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TRIAL CHAMBER VI

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public

Public Redacted Version of “Defence Observations on the Registry’s Second Report on Reparations”, 28 January 2021, ICC-01/04-02/06-2643-Conf

Source: Defence Team of Mr Bosco Ntaganda

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

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Further to the First Decision on Reparations Process issued by Trial Chamber VI (“Chamber”) on 26 June 2020 (“First Decision”)¹ and the Registry’s Second Report on Reparations (“Registry Second Report”),² Counsel representing Mr Ntaganda (“Mr Ntaganda” or “Defence”) hereby submit this:

Defence Observations on the Registry’s Second Report on Reparations
(“Defence Observations – 2nd Report”)

INTRODUCTION

1. The Registry Second Report provides an update on the security situation in Ituri, highlighting a context of continuing violence.³ To be sure, Mr Ntaganda is not accountable and cannot be held liable for the prevailing and ongoing ills in Ituri today. This, as previously underscored, is the premise of these observations in line with the Defence’s perspective regarding the reparations process. Indeed, the current security situation in Ituri will necessarily have to be taken into consideration by the Chamber when issuing its upcoming Reparations Order.⁴

2. In this regard, the Defence recalls its previous submissions on the necessity for the Trial Chamber to pronounce itself on the issue of the causal link and to acknowledge the possibility for a subsequent event to break the chain of causality. Not only is this necessary, it is the starting point to assess the eligibility of potential beneficiaries to receive reparations and the adequate amount to be granted.⁵

3. As requested by the Chamber, the Registry Second Report includes the Victim Participation and Reparations Section (“VPRS”) final assessment of potential beneficiaries from the victims authorized to participate in the proceedings (Category

¹ First Decision on Reparations Process, 26 June 2020, [ICC-01/04-02/06-2547](#).

² Registry Second Report on Reparations, 15 January 2021, [ICC-01/04-02/06-2639-Conf-AnxI](#) (“Registry Second Report”).

³ Registry’s Report on Security and Political Dynamics, 15 January 2021, [ICC-01/04-02/06-2639-Conf-AnxIII](#).

⁴ Defence Submissions on Reparations, 18 December 2020, [ICC-01/04-02/06-2634-Conf](#) (“Defence Final Submissions”), para.3.

⁵ [Defence Final Submissions](#), paras.57-75.

I). Notably, this *final* assessment exercise was carried out in the absence of a ruling by the Chamber on the system to be implemented to determine the eligibility of victims and without granting the Defence access to the application forms, allowing to challenge the eligibility of potential beneficiaries. Hence, the Registry carried out this eligibility assessment without the involvement of the Defence. Yet, and although the Registry adopted a conservative approach in performing this assessment, it is evident that difficulties were encountered when applying the Chamber's guidelines, which can be of significant relevance for the Defence.⁶

4. The Registry Second Report also provided an opportunity for VPRS to update its assessment of the harm found in potential victims' applications included in the sample, as well as to conduct a desk review of applications forms received in the *Lubanga* case, including for victims not found in the sample; a task it was not instructed to undertake.⁷ The Registry's latter initiative is perplexing to say the least, in that (i) the information available is, as acknowledged by the Registry, not even complete;⁸ and (ii) the desk review goes beyond the scope of what was asked by the Chamber.⁹

5. It is also paramount to recall that collective reparations must always be related to the relevant crimes and the harm experienced by potential reparation beneficiaries. Hence, when granting collective reparations, potential breaks in the chain of causation should be considered. Moreover, collective reparations must be distinguished from and cannot replace humanitarian assistance.

6. Lastly, concerning the *Lubanga* victims, the Defence deems appropriate to underscore that, in light of the Registry Second Report, the estimation of the total number of eligible potential beneficiaries must be undertaken with particular caution and the same applies for the mapping of potential new beneficiaries.

⁶ [Registry Second Report](#), para.8 and fn.23.

⁷ [Registry Second Report](#), para.33.

⁸ [Registry Second Report](#), para.33.

⁹ [Registry Second Report](#), para.10.

CONFIDENTIALITY

7. The Defence Observations – 2nd Report are classified confidential pursuant to Regulation 23*bis*(2) of the Regulations of the Court, as they respond to documents bearing the same classification.

PROCEDURAL BACKGROUND

8. On 8 July 2019, Trial Chamber VI issued the Trial Judgment, finding Mr Ntaganda guilty of eighteen counts of crimes against humanity and war crimes.

9. On 25 July 2019, the Single Judge issued the “Order for preliminary information on reparations” inviting the Registry to submit preliminary observations on the reparations proceedings by 5 September 2019 and inviting the Parties as well as the Trust Fund for Victims (“TFV”) to file their respective responses to the Registry Preliminary Observations by 19 September 2019.¹⁰

10. On 5 September 2019, the Registry filed its Preliminary Observations.¹¹

11. On 3 October 2019, the Legal Representatives of Victims (“LRVs”),¹² the Defence,¹³ the Prosecution¹⁴ and the TFV¹⁵ responded to the Registry Preliminary Observations.

¹⁰ Order for preliminary information on reparations, 25 July 2019, [ICC-01/04-02/06-2366](#) (“Order for preliminary information”).

¹¹ Registry’s observations, pursuant to the Single Judge’s “Order for preliminary information on reparation” of 25 July 2019, ICC-01/04-02/06-2366, 5 September 2019, [ICC-01/04-02/06-2391-Anx1](#) (“Registry Preliminary Observations”).

¹² Joint Response of the Legal Representatives of Victims to the Registry’s Observations on Reparations, 3 October 2019, [ICC-01/04-02/06-2430](#).

¹³ Response on behalf of Mr. Ntaganda to Registry’s preliminary observations on reparations, 3 October 2019, [ICC-01/04-02/06-2431](#) (“Defence’s Response to Registry’s Preliminary Observations”).

¹⁴ Prosecution Response to the Registry’s Observations, pursuant to the Single Judge’s “Order for Preliminary Observations on reparations” (ICC-01/04-02/06-2391-Anx1), 3 October 2019, [ICC-01/04-02/06-2429](#).

¹⁵ Trust Fund for Victims’ response to the Registry’s Preliminary Observations pursuant to the Order for Preliminary Information on Reparations, 3 October 2019, [ICC-01/04-02/06-2428](#).

12. On 5 December 2019, the Single Judge issued the “Order setting deadlines”, inviting the parties and participants to submit their observations on reparation proceedings.¹⁶

13. On 28 February 2020, the Registry,¹⁷ the Defence,¹⁸ the LRVs,¹⁹ the Prosecution²⁰ and the TFV²¹ filed their respective submissions on reparations.

14. On 26 June 2020, the Chamber issued its “First Decision on Reparations Process” whereby it instructed the Registry to prepare a report on reparations to be submitted by 30 September 2019, and every three months thereafter.²²

15. On 30 September 2020, pursuant to the “First Decision on Reparations Process”, the Registry submitted its First Report on Reparations.²³

16. On 30 October 2020, the Defence²⁴ and the LRVs²⁵ submitted their respective observations on the Registry First Report.

¹⁶ Order setting deadlines in relation to reparations, 2 December 2019, [ICC-01/04-02/06-2447](#), (“Order Setting Deadlines”).

¹⁷ Registry’s Observations on Reparations, 28 February 2020, [ICC-01/04-02/06-2475](#), with Public Annex 1, [ICC-01/04-02/06-2475-Anx1](#) (“28 February 2020 Registry Submissions”).

¹⁸ Defence Submissions on Reparations, 28 February 2020, [ICC-01/04-02/06-2479-Conf](#), (“28 February 2020 Defence Submissions”).

¹⁹ Submissions on Reparations on behalf of the Former Child Soldiers, 28 February 2020, [ICC-01/04-02/06-2474](#) with one public annex, (“28 February 2020 LRV1 Submissions”); Submissions by the Common Legal Representative of the Victims of the Attacks on Reparations, 28 February 2020, [ICC-01/04-02/06-2477-Conf](#) (“28 February 2020 LRV2 Submissions”) with a corrigendum version filed on 20 November 2020, [ICC-01/04-02/06-2477-Conf-Corr](#) with Confidential Annex 1, [ICC-01/04-02/06-2477-Conf-Corr-Anx1](#).

²⁰ Prosecution’s Observations on Reparations, 28 February 2020, [ICC-01/04-02/06-2478](#).

²¹ Trust Fund for Victims’ observations relevant to reparations, 28 February 2020, [ICC-01/04-02/06-2476](#), (“28 February 2020 TFV’s Observations”).

²² [First Decision](#).

²³ Annex I to the Registry’s First Report on Reparations, notified on 1 October 2020, [ICC-01/04-02/06-2602-Conf-AnxI](#).

²⁴ Defence Observations on the Registry First Report on Reparations, 30 October 2020, [ICC-01/04-02/06-2622-Conf](#) (“30 October Defence Observations”).

²⁵ Observations of the Common Legal Representative of the Former Child Soldiers on the “Registry’s First Report on Reparations”, 30 October 2020, [ICC-01/04-02/06-2620-Conf](#); Observations of the Common Legal Representative of the Victims of the Attacks on the Registry’s First Report on Reparations, 30 October 2020, [ICC-01/04-02/06-2621](#).

17. On 9 November 2020, the Legal Representatives for the Victims of the Attacks (“LRV2”) submitted a request to the Chamber seeking an Order addressed to the Registry to collect information pertaining to reparations.²⁶

18. On 18 November 2020, the Registry responded to LRV2 Request for an Order to the Registry to collect information, stating that if the Chamber were to grant the LRV2 request, the Registry would redouble its efforts in the field to ascertain the information.²⁷

19. On 20 November 2020, the Defence opposed the LRV2 Request for an Order to the Registry to collect information.²⁸

20. On 15 December 2020, the Chamber issued its Decision on the issues raised by the Registry’s First Report on Reparations and extended the deadline for the Registry to file its Second Report on Reparations to 15 January 2021.²⁹

21. On 18 December 2020, the Chamber rejected the LRV2 Request for an Order to the Registry to collect information.³⁰

²⁶ Request of the Common Legal Representative of the Victims of the Attacks for an Order to the Registry to collect information pertaining to reparations, 9 November 2020, [ICC-01/04-02/06-2624](#) (“LRV2 Request for an Order to the Registry to collect information”).

²⁷ Registry’s Observations on the “Request of the Common Legal Representative of the Victims of the Attacks for an Order to the Registry to collect information pertaining to reparations” of 9 November 2020, ICC-01/04-02/06-2624, 18 November 2020, [ICC-01/04-02/06-2627](#), para.19.

²⁸ Defence response to “Request of the Common Legal Representative of the Victims of the Attacks for an Order to the Registry to collect information pertaining to reparations”, 9 November 2020, ICC-01/04-02/06-2624, 20 November 2020, [ICC-01/04-02/06-2628](#).

²⁹ Decision on issues raised in the Registry’s First Report on Reparations, 15 December 2020, [ICC-01/04-02/06-2630](#) (“Decision on Guidance”).

³⁰ Decision on the Request of the Common Legal Representative of the Victims of the Attacks for an Order to the Registry to collect information pertaining to reparations, 18 December 2020, [ICC-01/04-02/06-2631](#).

22. On the same day, the LRV's,³¹ the TFV³² and the Defence³³ submitted their respective Final Observations on Reparations.

23. Lastly, on January 2021, the Registry Second Report was submitted.³⁴

SUBMISSIONS

I. Final Registry Assessment of Eligible Participating Victims

24. As a preliminary matter, the Defence deems appropriate to underscore that once again, it is called upon to submit observations on reparations proceedings *without* being in possession of the potential beneficiaries' application forms.

25. Notably, the Chamber ordered the Registry to carry out a final assessment of the participating victims falling within or outside the scope of the Judgment, without having pronounced itself on the Registry submissions – systematically opposed by the Defence – regarding the *modus operandi* to determine the eligibility of participating victims, *i.e.* the three-group system ("ABC approach").³⁵ Hence, the Registry conducted this exercise on a 'yes/no' or 'in/out' basis, without submitting any application forms of participating victims to the Defence to make observations. In fact, the Defence was not consulted at all. Moreover, the Registry did not categorise the application forms following their proposed "ABC approach".³⁶ Although the Defence opposed the Registry proposed system,³⁷ it would at least have been provided with the "Group C" applications, thereby enabling it to make observations to assist the Registry

³¹ Observations on the Appointed Experts' Reports and further submissions on reparations on behalf of the Former Child Soldiers, 18 December 2020, [ICC-01/04-02/06-2632](#) ("LRV1 Final Submissions"); Final Observations on Reparations of the Common Legal Representative of the Victims of the Attacks, 18 December 2020, [ICC-01/04-02/06-2633-Conf](#) ("LRV2 Final Submissions").

³² Trust Fund for Victims' Final Observations on the reparations proceedings, 18 December 2020, [ICC-01/04-02/06-2635-Conf](#) ("TFV's Final Observations").

³³ [Defence Final Submissions](#).

³⁴ [Registry Second Report](#).

³⁵ [Decision on Guidance](#), paras.11-12.

³⁶ [Registry Preliminary Observations](#), para.13; [28 February 2020 Registry Submissions](#), para.34.

³⁷ [Defence's Response to Registry's Preliminary Observations](#), para.26; [28 February 2020 Defence Submissions](#), para.85

– which did consider initially that unclear matter would be more easily resolved via a litigation process involving the parties³⁸ – and the Chamber in rigorously assessing the eligibility of participating victims.

26. The Defence is at a loss to explain why, at the trial stage, it was provided with the applications forms for which the Registry was not able to make a clear determination, but not at this stage, whereas the exercise is in fact the same, *i.e.* deciding on the eligibility of potential beneficiaries albeit on the basis of different parameters. This is especially the case and even more relevant in light of the Registry's own admission that it did struggle in assessing some applications with regard to the geographical scope.³⁹

27. The Defence also takes issue with the fact that the LRVs provided the Registry with updated consultation forms,⁴⁰ without the Defence being informed, let alone being consulted. It is also surprising – considering the LRVs' stance on the downside of consulting potential victims at this stage⁴¹ – that the LRVs obtained such information from their clients:

48. However, the Legal Representative wishes, at this stage, once again to caution against any consultation or outreach activities prior to the outcome of the appeals proceedings in the present case. Setting a consultation process in motion may raise undue expectations. The governing 'do no harm' principle firmly militates against premature widespread consultation processes.

28. The Defence also takes issue with the Registry's position regarding the eligibility of potential beneficiaries who claimed having had their property destroyed in a radius of 5 kilometres from Kobu and Sangi.⁴² The Defence stresses in this regard that the Chamber was clear in limiting the factual basis to "houses burned down", and not to destruction of property in general.⁴³ As a result, participating victims should not

³⁸ [28 February 2020 Registry Submissions](#), paras.35-36.

³⁹ [Registry Second Report](#), para.8.

⁴⁰ [Registry Second Report](#), paras.15-16.

⁴¹ [LRV1 Final Submissions](#), paras.73,75 and 77; [LRV2 Final Submissions](#), para.48.

⁴² [Registry Second Report](#), para.4.

⁴³ [Decision on Guidance](#), paras.26 and 19(f).

be considered eligible for any property destruction, *in general*, within a 5 kilometres radius of Kobu and Sangi. This renders eligible solely the participating victims whose houses were burned down.

II. Updating of the Sample

A. Access to the application forms

29. As a preliminary matter regarding the updating of the *sample* by the Registry, the Defence deems necessary to recall its prior submissions concerning the Registry's methodology to create the sample, more specifically in its Response to the First Registry Report.⁴⁴ These Defence submissions are of particular relevance at this stage – considering the Registry's extraction of results from the applications included in the sample – and even more so following the desk review conducted by the Registry.

30. For the purpose of the Registry Second Report, VPRS updated the harm of the potential victims included in the sample and conducted a desk review of applications forms received in the *Lubanga* case – including from victims not included in the sample – without being instructed to do so.⁴⁵ The Registry's latter initiative leaves the Defence perplexed, considering that (i) the information available is, as acknowledged by the Registry, not even complete;⁴⁶ and (ii) the desk review goes beyond the scope of what was asked by the Chamber.

31. More importantly, considering that the Chamber ordered the Registry to consult the parties and the TFV on the creation of the sample and the methodology to be adopted, the Defence contends that it should also have been informed, at a minimum, on the methodology employed by the Registry to carry its desk review. Indeed, the desk review had the same purpose as the sample: to update the harm and

⁴⁴ [30 October Defence Observations](#), paras.60-74.

⁴⁵ [Registry Second Report](#), para.33.

⁴⁶ [Registry Second Report](#), para.33.

the current needs of potential reparations beneficiaries. Certainly, the information should have been disclosed and the Defence consulted.⁴⁷

32. From the beginning of the reparations process in this case, Mr Ntaganda, through his Counsel, expressed an interest in playing a meaningful role therein.⁴⁸ To this end, the Defence deems appropriate to recall yet again, contrary to the LRV2's position,⁴⁹ that it is necessary for the Defence to have access to the victims' application forms and request for reparations.

33. Furthermore, now that the Registry has submitted a report detailing the harm suffered by all participating victims (Category I), the Defence posits that it is even more important and reasonable that it be granted access to the applications forms submitted by all potential reparations beneficiaries, at this stage.⁵⁰

34. Lastly, contrary to the LRV2's position,⁵¹ the Registry's sample should not be used to speculate on the number of victims or the cost of repair that will be set by the Chamber.

B. Current needs and types of reparations desired

35. Collective measures must not exceed the reparations process, and should not spill over into the realm of humanitarian assistance.⁵²

⁴⁷ [First Decision](#), para.37.

⁴⁸ [Defence's Response to Registry's Preliminary Observations](#), paras.36-37 ; [28 February 2020 Defence Submissions](#), para.86-91; Defence request seeking clarifications and/or further guidance following the "First Decision on Reparations Process" and Request seeking an extension of time to submit observations on the Registry 30 September Report, 11 September 2020, [ICC-01/04-02/06-2578](#), paras.7,11,15-19,23 and 26; [30 October Defence Observations](#), para.77; [Defence Final Submissions](#), paras.144-148.

⁴⁹ [LRV2 Final Submissions](#), para.84.

⁵⁰ *The Prosecutor v. Thomas Dyilo Lubanga*, Order for the transmission of the Application Files of Victims who may be Eligible for Reparations to The Defence Team of Thomas Lubanga Dyilo, 22 February 2017, [ICC-01/04-01/06-3275-tENG](#), paras.12 and 16; *The Prosecutor v. Thomas Dyilo Lubanga*, Decision on the "Defence Request for the Disclosure of Unredacted or Less Redacted Victim Applications", 1 September 2015, [ICC-01/04-01/07-3583-tENG](#).

⁵¹ [LRV2 Final Submissions](#), para.42.

⁵² *The Prosecutor v. Germain Katanga*, Observations of the victims on the principles and procedures to be applied to reparations, 15 May 2015, [ICC-01/04-01/07-3555-tENG](#), para.43.

36. The TFV has highlighted the fact that some of the programs it has implemented – in the context of its assistance mandate – are similar to the programs which could be implemented in the context of the reparations process.⁵³ Hence, when stating that none of the potential victims have ever received assistance, the Legal Representatives of the Former Child Soldiers (“LRV1”) is misrepresenting the reality.⁵⁴ Certainly, the fact that a large number of individuals have benefited from the programs implemented by the TFV, casts doubt on the LRV1’s affirmation.⁵⁵

37. Then again, reparations programmes implemented in the context of the proceedings before the Court should not be construed as humanitarian assistance. More importantly, the types of reparations awarded must restore, compensate and/or rehabilitate harms experienced as a result of crimes for which the convicted person was found guilty.⁵⁶ Although the Registry is only conveying information received from individuals consulted, the Defence takes issue with potential reparations taking the form of **“repairing the roads, access to drinkable water for their villages, a training center for the youth, and access to stable electricity for their communities.”**⁵⁷ These

⁵³ [TFV’s Final Observations](#), para.59: “Another point of comparison in terms of costs are the 10 projects conducted by the Trust Fund in DRC, since July 2020, under its assistance mandate, five of which are conducted in Ituri through carefully selected implementing partners (international and national NGOs). The Trust Fund submits that the costs of these projects can usefully serve as a basis to the Trial Chamber. Indeed, unlike projects ran for humanitarian purposes, assistance mandate programmes are conducted with a view to vindicating rights of victims in relation to harm suffered from crimes falling within the Court’s jurisdiction, and to provide them with reparative measures in relation to that harm. In this sense, they are comparable to a collective reparation programme with individualised components. However, they do not contain costs for the eligibility screening of beneficiaries in the same way as may be required for judicial reparations awards.”

⁵⁴ [LRV1 Final Submissions](#), para.109.

⁵⁵ [TFV’s Final Observations](#), paras.59-63: “[T]he Trust Fund is providing assistance [...] to 120 direct beneficiaries in the Irumu territory [...]. The reparative measures consist in a holistic package [...], **school assistance for dependents of victims and young child soldiers** [...]. This programme [...] reached 878 direct beneficiaries for psychological and physical rehabilitation, and 548 of those with socio-economic measures, including schooling” (emphasis added); see also [28 February 2020 LRV2 Submissions](#), para.62.

⁵⁶ [TFV’s Final Observations](#), para.59; [Article 75](#) of the Rome Statute; [Rule 85 \(a\)](#) of the Rules of Procedure and Evidence and [Regulation 46](#) of the Regulations of the Trust Fund for Victims.

⁵⁷ [Registry Second Report](#), para.27 (emphasis added).

are *not* reparations linked to a harm caused by a crime for which Mr Ntaganda has been convicted, but are more similar to humanitarian assistance.

38. In light of the collective reparations previously ordered by this Court, it would be inadequate and unfitting to grant this type of reparations in the case of Mr Ntaganda. For example, looking at the *Lubanga* and *Katanga* cases, the type of reparations put in place to benefit the victims were specifically intended to alleviate harms resulting from the crimes of the convicted person. For instance, in the *Katanga* case, the Chamber ordered:

The set of four modalities of collective reparations, therefore, would appear appropriate to the case. The Chamber hereby rules that collective reparations designed to benefit each victim shall specifically take the form of **support for housing, support for an income-generating activity, support for education and psychological support**.⁵⁸

39. More particularly, in that case, the TFV proposed the following concrete reparations in the context of the *Katanga* implementation plan:⁵⁹

Housing assistance

124. Under this modality, the Trust Fund proposes the following types of specific activities:

- Construction of a home with basic household furnishings;
- Renovation of current home (reinforcement or expansion);
- Assistance in purchasing a plot of land;
- Assistance in purchasing a home outside of Bogoro; or
- Assistance with rent payments.

Education assistance

126. Under this modality, the Trust Fund proposes the following activity:

- Payment of primary or secondary school fees and related costs, such as a school material kit, for the children (or minor dependents residing in the same household) of victims.

Income generating activities

⁵⁸ *The Prosecutor v. Germain Katanga*, Order for Reparations pursuant to Article 75 of the Statute, 24 March 2017, [ICC-01/04-01/07-3728-tENG](#), para.304. (emphasis added).

⁵⁹ *The Prosecutor v. Germain Katanga*, Draft implementation plan relevant to Trial Chamber II's order for reparations of 24 March 2017 (ICC-01/04-01/07-3728), 25 July 2017, [ICC-01/04-01/07-3751-Red](#), paras.124,126,128 and 130.

128. Under this modality, the Trust Fund proposes the following specific activities:

- Assistance with the payment of higher-education (university-level) enrolment and fees;
- Vocational training in small business enterprises (ex. dress making, taxi driver, etc.), animal husbandry, agriculture, and fishing;
- Training on how to develop business plans and budgets;⁷³
- Provision of a business kit (ex. Sewing machine and clothes making materials, farming kit, including seeds and tools, etc.);
- Provision of (small) livestock and veterinary kit; and
- Formation of and participation in village savings and loans associations mutuelles de solidarité (VSLA/MUSO).

Psychological rehabilitation

130. Under this modality, the Trust Fund proposes the following specific activities:

- Individual trauma-based counseling sessions; and
- Group counseling sessions.

40. In light of the above, the link between the events of Bogoro and these forms of reparations can easily be established, whereas, in the current case, the suggested collective measures appears to have no link with the crimes and the resulting harm. Indeed, the Defence sees no relation between the crimes for which Mr Ntaganda was convicted of, the preliminary assessment of the types of harms experienced by the victims of those crimes and access to drinkable water or stable electricity. What is more, these types of reparations would depart from what has been so decided in similar cases, such as *Lubanga* and *Katanga*.

III. Lubanga victims (Category II)

41. It is necessary to recall previous Defence submissions regarding the prohibition of double reparations for the same prejudice,⁶⁰ which have yet to be adjudicated by the Chamber.

⁶⁰ [Defence's Response to Registry's Preliminary Observations](#), para.20; [Defence Final Submissions](#), paras.127-138.

42. What is more, the estimation regarding the total number of potential eligible *Lubanga* victims in the current case is concerning and must be assessed with caution.

43. Indeed, in the *Lubanga* case, the parties and the TFV provided estimates regarding the number of potential eligible beneficiaries in the course of the reparations proceedings. The TFV argued that the reparations process would yield 3,000 victims.⁶¹ As for the LRV1, the estimate submitted comprised between 20,000 and 25,000 victims.⁶² On this basis, the Chamber held that the number of potential beneficiaries / victims would most likely revolve around 2,451 to 5,938, although it could be higher.⁶³ Notably, this figure was used in determining the *quantum* for which Mr Lubanga was held accountable.⁶⁴

44. Several years later, the actual number of beneficiaries has now been determined to be much lower. Indeed, the Registry submits that, as of January 2021, the total number of applications of potential beneficiaries received is [REDACTED], and the number authorized to this date by the Chamber is at [REDACTED].⁶⁵ The important gap between the estimated number and the confirmed one is a matter of concern. In addition, the argument put forward by the LRV1 regarding the return of Mr Lubanga's in Ituri and its impact on the number of victims coming forward⁶⁶ finds no echo in the material difference between these figures. Indeed, the reparations proceedings in that

⁶¹ *The Prosecutor v. Thomas Lubanga Dyilo*, Filing on Reparations and Draft Implementation Plan, 3 November 2015, [ICC-01/04-01/06-3177-Red](#), para.253.

⁶² *The Prosecutor v. Thomas Lubanga Dyilo*, Submissions on the Evidence Admitted in the Proceedings for the Determination of Mr Thomas Lubanga Dyilo's Liability for Reparations, 8 September 2017, [ICC-01/04-01/06-3359-tENG](#), para.73.

⁶³ *The Prosecutor v. Thomas Lubanga Dyilo*, Corrected version of the "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable", 21 December 2017, [ICC-01/04-01/06-3379-Red-Corr-tENG](#), paras.243-244 ("*Lubanga*, Decision Setting the Size of the Reparations").

⁶⁴ *The Prosecutor v. Thomas Lubanga Dyilo*, [Decision Setting the Size of the Reparations](#), paras.279-280; Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable', 18 July 2019, [ICC-01/04-01/06-3466-Red](#), paras.330-331 ("Judgment on the appeals against Decision Setting the Size").

⁶⁵ [Registry Second Report](#), para.31.

⁶⁶ [LRV1 Final Submissions](#), para.36; *see also* Registry Transmission of Appointed Experts' Reports, 30 October 2020, [ICC-01/04-02/06-2623](#) and [Annex 1](#) submitted on 2 November 2020, para.45.

case have been ongoing for many years now, while Mr Lubanga only returned to Bunia in Ituri, on 10 September 2020 after being absent for 17 years.⁶⁷

45. Despite the broader scope of the charges in the *Ntaganda* case, the Defence takes issue with the fact that the LRV1 estimates the number of child soldiers victims to likely exceed 3,000.⁶⁸

46. Hence, in determining the number of *Lubanga's* victims / child soldiers' victims, the Defence underscores the importance of keeping the *Lubanga* precedent in mind. This is essential for the purpose of assessing the cost of repair. Indeed, in confirming Mr Lubanga's liability for US\$10 million,⁶⁹ the Chamber relied on the identified victims in the sample and victims who may be identified later on during the implementation phase.⁷⁰ This observation also applies to the Category III.

IV. New potential beneficiaries (Category III)

47. The Defence posits that, in light of the results provided by the Registry, having consulted only 25 new potential beneficiaries,⁷¹ it is still very premature for the Registry to draw any conclusions.⁷² The Chamber should not take into consideration the Registry's results and submissions on the basis of 25 new potential beneficiaries out of the estimated 1,110.⁷³

48. Moreover, although the reparations proceedings are still at an early stage – considering *inter alia* that victims tend to come forward only once they are aware of the type of reparations that will be awarded⁷⁴ – the Defence submits that it is essential

⁶⁷ Registry's Updated Security Assessment, 30 September 2020, [ICC-01/04-02/06-2602-Conf-AnxV](#), paras.12 and 44.

⁶⁸ [LRV1 Final Submissions](#), para.37.

⁶⁹ *Lubanga*, [Decision Setting the Size of the Reparations](#), para.281.

⁷⁰ *Lubanga*, [Decision Setting the Size of the Reparations](#), paras.279-280; [Judgment on the appeals against Decision Setting the Size](#), paras.330-331.

⁷¹ [Registry Second Report](#), para.41 and fn.48.

⁷² [Registry Second Report](#), para.58.

⁷³ [Registry Second Report](#), para.39.

⁷⁴ [LRV1 Final Submissions](#), para.36.

to establish a deadline for the Registry to cease looking for new victims. To provide but one example, in the *Al Mahdi* case the Trial Chamber set a time limit for potential victims to submit application forms, to be considered in its Reparations Order.⁷⁵ This is without prejudice of the fact that a new time limit can be set for the newly identified beneficiaries during the implementation phase. With this suggestion, the Defence wishes to avoid the situation in the *Lubanga* case, where applications of potential beneficiaries are still being collected more than 6 years *after* the Appeals Judgment.

49. With regard to the Registry's estimate of potential new beneficiaries, the Defence understands from the Registry submissions that approximately 1,100 individuals could qualify as newly identified beneficiaries in the reparation process. Hence, when the Registry states that it "is confident that this number will increase significantly during the next reporting period",⁷⁶ the Defence understands that this statement refers to the 25 consulted potential new identified beneficiaries and not to the total number of 1,100. This stems from the Registry's later statement that in the course of further mapping "it is not expected to generate a major diversion from"⁷⁷ the anticipated number of 1,100 potential beneficiaries.

50. If the Defence misunderstood the Registry submission on his matter whereas the Registry actually believes that the number of new beneficiaries is now expected be much higher than 1,110, this should be clarified.

51. As for the Registry's estimate regarding the total number of potential *Lubanga* victims, for the same reasons, the Defence takes issue with the number of potential victims put forward by the LRV2. Evidently, it seems highly unreasonable to estimate that 50,000 new potential beneficiaries will come forward during the implementation phase.⁷⁸

⁷⁵ *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Reparations Phase Calendar, 29 September 2016, [ICC-01/12-01/15-172](#), para.2(iv).

⁷⁶ [Registry Second Report](#), para.39.

⁷⁷ [Registry Second Report](#), para.56.

⁷⁸ [LRV2 Final Submissions](#), para.95.

V. Security situation in Ituri and the existence of the causal link

A. Security situation and Hema victims

52. The Defence hereby expresses its appreciation to the Registry for its assessment of the security situation in Ituri. The Defence notes in particular the Registry's description of the rise in tensions in the Ituri region, which is very concerning.

53. The security situation is particularly exacerbated by the ongoing and continued intercommunal tensions between the Lendu and Hema communities, the creation of new community-affiliated armed groups and the ensuing violence.

54. The Registry's conclusions signal serious challenges in the context of the reparations proceedings in this case. Indeed, as mentioned by newly identified potential beneficiaries: "peace is a pre-condition to enjoy reparations and/or to rebuild their lives."⁷⁹

55. The rise in violence and the perpetration of crimes is likely to cause new harms and prejudices. Yet, the Defence concurs that the reparations process should be designed and implemented with a view to avoid exacerbating intercommunal tensions. The Chamber must thus take this situation – or particularly the current violence against the Hema community – in consideration when issuing its upcoming Reparations Order.

B. Causal link

56. The Defence stresses that the harm currently suffered by potential new beneficiaries cannot be automatically attributed to Mr Ntaganda's. Indeed, as previously argued, in order to pronounce on the liability of Mr Ntaganda, a causal link must be established between the crime for which he was found guilty and the harm suffered.⁸⁰

⁷⁹ [Registry Second Report](#), para.54.

⁸⁰ [Defence Final Submissions](#), paras.57-75.

57. In the present circumstances, the conflict that erupted again in Ituri at the end of 2017 is a clear example of an event, which constitutes a break in the chain of causation. An even more pinned down example is the Registry's finding that "consulted individuals became internally displaced persons between 2018 and 2020" and that such displacement exacerbated their vulnerabilities⁸¹ and that "the current conflict in Ituri revives the trauma and fear experienced by these individuals in 2003, also with the same locations being targeted again. This appears to negatively impact the victims' frail psychological situation."⁸²

58. Protracted violence can affect potential beneficiaries. The initial crimes for which Mr Ntaganda was convicted of cannot be considered the proximate cause of the harm suffered by the potential beneficiaries indefinitely, as it could not have been envisaged by the perpetrator after the commission of the crimes in 2002-2003. In relation to this issue, the Trial Chamber in the *Katanga* case affirmed:⁸³

the chain of causation between an act and its result is broken when an event which the person who committed the initial act could not have reasonably foreseen occurs after the commission of the initial act and affects its result. [...] the rationale for applying the proximate cause standard is the need to place just and fair limits on the consequences of the crimes that can be attributed to the convicted person.

59. For this reason, the Defence takes issue with many findings / conclusions in the Registry Second Report, which overlook the imperative requirement to conduct such a legal analysis.⁸⁴

⁸¹ [Registry Second Report](#), para.41.

⁸² [Registry Second Report](#), para.50 (footnote omitted) and fn.54.

⁸³ *The Prosecutor v. Germain Katanga*, Decision on the Matter of the Transgenerational Harm Alleged by Some Applicants for Reparations Remanded by the Appeals Chamber in its Judgment of 8 March 2018, 19 July 2018, [ICC-01/04-01-07-3804-Red-tENG](#), para.17.

⁸⁴ [Registry Second Report](#), paras.21 ("the consulted victims in Category I still suffer from psychological harm (26 out of 28) as a result of the crimes suffered in 2003"), 22 ("victims in this category reported that they continue to suffer from material harm"), 48 ("the victims interviewed to date under Category III reported to still suffer material harm"), 49a ("persistent physical harm as a result of the crime they suffered from in 2003"), 49c ("the continuing adverse effects of being displaced (9 individuals)") and 50 ("the Registry found that the current conflict in Ituri revives the trauma and fear experienced by these individuals in 2003").

RESPECTFULLY SUBMITTED ON THIS 15th DAY OF FEBRUARY 2021

A handwritten signature in black ink, appearing to read 'StB' with a small flourish at the end.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands