

Annex I

Public

The Registry's Observations on Reparations in the *Ntaganda* Case

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Introduction

1. The Victims Participation and Reparations Section (“VPRS”) of the Registry submits the present report pursuant to the 5 December 2019 Order of the Single Judge of Trial Chamber VI’s (“Chamber”) in the *Ntaganda* Case.¹ The VPRS recalls its Preliminary Observations on reparations submitted in the *Ntaganda* Case on 5 September 2019² as per the request of the Single Judge³ and will supplement those submissions in the present report with the results from its preliminary mapping exercise and with responses to the various points raised by the Single Judge in paragraph 9(c) of the 5 December 2019 Order.
2. For the purpose of this report, a distinction is made between the victims who are already participating in the proceedings (“participating victims”)⁴ and other victims who may also wish to benefit from reparations in the *Ntaganda* case but who have not yet been registered (“new potential applicants”). When referring to both groups together, the term “potential beneficiaries” will be used. In addition, the victims suffering harm from the First and Second Operations⁵ will be referred to as “victims of the attacks” while those conscripted or used as child soldiers will be referred to as “former child soldiers or child soldier victims”.

I. Registry observations on whether the principles on reparations established by the Appeals Chamber in the *Lubanga* case need to be amended or supplemented in light of the circumstances of the *Ntaganda* case.

3. The Registry notes the Appeals Chamber’s decision in the *Lubanga* case which states that “principles should be general concepts that, while formulated in the light of the circumstances of a specific case, can nonetheless be applied, adapted, expanded upon, or added to by future Trial Chambers” (“*Lubanga*

¹ 5 December 2019 Order

² Registry’s Preliminary Observations

³ 25 July 2019 Order, para. 4(a)(i) to (iii).

⁴ The Registry notes that no victims under rule 85(b) of the Rules are among the participating victims.

⁵ The Registry notes that, according to the Judgment in the instant case, the First Operation includes assaults on a number of villages in the Banyali-Kilo *collectivité* in November/December 2002 and the Second Operation includes assaults on a number of villages in the Walendu-Djatsi *collectivité* in February 2003; *Ntaganda* Judgment, pages 208-219.

principles”).⁶ While the Registry considers that the *Lubanga* principles are generally applicable in the *Ntaganda* case, it wishes to put forward the following additional considerations and principles linked to the specificities of the instant case.

Effective and meaningful participation through consultation

4. The Registry respectfully considers that the *Lubanga* principle of “accessibility and consultation with victims” should be enhanced in the *Ntaganda* case with more affirmative (and obligatory) language to reflect the central importance of this principle to the overall outcome of achieving meaningful reparations.⁷ In *Lubanga* principle 8, the Appeals Chamber holds that the Court “should consult with victims on issues relating, *inter alia*, to the identity of the beneficiaries and their priorities” (emphasis added).⁸ The consultation exercise should take into consideration to some extent the collective impact of the crimes, at least in some key locations. As noted by Trial Chamber I in the *Lubanga* case, “victims of the crimes, together with their families and communities should be able to participate throughout the reparations process and they should receive adequate support in order to make their participation substantive and effective.”⁹
5. As noted and applied by Trial Chamber II in the *Katanga* reparations proceedings, “it is paramount (...) to heed the expectations and needs voiced by the victims in the various consultation exercises.”¹⁰ As a first step, the *Katanga* Chamber initiated reparations proceedings by ordering an individualized consultation exercise with potential beneficiaries, the results of which went on to inform many crucial aspects of the reparation order itself. In so doing, the *Katanga* Chamber gave due consideration to the principle of consultation and aligned Court practice with that found in other relevant institutions at the international level.

⁶ Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, “Order for Reparations (amended)”, 3 March 2015, ICC-01/04-01/06-3129-AnxA, (“*Lubanga* Principles”) para. 5.

⁷ *Lubanga* principles, para(s). 29-32.

⁸ *Id.* at para. 32.

⁹ Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, “Decision establishing the principles and procedures to be applied in reparations”, 7 August 2012, ICC-01/04-01/06-2904 (“*Lubanga* Trial Decision on Principles”), para 203; See also IACtHR, *Loayza Tamayo v. Peru*, “[Judgement on Reparations and Costs](#)”, November 27, 1998, Series C, No. 42, para 178.

¹⁰ Trial Chamber II, *The Prosecutor v. Germain Katanga* “Order for Reparation pursuant to Article 75 of the Statute”, 24 March 2017, ICC-01/04-01/07-3728-tENG, (“*Katanga* Reparations Order”) para. 266.

6. The central importance of consultation in the context of reparations is recognized at the international level by the United Nations,¹¹ through the Convention on the Rights of the Child,¹² the Paris Principles,¹³ the UN Guidelines on Justice in Matters involving Child Victims and Witnesses¹⁴ and the work of the Special Rapporteur on the promotion of truth, justice reparation and guarantees of non-recurrence.¹⁵ In this sense and in the context of the current inter-ethnic tensions in Ituri, it is of particular importance to hear what victims have to say to avoid that the ICC reparations process would cause additional tension in a very volatile security situation. International civil society had also promoted the principle of consultation through the

¹¹ See United Nations, General Assembly, [Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power](#), 29 November 1985, Resolution 40/34, article 6 (b).

¹² See United Nations, General Assembly, [Convention on the Rights of the Child](#), 20 November 1989, Resolution 44/25, Article 12.1.

¹³ See United Nations, UNICEF, [The Paris Principles \(Principles and guidelines on children associated with armed forces or armed groups\)](#), point 7.83.2.

¹⁴ See United Nations, UN Economic and Social Council (ECOSOC), [Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime](#), 22 July 2005, Resolution 2005/20, point 21 (a).

¹⁵ See United Nations, General Assembly, Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, [Report to the Human Rights Council on the participation of victims in transitional justice measures](#), 27 December 2016, A/HRC/34/62. See also United Nations, General Assembly, Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, [Report to the General Assembly on reparations for gross human rights violations and serious violations of international humanitarian law](#), 14 October 2014, A/69/518. Concerning the principle of guarantee of non-recurrence, it was adopted as part of the UN General Assembly resolution 60/147 (see United Nations, General Assembly, [Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law](#), 16 December 2005, A/RES/60/147 ("UN Principles on Reparations 2005"), principle IX, para. 18 and 23) and aims at targeting the institutional roots which caused the harm suffered by victims (see United Nations, Office of the High Commissioner for Human Rights, [Rule of Law Tools for Post-Conflict States: Reparations Programmes](#), 2008, HR/PUB/08/1, p.7). Jurisprudence of the IACtHR provides some guidance as to the forms that this principle can take in order to be the most effective in remedying the harm caused to victims (see IACtHR, [Trujillo-Oroza v. Bolivia](#), "Judgement on reparations and Costs", 27 February 2002, Series C, No. 92, para 91 (c)). Moreover in the *Katanga* case, the United Nations made a submission on reparations before Trial Chamber II in which it highlighted the importance of this principle for victims to get effective reparations (see Trial Chamber II, *The Prosecutor v. Germain Katanga*, United Nations Joint Submissions on Reparations, dated 14 May 2015 and notified on 15 May 2015, ICC-01/04-01/07-3550, para. 71.). Finally, in the *Al Mahdi* case, Trial Chamber VIII held that certain reparation measures (aimed at rehabilitating certain protected sites) should include "measures to guarantee non-repetition" of relevant violations (see Trial Chamber VIII, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, [Reparations Order](#), 17 August 2017, ICC-01/12-01/15-236, para. 67.). Consequently, the Registry respectfully submits that the Reparations Order in the present case could contemplate some form of guarantee of non-repetition, involving the cooperation of the DRC as the Chamber may deem appropriate.

International Law Association Principles¹⁶ and the Nairobi declaration on women's and girls' right to a remedy and reparation.¹⁷ At the regional level, this principle has been recently taken into account by the committee of ministers at the Council of Europe which had recommended to member States that "there should be regular consultation (...) on behalf of victims and communities, in order to enable the development of a common understanding of the meaning and purpose of restorative justice".¹⁸ Finally, this principle of consultation has been observed in mass claim bodies like the Claims Resolution Tribunal for Dormant Accounts in Switzerland¹⁹ and transitional justice mechanisms²⁰ such as for instance East Timor,²¹ Sierra Leone,²² and Colombia.²³

7. Regarding the present case, the Registry submits that the principle of consultation of victims should be made mandatory and tailored to meet the needs and interests of both the child soldier victims and the victims of the attacks. The Court has underlined the need for reparations to correspond to traditional or cultural justice practices²⁴ and to each specific group of victims.²⁵

¹⁶See International Law Association, International Committee on Reparation for Victims of Armed Conflict, [Declaration of Procedural Principles for Reparations Mechanisms](#), 7-11 April 2014, Resolution 1/2014, Principle 2.

¹⁷See [Nairobi declaration on women's and girls' right to a remedy and reparation \("Nairobi Declaration"\)](#), 19-21 March 2007, principle 2 (B).

¹⁸See Council of Europe, Committee of Ministers to member States concerning restorative justice in criminal matters, [Recommendation CM/Rec\(2018\)8](#), 3 October 2018, point 55.

¹⁹As noted in the case ICJ, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), ["Amicus Curiae Submission on Reparation by Queen's University Human Rights Centre"](#), May 2019, para. 40: "The Claims Resolution Tribunal for Dormant Accounts in Switzerland (CRT-I) enabled the representatives of the largest group of potential claimants to take part in the planning and implementation of CRT-I".

²⁰As observed by the UN Office of the High Commissioner for Human Rights (OHCHR) in its publication: UN Office of the High Commissioner for Human Rights (OHCHR), [Rule of Law Tools for Post-Conflict States: Truth Commissions](#), 2006, p. 7. Also, by the UNICEF in its publication: United Nations Children's Fund (UNICEF), UNICEF Innocenti Research Centre, [Children and Truth Commissions](#), August 2010, p. 21.

²¹ See M. Suchkova, [The Importance of a Participatory Reparations Process and its Relationship to the Principles of Reparation \("M. Suchkova, 2011"\)](#), (Essex Transitional Justice Network, August 2011), para. 28. See also: [C. Evans "The Right to Reparation in International Law for Victims of Armed Conflict \("C. Evans, 2012"\)"](#), (Cambridge University Press, 2012), pp. 185-201.

²²See [M. Suchkova, 2011](#), para. 34. See also: [C. Evans, 2012](#), pp. 164-184.

²³ IACtHR, [Afro-descendant communities displaced from the Cacarica river basin \(Operation Genesis\) v. Colombia, "Judgment on Preliminary objections, Merits, Reparations and Costs"](#), 20 November 2013, Series C, no. 270, para. 470, "(...)in scenarios of transitional justice, (...)measures of reparation must be understood in conjunction with other measures of truth and justice, provided that they meet a series of related requirements, including their legitimacy – especially, based on the consultation with and participation of the victims; (...)". See also: [C. Evans, 2012](#), pp. 203-223.

²⁴ *Lubanga* Trial Decision on Principles, para. 245; *Lubanga* Principles, para. 47.

Consulting the child soldier victims and the victims of the attacks separately by discussing directly with victims of all ages, backgrounds and ethnicities, in relation to their own distinct reparations interests, would help ensure a transparent and effective reparations process with reparations tailored to victims' needs as closely as possible.

Specific principles related to victims of conflict-related sexual violence

8. The Rome Statute acknowledges the Court's duty to take special measures when dealing with victims of crimes of a sexual nature.²⁶ In light of the ultimate outcome of the *Prosecutor v. Jean Pierre Bemba Gombo* case, the Judgment in the instant case may be considered the first conviction at the Court for sexual and gender based crimes, namely rape and sexual slavery. Accordingly, the Registry considers that new and specific principles related to victims of conflict-related sexual violence should be added to those promulgated by the Appeals Chamber in the *Lubanga* case.
9. The Registry notes in this regard the developments in the area of gender sensitive reparations, which include the "Nairobi Declaration of the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence",²⁷ and the "UN Secretary-General's Guidance Note on Reparations for Conflict-Related Sexual Violence".²⁸ Both documents provide guiding principles and promote gender-sensitive approaches to the design and delivery of reparations for victims of conflict-related sexual violence.²⁹ These documents highlight the importance of the following:

²⁵ See for example for the Lubanga Trial Decision on Principles, para. 215, "The views of the child victims are to be considered when decisions are made about individual or collective reparations that concern them, bearing in mind their circumstances, age and level of maturity".

²⁶ Rome Statute, articles 54 and 68.

²⁷ [Nairobi Declaration](#), 19-21 March 2007.

²⁸ United Nations, UN Women, [Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence \("UN Note on Reparations for CRSV"\)](#), June 2014, p.7. See also, UN CEDAW, Committee on the Elimination of Discrimination against Women, [General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations](#), 18 October 2013, CEDAW/C/GC/30. See also UN Security Council, [Resolutions 1325 \(S/RES/1325 \(2000\)\); 1820 \(S/RES/1820 \(2008\)\); 1880 \(S/RES/1888 \(2009\)\); 1889 \(S/RES/1889 \(2009\)\); 1960 \(S/RES/1960 \(2010\)\); 2106 \(S/RES/2106 \(2013\)\); 2122 \(S/RES/2122 \(2013\)\)](#).

²⁹ For additional guidance on the specific principle proposed on sexual violence, see generally S. Gilmore, J. Guillerot and C. Sandoval, *Beyond Silence and Stigma: Crafting a Gender-Sensitive Approach for Victims of Sexual Violence in Domestic Reparation Programmes*, (Reparations, Responsibility & Victimhood in Transitional Societies, March 2020).

- a. the need for reparations to be transformative;³⁰
- b. the need to involve and consult victims of such crimes at every key step of the reparations procedure with the provision of adequate information through accessible means;³¹
- c. the need to conduct a participatory assessment that is sensitive to specific issues related to gender, age and cultural diversity among others;³²
- d. the need to take into account large numbers of obstacles that prevent female and male victims of sexual violence from being involved and benefitting, while addressing bias and stigma;³³
- e. the need to recognise indirect victims, such as family members, children or partners, and children born as a result of pregnancy from rape;³⁴
- f. the need to not further stigmatise or traumatise;³⁵ and
- g. the need to tailor rules accordingly, allowing for flexible procedures and evidentiary standards.³⁶

³⁰ "Reparations have the potential to be transformative and to assist in overcoming structures of inequality and discrimination. [...] practices and beliefs and that inform the perpetration of sexual violence", [UN Note on Reparations for CRSV](#), p. 6-8. Also: "Reparation must drive post-conflict transformation of socio-cultural injustices, and political and structural inequalities that shape the lives of women and girls, since the origins of violations of women's and girls' human rights predate the conflict situation", [Nairobi Declaration](#), p. 2.

³¹ Reparation should support the meaningful participation and consultation of victims in the different steps of the procedure: mapping, design, implementation, monitoring and evaluation. It is important to guarantee the provision of adequate information through accessible means to ensure meaningful participation and accessibility. See [UN Note on Reparations for CRSV](#), pp. 10-11.

³² "Practices and procedures for obtaining reparation must be sensitive to gender, age, cultural diversity and human rights, and must take into account women's and girls' specific circumstances, as well as their dignity, privacy and safety", [Nairobi Declaration](#), para. 2-E.

³³ "The devastating physical and psychological impact of sexual violence, compounded by the stigma attached to it, often prevents survivors from seeking or obtaining redress, including for fear of being ostracised by families and communities as a result of disclosing the facts, or of being further victimised by insensitive authorities or institutions". Specifically, "homophobia and the concept of emasculation or feminisation of victims can result in stigma and discrimination against men and boys who are survivors of sexual violence", [UN Note on Reparations for CRSV](#), p. 5.

³⁴ *Id.* at p. 3.

³⁵ "Participation of child victims needs to be carefully managed, taking into account their age, abilities, intellectual maturity and evolving capacities, and in a manner that does not risk further harm or trauma", *Id.* at p. 12.

³⁶ "Due to the complexity of the reparation programs violations of human rights and/or serious violations of international humanitarian law, including conflict-related sexual violence, which take place on a large scale, the procedures should be flexible", *Id.* at p. 6.

10. The Registry further notes that any reparations awarded to victims of sexual violence must offer the potential to address harm, regardless of the victim's gender. This is particularly challenging in contexts where sexual violence committed against both men and women is often underreported because reporting these crimes may result in stigmatization within the family or community. In the Ituri context, for female child soldiers, simply being identified as a former child soldier will automatically imply that the person in question suffered from some form of sexual violence.

Prompt and Efficient Reparations

11. The Registry notes the *Lubanga* principle of proportional and adequate reparations and stresses the need, particularly in light of the time associated with the implementation of reparations awards at the Court to date, to emphasize the importance of prompt and efficient reparations.³⁷ This principle, that expands the right to an effective remedy,³⁸ has been recognized in the jurisprudence of the Court,³⁹ and it implies that victims should receive effective, adequate and prompt reparations.⁴⁰ Specifically, concerning the promptness of reparations, the Registry notes that, within the framework of

³⁷ ICC, Assembly of States Parties, [Resolution ICC-ASP/11/Res.7 on "Victims and Reparations"](#), 21 November 2012, ICC-ASP/11/20, Preamble, para. 2.

³⁸ This right is enshrined in various human rights instruments and soft law declaratory texts. For example, Article 8 of the Universal Declaration on Human Rights; Article 2(3) of the International Covenant on Civil and Political Rights; Article 13 of the European Convention on Human Rights; Article 25(1) of American Convention on Human Rights; Article 24 of the International Convention for the Protection of All Persons from Enforced Disappearance; Article 14(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article 6 of the Convention on the Elimination of All Forms of Racial Discrimination; Articles 24(4)-(5) of the Convention for the Protection of All Persons from Enforced Disappearance; Principle 1(2) of the UN Basic Principles; Principle 2 of the UNSG Guidance Note; International Commission of Jurists' Declaration on Access to Justice and Right to a Remedy in International Human Rights Systems; Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, para 3(E); Principle 1(d) of the Principles on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment; and Declaration of Basic Principles of Justice for Victims of Crime and Abuse, para 4.

³⁹ *Lubanga* Principles, para. 44; See also Trial Chamber VIII, *The Prosecutor v. Ahmad Al Faqi Al Mahdi* "Reparations Order", 17 August 2017, ICC-01/12-01/15-236, para. 33; *Katanga* Reparations Order, para. 267; See also ["Representing Victims before the International Criminal Court, A Manual for legal representatives"](#), The Office of Public Counsel for Victims, fifth edition, 2019, p. 533.

⁴⁰ [UN Principles on Reparations 2005](#), Principle IX, paras. 15, and also Principle VII, para. 11 (b). In addition, for further information on the historical evolution of the basic principles on the right to reparation for victims, see, for example: [C. Evans, 2012](#), pp. 36-39.

International Human Rights Law (“IHRL”),⁴¹ “the jurisprudence of all international human rights bodies is consistent on promptness and effectiveness as prerequisites of any remedy”.⁴²

12. With respect to the principle of prompt and efficient reparations, the Inter-American Court of Human Rights (“IACtHR”) has ruled that the right of victims to a rapid remedy is not only relevant for the Inter American System of Human Rights but is considered as “ (...) one of the basic mainstays of the Rule of Law in a democratic society (...)”.⁴³ The IACtHR emphasized not only the promptness in relation to the order of reparations, but it also stressed that for a remedy to be effective its implementation should be “complete, perfect, comprehensive and without delay”.⁴⁴ This interpretation aligns with the European Court of Human Rights (“ECtHR”) jurisprudence on article 13 of the ECHR⁴⁵ that has paid particular attention to the speediness of remedies, and has reiterated that “the adequate nature of the remedy can be undermined by its excessive duration.”⁴⁶ The Registry also notes that different UN Committees,⁴⁷ amongst them the Committee on the Elimination of

⁴¹ In accordance with article 21 (3) of the Statute, “*The application and interpretation of law (...) must be consistent with internationally recognized human rights (...)*”. This provision applies to the establishment of principles relating to reparations pursuant to Article 75 (1) of the Statute.

⁴² As highlighted in [International Commission of Jurists, *The Right to a Remedy and Reparations for Gross Human Rights Violations A Practitioners’ Guide*](#), (International Commission of Jurists, October 2018), p. 65.

⁴³ IACtHR, [Mayagna \(Sumo\) Awas Tigni Community v Nicaragua](#), “*Judgment on Merits, Reparations and Costs*”, 31 August 2001, Series C, no. 79, para 112.

⁴⁴ IACtHR, [Mejía Idrovo v. Ecuador](#), “*Judgment on Preliminary Objections, Merits, Reparations and Costs*”, 5 July 2011, Series C, no. 228, paras. 105-106; IACtHR, [Furlan and Family v. Argentina](#), “*Judgment on Preliminary Objections, Merits, Reparations and Costs*”, 31 August 2012, Series C, no. 246, para. 210; IACtHR, [Acevedo-Jaramillo et al. v. Peru](#), “*Judgment on Preliminary Objections, Merits, Reparations and Costs*”, 7 February 2006, Series C, no. 144, para. 225.

⁴⁵ Council of Europe, [European Convention for the Protection of Human Rights and Fundamental Freedoms](#), as amended by Protocols Nos. 11 and 14, 4 November 1950.

⁴⁶ ECtHR, Third Section, [Doran v. Ireland](#), “*Judgment*”, 31 July 2003, application no. 50389/99, para. 57. See also: ECtHR, Grand Chamber, [De Souza Ribeiro v. France](#), “*Judgment*”, 13 December 2012, application no. 22689/07, para. 81.

⁴⁷ For example, see UN CAT, Committee against Torture, [General Comment No. 3: Implementation of article 14 by States Parties](#), 19 November 2012, CAT/C/GC/3, paras. 10,13, 17, 23 and 27; see also UN Human Rights Committee, [Blaga and Blaga v. Romania](#), [Comm. 1158/2003](#), U.N. Doc. A/61/40, 30 March 2006, para. 12.

Discrimination against Women⁴⁸ and the Committee on the Rights of the Child⁴⁹ have also stressed on the importance of timely remedies.

Prioritisation

13. In light of the expected number of new potential applicants in this case,⁵⁰ the Court might find it appropriate to consider some level of prioritisation when awarding reparations to potential beneficiaries. The Chamber may want to assess and decide which individuals or group(s) of potential beneficiaries may receive which types of reparations, and what type of award to issue first, as a priority. For that purpose, the Chamber may wish to consider adopting the principle of prioritisation, commonly applied in other judicial settings.⁵¹
14. Given the nature of the crimes committed against the potential beneficiaries in the instant case, and the current situation on the ground, the Chamber might consider prioritising reparations according to criteria such as:
 - a. the type and/or gravity of harm suffered; and
 - b. the vulnerability or neediness of the victims.⁵²

⁴⁸ UN CEDAW, Committee on the Elimination of Discrimination against Women, [General recommendation No. 30 on women's access to justice](#), 23 July 2015, CEDAW/C/GC/33, paras. 11, 14 (d), 18(d) and 19(a).

⁴⁹ UN CRC, Committee on the Rights of the Child, [General comment No. 16 \(2013\) on State obligations regarding the impact of the business sector on children's rights](#), 17 April 2013, CRC/C/GC/16, para. 30.

⁵⁰ See *infra*, para. 25.

⁵¹ The Registry respectfully refers the Chamber to the VPRS submissions on the principles of reparations filed in the *Lubanga* case, in which it developed in details the principle of prioritisation as a measure adopted in other judicial settings to prioritise the allocation of resources in favour of certain forms of reparations and particular groups of beneficiaries. Such measures are often taken where there are insufficient settlement funds to redress the harm caused to every beneficiary or where the provision of redress to all would be disproportionately burdensome or costly relative to the amounts available on a *per capita* basis. See Registry, *The Prosecutor v. Thomas Lubanga Dyilo*, "Second Report of the Registry on Reparations", dated 1 September 2011 and reclassified as public on 19 March 2012, ICC-01/04-01/06-2806, ("Registry's Second Report in *Lubanga*") paras. 25 et. seq. The principle of prioritisation is also applied in jurisdictions outside of the Court: see IACtHR, [Castro Castro Prison v. Peru, Judgement on Merits, Reparations and Costs](#), 25 November 2006, Series C no. 160, paras 421, 424-425 and 433; ECtHR, [Estamirov et al. v. Russia, Chamber Judgement](#), 12 October 2006, n°60272/00, paras. 129 and 134; Sierra Leone Truth & Reconciliation Commission, [Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission Volume 2](#), 2004, p.234, para 28. For further information on cases, see P. Limón and J. Von Normann, [Prioritising Victims to Provide Reparations: Relevant Experiences](#), (Essex Transitional Justice Network, August 2011).

⁵² Registry's Second Report in *Lubanga*, paras. 34-44; see also *Lubanga* Trial Decision on Principles, para. 210, "The Court shall take account of the age-related harm experienced by, along with the needs of, the victims of the present crimes. Furthermore, any differential impact of these crimes on boys and girls is to be taken into account".

15. The Chamber might also decide to order various consecutive measures by order of timing, starting with reparations awards that can be implemented more expeditiously and followed by other measures that, while no less important, require more time to execute.⁵³ For example, if both individual and collective reparations are contemplated, the Chamber might decide to start with the types of reparations that can be more rapidly implemented (e.g. standardised financial awards, provided the funds are available). Even during the implementation phase, further new potential applicants may be found.⁵⁴ Prioritisation should be applied without prejudice to these individuals, which the Court would continue to register in order to provide them with an opportunity to obtain reparations for the harm suffered on an equitable basis.
16. As previously highlighted by the Registry in the *Lubanga* case,⁵⁵ the prioritisation of reparations is a particularly delicate exercise that can have an enormous impact on the potential beneficiaries and on how they perceive the reparations process. The Chamber may therefore consider first hearing further submissions on the subject from the Defence, victims and their LRVs, experts, TFV and the Registry should it decide to prioritise certain groups of victims or certain types of awards for reparations.

Principle of “no over compensation”

17. According to the principle of “no over compensation” victims should not be enriched by reparations.⁵⁶ The Registry considers that the principle of no over

⁵³ The United Nations Compensation Commission (UNCC) Governing Council indicated that in cases where the volume of claims in the “A” Category was large, the Commissioners would adopt expedited procedures in which prompt full compensation would be offered, while larger or more complex claims were being processed. See United Nations, United Nations Compensation Commission, *Report and Recommendations made by the Panel of Commissioners concerning the First Instalment of Claims for Departure from Iraq or Kuwait (Category “A” Claims)*, 21 October 1994, S/AC.26/1994/2, p. 311.

⁵⁴ The Registry recalls its proposal to carry out the identification of new potential applicants for the largest part prior to the Chamber’s issuance of the Reparations Order; yet, the Registry is also cognisant that further beneficiaries may be found during the implementation process; it is proposed to also insert them into any reparations programmes in a flexible manner.

⁵⁵ Registry’s Second Report in *Lubanga*, para. 51.

⁵⁶ The meaning of this principle can be extracted from IHRL jurisprudence. The ECHR, in the case of *Piersack v. Belgium*, found that the applicant “certainly ought not to suffer financially for the failure to observe the requirements of the Convention found to have occurred in his case, neither should he profit therefrom”. See ECtHR, Chamber, [Piersack v Belgium, “Judgment”](#), 26 October 1984, application no. 8692/79, para. 15. Additionally, the IACtHR has established in different cases that “Reparations are

compensation should not negatively affect the child soldier victims in the instant case. The Registry notes that in both the *Lubanga* case⁵⁷ and in the instant case,⁵⁸ the convicted persons were declared financially indigent.⁵⁹ In similar instances, the TFV has been asked to “complement” the award for reparation with “other resources of the Trust Fund”.⁶⁰ The Registry submits that a “complement” to an award usually describes something *less* than full restitution. For instance, the “complement” offered by the TFV in the *Lubanga* case was considerably less than the overall sum of Mr Lubanga’s liability.⁶¹ In that case, the TFV noted early on in the proceedings that “the liability of Mr. Lubanga exceeds what may be complemented by the Trust Fund, i.e. there will be harm caused to victims by the crimes that he committed that cannot be redressed through the activities outlined in this plan.”⁶² Considering Mr Ntaganda’s stated indigence,⁶³ a similar scenario may arise in the instant case.

measures aimed at removing the effects of the violations. Their nature and amount are dependent upon the specifics of the violation and the damage inflicted at both the pecuniary and non-pecuniary levels. These measures may neither enrich nor impoverish the victim or the victim’s beneficiaries, and they must bear proportion to the breaches declared as such in the Judgment.” See [La Cantuta v. Peru, “Judgement on Merits, Reparations and Costs”](#), 29 November 2006, Series C no. 162, para. 202; IACtHR, [Rochela Massacre v Colombia, “Judgment on Merits, Reparations and Costs”](#), 11 May 2007, Series C, no. 163, para 250; IACtHR, [Bayarri v Argentina, “Judgment on Preliminary objections, Merits, Reparations and Costs”](#), 30 October 2008, Series C, no. 187, para 161. See also IACtHR, [The “White Van” \(Paniagua Morales et al.\) v. Guatemala, “Judgment on Reparations and costs”](#), 25 May 2001, Series C, no. 76, para. 79; IACtHR, [Castro Castro Prison v. Peru, “Judgement on Merits, Reparations and Costs”](#), 25 November 2006, Series C no. 160, para. 416.

⁵⁷ Trial Chamber II, *The Prosecutor v. Thomas Lubanga Dyilo*, Public Redacted Version of the 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, (“*Lubanga* decision setting size of reparations awards”) para. 287 and p. 112.

⁵⁸ Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, “Sentencing judgment”, 7 November 2019, ICC-01/04-02/06-2442, (“Sentencing Judgment”) para. 240.

⁵⁹ The Registry notes the *Katanga* Reparations Order, para. 335, where the Trial Chamber found “the burden of a convict’s indigence should not be borne by the victims alone.”

⁶⁰ Pursuant to [Article 56 of the Regulations of the Trust Fund for Victims](#).

⁶¹ In the *Lubanga* decision setting size of reparations awards, p. 112, Trial Chamber II held that Mr Lubanga’s liability amounted to USD 10,000,000. In Trial Chamber II, *The Prosecutor v. Thomas Lubanga Dyilo*, “Notification of the Board of Directors’ decision on the Trial Chamber’s supplementary complement request pursuant to regulation 56 of the Regulations of the Trust Fund for Victims”, 2 October 2018, ICC-01/04-01/06-3422, para. 11, the TFV notified the Chamber of its decision to provide an additional €2.5 million for the Lubanga reparations awards putting the total of the Trust Fund’s complement at €3.5 million.

⁶² Trust Fund for Victims, Annex A to Filing on Reparations and Draft Implementation Plan, 3 November 2015, ICC-01/04-01/06-3177-AnxA, para. 25.

⁶³ Sentencing judgment, para. 240.

18. The reparation awards that the Child Soldier victims may be entitled to will, by virtue of being a complement, be less than full restitution in both proceedings – and therefore will not lead to over-compensation. This is also consistent with the *Lubanga* Appeals Chamber’s ruling that its reparations order was not intended to affect the rights of victims to reparations in other cases, whether before the ICC or national, regional or other international bodies.⁶⁴

Principle of equity and fair compensation

19. The principles of equity and fair compensation may assist the Chamber in the determination of the amount of compensation to be granted to victims in the present case. As stated by the ECtHR, the principle of equity “(...) involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred.”⁶⁵ On the basis of this principle, the European court has awarded compensation for past and pecuniary losses in different cases.⁶⁶ This principle could guide the Chamber in the determination of reparations for the material and non-material⁶⁷ harm particularly where the precise amount of the harm suffered cannot be fully established due to the scarce situation regarding available documentation. The same principle, albeit more tailored, has been also applied by the IACtHR when determining the amount of compensation for emotional harm,⁶⁸ lost earnings,⁶⁹ immaterial damages (for violation of collective rights of indigenous peoples),⁷⁰ and also pecuniary losses in different circumstances.⁷¹

⁶⁴ *Lubanga* Principles, para. 4.

⁶⁵ ECtHR, Grand Chamber, [Al-Jedda v. The United Kingdom](#), “Judgment”, 7 July 2011, application no. 27021/08, para. 114.

⁶⁶ For example, see ECtHR, Grand Chamber, [Çakici v Turkey](#), “Judgment”, 8 July 1999, application no. 23657/94, paras. 130 and 133; ECtHR, [Selçuk and Asker v. Turkey](#), “Judgment”, 24 April 1998, (12/1997/796/998-999), para. 112; ECtHR, Former First Section, [Orhan v Turkey](#), “Judgment”, 18 June 2002, application no. 25656/94, paras. 430, 431 and 434; ECtHR, Second Section, [Ipek v Turkey](#), “Judgment”, 17 February 2004, application no. 25760/94, paras. 224, 228, 231 and 233.

⁶⁷ On non-material harm, the ICJ recognized that the “quantification of compensation for non-material injury necessarily rests on equitable considerations”, ICJ, [Case Concerning Ahmadou Sadio Diallo \(Republic Of Guinea v. Democratic Republic of the Congo\) Compensation Owed by The Democratic Republic of the Congo to the Republic of Guinea](#), “Judgment”, 19 June 2012, para. 24.

⁶⁸ IACtHR, [Velásquez Rodríguez v Honduras](#), “Judgment on Reparations and Costs”, 21 July 2001, Series C, no. 7, para 27.

⁶⁹ IACtHR, [Bámaca Velásquez v Guatemala](#), “Judgment on Reparations and Costs”, 22 February 2002, Series C, no. 91, paras. 51(b) and 54 (a). See also IACtHR, [“Juvenile Reeducation Institute” v. Paraguay](#),

20. The Registry also notes that the principle of fairness in reparations has been recognized by international jurisprudence when dealing with non-pecuniary damage.⁷²

II. Registry observations on the criteria and methodology to be applied in the determination and the assessment of: (i) the eligibility of victims; (ii) the relevant types and scope of harm; and (iii) the scope of liability of Mr Ntaganda, including the determination of the precise extent of the (monetary) obligations to be imposed on him

21. In order to facilitate the Chamber's determination of the most suitable criteria and methodology to determine the eligibility of victims, the Registry respectfully submits the following information and considerations.

Results of the VPRS preliminary mapping exercise

22. As noted in the Registry's Preliminary Observations,⁷³ the VPRS conducted a preliminary mapping exercise in order to gather information per village within the remit of the instant case on the available forms of documentation that could be used to support potential beneficiaries' claims, as well as to estimate the number of potential new applicants who may come forward to claim

["Judgment on Preliminary Objections, Merits, Reparations and Costs"](#), 2 September 2004, Series C, no. 112, para. 288.

⁷⁰ IACtHR, [Mayagna \(Sumo\) Awas Tigni Community v Nicaragua](#), "Judgment on Merits, Reparations and Costs", 31 August 2001, Series C, no. 79, paras. 167 and 168.

⁷¹ IACtHR, [Bueno-Alves v Argentina](#), "Judgment on Merits, Reparations and Costs", 11 May 2007, Series C, no. 164, paras. 172, 185, 190, 195, 200, 203, 204, 205, 221. *See also* IACtHR, [Saramaka people v Suriname](#), "Judgment on Merits, Reparations and Costs", 28 November 2007, Series C, no. 172, paras. 199, 201, 204, 206 and 207; and IACtHR, [Indigenous Community Kichwa of Sarayaku v. Ecuador](#), "Judgment on Merits and Reparations", 27 June 2012, Series C, no. 245, paras. 328 and 321.

⁷² *See* IACtHR, [Maritza Urrutia v Guatemala](#), "Judgment on Merits, Reparations and Costs", 27 November 2003, Series C, no. 103, para. 166. *See also* IACtHR, [Bulacio v Argentina](#), "Judgment on Merits, Reparations and Costs", 18 September 2003, Series C, no. 100, para. 96; IACtHR, [Juan Humberto Sánchez v. Honduras](#), "Judgment on Preliminary Objections, Merits, Reparations and Costs", 7 June 2003, Series C, no. 99, para. 172; IACtHR, [Caracazo v. Venezuela](#), "Judgment on Reparations and Costs", 29 August 2002, Series C, no. 95, para. 99; IACtHR, [Neira-Alegría v Peru](#), "Judgment on Reparations and Costs", 19 September 1996, Series C, no. 29, paras. 42 and 58; IACtHR, [Myrna Mack Chang v Guatemala](#), "Judgment on Merits, Reparations and Costs", 25 November 2003, Series C, no. 101, paras. 252, 253, 260, 266, 267, 290, and 292.

⁷³ Registry's Preliminary Observations, Annex 1, para. 8.

reparations as victims of the attacks.⁷⁴ The detailed results per location of that preliminary exercise have been presented in annex II to the present report.⁷⁵ The Registry will present below the key findings of this preliminary mapping exercise.

Available forms of documentation for potential beneficiaries

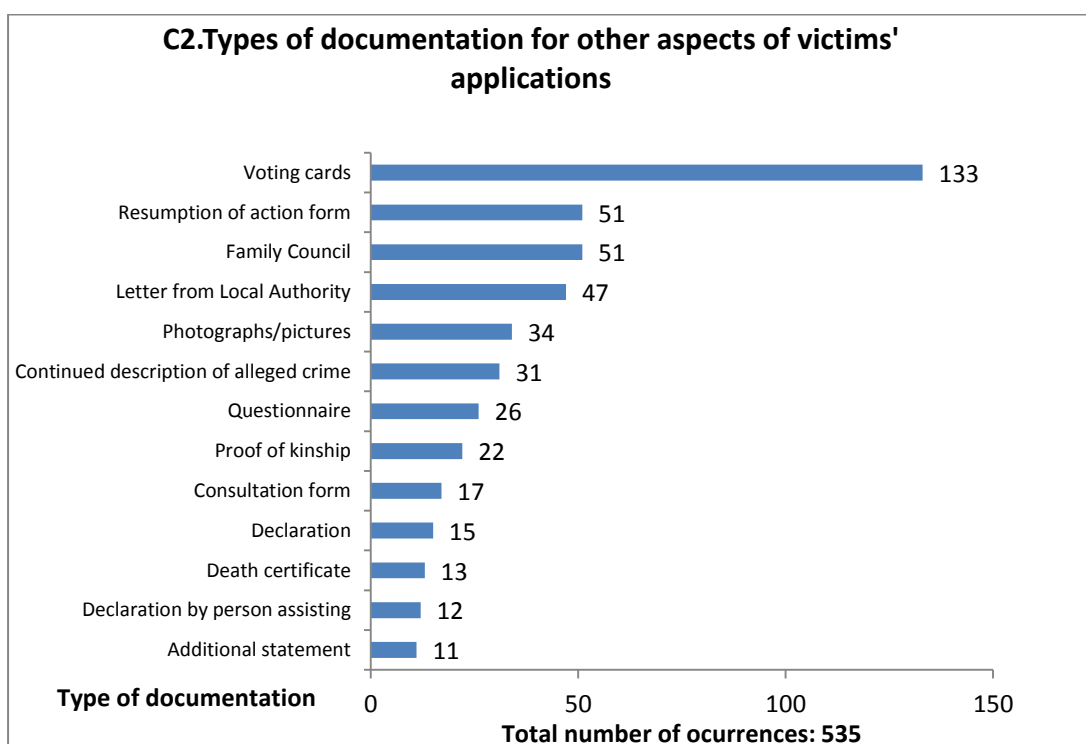
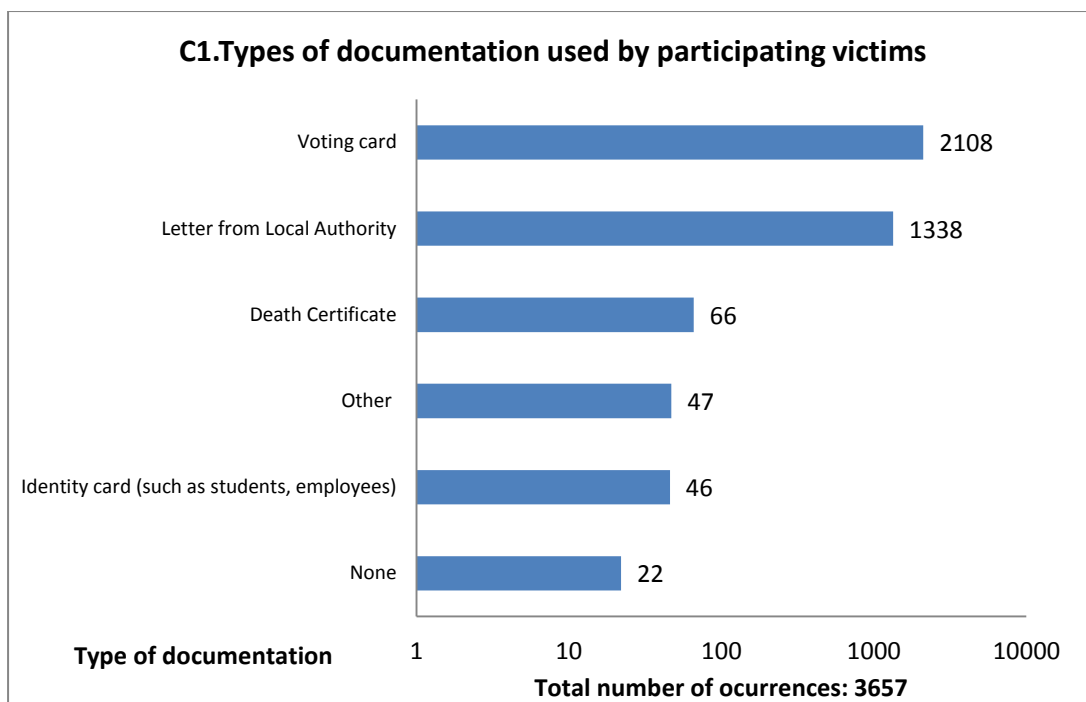
23. One of the key findings from the VPRS mapping exercise is that almost no contemporaneous supporting documentation has survived from the 2002-2003 conflict in Ituri. The reasons that the persons consulted reported for this include: 1) deliberate destruction of document storage facilities by the *Union des Patriotes Congolais* ("UPC") / *Force Patriotique pour la Libération du Congo* ("FPLC") during the conflict; 2) loss of documentation due to intervening conflicts and instability; and 3) loss of documentation due to the passage of time. As a result, nearly all of the documentation available to potential beneficiaries today must either be produced by local authorities on request from the potential beneficiaries or are in the possession of potential beneficiaries but were produced on some date after the events relevant to the *Ntaganda* case. These findings are supported by the types of documentation submitted by participating victims at trial (see chart C1⁷⁶ and C2⁷⁷ below). As can be seen from the charts, the form of documentation most readily available to victims are voting cards, which have a value for establishing identity, and letters from local authorities, which have been used to establish *inter alia* kinship but were produced on demand and well after the conflict.

⁷⁴ The Registry considers that for the child soldier victims, the ongoing identification and registration process in the *Lubanga* proceedings should be utilized.

⁷⁵ The Registry notes that annex II also includes a brief explanation on the methodology applied.

⁷⁶ The chart shows the most common type of documentation submitted by the victims to establish their identity. Other types of documentation were also submitted, including: Birth certificate; State Identity Card; Driver's licence; Passport; *Attestation d'identité* ; *Carte d'identité scolaire (et autres cartes relatives à la scolarité)*; Professional ID; Tax document.

⁷⁷ The chart shows the most common type of documentation submitted by the victims to support other aspects of their application (for example, kinship). However, the VPRS also notes that other types of documentation were also submitted, including: Additional statement related to prejudices; Medical Assessment Certificate; Witness statement; Survey; Assessment Certificate of Psychological harm; Additional information: date of crime; Clarification; Clarification/Declaration of Harm suffered; Annex declaration; Order of mission; Letter of PAB ; Map; Follow up form ; Birth certificate; Guardianship letter; Student Card; Certificate of loss of ID document; Attestation of victim.



24. The VPRS has provided the types of documentation available per village in annex II, along with the approximate costs associated with obtaining these forms of documentation (if any). The VPRS provides this information so that the Chamber is aware of the type of documentation that could reasonably be

relied upon by potential beneficiaries in establishing their claims.⁷⁸ However, obtaining these forms of documentation is likely to be costly for victims and time consuming for the registration process.

Estimated number of new potential applicants

25. Annex II contains an estimate of the approximate number of new potential applicants, per case location, relating to the First and Second Operations. In relation to the victims of the attacks, following the preliminary mapping exercise, the VPRS estimates that there may be at least approximately 1,100 new potential applicants.⁷⁹
26. With respect to the child soldier victims, an identification exercise is underway to locate and register new potential applicants in the context of the ongoing proceedings in the *Lubanga* case; this exercise will continue until the end of 2020. Considering the overlap between the two cases with respect to the charges surrounding the use of child soldiers, the Registry considers that its role in screening the application forms of new potential applicants in the *Lubanga* case may serve to facilitate the identification exercise in the *Ntaganda* case. Mindful of the classification of the proceedings in the *Lubanga* case, the VPRS has provided the Chamber (in annex III) with the latest information at its disposal with respect to the child soldier victims potentially eligible to receive reparations in that case.

Statistics on the participating victims at trial

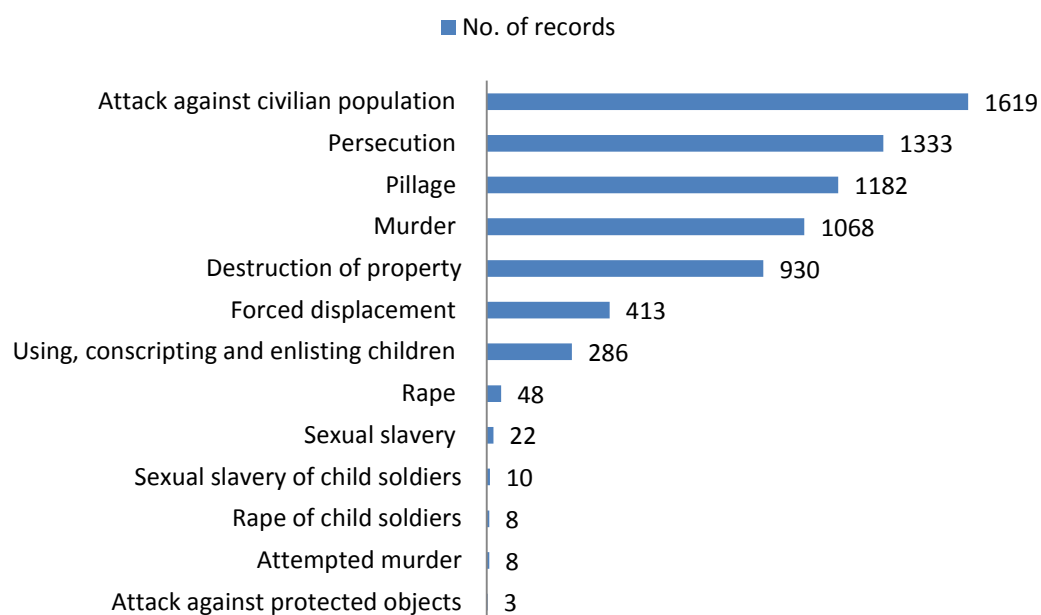
27. In an effort to ensure that the Chamber is apprised of the basic relevant information pertaining to, especially, the participating victims, the VPRS has collated information from its database on the crimes reported in the applications as well as the gender and age range of the participating victims. Those statistics are presented in charts C3, C4, and C5.1 and C5.2 below.⁸⁰

⁷⁸ This may assist the Chamber in its determination of the required documentation, if any, to satisfy the applicable burden of proof at the present stage of proceedings.

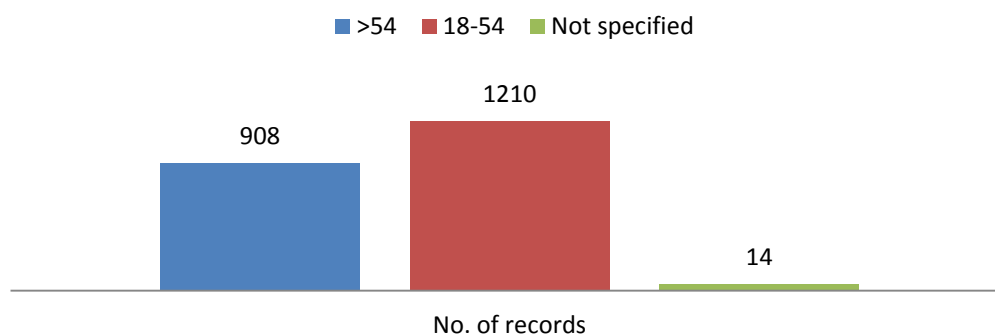
⁷⁹ The VPRS stands ready to supplement this information with any that the LRV of the victims of the attacks may have at his disposal.

⁸⁰ The VPRS notes that this information is based on the victims admitted to participate at trial and does not reflect any potential reduction of that group based on the reduced scope of the case following the issuance of the Judgment, as stated in Annex 1, paragraph 6 of the Registry's Preliminary Observations.

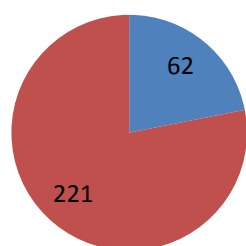
C3. Crimes reported by participating victims



C4. Age range of participating victims

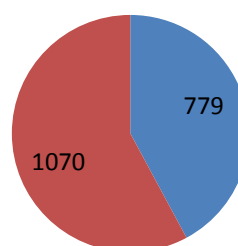


C5.1. Gender of child soldier victims



■ Female ■ Male

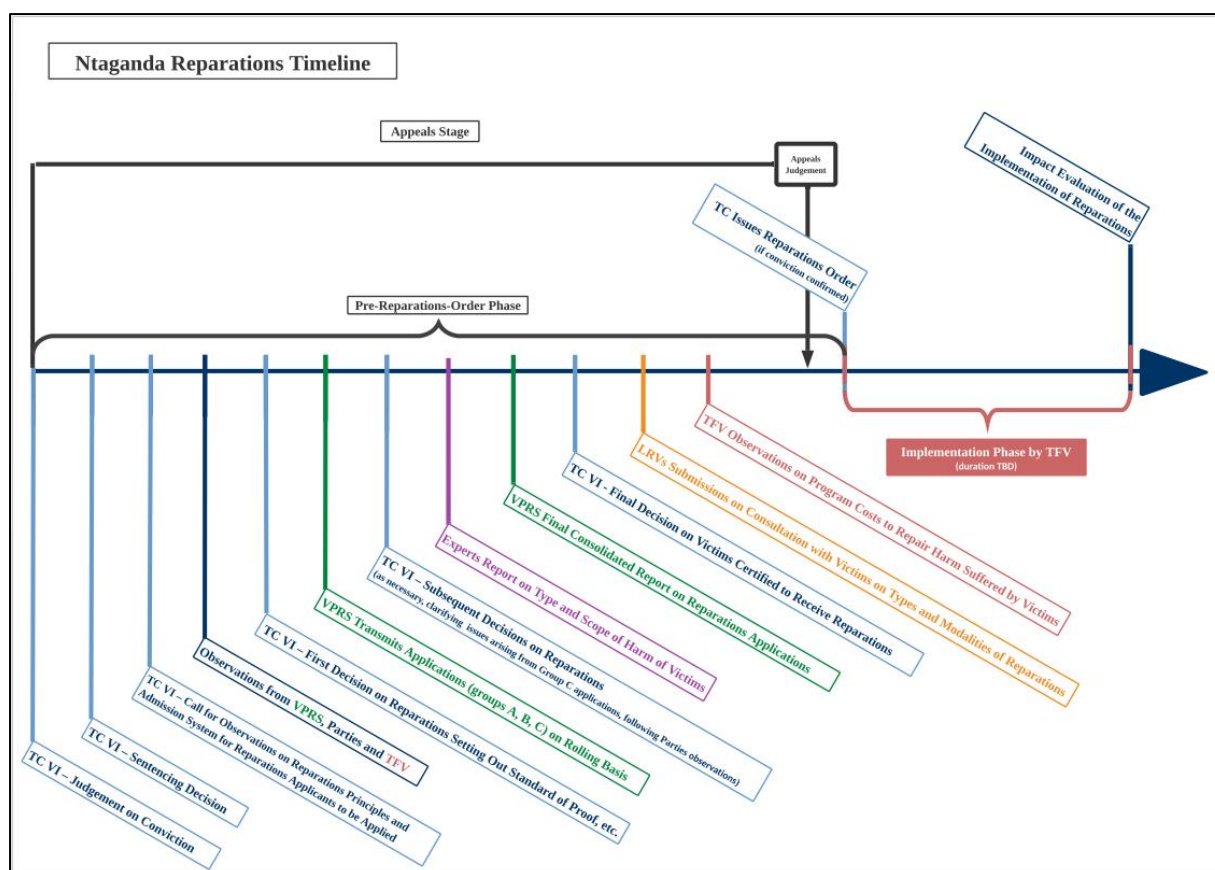
C5.2. Gender of victims of the attacks



■ Female ■ Male

Determination and assessment of the eligibility of victims

28. In the Registry's Preliminary Observations, the VPRS submitted its recommendations on *inter alia* the criteria and methodology to be applied in the determination and assessment of the eligibility of victims and incorporates them herein by reference.⁸¹ The timeline presented below in chart C6 briefly illustrates the key aspects of the Registry's proposal.



C6.Ntaganda Reparations Timeline⁸²

29. Following the Registry's Preliminary Observations and the responses thereto, the Chamber issued its 5 December 2019 Order which instructed the Registry to *inter alia* "(i) continue to carry out its preliminary mapping of potential new beneficiaries of reparations; (ii) carry out an assessment of how many of the victims participating in the *Ntaganda* case may potentially be eligible for

⁸¹ See Registry's Preliminary Observations, Annex 1, paras. 10-35.

⁸² The Registry recommends that an assessment on the impact of the implementation of reparations be conducted at the appropriate time.

reparations given the scope of the Judgment; and (iii) carry out an assessment of how many of the victims eligible for reparations as direct victim beneficiaries in the *Lubanga* case are also potentially eligible for reparations in the *Ntaganda* case.”⁸³ In order to faithfully carry out the tasks assigned in the 5 December 2019 Order, the Registry would seek certain clarifications from the Chamber with respect to how to determine and assess the eligibility of potential beneficiaries.

30. As noted in the Registry’s Preliminary Observations and in the present submission, the VPRS has already conducted a preliminary mapping exercise and gathered “information per village within the remit of the Case on the available forms of documentation that could be used to support potential new beneficiaries’ claims, as well as to estimate the number of potential additional reparations beneficiaries who have not yet been identified.”⁸⁴ The results of that preliminary mapping exercise have been appended to the present submission as Annex II. As developed further *infra* at para. 58, it is worth noting that since June 2019, renewed ethnic conflict has caused mass displacement of the population particularly in the territories of Djugu and Mahagi, and into neighbouring Uganda.⁸⁵
31. Noting the general timeline contemplated in the 5 December 2019 Order, the Registry considers that the most efficient manner by which new potential applicants can be further mapped out is to commence an individualized screening process.⁸⁶ In this way, rather than relying on secondary sources, the Registry can further clarify who may potentially be eligible for reparations by taking and assessing the statements and documentation of the new potential applicants and making them available to the Chamber, TFV and/or parties at the appropriate juncture. If the Chamber were minded to support such an approach, the Registry could begin the screening process immediately,

⁸³ 5 December 2019 Order, para. 9 (a).

⁸⁴ Registry’s Preliminary Observations, Annex 1, para. 8.

⁸⁵ The displacement may affect some of the results of the preliminary mapping exercise and may therefore need verification (in consultation with the LRV in particular) during the ensuing registration process, if so ordered by the Chamber.

⁸⁶ The Registry notes that in the present case the amount of potential new beneficiaries of reparations is manageable for an individualized application process, also since all potential child soldier victims from *Lubanga* would have been screened through an individualized process there, rendering that information available also in the *Ntaganda* proceedings.

provided a permissive security environment, subject to the eligibility criteria set out by the Chamber with respect to *inter alia* the standard of proof.⁸⁷

32. If a screening process were to be authorized, the Registry would take care to manage the expectations of the new potential applicants⁸⁸ with clear information regarding the possible outcomes of the proceedings and would solicit from the applicants only the information which would be needed from victims to become certified beneficiaries for reparations.⁸⁹ As such, the application process itself should not be too onerous and will also serve to ensure that the potential new applicants are consulted on the types and modalities of reparations they consider most appropriate in advance of the issuance of the reparations order by the Chamber. In carrying out this process, the Registry would consult with the TFV on what type of information will be most relevant to gather.

Eligibility assessment of participating victims

33. As outlined above with respect to potential new applicants, in order to effectively carry out the eligibility assessment for participating victims, the VPRS would need to know whether the Chamber requires any additional documentation from the participating victims in order to meet the standard of proof set at the reparations phase of the instant case. As set out by the Appeals Chamber in the *Lubanga* case, it is important for trial chambers to provide “clear indication to victims who have already been authorised to participate in proceedings, and to other victims seeking reparations, as to the standard of

⁸⁷ In accordance with Essential Element 5 of Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012”, 3 March 2015, ICC-01/04-01/06-3129 (“First *Lubanga* AC Decision”); and the Appeals Chamber, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, “Judgment on the appeal of the victims against the ‘Reparations Order’”, 8 March 2018, ICC-01/12-01/15-259-Red2, (“*Al Mahdi* AC Decision”), para. 64. reaffirming Essential Element 5 from the First *Lubanga* AC Decision “the actual assessment of individual applications must not necessarily be carried out by the Trial Chamber, as long as it sets out the eligibility criteria.”

⁸⁸ The Registry would provide clear and sufficient information regarding the possible outcomes (and length) of the proceedings in order to assist the new potential applicants to make informed decisions; regarding victims’ expectations, see [“Victims’ reactions to the reparations proceedings timeline”](#) International Justice Monitor, 24 February 2020, last accessed on 24 February 2020.

⁸⁹ Should the Chamber decide to endorse the approach recommended by the Registry, the VPRS would take this opportunity to consult the parties and the TFV on the tool to be used and any specific information the TFV may require for the implementation of reparations.

proof that will apply to the assessment of their eligibility for reparations.”⁹⁰ The Registry respectfully recalls at this juncture the rather scarce situation as pertains to (additional) documentation victims may be able to produce, should the Chamber be minded to rule that additional documentation is required for participating victims to qualify for reparations beyond their own submissions as to their harm and specific needs.⁹¹

34. In addition, the VPRS submits that the “ABC approach” for the assessment and certification of victim applications adopted by the Chamber at trial and recommended for use by the Registry in its Preliminary Observations, albeit with minor modifications,⁹² would greatly facilitate the eligibility assessment of participating victims.
35. At trial, and in accordance with the Chamber’s “Decision on victims’ participation in trial proceedings”,⁹³ following submissions from the parties, unclear matters emanating from certain individual applications were clarified through a process of focused litigation. The clarifications were used by the VPRS to preliminarily assess whether or not a victim was entitled to participate in the proceedings. Despite the territorial, temporal and subject matter findings in the Judgment, there remains the possibility that certain individual applications may raise issues for which the Registry will be unable to make a clear determination (and where guidance from the Chamber, after submissions from the parties, would greatly facilitate the Registry’s eligibility assessment).
36. As set out in its Preliminary Observations, the VPRS is thus seeking authorization to file, in circumstances where the Registry could not make a clear determination for any reason, certain exemplary applications of participating victims to the parties and Chamber. In much the same manner as was done at the trial stage, following submissions from the parties, the Chamber may assess these applications individually and provide guidance with respect to those specific examples. Following a decision by the Chamber on those “Group C” applications, the VPRS would then be in the position to carry out a quick and complete eligibility assessment for the participating victims in the instant case.

⁹⁰ Appeals Chamber, *Lubanga*, “Judgment on the appeals against Trial Chamber II’s ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’”, ICC-01/04-01/06-3466-Red, 18 July 2019, (“Second *Lubanga* AC Decision”) para. 156.

⁹¹ This point is developed in more detail *infra*, para. 44 and Annex 2.

⁹² Registry’s Preliminary Observations, Annex 1, para(s). 24-27.

⁹³ *Ntaganda* Participation Decision.

Eligibility of Lubanga victims in the Ntaganda case

37. Following the order issued by Trial Chamber II in the *Lubanga* case,⁹⁴ the Registry provides the Chamber in Annex III to the present filing with certain basic information from the VPRS database with respect to the *Lubanga* reparations proceedings. The Registry notes that the *Lubanga* process remains ongoing and therefore the numbers presented in Annex III are subject to change. In order for the Registry to provide clear and precise information to not only the Chamber with respect to the number of victims eligible but also to the new potential applicants (should the process be opened to them), the Registry respectfully proposes that the same criteria apply in the *Ntaganda* case that were brought to use in the *Lubanga* case for the eligibility assessment of victims (both direct and indirect) of the crime of enlistment, conscription and use of child soldiers.
38. With respect to registration, should no additional documentation be required to establish victim eligibility, a process is envisaged whereby the beneficiaries identified in the *Lubanga* case would simply need to indicate whether or not they wish to be considered for reparations in the instant case, rather than undergo an additional registration process *de novo*.

Additional Considerations

39. As was set out in the “Decision on victims’ participation in trial proceedings”,⁹⁵ in order to comprehensively carry out an assessment exercise on the eligibility of all potential beneficiaries in the instant case, the Registry would need the eligibility criteria from the Chamber in advance of the Reparations Order.⁹⁶ Apart from the documentation required, if any, to meet the standard of proof set for potential beneficiaries, the Registry recommends that, in light of the particular circumstances of the instant case, the same standards set for the participation of victims at trial be adopted for the reparations phase of proceedings. Those standards include, *inter alia*:
 - a. “Victim” qualification in the reparation phase of proceedings, including individuals and organizations;⁹⁷
 - b. Identity as a natural person;⁹⁸

⁹⁴ Trial Chamber II’s Decision of 4 February 2020.

⁹⁵ *Ntaganda* Participation Decision.

⁹⁶ The eligibility criteria could be set out by the Chamber, for example, in a “First Decision on Reparations” as shown in the timeline presented at C6 *supra*.

⁹⁷ *Ntaganda* Participation Decision, para(s). 41-43.

- c. Harm (including direct and indirect);⁹⁹
- d. Causation;¹⁰⁰
- e. Deceased victims (and resumption of action).¹⁰¹

Determination and assessment of the relevant types and scope of harm

Participating victims

40. The forms of harm resulting from the crimes cited in the Judgment are numerous and should, in the Registry's opinion, be the subject of further submissions from all parties involved.¹⁰² However, with respect to the participating victims, certain basic information with respect to harm was captured in the application forms and is presented below for the Chamber's consideration.¹⁰³

⁹⁸ *Id.* at para(s). 45-46 and para. 51 (for guidance on rule 85(b) of the Rules victims).

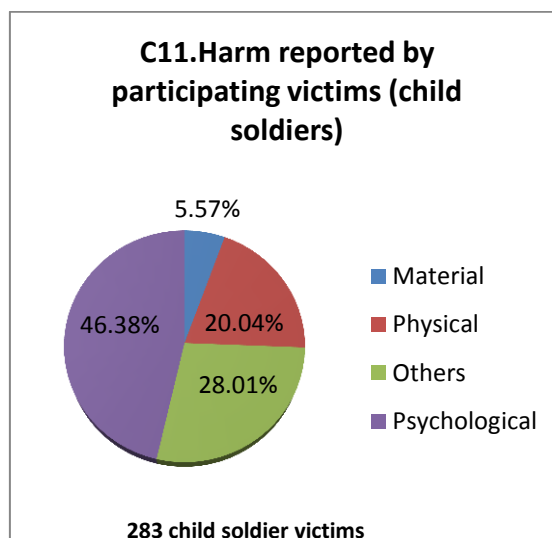
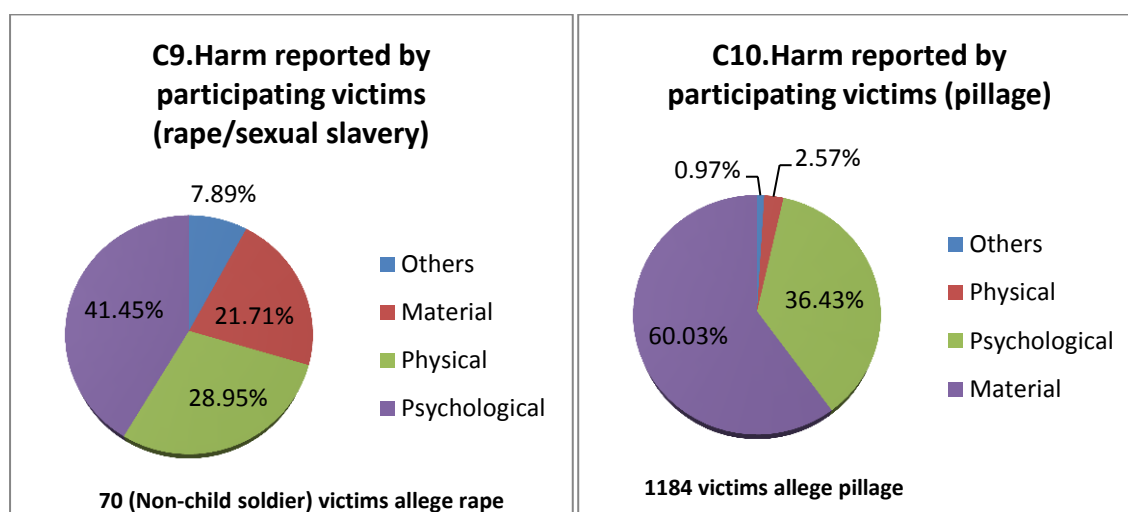
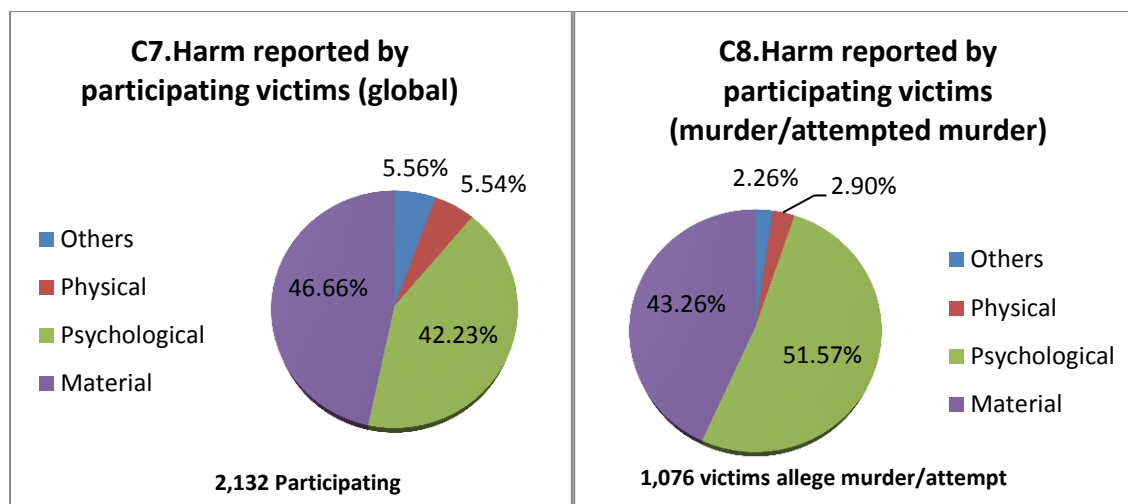
⁹⁹ *Id.* at para. 47-48; *See also*, Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo* "Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008", ICC-01/04-01/06-1432, 11 July 2008, para. 32, "[h]arm suffered by one victim as a result of the commission of a crime within the jurisdiction of the Court can give rise to harm suffered by other victims."

¹⁰⁰ *Ntaganda* Participation Decision, para(s). 49-51; The Registry notes that the standard set for causation at trial was *prima facie* and that the standard set at the reparations phase may be elevated to the balance of probabilities.

¹⁰¹ Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, "Fourth decision on victims participation in trial proceedings", ICC-01/04-02/06-805, 1 September 2015, para. 8.

¹⁰² In relation to the types of harm, it is important to keep in mind the communal dimension of the harm. During the mapping exercise, a key finding was the association made by those interviewed between the renewed ethnic tensions and the harm resulting from the crimes committed during the 2002-03 conflict. Entire communities have not only been ravaged by war, but the heterogeneous character of their population (cohabitation between Lendu and Hema, inter-ethnic marriages, etc.) has largely disappeared and resulted in a more polarized environment.

¹⁰³ The Registry notes that the category "other" refers to some other substantial impairment of fundamental rights. With respect to the participating victims, almost every respondent in the "other" category cited a lost or missed educational opportunity as a harm resulting from the charged crimes.



Experts

41. While useful information on the type and scope of harm may be derived from the application form used to register new potential applicants, the VPRS considers that the information collected from these forms should be supplemented by an expert report on the topic specifically. As noted in the Preliminary Observations, the Registry sees merit in “special advice on the scope of victimisation and long-term consequences affecting the victim communities, notably in light of the lapse of time since the crimes subject to Mr Ntaganda’s conviction were committed, and mindful of the complex security situation for these affected communities.”¹⁰⁴ The Registry considers that an expert report on the issue will be critical not only for the TFV in its efforts to design programs aimed at repairing the harm suffered, but also to the Chamber for the purposes of assigning liability to Mr Ntaganda.
42. The Registry stands ready to assist the experts in this regard by, *inter alia*, providing mission support to the experts so that they may travel to the relevant areas, introducing them to the relevant civil society actors and community leaders, providing them with access to the relevant victim communities, giving them access to relevant information and data held by the VPRS, and any other assistance.

Determination and assessment of the standard of proof and causation

Assessment of the Standard of Proof

43. The Appeals Chamber in the *Lubanga* case clarified that what is “sufficient” in terms of the victims’ burden of proof will also depend upon the circumstances of the specific case and that “Trial Chambers should take into account any difficulties that are present from the circumstances of the case at hand”.¹⁰⁵ The Appeals Chamber specified that this would include the difficulties victims may face in obtaining evidence in support of their claim owing to the destruction or unavailability of evidence.¹⁰⁶
44. As set out in annex II to the present submission, almost no contemporaneous documentation (from before or immediately after the war and the commission of the crimes charged) has survived to the present day. What is available, are

¹⁰⁴ Registry’s Preliminary Observations, para. 33.

¹⁰⁵ First *Lubanga* AC Decision, para. 81.

¹⁰⁶ *Lubanga* Principles, para. 22.

local authorities¹⁰⁷ who may be in the position to issue certain documentation on request (sometimes at considerable cost to victims), such as, a residency certificate, death certificate, kinship certificate or lost property certification.¹⁰⁸ The availability of each of the above mentioned forms of documentation may vary depending on location and, should they be required, would extend the length and complexity of the proceedings.¹⁰⁹ The Registry notes that the Chamber itself has recognized “the difficulties the applicants may often have in obtaining or producing copies of official documents in the DRC”.¹¹⁰

45. It is for these reasons that the Registry recommends that if, as has been done in other cases, a standard of proof of “balance of probabilities” is adopted in the reparations phase of the instant case, that standard be read and applied mindful of the context of the instant case and in particular the available documentation in Eastern DRC. The Registry notes that such an approach (i.e. adapted to situational specifics) has been endorsed by the Appeals Chamber in the *Lubanga* case¹¹¹ and adopted by Trial Chamber II in the *Katanga* case.¹¹² In light of the contextual circumstances surrounding the instant case (most notably the (non-)availability of documentary evidence), the documents used to support the reparations claims of potential beneficiaries may not be much

¹⁰⁷ The Registry notes that for each case village mapped, at least one of the authorities in the local hierarchy prevailing over *Banyali-Kilo* or *Walendu-Djatsi* reported that they were present during the First and Second Operations and can verify the claims of the potential beneficiaries who suffered harm in their respective villages.

¹⁰⁸ See Annex II for specific information per case village.

¹⁰⁹ Requiring additional forms of documentation at the reparations phase would render each of the applications submitted by participating victims incomplete (until supplemented with the required documentation). The Registry also stresses that the mapping of documentation was limited to the villages remaining in the instant case relating to the First and Second Operations (attacks). Therefore, the availability of documentation certifying the claims of child soldier victims will vary and may, in certain cases, be wholly unavailable.

¹¹⁰ *Ntaganda* Participation Decision, para. 45.

¹¹¹ Second *Lubanga* AC Decision, para. 202, “the Appeals Chamber considers that the fact that potential victims generally did not submit documents in support of their written allegations does not lead inexorably to the conclusion that the Trial Chamber was prevented from finding that their victimhood was established to a balance of probabilities”; See also Appeals Chamber, *The Prosecutor v. Germain Katanga*, “Public Redacted Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled «Order for Reparations pursuant to Article 75 of the Statute»”, 9 March 2018, ICC-01/04-01/07-3778-Red, 4th Key Finding, “Resort to factual presumptions in reparations proceedings is within a trial chamber’s discretion. However, this discretion is not unlimited and trial chamber must respect the rights of victims as well as the convicted person when resorting to presumptions.”

¹¹² *Katanga* Reparations Order, para. 55.

different than those relied upon for the participation phase (despite the different standards of proof).

46. In adopting a contextual approach to the application of the “balance of probabilities” standard of proof in the instant case, the Chamber would effectively enable those participating victims who remain in the case to be assessed as potential beneficiaries immediately and without having to supplement each application with additional documents. In so doing, the Chamber would also be in line with the Appeals Chamber’s Decisions in the *Al Mahdi* and *Lubanga*¹¹³ cases with respect to ensuring that both participating victims and new potential applicants are screened in a “consistent and equal manner”¹¹⁴ by not creating heightened standards of proof for only the new potential applicants.
47. Should the Chamber endorse the Registry’s recommendations set out above, and in order for the Registry to carry out its assessment of the participating victims and initiate a registration and assessment process for the new potential applicants, the Registry would benefit from a first decision on reparations from the Chamber similar in specificity to that issued at trial,¹¹⁵ setting out the standard of proof and the underlying documentation required to satisfy it.¹¹⁶ Following the issuance of the “eligibility criteria” by the Chamber, the Registry would be in a position to execute any screening responsibilities delegated to it by the Chamber, in accordance with prevailing Appeals Chamber jurisprudence.¹¹⁷

Determination of Causation

48. The Registry considers the standard of causation established in the *Lubanga* case to be appropriate in the instant case, i.e. a “but/for” relationship between the crime and the harm and a “proximate cause” test.¹¹⁸ The key consideration for the Registry is not the standard of causation set, but rather the underlying evidentiary requirement. The Registry notes that in its decision in the *Lubanga* case, the Appeals Chamber stated that victims are required to provide “sufficient proof of the causal link between the crime and the harm suffered,

¹¹³ Second *Lubanga* AC Decision, para(s). 5, 156 and 169.

¹¹⁴ *Al Mahdi* AC Decision, para. 56.

¹¹⁵ *Ntaganda* Participation Decision.

¹¹⁶ Set out in more detail in the Registry’s Preliminary Observations, Annex 1, para. 18.

¹¹⁷ *Al Mahdi* AC Decision, para 72; Second *Lubanga* AC Decision, para. 163.

¹¹⁸ First *Lubanga* AC Decision, para. 82.

based on the specific circumstances of the case.”¹¹⁹ The Registry thus considers it crucial that the required documentation to satisfy the standard of proof for the causal nexus between harm and crime reflects the specific circumstances of the case, most notably the availability of documentary evidence to victims.

Determination and assessment of the scope of liability of Mr Ntaganda

49. With respect to the determination and assessment of the scope of liability for Mr Ntaganda, the Registry supports the Appeals Chamber’s emphasis on establishing the “cost of repair” rather than the “sum-total of the monetary value of the harm caused.”¹²⁰ In the *Lubanga* appellate proceedings, it was explained in Judge Luz del Carmen Ibáñez Carranza’s separate opinion that to determine the cost of repair, it is necessary to determine: “(i) the scope and extent of harm, (ii) the scope and extent of victims who suffered harm, (iii) the most adequate and appropriate measures to effectively repair such victims, and (iv) the cost of programmes that would incorporate such measures.”¹²¹
50. In order to effectively carry out the abovementioned assessment, the Registry considers that the quintessential first step is identifying the “scope and extent of victims who suffered harm”. As has been set out in both its Preliminary Observations and the present submission, the Registry considers that the timely identification and registering of potential beneficiaries will yield important efficiencies for the proceedings and would be ideally commenced by the Registry as soon as possible. The results of this registration process will determine the overall population of potential beneficiaries. Once these

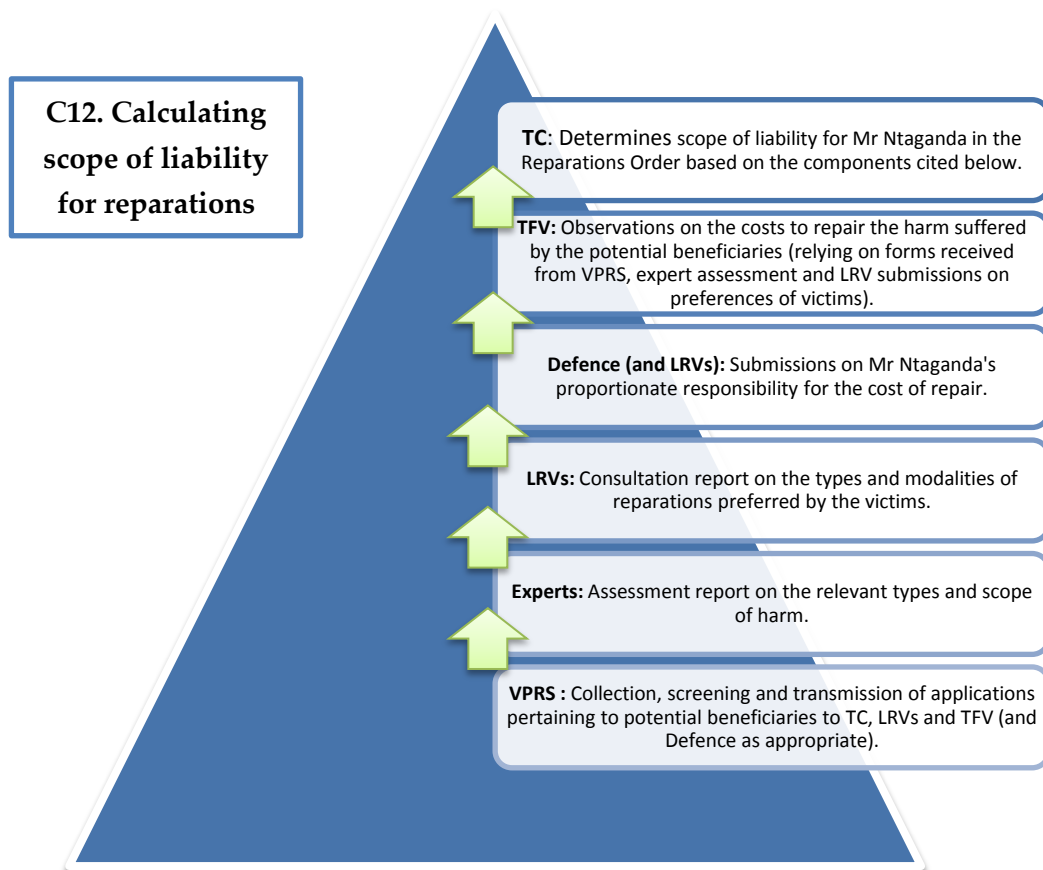
¹¹⁹ *Id.* at para. 81; Moreover, “the Appeals Chamber has highlighted the critical distinction between *identifying* the harms to direct and indirect victims caused by the crimes for which the person was convicted and *assessing the extent* of that harm for purposes of determining the nature and/or size of reparation awards”, see *id.* at para. 181.

¹²⁰ Appeals Chamber, *The Prosecutor v. Germain Katanga*, “Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled “Order for Reparations pursuant to Article 75 of the Statute””, 9 March 2018, ICC-01/04-01/07-3778-Red, para(s). 2 and 72.

¹²¹ Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, “Separate Opinion of Judge Luz del Carmen Ibáñez Carranza to the “Judgement on the appeals against the Trial Chamber II’s ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’”, 16 September 2019, ICC-01/04-01/06-3466-AnxII, para. 280. Judge Ibáñez Carranza added that these factors must all be analysed in light of “(a) the concrete circumstances of the case (including the personal circumstances of the convicted persons), (b) the level of participation of the convicted person in the commission of the crimes and causation of harm, and (c) the victims’ needs and interests. Only after this process is completed, will it be possible to ascertain the concrete amount of liability of the convicted person.”

potential beneficiaries are identified, the ensuing steps should be followed in order to arrive at the assessment by the TFV of the cost of repair.

51. First, basic information pertaining to the harm suffered may be gleaned from the forms collected from potential beneficiaries and supplemented by an expert report on the “scope and extent of harm” (the experts benefitting from a largely identified victim population rather than a theoretical mass of victims). Second, the applications from those deemed potential beneficiaries would be shared with the respective LRVs for ongoing representation and for consultation on “the most adequate and appropriate measures to effectively repair” the victims. Third, the applications falling within “Group A” would also be transmitted to the TFV so that the latter may begin the process of identifying potential partners and relevant programmes to help alleviate the harm suffered by victims, and assess the cost of those services. In this regard, the TFV may be greatly assisted by the expert report on harm and the LRVs’ submissions on the most adequate and appropriate measures to repair victims’ harm. Finally, the sum total of all of the abovementioned components would form the basis for the Chamber’s assessment of the liability of Mr Ntaganda. The recommended sequence of events is illustrated below in chart C12.



III. Registry observations on the types and modalities of reparations appropriate to address the types of harm relevant in the circumstances of the *Ntaganda* case, including factors relating to the appropriateness of awarding reparations on an individual basis, a collective basis, or both

52. In line with the principle of consultation, the VPRS considers that it would be inappropriate to expound on the types and modalities of reparations most suitable for the potential beneficiaries in this case without their LRVs first having consulted them on the matter directly. It is for this reason that the Registry recommends that a consultation exercise be ordered with the potential beneficiaries, carried out by the LRVs in order to ensure that the victims themselves are placed at the centre of these proceedings and able to communicate their preferences directly to the Chamber. Regarding potential

new beneficiaries,¹²² the Registry submits that the individualised application process outlined above could yield relevant information that could be brought to the Chamber's and TFV's attention sufficiently prior to the Reparations Order.

53. With regards to the application of individual reparations, collective reparations or both the Registry maintains its views previously expressed in the context of other cases before this Court.¹²³ The Registry submits as a general observation that individual and collective approaches to reparations are complementary and, if awarded together, should work in conjunction in a way that is most appropriate in the circumstances of each case.

Additional Registry Observations

The role of outreach in the reparations proceedings

54. The Registry's Public Information and Outreach Section notes that providing information to the affected communities and maintaining a dialogue on the reparations process and the outcomes contributes to creating conditions in which the victims can exercise their right to request reparations, thereby making the overall process more meaningful. Further, the communication of accurate information on reparations increases the confidence of the affected communities in the international criminal justice system and the reparations proceedings themselves.
55. The ultimate goals of communication on reparations are to publicise the judicial proceedings and contribute to rendering the process meaningful for victims and affected communities. More specifically, outreach aims to not only provide victims and affected communities with timely and accurate information but to also understand, listen and respond to their concerns as well as manage their expectations. This also applies to the population in the region in general. The Registry considers that effective communication with respect to reparations promotes a positive image for the Court in both the DRC and the wider international community.

¹²² This includes child soldier victims from the *Lubanga* proceedings that may be eligible for reparations also in the present case.

¹²³ Registry's Second Report in *Lubanga*, paras. 60-66; Registry, *The Prosecutor v. Germain Katanga*, "Registry's Observations pursuant to Order ICC-01/04-01/07-3532" 15 May 2015, ICC-01/04-01/07-3553; Registry, *The Prosecutor v. Jean-Pierre Bemba*, Registry's observations pursuant to Trial Chamber Order ICC-01/05-01/08-3410 of 22 July 2016", 31 October 2016, ICC-01/05-01/08-3460.

56. From the outset of the proceedings, the Registry's outreach team has focused on addressing the specific concerns raised by members of the affected communities with respect to reparations, but also to providing information to the general population. If there is an information gap, it leaves space for misinformation or space for political and/or other interest groups to provide the narrative. In particular, through its regular contact with the communities, outreach plays an important role in preparing the ground for potential consultations with communities. Managing expectations with the most affected communities but also with the victims that fall out of the scope of the case and are not eligible for reparations, is a key aspect during this process and can limit potential frustration.
57. The Registry undertakes to support the present reparations proceedings with appropriate outreach activities, carried out in close cooperation with VPRS as well as the LRVs and the TFV, with a view to creating a maximum of synergies and impact of its activities.

Current security situation

58. In its Preliminary Observations, the Registry provided the Chamber with an update on the Security Situation in DRC from its Country Analysis Unit. While the overall security situation remains permissive to date, the following developments have been observed since the notification of the Preliminary Observations on 6 September 2019.
59. Since the Registry's last update, as submitted to the Chamber in September 2019, the security and political situation deteriorated in Ituri.¹²⁴ The province experienced months of political instability around the vote of no confidence by the provincial Members of Parliament against the Governor of Ituri, Jean Bamanisa, in November 2019. Shortly thereafter, a new peak of violence was reported in Djugu. These recent events further suggested links between political dynamics, business interests and the violence in Djugu, in line with previous observations described in the Registry's latest report.
60. Overall, between December 2017 and September 2019, the MONUSCO Joint Human Rights Office ("JHRO") has established that at least 701 people have been killed further to attacks against the Hema community by armed men,

¹²⁴ The Registry's Preliminary Observations, annex 2.

presumably from the Lendu community.¹²⁵ The JHRO found that these attacks have been planned and organised with the aim to inflicting significant damage and trauma to prevent members of the Hema community from returning on their land in Djugu. The violence has triggered mass displacement of the population with over 550,000 internally displaced persons (“IDPs”) from Djugu to neighbouring territories since February 2018 and 57,000 people have fled to Uganda according the Office of the United Nations High Commissioner for Refugees. Following the recent surge in violence late last year, around 50,000 new IDPs were recorded by the Office of the United Nations High Commissioner for Human Rights in the first three weeks of January 2020 alone.¹²⁶ With respect the Ebola virus, the contamination level in Ituri is currently reported to be relatively low but the virus remains a concern.

61. Looking forward, this situation is likely to continue causing delays to the Court’s mandate delivery. In this context, the Registry stands ready to provide the Chamber, parties and participants with regular updates on relevant developments, main trends and potential outcomes with a view to identifying windows of opportunity to implement the Court’s activities in the best possible conditions. The Registry is available to submit quarterly reports including latest recommendations from the Court’s inter-organ Joint Threat Assessment Group should the Chamber so order.

The role of the DRC Authorities

62. The Registry notes that cooperation from States is a key facet of the Statute¹²⁷ and is fundamental to reparations proceedings.¹²⁸ It also notes Trial Chamber II’s ruling that “[a]n order for reparations does not [...] relieve States Parties of the responsibility to award reparations to victims pursuant to other treaties or domestic legislation.”¹²⁹ In this vein, the Registry believes that the involvement

¹²⁵ United Nations, Mission de l’Organisation des Nations Unies pour la Stabilisation en République démocratique du Congo (MONUSCO), [*“Rapport public du Bureau Conjoint des Nations Unies aux Droits de l’Homme sur les conflits en territoire de Djugu, province de l’Ituri: Décembre 2017 à septembre 2019”*](#), January 2020.

¹²⁶ United Nations, Office of the United Nations High Commissioner for Human Rights, [*Press release “DR Congo: Bachelet says new Government has “window of opportunity” after peaceful political transition”*](#), 29 January 2020, last accessed on 24 February 2020.

¹²⁷ See article 75(6) of the Statute.

¹²⁸ *Katanga* Reparations Order, para. 324; Permanent Court of International Justice (PCIJ), [*Factory at Chorzow \(Germany v. Poland\)*](#) (Jurisdiction), Judgment No.8, 26 July 1927; see also [*UN Principles on Reparations 2005*](#), principle IX, para 15.

¹²⁹ *Katanga* Reparations Order, para. 323.

of the Government of DRC in the reparations proceedings may positively impact on victims and affected communities in Ituri.

63. The Registry thus recommends that if the Chamber deems it necessary for potential beneficiaries to provide additional documentation to support their reparations claims, the Chamber request that these documents be provided by the DRC authorities free of charge, as far as it can be produced at all.¹³⁰

¹³⁰ As regards a corresponding State Party obligation under Part 9 of the Statute, *see* article 93(1)(i) of the Statute, which expressly envisages the “provision of records and documents, including official records and documents”.