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TRIAL CHAMBER VI

Before: **Judge Chang-ho Chung, Single Judge**

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR v. BOSCO NTAGANDA

Public Document
With one Public Annex

Submissions on Reparations on behalf of the Former Child Soldiers

Source: **Office of Public Counsel for Victims (CLR1)**

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

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I. INTRODUCTION

1. The Legal Representative of the Former Child Soldiers (the "Legal Representative") hereby files her Submissions on Reparations on behalf of the Former Child Soldiers, as instructed by the Single Judge acting on behalf of Trial Chamber VI (respectively the "Single Judge" and the "Chamber"), in the "Order setting deadlines in relation to reparations".[1]

2. The Legal Representative submits that the principles on reparations established by the Appeals Chamber in the *Lubanga* case should be adopted. They need, however, to be supplemented to reflect the crimes of rape and sexual enslavement, for which Mr Bosco Ntaganda ("Mr Ntaganda") has been convicted.

3. With respect to the beneficiaries of reparations, the Legal Representative requests that individuals whose victim applications for participation in the proceedings have already been granted be considered eligible to receive reparations. Individuals eligible for reparations in the *Lubanga* case should automatically be eligible for reparations in the current proceedings. Individuals who have not yet contacted the Court may be eligible for reparations, upon screening at the implementation stage of the reparations proceedings.

4. In the view of the Legal Representative, reparations should aim at repairing to the fullest possible extent the harm suffered by the victims. This must include, but not be limited to, the damage to the (direct) victim's project of life and the transgenerational harm suffered by (indirect) victims.

5. As regards the scope of Mr Ntaganda's liability, the Legal Representative submits that it not only includes the harm caused by the individual criminal acts established in the Judgment beyond reasonable doubt, but also the harm suffered by all victims – known and yet to be identified, who can establish the relevant criteria on the balance of probabilities. To determine the monetary obligations of Mr Ntaganda,

[1] See the "Order setting deadlines in relation to reparations" (Trial Chamber VI, Single judge), No. ICC-01/04-02/06-2447, 5 December 2019 (the "Order Setting Deadlines").

the Chamber should focus on the cost of repairing the harm he caused, based on estimations supported by relevant information filed before the Chamber.

6. With respect to the types and modalities of reparations, victims have consistently expressed their preference for, at the very least, an individual element in the reparations they will receive. Former child soldiers who were also victims of rape and/or sexual enslavement suffered harm of a particular intensity. It is requested that the Chamber awards individual reparations in the form of a symbolic lump sum. Given the security situation in Ituri and in order not to stigmatise further the individuals concerned, the Legal Representative posits that the United Nations Guidance Note on Reparations for Conflict-Related Sexual Violence (the "Guidance Note") shall be taken into account when implementing said modality.[2]

7. The reparations scheme should be designed so as to minimise security risks and avoid the aggravation of the ethnic tensions in the already very volatile context presently in Ituri. In line with the 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 (the "2005 Basic Principles"), the scheme's design should be responsive to the needs of victims and it should protect their privacy and safety from intimidation and retaliation ("*Do no harm principle*").[3] In addition, particularly with respect to victims of gender-based crimes, the approach to be followed must be specifically tailored to the consequences, sensitivity and stigmas attached to the harms caused by, and the specific needs arising from, sexual violence.[4]

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[2] See UNITED NATIONS, "Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence", June 2014 (the "Guidance Note"). Said note is intended to complement other United Nations tools and Guidance notes which are not listed in the present submissions but referred to in the Guidance Note.

[3] Idem, p. 5. See also the 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, UN General Assembly Resolution 60/147, 16 December 2005, para. 10 (the "2005 Basic Principles").

[4] See the Guidance Note, *supra* note 2, p. 2.

8. Finally, the Legal Representative remains of the view that Chambers already received, in other cases, a significant number of reports from organisations and experts addressing reparations issues. Said material appears useful and pertinent in the present case since it addresses the main issues related to reparations. Therefore, to avoid litigation and additional costs, the Legal Representative posits that the Chamber should first evaluate the extent of the material available and whether the information is sufficient to issue a reparation order, or identify the limited areas in which expertise is still needed. The Legal Representative includes, as an Annex, a table setting out the relevant references for ease of the Chamber[5].

II. PROCEDURAL BACKGROUND

9. On 8 July 2019, the Chamber − in a different composition, found Mr Ntaganda guilty of 18 counts of war crimes and crimes against humanity.[6]

10. On 25 July 2019, the Single Judge issued the "Order for preliminary information on reparations", requesting the Registry to submit observations on a number of issues.[7] The Single Judge noted that the Chamber intended to order the legal representatives of victims (the "LRVs"), the Defence, the Office of the Prosecutor (the "Prosecution"), the Registry and the Trust Fund for Victims (the "TFV") to submit observations on reparations six weeks after the issuance of the Chamber's sentencing decision pursuant to Article 76 of the Rome Statute (the "Statute").[8]

11. On 5 September 2019, the Registry filed its Observations on Reparations.[9]

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[5] See Annex, "List of experts' material relevant to reparations proceedings in the *Ntaganda* case".
[6] See the "Judgment" (Trial Chamber VI), No. ICC-01/04-02/06-2359, 8 July 2019.
[7] See the "Order for preliminary information on reparations" (Single Judge, Trial Chamber VI), No. ICC-01/04-02/06-2366, 25 July 2019, para. 4.
[8] *Idem*, para. 5. Where the term 'Article' is used in the present submissions, it refers to the Rome Statute unless otherwise indicated.
[9] See the "Registry's observations, pursuant to the Single Judge's 'Order for preliminary information on reparations' of 25 July 2019, ICC-01/04-02/06-2366", No. ICC-01/04-02/06-2391, 5 September 2019. The observations have been submitted in the Annex I, "Registry's Preliminary Observations on Reparations", No. ICC-01/04-02/06-2391-Anx1, 6 September 2019 (the "Preliminary Observations").

12. On 3 October 2019, the LRVs, the Defence, the TFV, and the Prosecution filed their responses.[10]

13. On 7 November 2019, the Chamber sentenced Mr Ntaganda to 30 years of imprisonment.[11]

14. On 5 December 2019, the Single Judge issued the Order Setting Deadlines, requesting submissions from the LRVs, the Defence, the Registry, the TFV, the Prosecution and the Democratic Republic of the Congo (the "DRC") authorities by 28 February 2020 with respect to:

> "*i. whether the principles on reparations established by the Appeals Chamber in the* Lubanga *case need to be amended or supplemented in light of the circumstances of the* Ntaganda *case;*
> *ii. the criteria and the methodology to be applied in the determination and the assessment of: (i) the eligibility of victims; (ii) the relevant types and scope of harm; and (iii) the scope of liability of Mr Ntaganda, including the determination of the precise extent of the (monetary) obligations to be imposed on him;*
> *iii. the types and modalities of reparations appropriate to address the types of harm relevant in the circumstances of the* Ntaganda *case, including factors relating to the appropriateness of awarding reparations on an individual basis, a collective basis, or both;*
> *iv. for the parties and the TFV, any responses to the Registry's identification of potential experts; and*
> *v. any other issue the parties, the Registry, and the TFV wish to bring to the attention of the Chamber*".[12]

15. On 4 February 2020, the Registry provided the LRVs and the Defence with a list of 31 candidates who may qualify as Experts in the case, as assessed by an external consultant. A final list of 34 candidates was sent on 6 February 2020.[13]

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[10] See the "Joint Response of the Legal Representatives of Victims to the Registry's Observations on Reparations", No. ICC-01/04-02/06-2430, 3 October 2019 (the "LRVs' Joint Response"); the "Response on behalf of Mr. Ntaganda to Registry's preliminary observations on reparations", No. ICC-01/04-02/06-2431, 3 October 2019; the "Prosecution's response to the Registry's observations, pursuant to the Single Judge's 'Order for preliminary information on reparations" (ICC-01/04-02/06-2391-Anx1)", No. ICC-01/04-02/06-2429, 3 October 2019; and the "Trust Fund for Victims' response to the Registry's Preliminary Observations pursuant to the Order for Preliminary Information on Reparations", No. ICC-01/04-02/06-2428, 3 October 2019.

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

[12] See the Order Setting Deadlines, *supra* note 1, para. 9(c).

16. On 19 February 2020, in compliance with the Order Setting Deadlines, the Registry filed its list of proposed experts on reparations.[14]

III. SUBMISSIONS

17. The Appeals Chamber set out, in the *Lubanga* case, five elements which, at a minimum, need to be addressed by the Chamber in its reparations order. Accordingly, the order should:

i. be directed against the convicted person, and establish and inform him of his liability;

ii. set out the type of reparations ordered (individual, collective or both) and reasons underpinning said determination;

iii. define the harm caused to direct and indirect victims;

iv. identify the modalities of reparations; and

v. identify the victims eligible or set out eligibility criteria.[15]

18. The Legal Representative notes that said jurisprudence is fully reflected in the Order Setting Deadlines. For the ease of the Chamber, the submissions *infra* will follow the breakdown suggested by the Single Judge in said Order, developing in further detail some issues upon which the Legal Representative already had an opportunity to comment as part of her Response to the Registry's Observations on Reparations.[16]

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[13] See the emails from the Registry to the LRVs and the Defence dated 4 February 2020, at 12.42, and 6 February 2020, at 16.25.

[14] See the "Registry List of Proposed Experts on Reparations Pursuant to Trial Chamber VI's Order of 5 December 2019", No. ICC-01/04-02/06-2472, 19 February 2020. Upon the Registry's request sent by email on 27 January at 18.05, the Chamber granted an extension of time until 19 February 2020 to submit the List by email dated 29 January 2020, at 15.55.

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

[16] See the LRVs' Joint Response, *supra* note 10.

A. Principles

19. According to Article 75(1), "*the Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation*". In its Order for Reparations in the *Lubanga* case, the Appels Chamber set out principles addressing the beneficiaries of reparations, the harm suffered, causation, the requirements of dignity and non-discrimination, the liability of the convicted person, the standard and burden of proof, the age of the victims, the accessibility and consultation with victims, the modalities of reparations, the need to receive proportional and adequate reparations and the preservation of the rights of the defence.[17] The Appeals Chamber also established that "[p]*rinciples should be general concepts that, while formulated in light of the circumstances of a specific case, can nonetheless be applied, adapted, expanded upon, or added to by future Trial Chambers*".[18]

20. These principles, although general, do contain specific reference to the crime of conscription, enlistment, and use of children under the age of fifteen to participate actively in hostilities.[19] Mr Lubanga and Mr Ntaganda being co-perpetrators with respect to the crimes of recruitment and use of child soldiers, the position of the Legal Representative is that these principles can be adopted as such for this typology these of crimes, without needing to be supplemented.

21. However, Mr Ntaganda has also been convicted for the crimes of rape and sexual enslavement against child soldiers. In the Amended Order for Reparation issued by the Appeals Chamber in the *Lubanga* case in 2015 (the "*Lubanga* 2015 Order for Reparations"), sexual and gender-based violence was deemed not to fall within the scope of the reparations process but remanded to the TFV for consideration in accordance with its mandate under regulation 50(a) of the Regulations of the TFV

[17] See the "Amended Order for Reparations", Annex A to the "Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012" (Appeals Chamber), No. ICC-01/04-01/06-3129-AnxA A A2 A3, 3 March 2015, paras. 6-52 (the "*Lubanga* 2015 Order for Reparations").
[18] *Idem*, para. 5.
[19] *Idem*, paras. 23-28, more specifically para. 26.

(known as the '*assistance mandate*').[20] Hence, the submissions *infra* focus on the additions required to reflect this type of victimisation in the *Ntaganda* case.

22. In June 2014, the Secretary General of the United Nations issued a guidance note to provide policy and operational direction in the area of reparations for victims of conflict-related sexual violence, including activities to advocate for and/or support the design, implementation, monitoring and evaluation of reparation programmes and initiatives directed at victims of conflict-related sexual violence.[21] Said note stresses the serious "*impact of conflict-related sexual violence, compounded by the stigma attached to it,* [which] *often prevents victims from seeking or obtaining redress, including for fear of being ostracised by families and communities as a result of disclosing the facts, or of being further victimised by insensitive authorities or institutions*".[22] It further emphasises that "[i]*n a context where women suffer from structural discrimination and have no access to education and productive resources, loss of family support can also result in destitution*", while male victims of sexual violence suffer stigma and discrimination.[23]

23. The Guidance Note contains a number of principles that should guide the decision of the Chamber on whether or not additions to the existing reparations principles are required. In summary, said guiding principles are:

> "*1. Adequate reparation for victims of conflict-related sexual violence entails a combination of different forms of reparations*
> *2. Judicial and/or administrative reparations should be available to victims of conflict-related sexual violence as part of their right to obtain prompt, adequate and effective remedies*
> *3. Individual and collective reparations should complement and reinforce each other*
> *4. Reparations should strive to be transformative, including in design, implementation and impact*
> *5. Development cooperation should support States' obligation to ensure access to reparations*

[20] *Idem*, para. 64.
[21] See the Guidance Note, *supra* note 2.
[22] *Idem*, p. 5.
[23] *Ibid*.

> *6. Meaningful participation and consultation of victims in the mapping, design, implementation, monitoring and evaluation of reparations should be ensured*
> *7. Urgent interim reparations to address immediate needs and avoid irreparable harm should be made available*
> *8. Adequate procedural rules for proceedings involving sexual violence and reparations should be in place*".[24]

24. The Guidance Note stresses that "*gender-sensitive reparations* [should] *take into account pre-existing gender relations and power imbalances to ensure a fair assessment of the harm inflicted upon women and men,* [and] *equal access to – and benefits from – reparation programmes for both women and men*".[25] This aspect is already captured in the *Lubanga* 2015 Order for Reparations, in that the Appeals Chamber emphasised the need for "[a] *gender-inclusive approach* […] [to] *guide the design of the principles and procedures applied to reparations*" and underlined "*gender parity in all aspects of reparations*" as an important goal of the Court.[26]

25. The Guidance Note underlines in addition that victims of conflict-related sexual violence include "*persons who, individually or collectively, suffered such violence* [and] *also family members, such as children or partners, and children born as a result of pregnancy from rape. Persons who depend on the victim of sexual violence and others may also be victims as a consequence of the harm inflicted through the violation. Victims may also include persons who have suffered harm in intervening to assist victims in distress or to prevent victimization*".[27] Admittedly, this definition does not necessarily expand the scope of indirect victims adopted in the *Lubanga* 2015 Order for Reparations.[28] However, it would be helpful to add as specific examples of family members of direct victims those children born as a result of pregnancy from rape, as in the *Ntaganda* case they are in a particularly vulnerable situation.[29]

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[24] *Idem*, p. 1.
[25] *Idem*, pp. 4-5.
[26] The *Lubanga* 2015 Order for Reparations, *supra* note 17, para. 18.
[27] See the Guidance Note, *supra* note 2, p. 8.
[28] See the *Lubanga* 2015 Order for Reparations, *supra* note 17, para. 6
[29] See *infra* paras. 51 and 73.

26. The *Lubanga* 2015 Order for Reparations includes, as a principle, that "[t]*he Court should consult with victims on issues relating,* inter alia*, to the identity of the beneficiaries and their priorities*".[30] It is to an extent unclear what is meant by the obligation to consult with the victims about their priorities. This principle could be clarified, specifying that victims should be consulted on the types and modalities of reparations to be issued to their benefit. As noted by the United Nations in a filing made before Trial Chamber III, in the *Bemba* case, this consultation must be preceded by a gender-sensitive outreach, to ensure that limitations regarding mobility, confidentiality, taboos or stigma attached to the participation of women and girls in reparation processes do not prevent victims of sexual violence from coming forward.[31] Experience in reparations proceedings at the Court thus far confirms the added value of such consultation which allows victims to clearly express their needs and preferences in terms of reparations to be awarded.[32]

27. In relation to victims' prioritisation, the *Lubanga* 2015 Order for Reparations sets out that "[p]*riority may need to be given to certain victims, who are in a particularly vulnerable situation or who require urgent assistance. The Court may adopt, therefore, measures that constitute affirmative action in order to guarantee equal, effective and safe access to reparations for particularly vulnerable victims*".[33] In the view of the Legal Representative, this principle should be expanded or clarified to reflect the idea that, without prejudice to all victims suffering harm, there may be a subset of victims who suffered damage of particular intensity. Victims in this category may be prioritised.

[30] See the *Lubanga* 2015 Order for Reparations, *supra* note 17, para. 32.
[31] See the "Joint submission by the United Nations containing observations on Reparations pursuant to Rule 103 of the Rules of Procedure and Evidence", No. ICC-01/05-01/08-3449, 17 October 2016, para. 32.
[32] See *infra* paras. 68-70.
[33] See the *Lubanga* 2015 Order for Reparations, *supra* note 17, para. 19.

B. Criteria and methodology applicable

1. Victims' eligibility

28. As indicated by the Appeals Chamber, the reparations order "*must identify the victims eligible to benefit from the awards for reparations or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted*".[34]

29. In the submission of the Legal Representative, former child soldiers − direct or indirect victims − already authorised to participate in the present case shall be eligible for reparations without being required to complete a new application form since they all fall within the scope of the Judgment. Contrary to the submission of the Defence,[35] their willingness to receive reparations should be presumed, even if not expressly indicated in their application forms, unless there are specific reasons to believe they might not be interested.[36] Should they be unwilling to receive reparations, they may simply decide not to come forward during the implementation stage of the reparations, as set out *infra*.[37]

30. In this regard, the Legal Representative reiterates her invitation to the Chamber not to pursue the findings the Appeals Chamber[38] requiring to "*seek the victims' consent when a collective award is made*"[39]; and with reference to regulation 118(2) of the Regulations of the Registry, their consent to the disclosure of confidential information contained in their application forms to the TFV for the purposes of participation in the eventual collective projects.[40] The Legal

[34] *Idem*, para. 32.
[35] See the "Response on behalf of Mr. Ntaganda to Registry's preliminary observations on reparations", *supra* note 10, para. 18.
[36] The Legal Representative is available to assist, on a victim by victim basis, in setting out who may not be willing to receive reparations, if anyone.
[37] See *infra* para. 34.
[38] See the LRVs' Joint Response, *supra* note 10, para. 33.
[39] See the "Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable'" (Appeals Chamber), No. ICC-01/04-01/06-3466-Red A7 A8, 18 July 2019, para. 40 (the "*Lubanga* 2019 Appeal Judgment on Reparations Size"); and the *Lubanga* 2015 Appeals Judgment on Reparations, *supra* note 15, para. 160.
[40] *Idem*, paras. 161 and 162.

Representative instead considers that said consent shall be presumed and *de facto* confirmed once the victims come forward to benefit from reparations at the implementation stage.[41] Similarly, victims who submitted applications for reparations should be presumed to have consented to their details being provided to the TFV[42]

31. Owing to the significant overlap between the *Lubanga* case and the *Ntaganda* case in terms of the territorial, temporal and subject-matter scope of reparations, with an inevitable need to contact the victims for different purposes during the parallel reparations proceedings, the Legal Representative submits that, should each Chamber engage with the victims, the '*Do no harm*' principle would be compromised.[43] It seems therefore appropriate to exercise particular care in this respect and to interact with the victims only if indispensable. Seeking their consent to receive reparations and to transmit their applications to the TFV is redundant.

32. The Single Judge ordered the Registry, in consultation with the LRVs and the TFV, to conduct an analysis of whether the victims whom participated in the trial proceedings fall within the scope of the Judgement.[44] Except for the references *infra*,[45] the Legal Representative makes, at this stage, no comments with respect to the scope of the conviction. In her understanding, this may be the subject of separate litigation once the assessment of the Registry is available.

33. As far as the beneficiaries for reparations already identified in the *Lubanga* proceedings are concerned, the Legal Representative posits that they should not be required to fill in a new form to be considered beneficiaries in the *Ntaganda* case.[46]

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[41] See the LRVs' Joint Response, *supra* note 10, para. 33.
[42] *Ibid*. See in the same vein the "OPCV Further Submissions in the appeals proceedings concerning the 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable'", No. ICC-01/04-01/06-3437 A7 A8, 31 January 2019, paras. 28 *et seq*.
[43] See the Guidance Note, *supra* note 2, p. 5. Instead, and pursuant to Regulation 60 of the Regulations of the TFV, these victims should interact with the TFV at the implementation stage of the proceedings rather than having to engage with different actors before then.
[44] See the Order Setting Deadlines, *supra* note 1, para. 9(a)(ii).
[45] See *infra*, paras. 34-37 and 52-54.
[46] See the LRVs' Joint Response, *supra* note 10, para. 32.

The Single Judge ordered the Registry, in consultation with the LRVs and the TFV, to indicate how many beneficiaries in the *Lubanga* case are also potentially eligible for reparations in the *Ntaganda* case.[47] The Legal Representative makes, at this stage, no further comments with respect to said issue. As with the issue *supra*, this may be the subject of separate litigation once the assessment is available. Therefore, she reserves her right to address said issue in due course.

34. Furthermore, individuals or entities yet to be identified may also be eligible for reparations, if they satisfy the definition of 'victim' in accordance with rule 85 of the Rules of Procedure and Evidence (the "Rules").[48] The methodology to be applied for the post-conviction identification of victims has been approached in different manners in the practice and jurisprudence of the Court. Chambers are vested with discretion to organise the reparations proceedings, which in practice resulted in three different methodologies and procedures being developed. First, the Chamber may identify and list the victims selected to benefit from reparations in the Reparations Order.[49] This type of procedure may be called 'formal' or 'application based'. Second, the Reparations Order may set out eligibility criteria instead of the identity of specific beneficiaries.[50] Victims are screened against said criteria by the TFV at the implementation stage of the reparations proceedings. This type of procedure may be called 'administrative'. Finally, the Chamber may set out eligibility criteria to be applied by the TFV at the implementation stage, but based on a sample of victims identified prior to the Reparations Order and determined to be beneficiaries by the Chamber.[51] This type of procedure may be called 'intermediate'.

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[47] See the Order Setting Deadlines, *supra* note 1, para. 9(a)(iii).
[48] Where the term 'Rule' is used in the present submissions, it refers to the Rules of Procedure and Evidence.
[49] This methodology has been followed in the *Katanga* case. See the "Order for Reparations pursuant to Article 75 of the Statute" (Trial Chamber II), No. ICC-01/04-01/07-3728-tENG, 24 March 2017 (the "*Katanga* 2017 Reparations Order"), paras. 32 and 33.
[50] This methodology has been followed in the *Al Mahdi* case. See the "Reparations Order" (Trial Chamber VIII), No. ICC-01/12-01/15-236, 17 August 2017 (the "*Al Mahdi* 2017 Reparations Order").
[51] This methodology has been followed in the *Lubanga* case. See the "Corrected version of the 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable'" (Trial Chamber II), No. ICC-01/04-01/06-3379-Red-Corr-tENG, 21 December 2017, paras. 190 *et seq*.

35. Although, as noted, the Chamber has discretion in organising the reparations proceedings in the manner that best contributes to the fairness and expeditiousness of the process, this discretion is not unfettered. As confirmed by the Appeals Chamber, the 'formal' or 'application based' procedure[52] is appropriate when the number of victims is very small[53] and "*it is apparent that a large majority (or all) of these victims has filed* [applications for reparations]".[54] By contrast, "*when there are more than a very small number of victims, this is neither necessary nor desirable*"[55] and the Trial Chamber "*is not required to rule on the merits of the individual requests for reparations*".[56] The Legal Representative reiterates her position that, given the number of potential beneficiaries in the *Ntaganda* case,[57] seeking to identify, in the Reparations Order, (all) victims eligible to benefit from reparations would neither be feasible nor in line with the jurisprudence of the Appeals Chamber.[58]

36. Rather, the eligibility of victims yet to be identified should be assessed by the TFV;[59] subject to judicial control.[60] The crimes for which Mr Ntaganda was convicted

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[52] See the *Lubanga* 2015 Appeals Judgment on Reparations, *supra* note 15, para. 142.
[53] *Ibid.*
[54] See the "Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable'" (Appeals Chamber), No. ICC-01/04-01/06-3466-Red A7 A8, 18 July 2019, para. 86.
[55] *Ibid.*
[56] *Idem*, para. 87, quoting the *Lubanga* 2015 Appeals Judgment on Reparations, *supra* note 15, para. 152.
[57] See the Preliminary Observations, *supra* note 9, para. 5, setting out that the total number of victims participating at this juncture in the case amounts to 2 129 individuals, of whom 1 849 are victims of the attacks and 283 are former child soldiers. The potential number of victims in the *Lubanga* case, which bears close similarities with the present case but is limited to the crimes of conscription, enlistment and the active use in hostilities of child soldiers, is approximately 3 000. *Idem*, para. 9. See footnote 12 for the references to the TFV submissions setting out the approximate number of victims in the *Lubanga* reparations proceedings. See also the *Lubanga* 2019 Appeal Judgment on Reparations Size, *supra* note 39, para. 57 recalling that Trial Chamber I's estimation of the number of victims may return a figure between 2 451 and 5 938 individuals.
[58] See the LRVs' Joint Response, *supra* note 10, para. 16.
[59] As recognised by the Appeals Chamber, it is appropriate to task the TFV with "[the] *responsibility for identifying a group of beneficiaries, when not already identified by the Trial Chamber (regulations 60 to 65 of the Regulations of the TFV)*". See the "Public redacted Judgment on the appeal of the victims against the 'Reparations Order'", No. ICC-01/12-01/15-259-Red2 A, 8 March 2018, paras. 63 (the "*Al Mahdi* 2018 Appeals Judgment on Reparations"), para. 63. The screening process in the *Lubanga* case has been delegated to the TFV. The victims overlap between the two cases makes an additional reason for the adoption of a methodology whereby in the *Ntaganda* case the screening process be conducted by the TFV. According to the Appeals Chamber, "*all applications* [should preferably] *be screened at the same time and by the same entity, which would ensure that the screening would be done in a consistent and equal manner*". See the *Al Mahdi* 2018 Appeals Judgment on Reparations, para. 56.

occurred some 18 years ago. Since then, victims have not benefited from any sort of assistance. They live in a situation of extreme poverty, permanent insecurity, and in a high level humanitarian crisis, as defined by the United Nations.[61] It is indeed crucial to proceed expeditiously. However, for the following reasons, the Legal Representative maintains that the screening should take place once Mr Ntaganda's conviction has become final and shortly before the material receipt of awards:[62]

a. Appeals against the Judgment are currently pending, entailing a possibility that the conviction be wholly or partly reversed.[63] Proceeding to screen hundreds of victims for the purposes of deciding their eligibility for reparations is a cumbersome and costly process for the Court that will inevitably raise the victims' expectations as much as their potential disappointment, should Mr Ntaganda's conviction be overturned or amended.

b. Contacting the victims at this stage may give rise to security issues, including exposure of their status as victims. Minimising contact with the victims tends to reduce this risk. Contacting the victims directly at the implementation stage, once they come forward to receive reparations, reduces the need for repeated contacts.

c. Victims are likely to be displaced or migrate, for reasons including the Ebola outbreak and the recent upsurge of inter-ethnic violence in the region. Hence, locating the victims now does not guarantee that their whereabouts will be known at the time a reparation order will finally be implemented.

d. Individuals tend to come forward once they know the potential content of the TFV projects, due to the psychosocial and security implications said step

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[60] *Idem*, paras. 60 and 72.
[61] See for all the "Thirteenth Periodic Report on Victims in the Case and their General Situation", No. ICC-01/04-02/06-2353, 6 June 2019.
[62] See the LRVs' Joint Response, *supra* note 10, para. 24.
[63] The jurisprudence of the Court indicates that a reparations order can only be made when the person has been found guilty. See the "Final decision on the reparations proceedings" (Trial Chamber III), No. ICC-01/05-01/08-3653, 4 August 2018, para. 3.

may have. Attempting to identify and screen the victims prior to the issuance of a reparations order, when the types and modalities of reparations are yet to be established, would fail to take said reality into account. This applies in particular to victims of rape and sexual slavery. Said victims, often highly traumatised and rejected by their communities, are not likely to come forward before having knowledge on the projects envisaged.

37. In the submission of the Legal Representative, an 'intermediate procedure' may be appropriate in the present case. However, this is subject to the following observations. At the time reparations proceedings started in the *Lubanga* case, the total number of victims authorised to participate in the proceedings was 129.[64] This figure is more than doubled in the *Ntaganda* case, where 283 former child soldiers have already been allowed to participate. In addition, as requested *supra*, the victims identified and found eligible for reparations in the *Lubanga* case (425)[65] should also be able to benefit from reparations in the *Ntaganda* case. There is, in the submission of the Legal Representative, sufficient material for a proper sample. The identification of further potential beneficiaries for sampling purposes at this stage of the process would unnecessarily incur the risks outlined *supra*. On the basis of the (existing) sample the Chamber may draw meaningful conclusions as to the eligibility criteria and provide guidance for the work of the TFV at the implementation stage. It would also enable the TFV to work backwards, with a view to setting up meaningful projects with respect to those found eligible and based on the criteria established in the Chamber's decision so as to be able to start implementing said projects as soon as Mr Ntaganda's conviction becomes final.

2. Types and scope of harm

38. To be eligible for reparations, victims must have suffered harm as a result of the commission of the crimes of which Mr Ntaganda was convicted. Article 75(1) and

[64] See the "Judgment pursuant to Article 74 of the Statute" (Trial Chamber I), No. ICC-01/04-01/06-2842, 14 March 2012, para. 15.
[65] See the "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable", *supra* note 51, paras. 259 and 279.

Rule 97(1) refer in this respect to the notions of "*damage, loss and injury*". Pursuant to the jurisprudence of the Appeals Chamber, 'harm' denotes "*hurt, injury and damage*".[66] The harm must have been personal and may be material, physical and/or psychological.[67]

39. In addition, the relevant harm must be *the result of* the crimes for which Mr Ntaganda has been convicted. A causal link between these crimes and the harms needs to be established, for purposes of reparations.[68] Following the jurisprudence of the Appeals Chamber, the causation standard ought to be determined in light of the specificities of a case[69] and, in the submission of the Legal Representative, there are no compelling reasons to deviate from the standard identified in the *Lubanga* case. Accordingly, the crimes committed by Mr Ntaganda must be the "*but/for*" and "*proximate*" cause of the harms for which reparations are awarded.[70]

40. Such harm must be defined in the Reparations Order.[71] For purposes of the *Lubanga* case, the Appeals Chamber identified the types of harm suffered by direct victims that are relevant to the crimes of conscription, enlistment and use of child soldiers to participate actively in hostilities:

i. Physical injury and trauma;

ii. Psychological trauma and the development of psychological disorders, such as, *inter alia*, suicidal tendencies, depression, and dissociative behaviour;

iii. Interruption and loss of schooling;

iv. Separation from families;

v. Exposure to an environment of violence and fear;

vi. Difficulties socialising within their families and communities;

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[66] See the *Lubanga* 2015 Order for Reparations, *supra* note 17, para. 10.
[67] *Ibid*.
[68] *Idem*, para. 11.
[69] *Ibid*.
[70] *Idem*, para. 59, setting out that "[t]*he standard of causation is a 'but/for' relationship between the crime and the harm and, moreover, it is required that the crimes for which Mr Lubanga was convicted were the 'proximate cause' of the harm for which reparations are sought*".
[71] See the *Lubanga* 2015 Appeals Judgment on Reparations, *supra* note 15, para. 32.

vii. Difficulties in controlling aggressive impulses; and

viii. The non-development of "*civilian life skills*" resulting in the victim being at a disadvantage, particularly as regards employment.[72]

41. The Legal Representative submits that these categories of harm can be adopted in the present case.

42. Further, reflecting the material and immaterial harm suffered as a result of the crimes of rape and sexual enslavement, the following factors need to be taken into account: (i) the age of the victims − all under fifteen years at the relevant time; (ii) the victim's gender − boys and girls shall be treated equally; (iii) the specific cultural meaning and taboos attached to sexual crimes; (iv) the circumstances in which the sexual crimes were committed – including the number of times the persons were raped, the number of perpetrators, the situation of captivity. Rape and sexual enslavement produce a multiple, chronic and multidimensional impact on the victims. They cause material and immaterial harm, including undesired pregnancies, miscarriages, children born out of rape, HIV/AIDS, other STD, infections, fistulas' and other injuries, sexual dysfunctions, stigmatisation, shame, guilt, anger, powerlessness, purposelessness, self-hate, revenge and suicidal thoughts and related attempts.[73]

43. As noted, at the time of the commission of the crimes, the (direct) victims were all under the age of fifteen. They suffer *inter alia* a very specific type of harm, the damage to a life plan/the project of life, a category that has been recently recognised and addressed in the jurisprudence of the Appeals Chamber:

> "*Also, and as pointed to by the OPCV, the Appeals Chamber stresses the need to recognise and address, as one type of harm, in the projects being implemented, the damage to a life plan/the project of life, which these children may have suffered. Again, the Appeals Chamber recalled this concept in the* Lubanga *Amended Reparations Order,*

[72] See the *Lubanga* 2015 Order for Reparations, *supra* note 17, para. 58.
[73] See the "Submission by QUB Human Rights Centre on reparations issues pursuant to Article 75 of the Statute" (Queen's University Belfast), No. ICC-01/05-01/08-3444, 17 October 2016, paras. 67 *et seq* (the "QUB 2016 Submissions").

> *noting that 'the concept of 'damage to a life plan', adopted in the context of State responsibility at the IACtHR, may be relevant to reparations at the Court'. In identifying the harm to direct victims of, specifically, Mr Lubanga's crimes, the Appeals Chamber included '[i]nterruption and loss of schooling' and '[t]he non-development of 'civilian life skills' resulting in the victim being at a disadvantage, particularly as regards employment'. The Appeals Chamber emphasises that it is crucial, in the reparations provided, that the specific situation of the children at issue in this case is recognised and that their harm is appropriately remedied through the particular reparations provided*".[74]

44. The concept of "*project of life*" was first developed by the Inter-American Court of Human Rights (the "IACtHR") in the *Loayza Tamayo* case.[75] The IACtHR observed that material damages and lost wages are generally insufficient to grant the victim's *restitutio in integrum*. It then introduced the notion of a person's life plan, which considered the full self-actualisation of the person concerned,[76] including the loss or severe diminution of her or his prospects of self-development.[77] Subsequent jurisprudence of the IACtHR endorsed measures to repair damages to one's life plan, accepting additional non-pecuniary damages under this category.[78] The notion has

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[74] See the *Lubanga* 2019 Appeal Judgment on Reparations Size, *supra* note 39, para. 38.

[75] See IACtHR, *Loayza-Tamayo v. Peru*, Reparations and costs, 27 November 1998. At the time, the IACtHR did not find the jurisprudence sufficiently evolved to order compensation under this category of harm. Such a development was undertaken later in the jurisprudence of that Court, as set out in the accompanying text *supra*.

[76] *Idem*, para. 147. The concept "*takes account of her calling in life, her particular circumstances, her potentialities, and her ambitions, thus permitting her to set for herself, in a reasonable manner, specific goals, and to attain those goals*".

[77] *Idem*, para. 150.

[78] See IACtHR, *Cantoral Benavides v. Peru*, Judgment of 3 December 2001 (Reparations and Costs), where Peru was ordered to provide the victim with the means to carry out and complete his studies at a university of recognised academic excellence, since his unlawful imprisonment denied his life project to pursue a university degree. See operative para. 99(6). In, *Tibi v. Ecuador*, Judgment on Preliminary Objections, Merits, Reparations and Costs, 7 September 2004, paras. 245-246, a case dealing with unlawful detention and torture, the IACtHR stated that Daniel Tibi's expectations for personal, professional, and family development, possible under normal conditions, were abruptly interrupted which clearly altered his life plan. The damage to the victim's "*life plan*" was considered as part of the Court's assessment that Mr. Tibi should receive €82 850.00 in compensation for non-pecuniary damages.

also been incorporated into the jurisprudence of the European Court on Human Rights (the "ECtHR") by the Grand Chamber.[79]

45. The Legal Representative underlines that the concept of "*project of life*" is particularly relevant to reflect aspects of the harm endured by former child soldiers and especially those children who, in addition, were sexually abused. The active involvement of children below 15 in military activities, exposing them to fear, anxiety and inhuman treatment creates significant psychological trauma that persists long after their demobilisation from the armed group. It may also have adverse effects on brain development, and delays in cognitive, language, and academic skills, impairing the child's learning abilities and affecting later performance in school, the workplace, and the community. Victims are deprived of vital aspects of their childhood, such as education and family life. Former child soldiers who were raped and became pregnant during their time in the militia face the same and additional major disruptions. In addition to the harms outlined *supra*, they are often rejected by their families and communities, unable to marry, denied access to productive activities and schooling, hence their life plan is seriously impaired.

46. The Appeals Chamber has set out, again for purposes of the *Lubanga* case, the relevant types of harm suffered by indirect victims:

i. Psychological suffering experienced as a result of the sudden loss of a family member;

ii. Material deprivation that accompanies the loss of the family members' contributions;

iii. Loss, injury or damage suffered by the intervening person from attempting to prevent the direct victim from being further harmed as a result of a relevant crime; and

[79] See ECtHR, *Thlimmenos v. Greece*, Judgment 6 April 2000, para. 70, recognising as part of the assessment of non-pecuniary damages that the violation suffered by the victim had harmed "*the applicant's access to a profession, which is a central element for the shaping of one's life plans*". The award for this type of damages, calculated on equitable basis, took into account said factor.

iv. Psychological and/or material sufferings as a result of aggressiveness on the part of former child soldiers relocated to their families and communities.[80]

47. The Legal Representative submits that, in the assessment of the damage caused, a relevant consideration is the '*transgenerational harm*' suffered by indirect victims. This consideration is crucial in the context of reparations proceedings taking place some 18 years after the commission of the relevant crimes. For reasons of page limitation, the details of this type of harm will not be set out in full in the present submissions. This would be unnecessary, as they have been addressed in various previous submissions,[81] expert reports[82] and jurisprudence.[83]

48. Over ten years ago, in the *Lubanga* case, Court-appointed expert Dr Elisabeth Schauer addressed the transgenerational nature of the harm caused. She underlined the existence of an intergenerational cycle of dysfunction that traumatised parents set in motion,[84] with a transgenerational handing-down of trauma owing to the fact that

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[80] See the *Lubanga* 2015 Order for Reparations, *supra* note 17, para. 58.

[81] See *e.g.* the "Observations sur le Projet de mise en œuvre des réparations déposé par le Fonds au profit des victimes le 3 novembre 2015", No. ICC-01/04-01/06-3193, 1 February 2016; the "Submissions relevant to reparations", No. ICC-01/05-01/08-3455, 31 October 2016; the "Submissions on the Evidence Admitted in the Proceedings for the Determination of Thomas Lubanga Dyilo's Liability for Reparations", No. ICC-01/04-01/06-3360-tEng, 8 September 2017(the "OPCV Submissions on the evidence"); the "*Soumissions conjointes des Représentants légaux des victimes d'éléments d'informations supplémentaires en vue de l'Ordonnance en réparation*", No. ICC-01/05-01/08-3581, 1 December 2017; and the "OPCV Further Submissions in the appeals proceedings concerning the "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable" (OPCV), No. ICC-01/04-01/06-3437, 31 January 2019.

[82] Relevant to the *Lubanga* case, see Annex 1 to the "Report of Ms. Elisabeth Schauer following the 6 February 2009 'Instructions to the Court's expert on child soldiers and trauma'", No. ICC-01/04-01/06-1729-Anx1, 25 February 2009, pp. 26-27; for the *Katanga* case, see the "Transmission of the 'Expert Report on the evaluation of the mental health of child victims of the attack on Bogoro of 24 February 2003'", No. ICC-01/04-01/07-3692-Red2, 31 May 2016.

[83] See the "Decision on the Matter of the Transgenerational Harm Alleged by Some Applicants for Reparations Remanded by the Appeals Chamber in its Judgment of 8 March 2018" (Trial Chamber II), No. ICC-01/04-01/07-3804-Red-tENG, 19 July 2018, 9-14. See also the *Katanga* 2017 Reparations Order, *supra* note 49, paras. 132-135.

[84] See Annex 1 to the "Report of Ms. Elisabeth Schauer following the 6 February 2009 'Instructions to the Court's expert on child soldiers and trauma'", *supra* note 82, pp. 26-27: "*Internalized affects of violent and neglectful caretaker-models deform the psyche and can also act out on the next generation.* […] *Violence and trauma at the time of parents' childhood may result in problematic attachment relationships that have long-term consequences for mental health and interpersonal relationships on the side of their children. An intergenerational cycle of dysfunction is set in motion.* […] [C]*hildren of survivors can be equally affected by their parents'*

violent and neglectful caretaker-models deform the psyche and can also impact on the next generation. Traumatised parents, who leave in constant and unresolved fear, unconsciously adopt a frightening behaviour. This affects the child's emotional behaviour, attachment and well-being, increasing the risk that they will suffer post-traumatic stress disorder, mood disorders and anxiety issues.[85] There is a cascading impact from each direct victim onto their relatives who became indirect victims of the events. In a nutshell, transgenerational harm is "*a phenomenon, whereby social violence is passed on from ascendants to descendants with traumatic consequences for the latter*".[86]

49. As noted in an expert report filed in the *Bemba* case:

> "*during the* Bemba *case, Trial Chamber III heard expert evidence that provided critical information about post-traumatic stress disorder and the longitudinal and inter-generational impact of sexual violence crimes. Not only have many of the victims of sexual violence experienced the individual trauma of harm inflicted upon their person, they would also have witnessed the brutality and cruelty inflicted on their family members. The frequency and ferocity of acts of rape that were committed in the presence of or within earshot of victims' children, parents, siblings, other family members, and/or neighbours was acknowledged. The Court should consider family members or dependents of the direct victims as indirect victims that have suffered harm both individually and collectively. Family members are at considerable risk of psychological damage, particularly when they have witnessed the sexual violence or been forced to participate in the rape*

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symptoms of numbing and avoidance, which are associated with substantial decrements in parent child relationship quality and prevent normal emotional expression and closeness. […] *Studies on fathers' who have experienced numerous war events show that feelings of detachment and numbing can carry over to their children, leading to behavioural problems in the child. Based on the vulnerability of surviving a war or growing up in a post-conflict setting, children in turn might also become more vulnerable to forces that instigate violence*".

[85] See YEHUDA (R.), and BIERER (L.M.), "Transgenerational Transmission of Cortisol and PTSD Risk", *Progress in Brain Research*, vol. 167, 2007, pp. 121-135. See also BOSQUET (E.M), EGELAND (B.), CARLSON (E.), BLOOD (E.), and WRIGHT (R.), "Mother-Infant Attachment and the Intergenerational Transmission of Posttraumatic Stress Disorder", *Development and Psychopathology*, vol. 26(1), 2014, pp. 41-65; and HUMAN RIGHTS WATCH, *I Just Sit and Wait to Die: Reparations for Survivors of Kenya's 2007-2008 Post-Election Sexual Violence*, February 2016, p. 61.

[86] See the "Decision on the Matter of the Transgenerational Harm Alleged by Some Applicants for Reparations Remanded by the Appeals Chamber in its Judgment of 8 March 2018", *supra* note 83, para. 10. See also "Order for Reparations pursuant to Article 75 of the Statute", No. ICC-01/04-01/07-3728-tENG, 24 March 2017, para. 132

> *of their family members. Children conceived from rape are particularly vulnerable; many are without societal or family support. Their existence may serve as a reminder of trauma; they may be ostracised, neglected, malnourished, and have poor educational attainment. Disruption to their education may impact their behaviour, emotional well-being, capacity for future employability and relationship with other family members. Many children may have been orphaned, their mothers' having died from HIV complications. Furthermore, a percentage of these children may be HIV positive requiring care and Antiretroviral Therapy (ARVT)*".[87]

50. Rape and sexual enslavement produce, as noted, a multidimensional impact affecting the victims' families and communities on social and economic levels, causing rejection and lack of support, disintegration of couples and families, exclusion, humiliation, mockeries and isolation.

51. In the submission of the Legal Representative, special attention needs to be given to all children, included children born out of rape, who often live in damaged, suffering and disjointed families. In addition, children born as a result of the rape of their mothers are often rejected by their families and communities, which in turn increases their vulnerability. The Chamber has been explicit in this regard:

> "*Particular difficulties were faced by female children under the age of 15 who had been associated with an armed group in returning to their families and communities where they returned with a child and where the communities assumed that these young women had undergone sexual abuses; in this respect, the Chamber recalls its finding that, after having been raped multiple times at Bule camp, P-0883 found out that she was pregnant, without knowing 'who was responsible for that pregnancy'. Children born as a result of sexual violence, as well as their mothers, faced rejection from their communities*".[88]

3. Scope of Mr Ntaganda's liability for reparations, including monetary obligations

52. Mr Ntaganda is liable for reparations in relation to the harm caused to the victims of the crimes for which he was convicted. His liability must be proportionate

[87] See the QUB 2016 Submissions, *supra* note 73, paras. 75-76.
[88] See the "Sentencing judgment", *supra* note 11, para. 113.

to the harm he caused and, *inter alia*, his participation in the commission of the crimes for which he was found guilty.[89] For the purposes of the present submissions, the Chamber must take into account that Mr Ntaganda has been found guilty, as an indirect co-perpetrator, of the following war crimes:

a. conscripting and enlisting children under the age of 15 years into an armed group between on or about 6 August 2002 and 31 December 2003, and using them to participate actively in hostilities between on or about 6 August 2002 and on or about 30 May 2003;

b. rape and sexual enslavement as a war crimes against children under the age of 15 years incorporated into the UPC/FPLC between on or about 6 August 2002 and 31 December 2003, in Ituri.[90]

53. Mr Ntaganda's conviction has been predicated on individual criminal acts that were found to have been "*established beyond reasonable doubt*". This holds true whether, and depending on the charges in question, these individual criminal acts overlapped with the scope of the charges or served only as examples of conduct falling within certain parameters.[91] However, as confirmed by the Appeals Chamber, reparations proceedings are "*fundamentally different*" from proceedings at trial and a more flexible evidentiary standard applies.[92] The applicable standard of proof is instead the "*balance of probabilities*".[93] Accordingly, each applicant must show that "*it is more probable than not that he or she suffered harm as a consequence of one of the crimes of which* [the Accused] *was convicted*".[94] The Legal Representative posits that all individuals demonstrating, on balance of probabilities, at this stage or at the implementation stage of the reparations proceedings, that they suffered harm as a result of the crimes set out *supra* are entitled to reparations falling within the scope of Mr Ntaganda's liability.

[89] See the *Lubanga* 2015 Appeals Judgment on Reparations, *supra* note 15, para. 118.
[90] See the Judgment, *supra* note 6, pp. 536-538.
[91] *Idem*, paras. 39 *et seq*. See also the "Sentencing judgment", *supra* note 11, paras. 93, 108 and 182.
[92] See the *Lubanga* 2015 Appeals Judgment on Reparations, *supra* note 15, para. 81.
[93] *Idem*, paras. 65 and 83.
[94] See the *Katanga* 2017 Reparations Order, *supra* note 49, para. 50.

54. For example, in relation to sexual violence, the Chamber has been explicit that the conviction and sentence have been pronounced on the basis of crimes committed against three individuals, acknowledging nevertheless that this is not representative of the number of female UPC/FPLC victims who were subjected to rape and sexual violence, a type of conduct that was a common practice in the UPC/FPLC during the relevant time period.[95] It was neither necessary nor at all feasible to establish in the Judgment, beyond reasonable doubt, each instance of victimisation relevant to this type of crime. That step is instead envisaged at the reparations stage of the proceedings, on a lower evidentiary standard. Indeed, it is implicit in the Order Setting out Deadlines that the current reparations proceedings are not limited to the three victims of specific criminal acts established beyond reasonable doubt in the Judgment, in that the Registry has been instructed to continue its preliminary mapping of potential new beneficiaries.[96]

55. As noted, there is a significant overlap between the victims of child recruitment in the *Lubanga* and the *Ntaganda* cases.[97] However, even where part of the harm suffered by a group of victims in the *Ntaganda* case may be targeted by reparation measures to be delivered in the *Lubanga* case, there will be significant room to improve the situation of these individuals. As underlined by the Appeals Chamber, it will often be unachievable to restore the victim to his or her circumstances before the crime was committed,[98] or rectify (transform) such a situation.[99] The limited resources and the difficulties in implementing reparation plans will make it impossible in practice to deliver integral reparations (*restitutio in integrum*). Hence, reparation awards targeting this same type of harm, one that could not be fully redressed, will remain within the scope of liability relevant to the present proceedings.

[95] See the "Sentencing judgment", *supra* note 11, para. 108.
[96] See the Order Setting Deadlines, *supra* note 1, para. 9(a).
[97] See the Preliminary Observations, *supra* note 9, para. 9.
[98] See the *Lubanga* 2015 Order for Reparations, *supra* note 17, para. 67(1).
[99] *Idem*, footnote 38.

56. The jurisprudence of the Court has addressed the factors that may be taken into account in the determination of the financial liability of the convicted person and certain factors that have no relevance to this determination. Mr Ntaganda's indigence has no impact in the determination of his financial liability. Taking this factor into account would constitute, according to the jurisprudence of the Appeals Chamber, an error.[100] Equally irrelevant to this determination are the monetary resources the TFV may make available to complementing the reparation awards. As noted in the jurisprudence of the Court, it is for the TFV to decide whether and how much of its resources will be made available[101] and, in any event, the amounts anticipated may be increased at a later point, *inter alia*, on account of successful fundraising efforts.[102]

57. With respect to the factors that shall be taken into account, the jurisprudence of the Appeals Chamber has insisted that the calculation must include the cost to repair the harm. Indeed, in the *Katanga* case, the Appeals Chamber concluded that:

> "*rather than attempting to determine the 'sum-total' of the monetary value of the harm caused, trial chambers should seek to define the harms and to determine the appropriate modalities for repairing the harm caused with a view to, ultimately, assessing the costs of the identified remedy. The Appeals Chamber considers that focusing on the cost to repair is appropriate, in light of the overall purpose of reparations, which is indeed to repair*".[103]

58. Later, in the *Lubanga* case, the Appeals Chamber clarified that:

> "[t]*he amount of the convicted person's liability should be fixed taking into account the cost of reparations considered to be appropriate and that are intended to be put in place (which can include reparations programmes) and the different harms suffered by the different victims, both individual victims (direct and indirect) in addition to, in particular circumstances, the collective of victims* […]. *If the information and evidence upon which the trial chamber relies does not enable it to set the amount of liability with precision, for example,*

[100] See the *Lubanga* 2015 Appeals Judgment on Reparations, *supra* note 15, paras. 102-105.
[101] *Idem*, paras. 106 *et seq*.
[102] See the *Al Mahdi* 2017 Reparations Order, *supra* note 50, para. 112.
[103] See the "Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled 'Order for Reparations pursuant to Article 75 of the Statute'" (Appeals Chamber), No. ICC-01/04-01/07-3778-Red A3 A4 A5, 8 March 2018 (the "*Katanga* Appeals Judgment on Reparations"), para. 72.

> *because it cannot obtain precise information as to the costing of specific reparations programmes, then it may, with caution, consider whether to rely on estimates* […] *as to the cost of reparations programmes. In doing so, it should, however, make every effort to obtain estimates that are as accurate as possible* [although it] *may, therefore, need to weigh the need for accuracy of estimates against the goal of awarding reparations without delay*".[104]

59. Admittedly, the calculation of the cost of repairing the harm is a challenging exercise. The exact figure requires clarity as to the types and modalities of reparations to be implemented, the potential number of beneficiaries, the specific programmes to be put in place and the cost of each program pursuant to a procurement process that is premised on the ICC Financial Regulations and Rules. Such an exact figure is however unnecessary since the Chamber may rely on estimates.

60. In the context of the present submissions, it is important to underline two aspects emerging from the *Lubanga* jurisprudence. First, although it has been a constant challenge to estimate the number of child soldiers serving within the UPC/FPLC at the relevant time, the amount quantified to redress the harms of still unidentified beneficiaries was considered in line with the rights of the Defence because it was based on a "*conservative estimate*".[105] The Legal Representative submits that the Chamber, in the present proceedings, shall equally rely on a conservative estimate with respect to unidentified potential beneficiaries. Second, Chambers must clearly set out the basis on which they reach their findings.[106] With respect to the relevant factors upon which the calculation of Mr Ntaganda's liability for reparations shall be undertaken, the Appeals Chamber referred to the work of the OPCV, in that it provided information as to the average costs of annual school fees and university tuition, literacy, language and vocational training, medical and psychological care as well as the cost of detoxification programmes.[107]

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[104] See the *Lubanga* 2019 Appeal Judgment on Reparations Size, *supra* note 39, para. 108.
[105] *Idem*, para. 120.
[106] *Ibid*.
[107] *Idem*, para. 115.

61. Furthermore, it is particularly relevant for the purposes of the calculation of Mr Ntaganda's liability for reparations to recall the efforts undertaken in the *Lubanga* case.[108] Trial Chamber II considered the submissions of the parties, domestic decisions, findings made in other ICC cases and the individual criminal responsibility of the convicted person[109] to make an *ex æquo et bono* estimation of the harm suffered by each victim, direct or indirect, within a sample of 425 victims found eligible for reparations.[110] Then, recalling that hundreds and possibly thousands additional victims suffered harm as a consequence of the relevant crimes the Chamber estimated *ex æquo et bono* the liability of the convicted person in respect of those other victims who may be identified during the implementation phase of reparations.[111] This process has been mostly endorsed by the Appeals Chamber.[112]

62. In the *Lubanga* case, the OPCV provided 'field information' concerning the economic context in Ituri, referring to the following costs:

> "*35. Upon compiling the information obtained, the Legal Representative notes – for informational purposes only – the following costs: average annual school fees at the primary level (including the snack for the teachers, school entrance fees, snack for the pupil and school supplies – bearing in mind that the fees vary depending on the* localité *and on the school's management method, i.e. private or public): USD 150; average annual school fees at the secondary level (using the same parameters): USD 260; moreover, there are additional fees for end-of-cycle final exams, without which diplomas cannot be obtained; annual university tuition (again, with variations depending on the area of studies): on average between USD 350 and USD 580, in addition to fees for university supplies, of an average amount of USD 400, totalling between USD 750 and USD 980, depending on*

[108] See the OPCV Submissions on the evidence, *supra* note 81, paras. 16, 31-32 and 50. The proposal was made on the basis of information from the field, collected though meetings with resource persons, intermediaries, teachers, etc. to discuss: average costs concerned in housing; annual school fees; various types of medical care; and costs of access to psychological care in the Democratic Republic of Congo (DRC). See the "Annex 1 to the Submissions on the Evidence Admitted in the Proceedings for the Determination of Thomas Lubanga Dyilo's Liability for Reparations", No. ICC-01/04-01/06-3360-Anx1, 8 September 2017.

[109] See the "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable", *supra* note 51, paras. 259 and 279.

[110] *Ibid*.

[111] *Idem*, para. 280.

[112] See also the *Lubanga* 2019 Appeal Judgment on Reparations Size, *supra* note 39, paras. 104 *et seq*.

> *the area of studies considered annually; literacy courses: between USD 100 and USD 200, depending on the* localité*; language training: between USD 10 and USD 50 per month, depending on the* localité *and the facilities available.*
> […]
> *38. With regard to vocational training, the Legal Representative submits – for informational purposes only – the following costs: from USD 40 to USD 120, depending on the vocational training and the facilities offering it, with costs ranging from USD 10 to USD 400 for the supplies needed for the given professional activity.*
> […]
> *39. In addition, on the basis of the presumption of psychological harm admitted in the instant case and on the victims' identified needs, the Legal Representative has also asked her resource persons for information on the costs of access to psychological care, where available. Such costs seem to range between USD 30 and USD 50 per month.*
> […]
> *40. Lastly, the Legal Representative has established a lump sum corresponding to fees for medical care required for almost all her clients (direct and indirect victims).This amount is, as a starting point, USD 300* per capita*, including both the normal costs of a medical consultation (from USD 3 to USD 10, depending on the* localité *and the host facility),the care administered (from USD 10 to USD 250, depending on the infrastructure available, the* localité *and the nature of the care), hospitalization days, where necessary (USD 6 to USD 11 per day, depending on the host facility and the* localité*),and the costs of the necessary medication, where applicable (whose unit prices may vary from USD 1 to USD 100, depending on the medication and the medical condition).*
> *41. The Legal Representative also notes that some additional fees would apply for victims who require help with detoxification (related to cannabis or alcohol addiction). According to the information obtained from her resource persons, the costs amount to USD 150 per month for programmes generally lasting at least four months,* i.e. *a lump sum of USD 600* per capita *as the starting point for the people concerned*".[113]

63. Although the anticipated costs vary considerably depending on the availability of relevant infrastructures in Ituri and whether said infrastructures can

[113] See the OPCV Submissions on the evidence, *supra* note 81.

be used to implement the reparations projects,[114] estimations are still possible and they should be substantiated upon factors such as those set out *supra*. Estimations that were considered overly challenging or unfeasible in the past[115] may be properly provided at present. For purposes of efficiency and expeditiousness the Legal Representative has conducted a preliminary inquiry and she is able to report that the costs set out *supra* remain up-to-date.[116]

64. These estimations will have to be adjusted to the specificities of the *Ntaganda* case, at least with respect to the three following points. First, the Legal Representative expects more former child soldiers to be willing to participate in the reparations proceedings in the present case because Mr Ntaganda is not of Hema ethnicity. Accordingly Hema victims will be more inclined to come forwards which might not have been the case in the *Lubanga* reparations proceedings. Second, relevant data about the cost of redressing the harm caused by rape and sexual enslavement will need to be collected and added. Finally, as requested *infra*,[117] should the Chamber grant a symbolic lump sum, in terms of individual reparations, to a specific subset of victims, then the monetary obligations of Mr Ntaganda will have to reflect an estimated additional cost under this heading.

C. Types and modalities of reparations

65. Reparations, as noted by the Appeals Chamber, "*must – to the extent achievable - relieve the suffering caused by the serious crimes committed* [and] *afford justice to the*

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[114] See the "Information Regarding Collective Reparations", No. ICC-01/04-01/06-3273, 13 February 2017, paras. 51-57.

[115] See the "Filing on Reparations and Draft Implementation Plan", No. ICC-01/04-01/06-3177-Red, 3 November 2015, para. 214. See also "Additional Programme Information Filing", No. ICC-01/04-01/06-3209, paras. 53-54.

[116] On 21 August 2019, the Acting Minister of Primary, Secondary and Vocational Education announced the abolition of all school fees for primary education in public schools. See RADIO OKAPI, RDC: le gouvernement supprime les frais de scolarité de l'enseignement primaire dans les écoles publiques, 21 August 2019. However, this reform is far from being globally implemented given its considerable budgetary impact. See JEUNE AFRIQUE, La RDC face au défi du coût de la gratuité scolaire, 25 August 2019 and LA CROIX, La chimérique gratuité de l'école primaire en RD-Congo, 30 August 2019, noting incidentally that free primary education was enshrined in the DRC constitution in 2006.

[117] See *infra*, paras. 77 *et seq*.

victims by alleviating the consequences of the wrongful acts".[118] Reparations can either be individual, pursuant to Rule 98(1) and (2) or collective in accordance with Rule 98(3). These categories are not mutually exclusive and they may be awarded concurrently.[119] The types of reparations include those with a symbolic, preventive or transformative value.[120] The modalities of reparations include restitution, compensation and rehabilitation.[121]

66. In the *Lubanga* case, the Appeals Chamber identified the modalities of reparations that are appropriate to redress the harm suffered as a result of the crimes of recruitment and use of child soldiers. These modalities of reparations may be properly adopted by the Chamber in the present case:

> *"i. Restitution should, as far as possible, restore the victim to his or her circumstances before the crime was committed, even if this will often be unachievable for victims of the crimes of enlisting and conscripting children under the age of fifteen and using them to participate actively in the hostilities.*
> *ii. The measures put in place for awarding compensation should take into account the gender and age-specific impact that the crimes of enlisting and conscripting children under the age of fifteen and using them to participate actively in the hostilities can have on direct victims, their families and communities. The Court should assess whether it is appropriate to provide compensation for detrimental consequences of child recruitment.*
> *iii. Rehabilitation of the victims of child recruitment should include measures that are directed at facilitating their reintegration into society, taking into account the differences in the impact of these crimes on girls and boys. These steps should include the provision of education and vocational training, along with sustainable work opportunities that promote a meaningful role in society.*
> *iv. The rehabilitation measures ought to include the means of addressing the shame that child victims may feel, and they should be directed at avoiding further victimisation of the boys and girls who suffered harm as a consequence of their recruitment.*
> *v. The steps taken to rehabilitate and reintegrate former child soldiers may also include their local communities, to the extent that the*

[118] See the *Lubanga* 2015 Order for Reparations, *supra* note 17, para. 71.
[119] *Idem*, para. 33.
[120] *Idem*, paras. 34 and 67.
[121] *Idem*, paras. 35-43.

> *reparations programmes are implemented where their communities are located. Programmes that have transformative objectives, however limited, can help prevent future victimisation, and symbolic reparations, such as commemorations and tributes, may also contribute to the process of rehabilitation.*
>
> *vi. The Court, through the present trial and in accordance with its broad competence and jurisdiction, assisted by the States Parties and the international community pursuant to Part 9 of the Statute on 'International cooperation and judicial assistance', is entitled to institute other forms of reparation, such as establishing or assisting campaigns that are designed to improve the position of victims; by issuing certificates that acknowledge the harm particular individuals experienced; setting up outreach and promotional programmes that inform victims as to the outcome of the trial; and educational campaigns that aim at reducing the stigmatisation and marginalisation of the victims of the present crimes. These steps can contribute to society's awareness of the crimes committed* […] *and the need to foster improved attitudes towards events of this kind, and ensure that children play an active role within their communities.*
>
> *vii. Reparations may include measures to address the shame felt by some former child soldiers, and to prevent any future victimisation. The reparation awards should, in part, be directed at preventing future conflicts and raising awareness that the effective reintegration of the children requires eradicating the victimisation, discrimination and stigmatisation of young people in these circumstances*
>
> […]".[122]

67. The projects developed to implement reparations in the *Lubanga* and the *Ntaganda* cases should complement each other. They should aim, jointly, at restoring – to the extent possible – the victims to the circumstances before the crime was committed or transform such a situation.[123] This will require coordination between multiple actors, who will have to work together towards achieving the best possible outcome in terms of benefit to the victims, avoiding duplication and maximising efficiency and expeditiousness.

[122] *Idem*, para. 67.

[123] *Idem*, para. 67(1) and footnote 38.

68. Reparations should incorporate "*a detailed appreciation of the concrete needs and wishes of the victim population*".[124] It is crucial to consult with victims and, to the extent achievable, award the types and modalities of reparations they request and refrain from issuing awards they do not favour. For example, in the *Katanga* case, Trial Chamber II noted "*that on consultation, the victims specifically rejected certain modalities, such as commemorative events, broadcasts of the trial, the erection of monuments or the tracing of missing persons*" and therefore it correctly refrained from ordering those measures as part of the Reparations Order.[125] Instead, it awarded "*collective reparations designed to benefit each victim, in the form of support for housing, support for an income-generating activity, support for education and psychological support*".[126] The Legal Representative requests the Chamber to adopt this methodology in the assessment of the types and modalities of reparations to be issued in the *Ntaganda* proceedings.

69. Consultations with victims have been carried out prior to the submission of the present observations. However, due to budgetary constraints, neither the Legal Representative nor her field counsel were able to travel to Ituri. Accordingly, a sample of victims was interviewed by telephone. Said sample is representative of the 283 former child soldiers participating in the present proceedings in terms of gender, ethnicity, harms suffered, place of residence, *etc*. From the consultations undertaken thus far, the Legal Representative reports that victims consider that a holistic approach to reparations shall be taken. They overwhelmingly expressed a preference for individual reparations, although they would also accept collective reparations with an individual component. They seek financial aid, to be used for different purposes, including returning to their towns or (re)building their houses and most importantly to provide for their children whom they designate as the indirect victims of the crimes they suffered as a result of the damage to their parents' "life plan" following their recruitment in the UPC/FPLC in 2002/2003. They also expect that reparations will help them and their children to finish their studies

[124] See the "Further information on the reparations proceedings in compliance with the Trial Chamber's order of 16 March 2018", No. ICC-01/04-01/06-3399-Red, 4 December 2018, para. 30.
[125] See the *Katanga* 2017 Reparations Order, *supra* note 49, para. 301.
[126] *Idem*, para. 302 and p. 118.

(Baccalaureate and University). Depending on their ethnic origin, some request an apology from Mr Ntaganda but others argue that a public apology would jeopardise the already volatile security situation in Ituri. Victims of rape and sexual enslavement still suffer physical harm, and wish to receive medical support. Most of them also request psychologic assistance since they feel they are still traumatised by the events, and some of them need support with respect to the drug and alcohol addictions which they continue to suffer from today.

70. Article 39 of the Convention on the Rights of the Child provides that "*States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child*".[127] The Legal Representative posits that collective reparations should address the harm suffered both by the former child soldiers and by their relatives. They may include a service package, one that addresses the physical and psycho-social harm suffered, that provides education or learning opportunities and that provides social care, to help restore family relations. Programmes should aim at ensuring the former child soldiers' effective and sustainable reintegration, allowing them to access education, a livelihood, life skills and a meaningful role in society which they has been deprived of for 18 years.

71. The reparations should therefore facilitate the victims' access to primary and secondary education or accelerated programmes of education and/or vocational training. This applies not only to children of direct victims, but also to former child soldiers themselves, should they still require this type of assistance despite the lapse of time between the current proceedings and their recruitment in the UPC/FPLC (for instances, assistance to finish their baccalaureate and to undertake university studies). A very large majority of the sampled victims see the possibility of accessing

[127] See the Convention on the Rights of the Child, UN General Assembly Resolution A/RES/44/25, 20 November 1989.

education as a necessary step for their reintegration into the community and to compensate for the major disruptions to their "*project of life*" caused by their recruitment in the UPC/FPLC when they were children.

72. The reparation measures shall also facilitate the victims' access to physical and psychological health care benefits. Some former child soldiers have serious untreated diseases and disabilities. Some continue to suffer from drug and alcohol addiction issues, as well as post-traumatic reactions and mental health problems that require treatment.

73. The victims who were subjected to rape and sexual enslavement while recruited in the UPC/FPLC are particularly vulnerable. Girls, who were victims of sexual violence and became pregnant as a result experienced disruptions to their "*project of life*".[128] They may suffer diseases as a consequence of the rape, with serious implications for their health.[129] They face great difficulties to be accepted back into their families and communities. Children born out of rape experience the highest levels of rejection upon return.[130] They may be unable to marry, which may also deprives them of emotional and financial security. They may be denied access to productive activities, which may force them to live in poverty. They may be prevented from attending school, which in turn deprives them of the opportunity to raise themselves out of poverty.

74. In the submission of the Legal Representative, the projects developed in implementation of collective reparation measures shall take into account the specificities of the harm suffered by victims of rape and sexual enslavement. As noted, the Appeals Chamber has directed "*a gender-inclusive approach*" to "*guide the*

[128] See *supra* paras. 43-45.
[129] In this sense, see DUGGAN (C.) and ABUSHARAF (A.), "Reparation of Sexual Violence in Democratic Transitions: The Search for Gender Justice", in GREIFF (P.) (Ed.), *The Handbook of Reparations*, Oxford University Press, 2006, pp. 623-649.
[130] See UNITED NATIONS, Operational Guide to the Integrated Disarmament, Demobilization and Reintegration Standards, December 2014.

design of the principles and procedures applied to reparations" and emphasised that "*gender parity in all aspects of reparations is an important goal of the Court*".[131]

75. As already indicated, should Mr Ntaganda's conviction be overturned entirely or in part on appeal, any community-based measures implemented up to that point should nevertheless be considered to have been awarded under the assistance mandate of the TFV.[132] As noted in the "*Report of the Court on the Revised strategy in relation to victims*",[133] the reparations and assistance mandates can have a significant effect in contributing to the healing process of societies and the Court must constantly monitor and adjust its strategies to respond to local dynamics; "[t]*o do so requires from the entire Court system immense flexibility, creativity and, at times, speed*".[134] This would, indeed, be a novel procedure involving a significant degree of flexibility from all actors in the interests of victims. Yet it may have the potential to ensure some degree of timely and meaningful redress to victims, without incurring the risks highlighted *supra*. The reality is that, in the only instance before the ICC where a conviction has been overturned by the Appeals Chamber pending reparations proceedings (the *Bemba* precedent), the assistance mandate of the TFV was reactivated to address the harm suffered by victims.[135] Measures are urgently required, particularly for the benefit of the most vulnerable victims whose situation has significantly worsened with the lapse of time. Such measures should be designed so as to ensure that the inter-ethnic tensions, and hence insecurity in the region, are

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[131] See the *Lubanga* 2015 Order for Reparations, *supra* note 17, para.18.
[132] See the LRVs' Joint Response, *supra* note 10, para. 30.
[133] See ASSEMBLY OF STATES PARTIES, *Report of the Court on the Revised strategy in relation to victims: Past, present and future*, No. ICC-ASP/11/40, 5 November 2012, paras. 46, 80 and 83: "*46. One of the unique features of the Rome Statute system is that victims have been granted the right to request reparations and may benefit from support by the TFV under its assistance mandate. The further advantage presented by the reparations and assistance mandates is that positive and pro-active engagement with victims can have a significant effect on how they experience and perceive justice, thus contributing to their healing process and the rebuilding of peaceful societies.* […] *80. Overall, the Court must adapt to the unique aspects of each case and situation.* […] *83. The Court must constantly monitor and adjust strategies and messages in order to respond not only to judicial developments but also to local dynamics. To do so requires from the entire Court system immense flexibility, creativity and, at times, speed*".
[134] *Ibid*.
[135] See ICC Press Release, "Following Mr Bemba's acquittal, Trust Fund for Victims at the ICC decides to accelerate launch of assistance programme in Central African Republic", 13 June 2018.

not further exacerbated. They must be conceived, for these purposes, as broadly as possible in terms of the communities concerned.

76. The reparations measures to be awarded in the case should also aim at the victims' "satisfaction". As set out in Principle 22 of the 2005 Basic Principles, these measures include:

a. effective measures aimed at the cessation of continuing violations;

b. verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;

c. the search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;

d. an official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;

e. public apology, including acknowledgement of the facts and acceptance of responsibility;

f. judicial and administrative sanctions against persons liable for the violations;

g. commemorations and tributes to the victims; and

h. inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.[136]

[136] See the Basic Principles, *supra* note 3, Principle 22.

77. Finally, in the submission of the Legal Representative, there exists special category of victims in the case for which individual reparations would be feasible, convenient, and appropriate. The Guidance Note indicates the preference for individual reparations, along with collective reparations, with respect to victims of sexual violence in armed conflict. The Convention on the Rights of the Child directs that those legally responsible for the harm shall provide compensation for damages. Individual reparations are herewith requested given the intensity of the harm suffered by victims of sexual violence during child recruitment, as developed *infra*.

78. As set out in the Guidance Note, due to the plurality of harms associated with sexual violence and its consequences a dual approach to reparations should be adopted *i.e.* certain needs are more readily dealt with on a collective basis, whereas other needs can only be addressed on an individual basis.[137] Accordingly, "[a]*dequate reparation for victims of conflict-related sexual violence entails a combination of different forms of reparations*"[138] and "[i]*ndividual and collective reparations should complement and reinforce each other*".[139]

79. In turn, the right of children to reparations is clearly established in the UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, according to which "[c]*hild victims should, wherever possible, receive reparation in order to achieve full redress, reintegration and recovery*".[140] Article 9(4) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography states that "*State Parties shall ensure that all child victims of the offences described in the present Protocol have access to adequate procedures to seek, without discrimination, compensation for damages from those legally responsible*".[141]

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[137] See the Guidance Note, *supra* note 2, p. 6.
[138] *Idem*, p. 5.
[139] *Idem*, p. 7.
[140] See the United Nations Economic and Social Council, "Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime", Resolution 2005/20, para. 35. See also article 39 of the Convention on the Rights of the Child, *supra* para. 70.
[141] See the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, UN General Assembly Resolution A/RES/54/263, 25 May 2000.

80. Compensation may take the form of a symbolic lump sum payment, that the victim may spend as he/she sees fit.[142] Compensation payments need to be carefully managed to ensure that they are gender sensitive. There is a risk that payments can create tensions within victim communities as well as stigmatisation if they are not administered in a sensitive way. The Chamber may draw from the experience in the *Katanga* case, and implement similar measures applied by Trial Chamber II when awarding individual reparations in order to overcome analogous obstacles.[143]

81. As noted by the United Nations in a report filed in the *Bemba* case:

> "*If individual compensation awards are granted, the Trust Fund for Victims may also need to provide programmes for beneficiaries on basic financial literacy and negotiate with banks or mobile money providers on the transfer to and use of funds by beneficiaries. Once again, such issues should not be seen as obstacles to individual awards of compensation, but rather as having the further ability to transform the lives of victims*".[144]

82. The Legal Representative posits that it would be appropriate to single out this specific group of victims, former child soldiers who are also victims of rape and sexual enslavement and award them individual compensation in the form of a symbolic lump sum. In the submission of the Legal Representative, the relevant individuals shall be identified at the implementation stage of the reparations proceedings pursuant to Regulation 60 of the Regulations of the TFV. If, for instance, 30% of the relevant former child soldiers (about 3000) were subjected to sexual violence the number of beneficiaries may still be manageable, even if, as noted, this type of conduct was "*common practice*" in the UPC/FPLC during the relevant time period.[145] The practices adopted for the delivery of symbolic individual reparations in

[142] See the QUB 2016 Submissions, *supra* note 73, para. 82.
[143] See the *Katanga* 2017 Reparations Order, *supra* note 49, p. 118.
[144] See the "Joint submission by the United Nations containing observations on Reparations pursuant to Rule 103 of the Rules of Procedure and Evidence", *supra* note 31, para. 49.
[145] See the "Sentencing judgment", *supra* note 11, para. 108.

the *Katanga* case would be highly informative and constitutes a successful precedent of a victim centred approach; where several achievements have been accomplished.[146]

D. Experts

83. In the Order Setting Deadlines, the Single Judge directed the Registry, in consultation with the parties, to identify three or more experts with expertise in, *inter alia*:

> "*(i) the scope of liability of the convicted person;*
> *(ii) the scope, extent, and evolution of the harm suffered by both direct and indirect victims, including the long-term consequences of the crimes on the affected communities and including the potential cost of repair;*
> *(iii) appropriate modalities of reparations;*
> *(iv) sexual violence, in particular sexual slavery, and the consequences thereof on direct and indirect victims; and*
> *(v) any other matter deemed relevant after the aforesaid consultation*".[147]

84. The Chamber indicated that, following the receipt of the list of experts and responses to the Registry's identification, it will decide which experts, if any, will be appointed to assist its determinations during the reparations phase.[148] Accordingly, the Registry issued a call for expressions of interest,[149] to which 53 applicants responded. An external consultant assessed these applications and concluded that, out of the 53 applicants, 34 candidates may properly qualify as Experts in the present

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[146] See ASSEMBLY OF STATES PARTIES, *Report to the Assembly of States Parties on the projects and the activities of the Board of Directors of the Trust Fund for Victims for the period 1 July 2018 to 30 June 2019*, No. ICC-ASP/18/14, 26 July 2019, para. 62. With respect to the "*innovative approaches to implement the education and income generating activities (IGA) reparations programmes*", see ASSEMBLY OF STATES PARTIES, *Report on the Activities of the International Criminal Court*, No. ICC-ASP/18/9, 21 October 2019, para. 60.

[147] See the Order Setting Deadlines, *supra* note 1, para. 9(b).

[148] *Ibid*.

[149] See the Call by the Registry of the ICC for experts on reparations for victims within the framework of reparations proceedings in the case of *The Prosecutor v. Bosco Ntaganda*, 20 December 2019.

case.[150] The names and information concerning the 34 candidates have been provided to the Legal Representative.[151]

85. The Legal Representative maintains that the Court already received, in other cases, a significant number of reports from organisations and experts addressing issues, general in nature, of reparations. This material is part of the public record of those cases and the Chamber may refer to it, as documentary evidence, without any need to request new reports. This will avoid litigation, streamline the proceedings and ensure that the limited financial resources available are used for the benefit of victims.

86. For the ease of the Chamber, the Legal Representative set out in the Annex a list of experts that have provided reports concerning issues relevant to the current proceedings, in writing or orally, before the Court in other cases.

87. Should the Chamber nevertheless determine that calling experts is necessary in the present proceedings, the Legal Representative reviewed the 34 applications selected by the external consultant. Although she has no expert skill in assessing the expertise of the applicants, given the specificities of the current reparations proceedings, the need to be cost effective and to avoid raising victims' expectations[152] at the present stage of reparations proceedings, the Legal Representative posits that only an expert very familiar with the Iturian context – past and present − may be of assistance to the Chamber.

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[150] See the "Registry List of Proposed Experts on Reparations Pursuant to Trial Chamber VI's Order of 5 December 2019", *supra* note 14, para. 8(4) and (5).

[151] *Idem*, Annex 1, No. ICC-01/04-02/06-2472-Conf-Anx1. See also Annexes 2 to 35 containing the confidential applications and attached documents of each of the 34 proposed experts. Said list was also communicated through email on 6 February 2020. See the email from the Registry to the LRVs and the Defence dated 6 February 2020, at 16.25. See also *supra* para. 15.

[152] The appointment of experts and their subsequent meetings with victims in the field may be seen by the latter as an indication that reparations will be implemented within a short period of time and hence unnecessarily raise victims' expectations.

Respectfully submitted,

Sarah Pellet
Common Legal Representative of the former
Child soldiers

Dated this 28th Day of February 2020

At The Hague, The Netherlands