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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
with public Annex 1

Corrigendum of the "Public Redacted Version of the 'Submissions by the Common Legal Representative of the Victims of the Attacks on Reparations'" (ICC-01/04-02/06-2477-Red)

Source: **Office of Public Counsel for Victims (CLR2)**

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I. INTRODUCTION

1. The Common Legal Representative of the Victims of the Attacks (the "Legal Representative") hereby presents his submissions on reparations.

II. PROCEDURAL BACKGROUND

2. On 8 July 2019, Trial Chamber VI (the "Chamber") found Mr Bosco Ntaganda guilty of 18 counts of war crimes and crimes against humanity.[1]

3. On 25 July 2019, the Chamber issued an order whereby it designated the Single Judge for reparations issues.[2] The same day the Single Judge issued an order issuing directions and setting deadlines with respect to the fair and expeditious conduct of the reparations proceedings.[3]

4. On 5 September 2019, the Registry filed 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".[4]

5. On 3 October 2019, the Trust Fund for Victims,[5] both teams of Common Legal Representatives of Victims,[6] and the Defence[7] filed their respective observations in response to the Registry's observations in accordance with the Single Judge's order of

[1] See the "Judgment" (Trial Chamber VI), No. ICC-01/04-02/06-2359, 8 July 2019 (the "Judgment").
[2] See the "Decision notifying the designation of a Single Judge", No. ICC-01/04-02/06-2365, 25 July 2019, para 3.
[3] See the "Order setting deadlines in relation to reparations", No. ICC-01/04-02/06-2447, para. 9.
[4] 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, 6 September 2019.
[5] See 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.
[6] 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.
[7] See the "Response on behalf of Mr. Ntaganda to Registry's preliminary observations on reparations", No. ICC-01/04-02/06-2431, 3 October 2019.

25 July 2019 and his subsequent decision on a related Defence request for extension of time.[8]

6. Following the re-composition of the Trial Chamber on 20 November 2019,[9] the Trial Chamber elected Judge Chang-ho Chung as the Presiding Judge of the Chamber and as the Single Judge for the reparations phase of the proceedings.[10]

7. On 5 December 2019, the Single Judge issued the "Order setting deadlines in relation to reparations" (the "Order"), whereby he ordered (i) the Registry to continue carrying out "preliminary mapping of potential new beneficiaries of reparations; (ii) the Registry – in consultation with the parties – to identify three or more experts; (iii) the Registry to submit a list of proposed experts by 14 February 2020; the Registry, parties, and the Trust Fund for Victims to make submissions on a number of substantial questions, including the principles, criteria, and methodology to be applied, by 28 February 2020.[11]

8. The Single Judge further invited the Prosecution and the authorities of the Democratic Republic of the Congo to file submissions by the same deadline, and specified that any interested organisation could apply for the filing of submissions as *amicus curiae* by 10 January 2020.[12]

9. The International Organization for Migration submitted a request pursuant to Rule 103 of the Rules by the specified deadline on 10 January 2020.[13]

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[8] See Email communication from the Chamber to the parties and Registry of 18 September 2019 at 18:05. See also the "Request for a variation of time limit to submit the Defence response to 'Registry's observations, pursuant to the Single Judge's 'Order for preliminary information on reparations' of 25 July 2019, No. ICC-01/04-02/06-2366'", No. ICC-01/04-02/06-2411, 18 September 2019.

[9] See the "Decision re-composing Trial Chamber VI" (Presidency), No. ICC-01/04-02/06-2444, 20 November 2019, p. 3.

[10] See the "Decision notifying the election of the Presiding Judge and the designation of a Single Judge" (Trial Chamber VI), No. ICC-01/04-02/06-2445, 22 November 2019, para. 5.

[11] 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").

[12] *Idem*, para. 9e.

[13] See the "Request for Leave to Submit Observations on the issue set out under point 9 (c) of the Order ICC-01/04-02/06-2447", No. ICC-01/04-02/06-2455, 10 January 2020.

10. On 17 January 2020, the Single Judge granted the International Organisation for Migration leave to submit observations on the issues identified under paragraphs 9(c)(i), (ii) and (iii) of the Order by 28 February 2020.[14]

11. On 4 February 2020, the Registry communicated a confidential List of Proposed Experts to the parties.[15]

12. On 19 February 2020, the Registry filed the "Registry List of Proposed Experts on Reparations Pursuant to Trial Chamber VI's Order of 5 December 2019".[16]

III. CONFIDENTIALITY

13. The present submissions are classified as confidential pursuant to regulation 23*bis*(1) and (2) of the Regulations of the Court, since they refer to the content of documents likewise classified as confidential. A public redacted version of these submissions is filed at the same time.

IV. SUBMISSIONS

A. ON THE APPLICABILITY OF THE LUBANGA *PRINCIPLES*

14. In the Order, the Single Judge instructed the parties to provide their views on whether the principles set by the Appeals Chamber in the *Lubanga* case (hereinafter the "*Lubanga* principles"[17]) need to be amended or supplemented in the present case.[18]

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[14] See the "Decision on request for leave to submit Amicus Curiae observations" (Trial Chamber VI, Single Judge), No. ICC-01/04-02/06-2460, 17 January 2020.
[15] See the Email Communication from the VPRS to the parties of 4 February 2020 at 13:16.
[16] 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-Conf, 19 February 2020.
[17] 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, 3 March 2015, para. 1 (the "*Lubanga* Judgment on Reparations Principles"). See also the "Amended Order for Reparations"

15. The Legal Representative, is, in general, not opposed to the application of the *Lubanga* principles, as they in particular provide for the need to treat victims with dignity, fairly and equally with due regard to a gender-inclusive approach.[19] However, the *Lubanga* principles must be applied in a way that is adapted to the specificities of the present case, namely by taking into account: (i) the large number of victims; (ii) the large geographic scope of victimisation; (iii) the prevailing extreme poverty in the affected communities; (iv) the perpetual lack of assistance to victims since the events; (v) the necessity to tailor the reparation to the general principle of "*do no harm*".

16. To give more context to the last aspect raised under (v), it is submitted that, and in line with the principle of non-discrimination and non-stigmatisation, any reparation award eventually decided must strictly avoid being a source of jealousy, animosity or stigmatisation amongst the affected communities and between the cohabitating Lendu and Hema groups. It is therefore particularly important that reparations be designed in a manner that does not draw distinctions between persons in valuing the harm suffered by one person higher than that of his or her neighbour. Reparations should, to the contrary, be the antithesis to division; they should have a healing and restorative function. Their objective is not only repairing harm suffered to the fullest extent possible but also the promotion of reconciliation among communities.[20] The security situation in Ituri has remained extremely volatile over the last years with a high potential for on-going inter-ethnic tensions in particular between the Hema and Lendu communities who continue to reside alongside each other. Creating new tensions – even when well-intentioned – has a highly destructive potential and all measures should be taken to refrain from any act that would amplify inequalities or otherwise negatively impact on the well-being of the victims concerned.

(Appeals Chamber), No. ICC-01/04-01/06-3129-AnxA, 3 March 2015 (the "*Lubanga* Amended Order for Reparations"), paras. 1-52.

[18] See the Order, *supra* note 11, para. 9c.

[19] See the *Lubanga* Amended Order for Reparations, *supra* note 17, paras 12-18.

[20] *Idem*, para. 46.

17. Moreover, as an overriding observation, the Legal Representative respectfully submits that in the absence of Mr Ntaganda's conviction having been affirmed by the Appeals Chamber making it *res judicata,* this Chamber should refrain from identifying all beneficiaries at this stage, as doing so, despite all efforts of explanations to the contrary, *will* create expectations of potential reparations among the affected population. Judicial certainty of Mr. Ntaganda's conviction, namely certainty as to the exact extent of the crimes and their geographical scope is an absolute prerequisite before the precise identification and screening of the eligible beneficiaries can be carried out.

18. The Legal Representative cannot stress enough that setting in motion any identification of beneficiaries prior to the Appeals Chamber's judgment on Mr Ntaganda's and the Prosecution's appeals will raise hopes among the affected communities, lead to significant expenditure of public funds that should rather be employed when the scope of reparation related to Mr Ntaganda's liability is known, and ultimately risks the severe disappointment should aspects of his conviction not be upheld on appeal. Trial Chamber III in the *Bemba* proceedings recognised the seriousness of such situation when it terminated the reparations proceedings in that case.[21] Any, even remote risk of such a situation must be avoided at all costs in order to shield the victims from further harm the ensuing disappointment would cause.

19. Lastly, it must be noted that many of the affected victims and, therefore, potential beneficiaries do not reside in the affected communities anymore but have been dispersed all over the territory of Ituri and even beyond, because either of insecurity or the Ebola outbreak or simply in search for income.

20. Accordingly, it is respectfully submitted that the reparations order should set out the relevant eligibility criteria for the assessment of beneficiaries during the implementation phase, rather than launching an application-based process as carried

[21] See the "Final decision on the reparations proceedings" (Trial Chamber III), No. ICC-01/05-01/08-3653, 3 August 2018, paras 6-7.

out in previous cases. The latter should be avoided since, given the extremely high number of beneficiaries in this case a detailed, heavy application process would be disproportionally time-consuming, costly and contrary to principles of judicial economy.

21. In this regard, in the *Lubanga* case, the Appeals Chamber held that

> "[T]*here may be cases where the trial chamber contemplates an award for reparations that is not based on an individual assessment of the harm alleged in the requests filed. This may be, for instance, due to the number of victims. In such cases, the trial chamber 'is not required to rule on the merits of the individual requests for reparations'.* […] [I]*n cases with more than a few victims, proceeding in this manner may prove to be more efficient than awarding, or deciding on the eligibility for, reparations on an individual basis, precisely because it is not necessary for the trial chamber to consider individual requests for reparations.*"[22]

22. Secondly, the reparations order should, in line with the Appeals Chamber's *dicta* in the *Lubanga* case, consider the *cost of repairing the harm*,[23] rather than calculating individual lump sum payments based on a meticulous evaluation of different types of harm. It is submitted that in calculating the cost of repair, the Chamber should set an average cost of repair per beneficiary informed by the occurrence of multiple victimisation and therefore compound impact of different harm suffered by the victims of the crimes for which Mr Ntaganda has been convicted. This average per capita cost of repair should therefore form the baseline which will inform the overall reparation award. Thus, the **total cost of repair** of the harm suffered by all victims will accordingly be both the sum of the reparation award to be imposed against Mr Ntaganda and the cost parameters for the implementation of collective reparation programmes. Within the context of that sum, the Trust Fund for Victims ("TFV") should then be mandated to implement reparations programmes that are individually addressing different types of harm sustained by the victims. These programmes should be set up and implemented to

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[22] 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", No. ICC-01/04-01/06-3466-Red, 18 July 2019 (the "*Lubanga* 2019 Judgment"), paras. 87-88.

[23] *Idem*, para. 107. See also 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 (the "*Katanga* Appeal Judgment on Reparations Order"), para. 72.

address the specific needs of victims in the affected areas. It will be important that the overall cost of repair award is used in the most cost-effective way so that several different programmes addressing different needs can be realised.

23. Third, and this is of particular importance in the present case, reparations must not be the source of stigmatisation. Reparation should be the antithesis of stigmatisation. It is therefore crucial that reparations are designed in a manner that takes all steps to avoid sparking animosity or inter-ethnic tensions due to frustrations by those residing alongside but not covered by reparations. Since reparations should aim not only to repair harm suffered to the fullest extent possible but also, as recognised by the TFV, to promote, whenever possible, reconciliation among communities,[24] it is submitted that reparations should be put in place while at the same time ensuring that the TFV assistance programmes for persons not covered by reparations are being put in place in areas of co-habitation of Lendu and Hema communities.

B. ON THE ELIGIBILITY ASSESSMENT

24. As set out *supra*, no application-based process should be carried out to establish entitlements to reparations. It is further submitted that this application-based process should not only be dispensed with at this stage prior to a final determination of the Appeals Chamber on the conviction of Mr Ntaganda. Rather, the Legal Representative submits that such comprehensive, time-consuming process should not be carried out at all. Instead, after the Appeals Chamber has disposed of the final appeals on conviction, beneficiaries should be ascertained by way of a simplified screening process according to eligibility criteria set by the Chamber in accordance with the parameters of the conviction and hence the harm inflicted through the commission of the crimes in question. The eventual eligibility of beneficiaries will then, in practice, be assessed by the TFV in coordination and

[24] See the *Press Release of the Trust Fund for Victims of August 2012*, 8 August 2012.

cooperation with the Legal Representatives as currently practiced in the *Lubanga* and *Al Mahdi* cases.

25. Delegating this task to the TFV is in line with relevant jurisprudence of the Court. In the *Lubanga* case, Trial Chamber I tasked the TFV with the identification of the victims and beneficiaries.[25] Similarly, in the *Al Mahdi*, the Appeals Chamber approved delegating the identification of 'unidentified victims' to the TFV pursuant to the latter's mandate under rule 98 of the Rules of the Trust Fund that confers upon it the power to identify a group of beneficiaries not yet identified by the Trial Chamber.[26]

26. In fact, in the *Al Mahdi* case, the Appeals Chamber stated that:

> "[t]*he applicable legal texts at the Court confer discretion on the trial chamber in its determination of reparations. Beyond article 75 (1) of the Statute and rule 97 (1) of the Rules, there are no provisions that regulate the content of a chamber's final decision on reparations. The Court's legal texts, however, envisage scenarios whereby the TFV may assist a trial chamber in the implementation of an order, with rule 98 (2) of the Rules providing that: 'The Court may order that an award for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim.'*"[27]

27. The Legal Representative submits that the same should be practiced in this case. Once the conviction is finally determined, it should be for the TFV in cooperation with the Legal Representatives to proceed with the identification and screening of beneficiaries.

28. Prior to the reparation order, nothing more than a preliminary mapping exercise of the number of potential beneficiaries should be carried out for the

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[25] See the "Decision Approving the Proposals of the Trust Fund for Victims on the Process for Locating New Applicants and Determining their Eligibility for Reparations" (Trial Chamber II), No. ICC-01/04-01/06-3440-Red-tENG, 12 April 2019, para. 45-48. See the "Decision establishing the principles and procedures to be applied to reparations" (Trial Chamber I), No. ICC-01/04-01/06-2904, 7 August 2012, para. 283.

[26] See the "Judgment on the appeal of the victims against the 'Reparations Order'" (Appeals Chamber), No. ICC-01/12-01/15-259-Red2 A, (the "*Al Mahdi* Appeal Judgment on Reparations Order"), 8 March 2018, para. 63.

[27] *Idem*, para. 60.

purposes of assessing the cost of repair and thus fixing a reparation award. To be clear, there should not be any collection of forms for reparations at any stage. Potential beneficiaries would simply present themselves with the necessary means of proving their eligibility – discussed *infra* – to the TFV representatives in the field during the implementation phase.

29. The Legal Representative particularly advocates against an application-based process because the distribution of application forms prior to any award being set brings with it the real danger of harm to already traumatised victims by creating hope and expectation. To avoid this in the most effective manner, exposure to anything that could raise expectations of being provided with any kind of assistance or monetary award should strictly be avoided. Previous proceedings at the Court have taught a bitter lesson of disappointment to thousands of potential beneficiaries of reparations when a conviction was quashed and they lost their entitlement to reparation.[28] It is moreover a moral obligation and ethical consideration to refrain from raising and nurturing hopes amongst affected communities. Equally, Mr Ntaganda is entitled to know the full and final extent of his conviction before reparations awards are contemplated. This in turn can only be ascertained once the number of eligible beneficiaries is known, but mapping through obtaining reliable demographic data will be sufficient in this regard.

30. At the implementation phase of the reparation order, eligibility should be ascertained by joint screening missions in accordance with the criteria set by the Chamber carried out by the TFV in cooperation with the Legal Representatives.

C. ON THE STANDARD OF PROOF

31. It is submitted that the nature of atrocities suffered by victims in the present case is such that harm should be presumed once a victim has proved, on a balance of

[28] See the "Final decision on the reparations proceedings" (Trial Chamber III), No. ICC-01/05-01/08-3653, 3 August 2018, para. 3.

probabilities standard, that he or she qualifies as a victim of the crimes for which Mr Ntaganda has been found guilty. Thus, in case of attacks against civilians and/or persecution and/or forcible transfer and/or forced displacement combined with pillage and/or destruction of the adversaries property, eligibility for reparation should be established once a person who presents himself or herself during the implementation phase can credibly demonstrate that he or she was residing in a specific village covered by the geographical scope of the facts underlying the conviction at the relevant time, as defined by the conviction.

32. In terms of proving such facts to the standard of a balance of probabilities, the Legal Representative relies on the interpretation of the balance of probabilities as specified by the Appeals Chamber in the *Lubanga* case, namely that "*the difficulty victims may face in obtaining supporting documentation can be taken into consideration when determining the appropriate standard of proof in reparations proceedings*."[29] In particular, the Appeals Chamber added that a chamber "*may find a person eligible for reparations, even where he or she has not supplied any documentation*."[30] According to the Appeals Chamber, a trial chamber "*is also not prevented from finding a person eligible for reparations in circumstances where he or she did not give reasons for his or her inability to provide supporting documentation*."[31] It is submitted that the same principle should be transposable to agents of the TFV carrying out the eligibility assessment during the implementation phase.

33. Due to the frail local administrative infrastructure and on-going conflict situation in Ituri, combined with the fact that many victims were chased from their homes and spent months in the bush or fleeing from village to village, it is a given that most victims will be unable to provide any kind of documents to prove of their losses. Moreover, the crimes date back 18 years already. It is therefore respectfully suggested that the Chamber accept credible and coherent accounts of persons who

[29] See the *Lubanga* 2019 Judgment, *supra* note 22, para. 204.
[30] *Idem*.
[31] *Ibid*.

present themselves for an eligibility assessment in due course during the implementation phase. Therefore, a person will either credibly and coherently establish that they have been present in the locations in question at the time in question or not. Once a person has established this fact, their suffering of harm as a result of the attacks should then be presumed and no additional proof is necessary or required to meet this requirement of eligibility. Adopting this process will significantly simplify and therefore streamline the process.

34. Since the Appeals Chamber in the *Lubanga* case was also satisfied that finding the victims' accounts 'coherent and credible' did not offend its application of the burden of the balance of probabilities,[32] documents or other proof, although desirable, will not strictly be required to satisfy the burden.

35. In relation to physical injury resulting from attacks or attempted murder, the process should be the same. Victims should present themselves for eligibility screening. If they are in possession of relevant medical documentation, they should present such proof, however, a coherent and credible account of how their injury resulted from the crimes committed during the attacks for which Mr Ntaganda has been convicted can be sufficient to satisfy the burden of proof.

36. With respect to the murder, persons should present themselves at the implementation phase if they are relatives of a person who was murdered during the attacks within the parameters of the conviction. In order to satisfy the burden of proof, the person should present a death certificate or alternatively two accounts of persons able to attest to the death (such as *chef de village* etc.) and also produce documentation proving the family link. This should not be limited to the nuclear family but also be accepted in case of more remote family relations since the socio-cultural perception of the family unit is different and in general much wider in the affected region. Close dependence and relations between 'remote' family members is

[32] *Ibid*., paras. 198-202.

considered the norm. Therefore, no discrimination in terms of the degree of kinship should be practiced in the implementation of eligibility criteria regarding the suffering of harm as a result of murder. In this regard, in the *Katanga* case, the Trial Chamber held that the loss of a family member is a traumatic experience entailing psychological suffering to both close and remote family members.[33]

37. Persons proving the death of a relative should be found eligible on the basis that psychological and emotional harm arising therefrom, should in any event be presumed. Even where persons are further able to show that they suffered financially as a result of the passing of their relative, no distinction in eligibility between them and other victims merely proving the death should be made for reasons of equal treatment as set out *supra*.[34]

38. As regards victims or rape and sexual slavery, it is submitted that special care must be taken in relation to this most vulnerable group of victims. Psychological and emotional harm is to be presumed in any event. The Chamber, already during the evidentiary phase of this case has received expert testimony on the devastating effects of rape.[35] In these circumstances, persons should be found eligible if they credibly state that they have been victims of rape or sexual slavery and the circumstances of their allegations fit the parameters of the conviction in terms of time, place, and the perpetrator being affiliated with the UPC/FPLC. Being in the possession of documents/medical records where the person has had access and the opportunity to be seen by a doctor, these should be produced, but in particular in relation to victims of sexual violence this should not be a requirement. Indirect victims, such as close relative or children born out of the rape should also be eligible for reparation and their harm resulting from the crime should also be presumed.

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[33] See the "Order for Reparations pursuant to Article 75 of the Statute" (Trial Chamber II), No. ICC-01/04-01/07-3728-tENG, 17 August 2017 (the "*Katanga* Order on Reparations"), para. 121.
[34] See *supra* para. 17.
[35] See P-0938, the transcript of the hearing held on 30 June 2016, No. ICC-01/04-02/06-T-113-Red-ENG WT, pp. 53-54.

D. ON THE TYPES AND SCOPE OF HARM

39. The victims of the crimes in the present case suffered multi-dimensional harm by virtue of the fact that entire communities were targeted in the perpetration of these crimes, such as attacks against the civilian population and/or persecution, and/or forcible transfer and/or forced displacement of entire villages in combination with pillage and/or destruction of private property and protected objects, and in many cases murder, attempted murder, and sexual violence.

40. As regards the types of harm that should be recognised by the Chamber in its reparation order, the Legal Representative submits that, while he advocates for an assessment of the average harm, the Chamber should recognise the harm suffered by the victims of the crimes that forms the basis of the reparation that is to be effected.

41. Specifically, it is submitted that persons subjected to the crimes of attacking civilians and/or persecution and/or forcible transfer and/or forced displacement combined with pillage and/or destruction of property have suffered the following types of harm:

a. Psychological/emotional harm
b. Material and economic harm
c. Loss of life chances/living standards due to the loss of income-generating opportunities
d. Loss of opportunities for development (including schooling children)

42. In relation to the crime of attempted murder:

a. Physical harm and trauma
b. Psychological and emotional harm
c. Loss of life chances/living standards/opportunities due to physical handicap

43. In relation to the crime of murder of a relative:

a. Psychological/emotional harm

b. Additional burden as a result of having to provide for dependents of the murdered relative which in turn affected their standard of living and resulted in loss of development opportunities

c. Material losses where the murdered relative was the provider or contributor to providing for the family unit

44. In relation to crimes of sexual violence:

a. Psychological/emotional harm amounting to PTSD

b. Sexually transmitted and other diseases, including reproductive capacity affected or lost

c. Stigmatisation

d. Difficulties in resuming social life, including interaction with family and community

e. Loss of life chances/living standards/opportunities and stigma-related consequences

45. As a result of the destruction of community property (hospitals, churches, schools) victims lost access to health care, schooling and religious practice.

46. Various types of harm suffered by victims were elucidated by witnesses and victims in the case, and recognised by the Chamber in the Sentencing Judgment.[36]

E. ON THE ELIGIBILITY CRITERIA

47. Although in the *Lubanga* case, the Trial Chamber held that for a natural person to qualify as a victim for the purposes of reparations under rule 85(a) of the Rules of

[36] See the "Sentencing Judgment" (Trial Chamber VI), No. ICC-01/04-02/06-2442, 7 November 2019 (the "Sentencing Judgment"), paras 44, 49-52, 102-107, 137; 146; 139-141; 158; and 161-162.

Procedure and Evidence, he or she must provide identification, and sufficient proof of the harm suffered and of the causal nexus between the crime and the harm,[37] it is submitted that the presumption of harm is sufficient when the person establishes on the balance of probabilities that he or she was a victim of a crime within the parameters of the conviction, i.e. location, relevant time, attack of the UPC/FPLC.

48. The extent of displacement as such, coupled with the destruction of property and pillage of basic belongings strongly militate in favour of the abovementioned way of demonstrating harm and thus eligibility. Moreover, the sheer expected number of beneficiaries is such that meticulous review and individual decisions on each and every beneficiary in the way this has, for instance, been done in the *Katanga* case, is not feasible.

49. The circumstances and victim base in this case are such that there should be no individual *assessment* of harm as such; rather, once persons meet the eligibility criteria, their having suffered harm should be presumed. There should be no individual assessment of the type of harm suffered either. The eligibility criteria should be such that a person either qualifies and, therefore, is presumed to have suffered harm or not.

50. Psychological/emotional harm resulting from attacking civilians and/or persecution and/or forcible transfer and/or forced displacement should be presumed for direct victims. According to the constant jurisprudence of the IACtHR for instance, it is "*inherent in human nature that any person who suffers a violation to their human rights experiences suffering; consequently, the non-pecuniary damage is evident.*"[38] Furthermore, "[i]t *is obvious to the* [Inter-American Court] *that the victim suffered moral damages, for it is characteristic of human nature that anyone subjected to the kind of*

[37] See the "Public Redacted Corrected version of the 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable" (Trial Chamber II), No. ICC-01/04-01/06-3379-Red-Corr-tENG, 21 December 2017 (the "*Lubanga* 2017 Decision on Reparations Award"), para 40.
[38] See IACtHR, *Río Negro Massacres v. Guatemala*, Judgment, 4 September 2014, para. 307.

aggression and abuse proven in the instant Case will experience moral suffering. No evidence is required to arrive at this finding."[39] In the same line, in the *Katanga* case, the Trial Chamber held that the fact of having experienced an attack on civilians entails psychological harm.[40]

51. The same is also evidently true for the victims in the present case who suffered from mass and community-targeted crimes entailing acts of aggression and violence. The Chamber has itself stated that for instance persecution constitutes "*one of the most serious crimes against humanity [and] amounts to a denial of fundamental rights of one or more persons by virtue of their belonging to a particular group or collectivity*."[41]

52. Material harm from pillage and destruction of property combined with the crimes of attacking civilians and/or persecution and/or forcible transfer and/or forced displacement should be presumed for individuals (and the entire family unit[42]) because the standard of living was affected by the pillage/destruction and resulted in the loss of income-generating and other development opportunities such as interrupted business activities, interrupted schooling, etc. Within the local context, similar to the context of the Central African Republic,[43] the notion of family is larger than that of the strictly nuclear family.[44] Therefore, the extended family unit should

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[39] See IACtHR, *Loayza-Tamayo v. Peru*, Judgment (Reparations and Costs), 27 November 1998, para. 138. See also *Pueblo Bello Massacre v. Colombia*, Judgment (Merits, Reparations and Costs), 31 January 2006, para. 255.

[40] See the *Katanga* Order on Reparations, *supra* note 33, para. 131.

[41] See the Sentencing Judgment, *supra* note 36, para. 175.

[42] In this regard, the IACtHR has recognised harm to the family unit as such, where there is a substantial change in life quality and conditions as a direct result of the exile or relocation of the household; expenses incurred upon social reincorporation; expenses incurred to return to employment lost due to the State's violations; expenses related to loss of education opportunities; loss of possessions, and any detriment to the physical, psychical and emotional health of the injured family. See *Baldéon-García v. Perú*, Judgment (Merits, Reparations, and Costs), 6 April 2006, para. 186.

[43] For *inter alia* this reason, the Legal Representative suggests that the Expertise furnished in the Bemba reparations proceedings at the time, could provide useful information to the Chamber in the present case.

[44] See UNESCO, DANAGORO (J.P.R.), « *La famille traditionnelle en République Centrafricain et les promoteurs de développement* », DEV.87/WS/32, 26 juin 1987, p. 2: "[La notion de famille] *comprend la cellule familiale initiale, c'est-à-dire: les grands-parents et leurs descendants, entretenant des rapports sociaux basés sur des liens de sang et les personnes étrangères à la suite d'un lien de mariage. C'est la famille élargie à l'intérieur de laquelle se manifestent des relations sociales et des devoirs réciproques et qui développe ses rapports avec les autres familles ou clans et même avec ceux déjà morts*".

therefore fall within the ambit of the presumption. In this regard, in the *Katanga* case, the Trial Chamber held that the loss of opportunities, the loss of living standards and the forced exile are covered by the psychological prejudice resulting from having experienced an attack on civilians.[45]

53. Since it is suggested that, if a person fulfils the eligibility criteria, harm should be presumed, there is no need and no basis for individual assessments of harm.

F. TYPES AND MODALITIES OF REPARATIONS

54. The victims thus far participating in the proceedings have expressed a preference for individual, but equal reparation awards. However, they also understand that their sheer number may have the potential of rendering the process difficult and that there exist real challenges in relation to the payment of individual awards. Therefore, the victims agree to being provided with collective reparations that have individualised features in form of health and psycho-social and economic rehabilitation and support. Such initiatives should cover psychological and medical support, the provision of opportunities for development encompassing education and vocational training, assistance in creating farming or other-types cooperatives, support to business start–ups, micro credits and other income-generating activities. These programmes could be implemented, depending on the location of victims, on a community or family-based approach or another group-based approach. These measures would be of benefit for both individual victims, families and communities as a whole.

55. Accordingly, and in view of the large number of victims in this case, the Legal Representative suggests that collective programmes with individualised features are the most appropriate form of proceeding. Given the eighteen years that elapsed since the victimisation, it is difficult to fathom placing the victims in the position in which

[45] See the *Katanga* Order on Reparation, *supra* note 33, para. 139.

they were in had the harm not occurred. Rather, if collective reparation in form of development programmes is going to be the selected form of reparation, the focus must be to provide the victims with the life opportunities they have lost as a result of the harm suffered.

56. It is on this basis that it is submitted that collective reparations may be appropriate where they nevertheless contain individualised features, i.e. individual needs. In contrast to individual reparations, collective reparations are typically categorised as measures that nurture the group's self-empowerment or the community's cultural transformation, or at least to improve the conditions under which victims live.[46] Individualised features must therefore address the specific harm suffered by individuals collectively with others. Both in the *Lubanga* and the *Katanga* cases it has been recognised that "[w]*hen collective reparations are awarded, these should address the harm the victims suffered on an individual and collective basis*"[47] and that "*to receive collective reparations a group or category of person may be bound by a shared identity or experience, but also by victimisation by dint of the same violation or the same crime with the jurisdiction of the Court.*"[48] The *Lubanga* Trial Chamber therefore recognised that collective reparations "*must benefit a group or category of persons who have characteristics in common and/or have suffered shared harm.*"[49] To follow these principles, the Legal Representative posits that designing programmes with 'common characteristics' would be the most appropriate way to proceed in this case.

57. The concept of common characteristics should extend to covering 'common needs' in order to reap the largest possible benefit for each individual person from a collective award programme. Eligible persons should therefore be grouped according to which needs such programmes can cover, namely: education, vocational training, farming assistance, business assistance and micro finance, etc. All of these

[46] See WALKLATE (S,) *Handbook of Victims and Victimology*, 2nd edition, Routledge, London, 2017, p. 250 *et seq*.
[47] See the *Lubanga* 2017 Decision on Reparations Award, *supra* note 37, para. 192.
[48] *Idem*, para. 193.
[49] *Ibid*.

persistent needs are the result of loss of life opportunities through the victimisation that occurred in this case. As expressed by the Inter-American Court of Human Rights (the "IACtHR") in the *Aloeboetoe et al. v. Suriname* in addition to compensation, education had to be guaranteed to the children heirs of the deceased.[50]

58. Since in the present case, all victims suffered from the loss of opportunities to various extents, the concept of "life project" or "life plan" developed by the IACtHR is of relevance. In particular, in the case of *Loayza Tamayo*,[51] the IACtHR observed first that material damages for expenses and lost wages are generally insufficient to truly grant the person *restitutio in integrum.* In addition to being stripped of monetary means during their deprivation of liberty as well as other rights, the violations affected a person's life plan which "*deals with the full self-actualisation of the person concerned and 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.*"[52] It further held that: "[...] *acts that violate rights seriously obstruct and impair the accomplishment of an anticipated and expected result and thereby substantially alter the individual's development. In other words, the damage to the 'life plan', understood as an expectation that is both reasonable and attainable in practice, implies the loss or severe diminution, in a manner that is irreparable or reparable only with great difficulty, of a person's prospects of self-development.*"[53]

59. In subsequent cases, the IACtHR held that the violations in question had caused a serious alteration in the life plan of the victims, which led to additional non-pecuniary damage.

60. In particular, in the case of *Cantoral Benavides*, the IACtHR ordered Peru to provide the victim with the means to carry out and complete his studies at a

[50] See IACtHR, *Aloeboetoe et al. v. Suriname*, Judgement (Reparations and Costs), 10 September 1993, para. 96.
[51] See IACtHR, *Loyaza Tomayo v. Peru*, Judgment (Reparations), 27 November 1998, para. 147.
[52] *Idem*.
[53] *Ibid*., para. 150.

university of recognized academic quality, since his unlawful imprisonment denied his life project to pursue a university degree.[54] In the case of *Tibi*, it calculated the damage to the victim's "life plan" in the form of a monetary award,[55] while in the case of *Cantoral Benavides*, in which the victim was a student who had suffered arbitrary detention, torture and unfair trial, the Court was careful to make a more specific reparations award. In this case it ordered the State to: "[...] *provide him with a fellowship for advanced or university studies, to cover the costs of a degree preparing him for the profession of his choosing, and his living expenses for the duration of those studies, at a learning institution of recognised academic excellence, which the victim and the State select by mutual agreement.*"[56]

61. Similarly, the European Court of Human Rights (the "ECtHR") has recognised the possibility to award reparations for "loss of opportunity". In particular, in the case of *Campbell Cosans v. United Kingdom* the Court found that the violation in question had deprived the victim "*of some opportunity to develop his intellectual potential*".[57] In the same vein, in the case of *Thlimmenos v. Greece*, the Grand Chamber of the ECtHR stated 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.*"[58]

62. Development programmes with individualised features could take the basis form of programmes such as those run by the TFV under its assistance mandate. The TFV has already successfully run such programmes in Northern Uganda[59] or

[54] See IACtHR, *Cantoral Benavides v. Peru*, Judgment (Reparation and Costs), 3 December 2001, para. 80.
[55] See IACtHR, *Tibi v. Ecuador*, Judgment (Preliminary Observations, Merits, Reparations and Costs), 7 September 2004, paras. 245-246.
[56] See IACtHR, Cantoral Banavides v. Peru, *supra* note 54, para. 80.
[57] See ECtHR, *Campbell Cosans v. United* Kingdom, App. No. 7511/76 and 7743/76, Satisfaction, 22 March 1983, para. 26. See also ECtHR, *T.P. and K.M v. United Kingdom*, App. No. 28945/95, Judgment, 10 May 2001 para. 115.
[58] See ECtHR, *Thlimmenos v. Greece*, App. No. 34369/97, Judgment (Merits), 6 April 2000, para. 70.
[59] See the *TVF Assistance Programme in Northern Uganda "Psychological rehabilitation for victimised communities by addressing their mental health needs"*, TFV/UG/2007/R1/014c.

elsewhere in the DRC.[60] For instance, the TFV's assistance program TFV/DRC/2007/R1/022 implemented in Bunia through a local from 2008 until 2017 was aimed at providing victims of sexual violence with psychological rehabilitation and material support in form of supporting economic development initiatives, educational assistance, and creating employment opportunities. Victims were provided with training and start-up funding via savings and loan associations.[61]

63. Other relevant examples of sustainable development initiatives are those by the World Food and Agricultural Organisation (the "FAO"), such as programme OSCO/DRC/907/Bel running from 2009 until 2010 in which the organisation assisted persons of advanced age to engage and form agricultural cooperatives in order to foster sustainable means of farming activities. The FAO also supported displaced families in agricultural activities and supported strengthening skills and empowering women by targeting women's associations in particular and providing farming field schools.[62]

64. Furthermore, the World Bank has been running relevant development programmes in Eastern DRC that bears all the hallmarks of creating sustainable opportunities. While the focus of the World Bank's initiative may be different, the goal is ultimately the same – namely assistance to the vulnerable to ultimately address socioeconomic issues fostering on-going conflict. In particular, the objectives and features of the World Bank's DRC Eastern Recovery Project are of particular relevance to be eventually used in order to address the harm of the victims in the present case.[63] In particular, this project based on Community-Driven Development programs contains three components: community support; livelihoods and employment generation; and capacity building,[64] and has been designed given due

[60] See the *TFV Assistance Programme in the DRC "A School of peace"*, TFV/UG/2007/R1/014c.
[61] See the *TFV Assistance Programme "Psychological assistance of victims of sexual violence in Bunia and 8 nearby locations"*, TFV/DRC/2007/R1/022.
[62] See FAO, the "*Saving Livelihoods Saves Lives*" *Programme*. See for FAO further relevant projects: http://www.fao.org/emergencies/fao-in-action/projects/results/en/?recipient=Congo.
[63] See WORLD BANK, the *Eastern DRC Recovery Project*, para. 7.
[64] *Idem*, para. 9.

regard to prevailing insecurity and other risks in the region, such as conflict mitigation, and with an aim to foster community recovery and resilience.[65] The World Bank recognised that "*most financing has been focused on humanitarian and peacekeeping activities, with relatively few allocations to economic recovery and development interventions considered critical for long-term and sustainable peace consolidation*."[66] According to its report, subsistence farming employs the majority of the population in the eastern provinces and is typically low in input and output. Lack of agricultural infrastructure and capital, low productivity, limited skills and difficulties to sell or store agricultural produce exacerbates the food insecurity in the area.[67]

65. This assessment also holds true for the majority of victims in this case. As the Chamber itself heard from the majority of the witnesses and victims that appeared before it, most of them were themselves engaged in subsistence farming[68] or small scale business[69] and suffered significant losses due to the pillage of tools, the pillage of livestock, devastation of farming land, or physical injury preventing them to continue their farming activities.

66. It is submitted that joining, extending, or even simply mirroring programmes already available in neighbouring parts of the country the Court could build on expertise in the area and make significant time savings in mapping possible collective reparations programmes.

67. With regard to the possibility of symbolic reparations, it is submitted that victims are not considering this form of reparation as addressing their harm in any meaningful way. They, in effect, fail to understand the benefit of memorial sites of monuments. However, they would welcome a more pragmatic approach to symbolic

[65] *Ibid*.
[66] *Ibid*.
[67] *Ibid*., para. 13.
[68] [REDACTED]
[69] [REDACTED]

reparation, such as, naming a community centre that would be constructed as part of a reparation award after the deceased Abbé Bwanalungwa.

G. ON THE COST OF REPARATION

68. The cost to repair is dependent on the number of beneficiaries. The cost of the average harm sustained multiplied by the number of beneficiaries will equal the overall cost to repair and therefore inform the sum of the overall reparations award. In light of the fact that it is submitted that the beneficiaries should be ascertained after the eligibility criteria have been set, it is therefore necessary, at this stage, to estimate the number of beneficiaries for the purpose of setting an award. Doing so will allow the Chamber to set the cost of repair, subject to amendment if necessary based on the later determination of the number of beneficiaries.

69. In this regard, in the *Lubanga* case, the Appeals Chamber held that

> "*In setting* [the cost of reparations], [i]*f the information and evidence upon which the trial chamber relies does not enable it to set the amount of liability with precision, for example, 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. In this regard, depending on the type of reparations contemplated, and the information it has managed to obtain, the trial chamber may have to rely on estimates as to the cost of reparations programmes*."[70]

70. The cost of repair established in this way will then form the overall parameter for the establishment of collective reparation programmes, the individual costs of which will depend on the individual needs identified. The design and individual cost implication of the programmes to be implemented in the context of the award should be determined by the TFV at the implementation stage.

71. To estimate the number of potential beneficiaries for the purposes of setting an award, it is submitted that the Chamber should take into account the nature of the crimes carried out on a widespread scale and the ensuing victimisation of entire

[70] See the *Lubanga* 2019 Judgment, *supra* note 22, para 108.

village communities. An estimate provided by the UN of the population within the effected communities in 2002, the population of Mongbwalu alone was around 80,000 with the Lendu constituting the majority of the population.[71] According to other publically available figures, the estimated population size of Mongbwalu in 2004 shrunk to 26,176 in 2004.[72] These figures give an insight into the number of members of the population who fled the town as a result of the events. The UN further estimated at the time that around 60,000 civilians were forced to flee to the relative safety of the surrounding bush associated with the *shika na mukono* attack.[73]

72. Bearing in mind that entire villages were affected by the crimes of forcible displacement,[74] and pillage for instance, it can roughly be estimated that the potential beneficiaries will be numbering at least 100,000 across all locations affected by the crimes. Although the precise number of potential beneficiaries cannot now be estimated, it is nevertheless clear that the numbers will be significantly higher than in the *Lubanga* case or *Katanga* cases.[75] Hence, the principles to be set by this Chamber should accommodate the fact that victims entitled to reparations will number in the tens of thousands. Simple direct application of the *Lubanga* principles will therefore not be feasible.

73. As regards the cost estimate of the average harm, it is submitted that these should be estimated at the same level, so as to no prejudice victims in this case vis-à-vis victims in the *Lubanga* and *Katanga* cases who were awarded 8,000 USD and 12,635 USD respectively.[76]

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[71] See DRC-OTP-0074-0422, the *Special Report on the events in Ituri, January 2002-December 2003*, 16 July 2004, S/2004/573, para. 98.
[72] See the *World Gazetteer, Congo (Dem. Rep.): largest cities and towns and statistics of their population*.
[73] See DRC-OTP-0074-0422, para. 70.
[74] See e.g. the Judgment, *supra* note 1, paras. 1032, and 1051-1055.
[75] See the *Katanga* Order on Reparation, *supra* note. 33, para. 64.
[76] The Chamber arrived at an average sample cost of 3,400,000 in respect of 425 victims. See the *Lubanga* 2017 Decision on Reparations Award, *supra* note 37, paras. 258 and 279.

74. Notably, in *Katanga*, the Chamber determined the awards in relation to individual types of harm, for example determining psychological harm connected to the death of a near relative was reckoned *ex aequo et bono* at 8,000 and 4,000 USD[77] the award for a house at 500USD, the award for business premises at 300 and 800 USD, the average amount for livestock at 524 USD, that for harvest and fields at 150 USD and physical harm at 250 USD[78], which in respect of all 297 eligible persons totalled 3.752.620 USD and averaged at 12,635 USD per capita.

75. To remain within these parameters, given the same geographical and temporal context in which people were victimised and comparable levels of harm sustained, it is submitted that the per capita cost of repair should be taken to average 10,000 USD per capita in the present case.

76. Even though the scale of victimisation will be on a different and much higher level in this case as compared to those in the above cited previous cases, there is nevertheless no reason to depart from the existing practice.

77. In line with the *Lubanga* principles, victims should be treated on an equal footing and without discrimination either among them or vis-à-vis victims in other cases. If the average harm suffered by victims in this case would be deemed significantly lower than in the *Lubanga* and *Katanga* cases, this would be manifestly unfair and undermine trust in the Court and its reparations system as a whole. This is particularly so since the economic situation of victims is directly comparable and the crimes were committed during the same time span.

78. In this regard, it is of utmost importance that awards should not be limited by the current availability of funds of the TFV. In fact, the Trial Chamber in the *Al Mahdi* case explained that the question as to which resources are available to the TFV was

[77] See the *Katanga* Order for Reparation, *supra* note 33, para. 232.
[78] *Idem*, para. 239.

"*unnecessary for several reasons*".[79] It stated that, first, the award was levied against the convict personally and the resources of the TFV were irrelevant to the question of his liability. Secondly, the Chamber found that it was for the TFV to decide whether it would use resources to complement a reparations award. Third, it held that in any event, the figure of available resources would have no bearing on whether the TFV would in fact use these resources in that case. And fourth, the Chamber pointed out that the TFV itself stated that the amount of complemented resources may be increased at a later point in the implementation process on account of, *inter alia*, fund raising efforts and that in any event, available resources are not a fixed figure.[80]

79. Thus, the liability of Mr Ntaganda must be set irrespective of currently available resources. However, the TFV also has the responsibility to generate sufficient resources to meet the financial burden ensuing from a reparations order that indemnifies victims to the required degree, given that Mr Ntaganda is himself indigent. In this regard, since the ICC's current reparations system is almost completely dependent on the TFV's ability to secure funding, the TFV should be urged to diversify its funding sources and develop its fundraising capacity by enhancing its communications capacity to become a more visible and well-known institution, and to ensure effective synergies and strategies amongst relevant actors.[81]

80. Furthermore, based on the concept of reparative complementarity,[82] States Parties to the Court have a general responsibility to afford redress to victims within its borders that have suffered egregious abuses,[83] and more generally, it is submitted that States Parties to the Court all together should have the collective responsibility

[79] See the "Reparations Order" (Trial Chamber VIII), No. ICC-01/12-01/15-236, 17 August 2017, para. 112 (the "Al-Mahdi Reparations Order").
[80] *Idem*.
[81] See the *REDRESS Trust Report "No Time to Wait: Realising Reparations for Victims before the International Criminal Court"* (the "REDRESS Report"), pp. 34-35. See also the Regulations of the Trust Fund, Regulation 23.
[82] See MOFFETT (L.), *Reparative complementarity: ensuring an effective remedy for victims in the reparation regime of the International Criminal Court*, The International Journal of Human Rights, 2013, Vol. 17, No. 3, pp. 379-384. .
[83] See the REDRESS Report, *supra* note 81, p. 36.

to assist in ensuring that victims are provided with meaningful reparation for the crimes successfully prosecuted under the Statute.

81. As regards collective reparation programmes in the present case, the Legal Representative submits that efforts should be made to ensure synergies amongst relevant stakeholders, such as the FAO and/or the World Bank in order to identify ways of engaging in collaborative efforts or to obtain shared expertise and lessons on best practices that would enable to TFV to the design of similar programmes with a sustainable development character in the field in a cost-efficient manner.

82. As to the costs of such local development programmes, it is submitted that their real cost can only be estimated by the TFV at the implementation stage once the scope of the conviction is determined and the locations in which they would be implemented are known and relevant programmes for these locations identified. It is at this stage impossible to provide an accurate forecast.

83. However, based on available data from the FAO, the World Bank, and the TFV's successfully implemented assistance programmes, forecasts can be generated in relation to a number of scenarios, duration of implementation phases, number of participants etc. Hypothetic calculations and mapping exercises can already be undertaken in the time until confirmation of the conviction. The TFV can already open channels of communication and exchange with all possible and relevant partners to pave the way for smooth implementation of awards and/or collective programmes in the future once the number of eligible beneficiaries can be ascertained in a more accurate manner.

H. ON MR NTAGANDA'S LIABILITY

84. Reparations are intrinsically linked to the individual whose criminal responsibility is established in a conviction and whose culpability for those criminal acts is determined in a sentence.[84]

85. Mr Ntaganda's liability should, therefore, correspond to the final conviction and the mode of liability set forth therein. The involvement of other actors should not have any impact on his reparations liability.

86. The Trial Chamber in the *Katanga* case recalled that "*the purpose of the reparation proceedings is to oblige those responsible for grave crimes to repair the harm they caused to the victims and to enable the Court to ensure that offenders account for their acts*."[85] Moreover, the convicted person's liability for reparations must be proportionate to the harm caused.[86] The Appeals Chamber held that "*in principle, the question of whether other individuals may also have contributed to the harm resulting from the crimes for which the person has been convicted is irrelevant to the convicted person's liability to repair that harm. While a reparations order must not exceed the overall cost to repair the harm caused, it is not, per se, inappropriate to hold the person liable for the full amount necessary to repair the harm*,[87] *and* [n]*evertheless, the focus in all cases should be the extent of the harm and cost to repair such harm, rather than the role of the convicted person*."[88]

87. The harm caused is extensive[89] and this must be reflected in the reparations order against Mr Ntaganda. The jurisprudence in previous cases is unequivocal on

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[84] See the *Lubanga* 2017 Decision on Reparations Award, *supra* note 37, para. 268.
[85] See the *Katanga* Order on Reparations, *supra* note 33, para. 15.
[86] See the *Al Mahdi* Reparations Order, *supra* note 79, para. 110.
[87] See the Katanga Appeal Judgment on Reparations Order, *supra* note. 23, para. 178.
[88] *Idem*, para. 180.
[89] The Chamber, for instance, found the scale of the crime of murder to be "large"; of the crime of intentionally attacking civilians to be "relatively large"; of the crime of rape to be "significant"; of the crime of pillage to be "significant"; of the crime of destruction of houses and bindings to be "significant"; of the crime of forcible transfer to be "significant". See the Sentencing Judgment, *supra* note 36, paras. 47; 56; 98; 140; 145 and 160.

this point. This is not an award made in the abstract, but one made against a person who bears responsibility for the crimes committed and the harm inflected. There is no reason to depart from these principles in this case. To the contrary, the high sentence justified by the circumstances of this case illustrates the specific culpability of Mr Ntaganda and, against this background, he must absolutely be held accountable in financial terms as well.

I. ON THE PROPOSED LIST OF EXPERTS

88. The Legal Representative takes note of the List of Experts communicated by the Registry and acknowledges the high competence of the persons featuring on this list. However, he will not suggest calling any of them in the circumstances.

89. Significant and relevant expertise that finds application in this case as well has previously been prepared and submitted in other cases before the Court, including by persons featuring on the List of Expert now submitted by the Registry, namely [REDACTED].[90] It therefore appears to be in the interests of judicial economy to first consult the expertise provided to the Court by these experts. While the Legal Representatives does not, as such, subscribe to all views expressed in the report, such as their recommendation to exclude persons from being able to receive reparation who did not participate in the proceedings, he nevertheless believes that on several other topics, notably on the effects of certain comparable crimes, the expertise provided is of great relevance to the circumstances of this case and does not need to be duplicated.

90. Particularly in relation to the types of harm suffered, the report finds application to the circumstances of this case because it looks at the effects of pillage, murder and rape in a socio-economic and cultural setting that is very closely related to that of the present case.

[90] [REDACTED]

91. The experts, for instance set out why there is "*no need to identify and prove the specific harm suffered by a particular victim*"[91] and that "*harm must be presumed for every person who was subjected to one of* [the convict's] *crimes*" both in relation to direct and indirect victims.[92] They also explain how they arrived at their view – in the context of the case – that victims of pillage, which concerns almost all victims, should be compensated with a standard amount in relation to the pillage and that such eligibility should be assessed by the TFV, i.e. the implementing entity.[93] The Legal Representative further draws the Chamber's attention to the Bemba experts' observations that "[t]*here is little dispute in law or in practice that various forms of harm may take place and coexist with one another, particularly when serious international crimes are at stake*" and that "*individual harm could be pecuniary or non-pecuniary*."[94]

92. Their findings are further very relevant as to the scope of non-pecuniary harm, and – in connection with the testimony of other experts heard during the evidentiary phase of the Ntaganda proceedings, such as P-0933 and P-0938 – could assist the Chamber in its decision on the recognised categories of harm that will inform its order on reparations.[95]

93. Listed heads of pecuniary damage are likewise relevant to the considerations of the Chamber and, given the socio-economic and geographical context of both cases, transposable to the present case.[96] The findings of the report should therefore be considered by the Chamber, instead of instructing other experts.

94. Furthermore, the expertise provided to the *Bemba* Trial Chamber provides detailed explanations on the impact of murder on surviving family members and the cultural circumstances that give it a particular meaning in the local context.[97] Equally,

[91] See the *Bemba* Experts Report, *supra* note 90, paras. 18, 64-65.
[92] *Idem*, para. 18.
[93] *Ibid*., para. 34.
[94] *Ibid*., para. 56.
[95] See the relevant parts in the *Bemba* Experts Report, *supra* note 90, paras. 52 et seq.
[96] *Idem*, para. 68 in relation to the impact of the pillage of common household goods.
[97] *Ibid*., paras. 78-97.

the significant and stigmatising impact of rape is considered at length and provides the Chamber with relevant expert opinion in this regard.[98]

95. It is submitted that the Chamber could take judicial notice of the expertise provided by [REDACTED] in the *Bemba* case and thus incorporate it into the record of these reparations proceedings.

96. Doing so would avoid incurring additional cost and time as well as avoid raising expectations among the local community through the involvement and engagement with persons in the field in the preparation of said expertise.

97. Ultimately, the decision whether it would benefit on the expertise of any of the proposed persons lies with the Chamber and the Legal Representative accordingly leaves it up to the discretion of the Chamber to call any experts in this case.

98. Should the Chamber be willing to appoint experts from the proposed List of Experts, the Legal Representative, not being best placed to fully assess the scope of expertise of the proposed experts, respectfully suggests that for the purpose of both cost-efficiency and effectiveness an eventual expert should be fully acquainted with the 2002-2003 events in Ituri and with current realities in the field.

99. Finally, and in line with his suggestion to explore the mechanisms of current sustainable development programmes in the area, the Legal Representative suggests that the Chamber may want to consider requesting the expertise of other international organisations, such as the World Bank or the FAO to provide expertise on the structuring and implementation of its aide programmes rather than focusing on further expertise on the scope and nature of harm in instructing further experts on this topic. In particular, it is suggested to call persons involved in the design and implementation of the World Bank's DRC Eastern Recovery Project referred to *supra*.

[98] *Idem*, paras. 98-133.

100. An expert from the World Bank could be requested to provide expertise on *inter alia* the following domains: the feasibility of community-driven development programmes in the locations affected by the present case in light of security and other relevant factors; the way to design and implement such programmes in the affected communities in most cost-efficient and effective manner while ensuring conflict mitigation; risks and challenges that should be foreseen and addressed at the stage of programmes design and implementation; lessons learnt by the World Bank so far when realising DRC Eastern Recovery Project and other similar projects in Eastern DRC.

101. Should the Chamber be inclined to call an expert from the World Bank, the Registry should be requested to liaise with the Bank in order to identify the relevant expert(s) available to provide the requested expertise.

RESPECTFULLY SUBMITTED

Dmytro Suprun
Common Legal Representative of the Victims of the Attacks

Dated this 20th Day of November2020
At The Hague, The Netherlands