubanga* and the sample assembled in this case best display this point. In *Lubanga*, there were 146 participating victims;⁹⁷ initially, when the Trial Chamber decided to identify the

⁹³ Appeal Judgment, para.338.

⁹⁴ Appeal Judgment, para.339.

⁹⁵ Appeal Judgment, para.345.

⁹⁶ 25 November Decision; Decision on the Application on behalf of Mr Bosco Ntaganda seeking leave to appeal Decision on the Registry submission in compliance with the “Order for the implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled ‘Reparations Order’”, 21 December 2022, ICC-01/04-02/06-2805.

⁹⁷ ICC, Fiche d’information sur l’affaire (*Le Procureur c. Thomas Lubanga Dyilo*), available at <https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/LubangaFra.pdf>

potential victims and to collect application forms, its aim was to identify all potential victims;⁹⁸ the collection of the applications / dossiers was stopped at 473 due to time considerations; the sample was put together during a period of 14 months;⁹⁹ the sample contained 327 non-participating victims; the TFV, the two victims representatives, the Defence and the Registry offered estimates of the total number of potential beneficiaries to the Trial Chamber;¹⁰⁰ and, in addition to its analysis of the sample, the Trial Chamber resorted to other mechanisms¹⁰¹ – at least one having a scientific / statistical basis – to determine the estimated total number of potential beneficiaries.

58. In this case, the Trial Chamber cannot ignore the findings of Trial Chamber VI in the Reparations Order, namely, *inter alia*, that it was impossible to predict in advance how many victims may ultimately come forward, and the absence of reliable figures regarding the unidentified potentially eligible victims. Yet, the sample assembled contains no more than six non-participating victims¹⁰² as well as no more than a small percentage of the total number of participating victims.¹⁰³ Moreover, as stated by the TFV's submissions in its updated Draft Implementation Plan – now moot - neither the Trial Chamber nor the parties, participants and Registry were able to advance estimates regarding the total number of potential beneficiaries in the case.¹⁰⁴

59. Reacting to the submissions of the TFV, [REDACTED]¹⁰⁵ [REDACTED] the Defence¹⁰⁶ held the view that the appropriate way ahead would be for the VPRS to conduct a detailed mapping exercise, as expeditiously as possible, with a view to identifying new potential

⁹⁸ See, e.g., *Prosecutor v. Thomas Lubanga*, Order instructing the Trust Fund for Victims to supplement the draft implementation plan, 9 February 2016, ICC-01/04-01/06-3198, para.14; *Prosecutor v. Thomas Lubanga*, Request for Leave to Appeal against the “Ordonnance enjoignant au Fonds au profit des victimes de compléter le projet de plan de mise en œuvre” (9 February 2016), 15 February 2016, ICC-01/04-01/06-3200, para.7.

⁹⁹ See, e.g., *Prosecutor v. Thomas Lubanga*, Order instructing the Trust Fund for Victims to supplement the draft implementation plan, 9 February 2016, ICC-01/04-01/06-3198; *Prosecutor v. Thomas Lubanga*, Decision on Requests for the Extension of Time submitted by the Office of Public Counsel for Victims, the Registry and the Legal Representatives of V02 Victims, 6 April 2017, ICC-01/04-01/06-3290.

¹⁰⁰ See, e.g., *Prosecutor v. Thomas Lubanga*, Corrected version of the “Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable”, 21 December 2017, ICC-01/04-01/06-3379, paras.200-212.

¹⁰¹ *Prosecutor v. Thomas Lubanga*, Corrected version of the “Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable”, 21 December 2017, ICC-01/04-01/06-3379, paras.213-230.

¹⁰² Registry Transmission of 173 Unredacted Victims' Dossiers to the Chamber and the Legal Representatives of Victims, 28 November 2022, ICC-01/04-02/06-2795, fn.7; amounting therefore to 3.5% of the total potential beneficiaries included in the sample.

¹⁰³ 7.4% as opposed to 100% in *Lubanga*.

¹⁰⁴ Updated Draft Implementation Plan, para.96.

¹⁰⁵ [REDACTED].

¹⁰⁶ Observations on behalf of the convicted person on the Trust Fund for Victims' Updated Draft Implementation Plan, 18 May 2022, ICC-01/04-02/06-2765, para.64.

beneficiaries and collecting new application forms. This suggestion remains relevant and timely to ensure that the new reparation order rests on a sufficiently strong evidential basis.

60. Regarding the estimates referred to by Trial Chamber VI – *i.e.* at least 1,100, to a minimum of 100,000, the Appeals Chamber found that the Trial Chamber failed in its duty to establish an actual or estimated number of victims of the award that was as concrete as possible and based upon a sufficiently strong evidential basis, given that “[a]t no point did the Trial Chamber expressly rule upon which of the varying estimates and numbers it found more persuasive.”¹⁰⁷ “What was required in those circumstances was a determination of the issue by the Trial Chamber on the basis of all the facts and information that it had before it **and/or deemed necessary to obtain**.”¹⁰⁸ Hence, in addition to ruling on the sample, it will be necessary for the Trial Chamber to address this issue. The arguments of the parties in challenging or supporting these estimates are on the record,¹⁰⁹ and will not be repeated here in *extenso*. Suffice it to say that the LRV2’s estimate of over 100,000 potential victims exists as a clear anomaly to the other estimates and is manifestly unreliable. An important distinction must be made between official figures regarding the population in a given municipality before the conflict – let alone the fact that such figures are not available – and the number of persons not taking an active part in the hostilities present at the time of the crimes, which can only be resolved on the basis of the evidence. To provide but one example, most of the population of Mongbwalu had already left this municipality before the First attack was even launched.

61. Lastly, the ratio of indirect victims to direct victims must also be considered in relation to the estimated total number of potential beneficiaries. While the TFV and the LRVs previously submitted various figures concerning the number of indirect victims that can be expected based on the number direct victims identified, the Trial Chamber in *Lubanga* established that the ration of indirect to direct victims in that case was around 25%.¹¹⁰ It follows, at a minimum, that no multiplying factor should be used when attempting to determine / extrapolate the number of indirect victims from the number of direct victims.

CONCLUSION

¹⁰⁷ Appeal Judgment, para.168.

¹⁰⁸ Appeal Judgment, para.168 (emphasis added).

¹⁰⁹ See, e.g., Defence Appellant Brief, paras.226-229; Appeal Brief of the Common Legal Representative of the Victims of the Attacks against the Reparations Order, 7 June 2021, ICC-01/04-02/06-2674, paras.64-68; Response on behalf of Mr Ntaganda to the “Appeal Brief of the Common Legal Representative of the Victims of the Attacks against the Reparations Order”, 9 August 2021, ICC-01/04-02/06-2702, paras.25-36.

¹¹⁰ *Prosecutor v. Thomas Lubanga*, Corrected version of the “Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable”, 21 December 2017, ICC-01/04-01/06-3379, para.204.

62. While estimation of the number of potential beneficiaries is a complex exercise, it is at the heart of a reparations award. Accordingly, any estimation must be conducted on the basis of a sufficiently strong evidential basis, and in a manner that ensures that the number is as concrete and realistic as possible. As regards transgenerational harm, on the basis of the submissions herein concerning the inherent novelty and uncertainty of this head of damage, and the absence of any additional information or expert opinion, the Defence submits that it cannot safely be relied upon as a basis for reparations in the *Ntaganda* case. In addition, the Defence respectfully submits that additional submissions from the parties are warranted in relation to the other topics before the Trial Chamber issues the new reparations order.

RESPECTFULLY SUBMITTED ON THIS 8th DAY OF JUNE 2023

A handwritten signature in black ink, appearing to read 'S+B' with a stylized flourish.

Me Stéphane Bourgon *Ad.E.*, Counsel for Bosco Ntaganda

The Hague, The Netherlands