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Date: **30 September 2021**

THE APPEALS CHAMBER

Before: **Judge Marc Pierre Perrin de Brichambaut, Presiding Judge**
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa
Judge Gocha Lordkipanidze

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR V. BOSCO NTAGANDA

Public

Reply to LRV1 and LRV2 Responses to Mr Ntaganda's Appellant Brief

Source: **Defence Team of Mr Bosco Ntaganda**

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Reply to LRV1 and LRV2 Responses to Mr Ntaganda's Appellant Brief

SUBMISSIONS

1. Further to the Appeals Chamber "Decision on various procedural issues" ("Decision"),[1] the Defence hereby replies to the six issues authorised therein.

I. First Issue – Decision, paragraph 14 (a)

2. In her response to Ground 2[2] of the "Defence Appellant Brief against the 8 March Reparations Order" ("Defence Appeal"),[3] the LRV1 submits that the Defence had a chance to "formulate observations on the victims' individual applications throughout trial, and in particular to respond to the submissions made on their behalf regarding the harm they have been suffering from."[4] Further, the LRV1 argues that "[t]he same holds true with regard to subsequent submissions to be made by the Registry and the TFV, to which the Defence will have an opportunity to respond."[5]

3. The first assertion is incorrect. Throughout the course of the proceedings against Mr Ntaganda, the Defence only had access to extremely limited information on the harm suffered by individual victims.

4. During the pre-trial phase of the proceedings, the Defence received six batches of victims' applications for participation, amounting to a total of 1185 individual simplified forms. However, what the LRV1 does not mention is that the Defence only received heavily redacted forms containing extremely scarce information, which effectively made it impossible to provide substantial observations. Notably, all 1185

[1] Decision on various procedural issues, 9 September 2021, ICC-01/04-02/06-2708.
[2] Response of the Common Legal Representative of the Former Child Soldiers on Mr Ntaganda and the Victims of the Attacks' Appeals against the Reparations Order (ICC-01/04-02/06-2659), 9 August 2021, ICC-01/04-02/06-2700 ("LRV1 Response"), para.43. These submissions are repeated in para.89 of the LRV1 Response in relation to Ground 10.
[3] Defence Appellant Brief against the 8 March Reparations Order, 7 June 2021, ICC-01/04-02/06-2675.
[4] LRV1 Response, para.43.
[5] *Ibidem*.

application forms had the name of the applicant redacted.[6] In addition, as highlighted by the Defence on six different occasions,[7] the forms disclosed were excessively short, imprecise and vague, did not enclose any document in support, and often contained redactions as to the applicants' ethnicity, their age and place of birth, the harm they allegedly suffered, and the dates and places of relevant events. In this context, the Defence repeatedly observed that it was not in a position to provide submissions due to the insufficiency of information disclosed.[8] Nonetheless, the Single Judge admitted 1120 victims at the confirmation stage of the proceedings.[9]

5. The situation did not improve at trial. Despite extensive submissions on the importance of the involvement of the Defence in the victim admission process,[10] Trial Chamber VI determined such involvement to be "neither appropriate nor necessary"[11] and implemented a system whereby the Registry was instructed to divide the applicants in three groups: (i) applicants who clearly qualify as victims ("Group A"); (ii) applicants who clearly do not qualify as victims ("Group B"); and (iii) applicants for whom the Registry could not make a clear determination ("Group

[6] See, *inter alia*, Public redacted version of the 'Fifth Report to the Pre-Trial Chamber on applications to participate in the proceedings' (ICC-01/04-02/06-179-Conf) dated 13 December 2013, 1 August 2014, ICC-01/04-02/06-179-Red, para.13; Public redacted version of the "Sixth Report to the Pre-Trial Chamber on applications to participate in the proceedings" (ICC-01/04-02/06-200-Conf) dated 10 January 2014, 01 August 2014, ICC-01/04-02/06-200-Red, para.9.

[7] Observations de la Défense de M. Bosco Ntaganda sur les 29 demandes de participation transmises à la Défense le 13 septembre 2013, 1 October 2013, ICC-01/04-02/06-118 ("First Observations"); Observations de la Défense de M. Bosco Ntaganda sur les 172 demandes de participation transmises à la Défense le 9 octobre 2013, 24 October 2013, ICC-01/04-02/06-127 ("Second Observations"); Observations de la Défense de M. Bosco Ntaganda sur les 258 demandes de participation transmises à la Défense le 31 octobre 2013, 15 November 2013, ICC-01/04-02/06-143 ("Third Observations"); Observations de la Défense de M. Bosco Ntaganda sur les 363 demandes de participation transmises à la Défense le 22 novembre 2013 ; 9 December 2013, ICC-01/04-02/06-169 ("Fourth Observations"); Observations de la Défense de M. Bosco Ntaganda sur les 160 demandes de participation transmises à la Défense le 13 décembre 2013; 30 December 2013, ICC-01/04-02/06-196 ("Fifth Observations"); Observations de la Défense de M. Bosco Ntaganda sur les 204 demandes de participation transmises à la Défense le 10 janvier 2014; ICC-01/04-02/06-219 ("Sixth Observations").

[8] First Observations, para.7; Second Observations, para.7; Third Observations, para.9; Fourth Observations, para.12; Fifth Observations, para.14.

[9] Decision on victims' participation at the confirmation of charges hearing and in the related proceedings, 15 January 2014, ICC-01/04-02/06-211; Second Decision on Victims' participation at the confirmation of charges hearing and in the related proceedings, 7 February 2014, ICC-01/04-02/06-251.

[10] Transcript of hearing on 11 September 2014, ICC-01/04-02/06-T-13-ENG ET, p.50.

[11] Decision on victims' participation in trial proceedings, 6 February 2015, ICC-01/04-02/06-449, para.34 ("Decision on victims' participation").

C").[12] Only the applications belonging to the latter group were disclosed, in redacted form, to the Defence.[13] In other words, the Defence was granted access only to 41 applications out of the 2232 submitted, amounting to less than 2%. Thus, it emerges with clarity that the LRV1's assertion is far from the truth.

6. The lack of proper access to victims' applications is exacerbated by the fact that the test to be admitted as a participant is different from the test to be found eligible for reparations. While the former only requires a *prima facie* assessment of the requirements set out in Rule 85 of the Rules of Procedure and Evidence ("Rules"),[14] eligibility to receive reparations must be established on the balance of probabilities.[15] It follows that, even if the Defence had been granted a chance to provide submissions on the victims' applications for participation during trial, it would not have been able to challenge the applicants' eligibility to obtain reparations.

7. As of today, the Defence has not been granted access to victims' applications, either for participation or reparations. Thus, the Defence never had a realistic chance to challenge the content of the applications and the specific harm alleged to be suffered by the applicants. Regrettably, this prevents the Defence from having a meaningful role in the reparations phase, a role which would enhance the fairness of the proceedings and ensure that after a proper assessment of the applicable criteria, only those who are eligible for reparations ultimately benefit from them.

8. A good example of the importance of Defence submissions on individual victim applications is provided by "dual status" witnesses, for whom the Defence

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[12] Decision on victims' participation, para.24.
[13] Decision on victims' participation, paras.24,34.
[14] Decision on victims' participation, paras.30,41-44.
[15] See, *ex multis*, *Prosecutor v. Thomas Lubanga Dyilo*, Order for Reparation, 3 March 2015, ICC-01/04-01/06-3129-AnxA, para.65; *Prosecutor v. Thomas Lubanga Dyilo*, 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, ("Lubanga 2019 Appeals Judgment on Reparations"), para.181; *Prosecutor v. Germain Katanga*, Ordonnance de réparation en vertu de l'article 75 du Statut, 24 March 2017, ICC-01/04-01/07-3728, ("Katanga reparations order"), paras.49-51; *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", 8 March 2018, ICC-01/04-01/07-3778-Red, para.42.

was provided with complete information.[16] The Defence thoroughly assessed and challenged the content of their victim application forms, highlighting contradictions, discrepancies and various issues of credibility.[17] While the Trial Chamber ultimately found these dual status witnesses to be reliable, the Defence submissions were considered and, in some instances, given merit.[18] Indeed, it is crucial that the Defence be allowed to make submissions on the specificities of individual applications. The LRV1s statement that this deficiency can be cured by making submissions in response to the Registry and the TFV[19] is without merit.

9. In conclusion, the LRV1's assertions on the level of participation accorded to the Defence during trial are at best erroneous and misleading. Despite remarking on its intention to take active part in both the victim admission process and the eligibility assessment for reparations, the Defence has so far been denied a concrete chance to do so.

II. Second Issue – Decision, paragraph 14 (b)

10. The defence submits that the determination of the status of a victim as direct or indirect is a legal finding and not a symbolic one. It is a matter of law. Indeed, "an order for reparations should be classified as a 'fundamental' decision, treated in the same manner as a decision of conviction, acquittal or sentence".[20] Accordingly, the "reparations phase, like all proceedings before the Court, is a judicial process".[21] The

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[16] On this point, see *Prosecutor v. Mahamat Said Abdel Kani*, Judgment on the appeal of Mr Mahamat Said Abdel Kani against the decision of Pre-Trial Chamber II of 16 April 2021 entitled "Decision establishing the principles applicable to victims' applications for participation", 14 September 2021, ICC-01/14-01/21-171, paras.4,52,76.

[17] 13 victims were called to testify for the Prosecution. In its Defence Closing Brief, (Corrigendum of Annex 1 to the Defence Closing Brief, 2 July 2018, ICC-01/04-02/06-2298-Conf-Anx1-Corr), the Defence provided detailed submissions for P-0887 (paras.419-424), P0894 (paras.435-442) and P0892 (paras.443-449).

[18] Judgement, 8 July 2019, ICC-01/04-02/06-2359, fn.1573 with regard to P0887; fn.1533 with regard to P0892.

[19] LRV1 Response, para.43.

[20] *Prosecutor v. Thomas Lubanga*, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, 3 March 2015, ICC-01/04-01/06-3129 ("Lubanga 2015 Appeals Judgment on Reparations"), para.67.

[21] Katanga reparations order, para.18.

assessment of which victims qualify as direct or indirect has to date been made by the judges. It thus follows, contrary to LRV1's assertion,[22] that any determination made by the Chamber within the reparations order is a legal decision with legal consequences for the convicted person.

11. The Defence submits that qualifying children born out of rape and/or sexual slavery as direct victims constitutes an error of law and directly impacts the convicted person's liability for reparations. It not only enlarges the number of direct victims but also the number of indirect victims. Indeed, the offspring of the children born out of rape and/or sexual slavery would in turn qualify as indirect victims, thereby transcending Mr Ntaganda's liability to two generations unborn at the time of the commission of the crimes. Trial Chamber VI went even further and held that "indirect victims who are close family members of direct victims of the crimes against child soldiers, rape and sexual slavery, also benefit from a presumption of material, physical and psychological harm"[23], thereby lowering the burden of proof.

12. Furthermore, the Chamber enlarged the concept of indirect victims to include distant family members and other persons who did not have a close personal relationship with the direct victims.[24] This would mean that the current partner of a child born out of rape and/or sexual violence would qualify as an indirect victim, as well as his/her friends. The Defence submits that this leads to an inaccurate number of victims and artificially enlarges the liability of the convicted person.

13. The Defence reiterates that all the parties in this case were unanimous in their view that children born out of rape fall within the category of indirect victims.[25]

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[22] LRV1 Response, para.59.
[23] Reparations Order, 8 March 2021, ICC-01/04-02/06-2659, ("8 March Reparation Order") para.145.
[24] 8 March Reparation Order, paras.124-128.
[25] Observations on the Appointed Experts' Reports and further submissions on reparations on behalf of the Former Child Soldiers, 18 December 2020, ICC-01/04-02/06-2632, para.44; Public Redacted Version of the "Final Observations on Reparations of the Common Legal Representative of the Victims of the Attacks" (ICC-01/04-02/06-2633-Conf), 21 December 2020, ICC-01/04-02/06-2633-Red, paras.31-33; Public redacted version of "Defence Submissions on Reparations", 18 December 2020, ICC-01/04-02/06-2634-Conf, 11 January 2021, ICC-01/04-02/06-2634-Red, para.107; Public Redacted Versions of

Further, the expert in this case, Dr Sunneva Gilmore, has viewed children born out of rape as indirect victims and 'next of kin' of victims of sexual violence,[26] further stating that "[c]hildren born as a result of rape should be eligible, but their harm from the rape is more indirect (Category II)".[27]

14. It is the view of the Defence that indirect victims must provide sufficient proof of the causal link between the crime and the harm suffered. For instance, in the case of rape, there is no automatic presumption that the rights of family members were also violated, but family members may provide evidence of harms suffered.[28] The European Court of Human Rights ("ECtHR") has also found it pertinent to distinguish the harms of family members given the distinct dimension and character of the distress from that of the direct victim.[29]

15. The Defence thus submits that contrary to the LRV's assertion, it has demonstrated an error of law and that this error of law materially affects the impugned decision.

III. Third Issue – Decision, paragraph 14 (c)[30]

16. In reply to the LRV2's submission that "[…] in accordance with the jurisprudence of the Court, in case of collective reparation awards, the Defence's involvement in the screening of the eligibility of potential beneficiaries of reparations

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the "Trust Fund for Victims' Final Observations on the reparations proceedings", 18 December 2020, ICC-01/04-02/06-2635-Red, paras.32-36.

[26] Sunneva Gilmore, Julie Guillerot and Clara Sandoval, BEYOND SILENCE AND STIGMA: Crafting a Gender-Sensitive Approach for Victims of Sexual Violence in Domestic Reparation Programmes, p.34, available at https://reparations.qub.ac.uk/assets/uploads/QUB-SGBV_Report_English_Web.pdf

[27] Dr Sunneva Gilmore, Expert Report on Reparations for Victims of Rape, Sexual Slavery and Attacks on Healthcare, filed as Annex 2 to the Registry Transmission of Appointed Experts' Reports, 2 November 2020, ICC-01/04-02/06-2623-Conf-Anx2-Red, Part IV ("Dr Gilmore Report"), para.80. A public redacted version of the Report was distributed on 3 November 2020, ICC-01/04-02/06-2623-Anx2-Red2.

[28] Inter-American Court of Human Rights, *Fernández Ortega et al. v. Mexico*, Judgment (Preliminary Objections, Merits, Reparations, and Costs), paras.139-149.

[29] ECtHR, *Çakici v. Turkey*, Judgment, 8 July 1999, para.98.

[30] The Third issue put forward at paragraphs 27-28 of the "Request on behalf on Mr Ntaganda seeking leave to reply to LRV1 and LRV2 Responses, 13 August 2021, ICC-01/04-02/06-2703, actually flows from the Fourth issue set out in paragraphs 31-32 below, i.e. the difference between individual and collective reparations.

is neither foreseen nor warranted",[31] the Defence offers the following observations and arguments.

17. First, in finding in the 8 March Reparations Order that "(c)onsidering its decision to award collective reparations with individualised components, the Chamber sees no need to rule on the merits of individual applications for reparations, pursuant to rule 94 of the rules"[32] – a finding challenged on appeal based on the specific circumstances of this case[33] – Trial Chamber VI did not rule that the Defence was foreclosed from being involved in the screening of the eligibility of potential beneficiaries of reparations.

18. As set out in the Defence reply to the Fourth issue, *infra*, whether individual or collective reparations are awarded, the eligibility of potential beneficiaries will have to be assessed pursuant to the applicable standard of proof, chain of causation and identity requirements.[34] At what stage, how and by whom such eligibility assessment will be conducted depends on the circumstances of each case.

19. Considering the ICC reparations scheme, including the fact that a reparations order is directed at the convicted person as the result of what is meant to be a judicial process, it is imperative that the due process rights of the convicted person, including *inter alia*, equality of arms between the parties - *i.e.* the LRVs on behalf of the victims they represent and the Defence on behalf of the convicted person – and access to all material considered by a trial chamber before delivering a reparations order, and the possibility to participate and make meaningful submissions, be fully enforced.

20. In *Lubanga*, the Appeals Chamber held that "[i]n deciding what reparations are appropriate, a trial chamber must take into account the rights of the convicted person […] [t]he convicted person must be given a sufficient opportunity to make

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[31] Response of the Common Legal Representative of the Victims of the Attacks to the Defence's Appeal Brief (ICC-01/04-02/06-2675), 9 August 2021, ICC-01/04-02/06-2701, ("LRV2 Response"), para.50.
[32] 8 March Reparation Order, para.196.
[33] Defence Appeal, Part III, Section II.
[34] *Infra,* para. 39.

submissions […] so as to comply with the requirements of fairness […] [t]o that end, the trial chamber must give notice to the parties […] especially where it does not intend to make individual determinations with respect to each victim who has filed a request […] it must ensure that the person is adequately on notice as to the information on which it will rely in making its order so that he or she has a meaningful opportunity to make representations thereon […]".[35]

21. Accordingly, when reviewing Trial Chamber I's Decision on the principles, the Appeals Chamber included further instructions in the amended order for reparations – providing Mr Lubanga with an opportunity to review the screening process of victims by the TFV at the implementation stage, subject to protective measures required, and to have his observations considered[36] - for the specific purpose of ensuring that "the procedures under rule 98 of the Rules of Procedure and Evidence and the Regulations of the Trust Fund do not infringe on Mr Lubanga's rights".[37]

22. On 9 February 2016, Trial Chamber II held that it would "not be able to rule on the monetary amount of Mr Lubanga's liability until the potential victims have been identified and it has examined both their status as victims eligible to benefit from the reparations and the extent of the harm they have suffered […]"[38], and it ensured that "the Defence has had the opportunity to submit its observations on the eligibility of each victim".[39]

23. In *Lubanga*, the Appeals Chamber expressed concern that Mr Lubanga did not have a sufficient opportunity to challenge the relevance and reliability of information

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[35] Lubanga 2019 Appeals Judgment on Reparations, para.90.
[36] Lubanga 2015 Appeals Judgment on Reparations, para 167; *Prosecutor v. Thomas Lubanga*, Order for Reparations, 3 March 2015, ICC-01/04-01/06-3129-AnxA ("Lubanga Amended Reparation Order"), para.66.
[37] Lubanga 2019 Appeals Judgment on Reparations, paras.165,168.
[38] Lubanga 2019 Appeals Judgment on Reparations, para.48; *Prosecutor v. Thomas Lubanga*, Order instructing the Trust Fund for Victims to supplement the draft implementation plan, 9 February 2016, ICC-01/04-01/06-3198-tENG ("Lubanga 9 February 2016 Order"), para.15.
[39] Lubanga 9 February 2016 Order, para.14.

considered by Trial Chamber II in issuing the 21 December 2017 decision setting the liability of Mr Lubanga for reparations.[40]

24. In the same Judgment, when considering the legal framework regulating the information a convicted person should receive in reparations proceedings, the Appeals Chamber noted that the concept of a 'fair and impartial trial' includes the principle of equality of arms, which implies that "each party must be afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the other party".[41] The Appeals Chamber also held that victims' dossiers should be notified to the convicted persons in a timely manner allowing him or her to have adequate time to make representations thereon.[42]

25. Furthermore, turning to the possible limitations that may be made to the provision of information to the convicted person in reparation proceedings, the Appeals Chamber concluded that these were limited to redactions rendered necessary as a result of protective measures implemented.[43]

26. Contrary to the submission of the LRV2, in *Al Mahdi*, the convicted person was authorized to participate in the screening process conducted by the TFV during the implementation phase.[44] Although the Appeals Chamber held that the Trial Chamber accorded too much weight to the role of Mr Al Mahdi in the screening process and as a result authorized the redaction of victims' identity on request, Al Mahdi was nonetheless involved in the screening of potential beneficiaries conducted by the TFV.[45]

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[40] Lubanga 2019 Appeals Judgment on Reparations, para.229.
[41] Lubanga 2019 Appeals Judgment on Reparations, para.248.
[42] Lubanga 2019 Appeals Judgment on Reparations, paras.246-248.
[43] Lubanga 2019 Appeals Judgment on Reparations, para.249.
[44] *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Public redacted Judgment on the appeal of the victims against the "Reparations Order", 8 March 2018, ICC-01/12-01/15-259-Red2, ("Al-Mahdi Appeals decision") paras.45,89.
[45] Al-Mahdi Appeals decision, para.92.

27. In this case, although the Defence was involved in the briefing process leading to the 8 March Reparations Order, Mr Ntaganda was deprived of a genuine opportunity to make meaningful submissions on the information available to and used by Trial Chamber VI to issue the 8 March Reparations Order.

28. During trial, Mr Ntaganda was not provided with the participating victims' dossiers in violation of the applicable rules.[46] As a result, Mr Ntaganda entered the reparations process initiated by Trial Chamber VI empty-handed, whereas this information was available to Trial Chamber VI, the LRVs and the Registry. Trial Chamber VI denied Mr Ntaganda the opportunity to assess which of the participating victims were impacted by the Trial Judgment, in which no findings were made for many municipalities. Trial Chamber VI denied Mr Ntaganda's request seeking clarifications concerning the role of the Defence and access to victims' applications.[47] Thereafter, the Registry, not being able to perform this apparently easy exercise, sought guidance from the Chamber.[48] In December 2020, three days before the deadline for final submissions on reparations, Trial Chamber VI ruled on the guidance sought by the Registry without providing Mr Ntaganda with an opportunity to challenge the same.[49] In its Second Report on reparations, the Registry applied the guidance obtained from Trial Chamber VI, reporting that 661 victims of the attacks did not meet the requirements to be potential beneficiaries in this case, without involving the Defence.[50] During the reparations process and briefing period leading to the 8 March 2021 Reparations Order, Trial Chamber VI also engaged the parties and participants in the preparation of a sample, again without providing Mr

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[46] *Supra*, First issue.

[47] Decision on the 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, 29 September 2020, ICC-01/04-02/06-2601.

[48] Public redacted version of "Annex I to the Registry First Report on Reparations", 1 October 2020, ICC-01/04-02/06-2602-Conf-AnxI, 26 October 2020, ICC-01/04-02/06-2602-AnxI-Red.

[49] Decision on issues raised in the Registry's First Report on Reparations, 15 December 2020, ICC-01/04-02/06-2630.

[50] Annex I to the Registry's Second Report on Reparations, 15 January 2021, ICC-01/04-02/06-2639-Conf-AnxI, para.9.

Ntaganda with access to the limited participating victims' dossiers selected for the sample.[51]

29. Against this backdrop, the Defence takes issue with the submission of the LRV2 that because collective reparations have been ordered by Trial Chamber VI, the involvement of the Defence in the screening to be conducted by the TFV during the implementation phase is neither foreseen nor warranted.[52]

30. It is evident based on the time that was required by the Registry to complete an objective analysis of the participating victims still considered potentially eligible further to the delivery of the Trial Judgment, that assessing the eligibility of potential beneficiaries is a complicated endeavor that requires knowledge, skills and information. Since no trial chamber will be involved in the process, the involvement of the Defence is not only warranted, it is essential. Due process requires nothing less.

IV. Fourth Issue – Decision, paragraph 14 (d)

31. In reply to the submission of the LRV2 that "[c]ontrary to the Defence contention, 'individual components' do not transform a collective award into individual awards" and that "the Rules are clear insofar as they foresee only two types of reparations: collective or individual",[53] reference is made first, to the detailed submissions addressed to Trial Chamber I by (i) the Legal Representatives of the VO1 group of victims; (ii) the Legal Representatives of the VO2 group of victims; (iii) OPCV; (iv) TFV; (v) Registry; (vi) Women's Initiatives for Gender Justice; (vii) International Center for Transitional Justice; (viii) UNICEF; (ix) Fondation Congolaise pour la Promotion des droits humains et la Paix; (x) the Coalition pour la CPI; (xi) Avocats sans frontiers along with other non-governmental organisations; and (xii) the Lubanga Defence (together the "Lubanga Parties and Participants"), concerning their understanding of the differences between individual and collective

[51] First Decision on Reparations Process, 26 June 2020, ICC-01/04-02/06-2547, paras.37-38.
[52] LRV2 Response, paras.50.
[53] LRV2 Response, para.58.

reparations as well as which type of reparations would be most appropriate in the Lubanga case.[54] Notably, the Lubanga Parties and Participants' understanding of the attributes of and the distinction between individual and collective reparations vary considerably.

32. Significantly, when Trial Chamber I issued the Lubanga Decision on Principles, the Lubanga Parties and Participants quasi unanimously took the view that Trial Chamber I had awarded individual reparations.[55] Yet, on appeal, the Appeals Chamber considered that "[…] the Trial Chamber decided to award reparations only on a *collective* basis pursuant to Rule 98(3) of the Rules of Procedure and did not award reparations on an individual basis pursuant to rule 98(2) of the Rules of Procedure and Evidence."[56]

33. In the Lubanga Decision on Principles, Trial Chamber I had held that "[…] the Court should ensure that there is a *collective approach* that ensures reparations reach those victims who are currently unidentified".[57] The Appeals Chamber referred to this finding in its 2019 Appeals Judgment on Reparations.[58] It is unsure however whether the 'collective approach' referred to by Trial Chamber I meant that it had decided to award reparations only on a *collective* basis pursuant to Rule 98(3).

34. Individual reparations refer to reparations awarded to individuals, which require a trial chamber to assess applications submitted by potential beneficiaries individually in respect of the harm suffered, their eligibility and the award to be attributed. An example of an individual reparation is when a potential beneficiary is found eligible by a trial chamber and awarded a sum of money to rebuild his home, which was damaged during the fighting.

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[54] *Prosecutor v. Thomas Lubanga* Decision establishing the principles and procedures to be applied to reparations, 7 August 2012, ICC-01/04-01/06-2904, ("Lubanga Decision on Principles") paras.41-67.
[55] Lubanga 2015 Appeals Judgment on Reparations, paras.136-139.
[56] *Idem*, para.140.
[57] Lubanga Decision on Principles, para.219 (emphasis added).
[58] Lubanga 2019 Appeals Judgment on Reparations, para.92.

35. Collective reparations on the other hand are awarded to a group of potential beneficiaries who share common characteristics, and who will collectively benefit from the collective reparation awarded. Classic examples of collective reparations include the construction of a monument, the building of a school or even an information / advocacy campaign aimed at promoting the social re-integration of child soldiers. In such cases, the reparation award benefits the group of victims collectively rather than individually and indeed does not require a ruling on the merits of individual requests submitted by members of the group.

36. The mixed scenario where collective reparations are meant to repair the harm caused to and benefit members of a group individually, is altogether different; for example, when individual beneficiaries obtain medical or psychological treatment made available through a program designed to repair the harm caused to a group of victims collectively.

37. From the point of view of the victims who will benefit individually from such a program / collective reparation award, it makes little or no difference whether the individual benefit they obtain is labelled as an individual or a collective reparation award.

38. As held by the Appeals Chamber, "[i]ndividual and collective reparations are not mutually exclusive, and they may be awarded concurrently."[59] Trial Chamber I also held in its Decision on Principles that "[w]hen collective reparations are awarded, these should address the harm the victims suffered on an individual and collective basis."[60]

39. More importantly, considering that reparation orders are intrinsically linked to the *individual* whose criminal liability is established in a conviction and whose culpability for these criminal acts is determined in a sentence,[61] it is paramount that

[59] Lubanga 2019 Appeals Judgment on Reparations, para.40.
[60] Lubanga Decision on Principles, para.221.
[61] Lubanga 2015 Appeals Judgment on Reparations, para.65.

the eligibility of all victims who will benefit individually from a reparation award be assessed and confirmed pursuant to the applicable standard of proof, chain of causation and identity requirements. Setting out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted, alone, is not sufficient for the purpose of establishing and informing the convicted person of his or her liability with respect to the reparations awarded in a reparations order.

40. It follows that pursuant to the ICC reparations scheme, the sole difference between individual and collective reparations with individual components, as in this case, is at what stage, by whom and how the eligibility of potential beneficiaries will be assessed.

41. Regardless, if the ICC reparations scheme is to remain a judicial process in which the convicted person is a party, entitled to participate and make meaningful submissions towards the determination of his or her liability for reparations, it is imperative that due process rights, including *inter alia*, equality of arms and access to all material that will be considered by a trial chamber in the process, be enforced.

42. In this case, as argued elsewhere in his Appellant Brief, Mr Ntaganda's due process rights have been violated from the beginning of the reparations process triggered by Trial Chamber VI and it is neither correct *nor* appropriate for the LRV2 to refer to Trial Chamber VI's decision to award collective reparations with individual components as a sort of a shield to argue that Mr Ntaganda's due process rights have been respected.

43. Based on the criteria referred to by the Appeals Chamber to guide future trial chambers in deciding whether to award individual or collective reparations, *i.e.* (i) at the time of making the order it is impossible or impracticable to make individual awards directly to each victim; and (ii) where the number of victims and the *scope, forms and modalities* of *reparations* makes a collective award more appropriate, it is unlikely that individual reparations will ever be awarded in cases that reach the ICC.

Decisions to award collective reparations pursuant to Rule 98(3), albeit much more convenient for a trial chamber, should not be a vehicle to minimize a convicted person's due process rights.

V. Fifth Issue – Decision, paragraph 14 (e)

44. The purpose of reparations is to hold the person responsible for their crimes. Thus, a causal nexus must be established between the harm and the crimes for which Mr Ntaganda was convicted. In the case of transgenerational harm, the individual eligibility assessment has been delegated to the TFV. The Defence submits that this is a fact-intensive inquiry that requires, at the very least, baseline prerequisites to establish a chain of events and identify traumatic events that could break the causal link.

45. In assessing the concept of transgenerational harm in *Katanga*, the Trial Chamber emphasized the rationale for applying the proximate cause standard in order to "place just and fair limits on the consequences of the crimes that can be attributed to the convicted person".[62] The Trial Chamber correctly asserted that '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'.[63] The context of this particular case is within a protracted armed conflict where the causal link may have been broken by other incidents, further compounding the extent and type of harm suffered by the victims.

46. In *Katanga*, the Trial Chamber assessed a number of documents including mental health certificates and also noted that "the closer the date of birth of the Applicant to the date of the Attack, the more likely it is that the Attack had an impact

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

on the Applicant Concerned, especially if no other potentially traumatic events occurred […]".[64] In this regard, following assessment by the chamber, the applications were rejected.

47. The Appeals Chamber in *Katanga* was also unconvinced by the LRV assertion that 'harm concerning a parent should, without more, necessarily result in a finding of harm for the children based on its transgenerational nature […]'.[65] Indeed, *more* is required, that is, sufficient proof of the causal link between the harm suffered and the crime for which the person is convicted.

48. The Expert, Dr Sunneva Gilmore, assessed some identifiable criteria in the determination of this category of victims: "where they are born when their mothers were within the UPC, or civilians within 42 weeks since the rape are eligible and should be assisted to apply".[66] This again supports, at minimum, a requirement of date of birth.

49. The Defence notes that this is one way of determining parametres to assess transgenerational harm. However, the Defence asserts that assessing transgenerational harm is a fact intensive inquiry. Major studies done on the concept of transgenerational harm on various communities have been scientific and medical in nature. And despite much literature and scholarship, it remains contested and is still considered a 'young' or novel science. Rachel Yehuda, professor of psychiatry and neuroscience and well known for examining the relationship between PTSD in Holocaust survivors and their adult children, speaks of complexities involved in making inferences about the mechanisms that underlie transgenerational transmission stating:

> Research on epigenetic inheritance of effects of trauma faces many scientific and methodological complexities, not to mention conceptual issues regarding

[64] Katanga decision on transgenerational harm, para.29.
[65] *Prosecutor v. Germain Katanga,* Public redacted Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute", 9 March 2018, ICC-01/04-01/07-3778-Red, para.236.
[66] Dr Gilmore Report, para.80.

> interpretation of transmitted effects… At the present time, the field has not sufficiently grappled with the meaning of the intergenerational transmission of trauma effects for the offspring.[67]

50. The Defence submits that contrary to LRV2's submissions,[68] the nature of the reparations, whether collective or individual, does not diminish the fact that this kind of assessment is fact-intensive. Studies have been made on collective trauma on the community/society level, in instances such as slavery and colonialism. Researchers studying collective trauma have emphasized accommodating the complex sequelae of collective trauma on different multi-level frameworks that include the individual, the family and the society.[69] In fact, on a community level, the impacts remain understudied, and those that have been studied have led to inconclusive results.[70]

51. In the context of the Court, this would be further compounded by the prerequisite to establish a causal nexus between the alleged harm and the crimes for which the defendant was convicted. The Defence therefore submits that the novelty of this field in science and at the Court requires a thorough study, without which the Chamber's reliance on it for purposes of reparations is unsound. For this reason, the Chamber committed an error when it recognized transgenerational harm without properly engaging with the novelty of the concept, its limitations and shortcomings.

VI. Sixth Issue – Decision, paragraph 14 (f)

52. In his response to Ground 4[71] of the Defence Appeal, the LRV2 mischaracterizes the Defence argument that Trial Chamber VI erred by solely relying

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[67] Rachel Yehuda and Amy Lehrner, Intergenerational transmission of trauma effects: putative role of epigenetic mechanisms, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6127768/
[68] LRV2 Response, para.89.
[69] Evans-Campbell, T., 2008, Historical trauma in American Indian/Native Alaska communities: a multilevel framework for exploring impacts on individuals, families, and communities. J. Interpers. Violence 23 (3), 316e338. *See also*, Brent Bezo and Stefania Moggi, Living in "survival mode: "Intergenerational transmission of trauma from the Holodomor genocide of 1932 e 1933 in Ukraine, 15 April 2015, p.87.
[70] Brent Bezo and Stefania Moggi, Living in "survival mode: "Intergenerational transmission of trauma from the Holodomor genocide of 1932 e 1933 in Ukraine, 15 April 2015, p.88.
[71] LRV2 Response, paras.105,107.

on one of the expert reports to assess the extent of the damage suffered by the Sayo Health Center, thereby relying solely on unreliable and untested evidence.

53. The LRV2 argue that "[…] the Trial Chamber appointed the Experts for the specific purpose of being able to rely on their expertise in order to assist its determinations during the reparations proceedings. It would thus be self-defeating if the Trial Chamber could not rely on the reports of the Experts it has appointed."[72] The LRV2 further justify the Chamber's approach highlighting that "the conclusions of Dr Gilmore's Report on the damaged caused to the Sayo health center is based on a variety of sources."[73]

54. Indeed, the Defence takes issue with the LRV2's suggestion that the Chamber can simply rely on the experts' reports unquestionably, at face value, without assessing the accuracy of the factual matrix underpinning the analysis, the reliability of the underlying evidentiary material and the correctness of the conclusions. The Defence contends that a proper evaluation in this sense is necessary to determine the weight that can be given to the report and ultimately justify the Trial Chamber's reliance on the expert's conclusions. Regrettably, Trial Chamber VI declined to do so with respect to Dr Gilmore and the damage caused to the Sayo Health Center.

55. In this respect, it is noteworthy that Trial Chamber VI, with regard to the admissions of expert testimony at trial, held that "any issues surrounding the sources used, or the referencing, structure or methodology of [an expert's] report, are matters that can be […] taken into consideration in evaluating the weight of the report […]".[74] This is in line with established jurisprudence of the Court, according to which a Trial Chamber, when dealing with expert testimony, should give regard "to the methodology used, the extent to which the expert's findings were consistent with

[72] LRV2 Response, para.105 [footnote omitted].
[73] *Ibidem.*
[74] Decision on Defence preliminary challenges to Prosecution's expert witnesses, 9 February 2016, ICC-01/04-02/06-1159, para.16 ("Decision on Expert witnesses").

other evidence in the case and the general reliability of the expert's evidence".[75] Indeed, the Defence is of the view that this represents the core of the Chamber's judicial function, as "the content of the proposed expert report or testimony must not usurp the functions of the Chamber as the ultimate arbiter of fact and law."[76]

56. In addition, the Defence observes that the specificities of Dr Gilmore's conclusions on the Sayo Health Center required the Chamber to properly assess the material relied upon by the expert and the weight to be given to her determinations.

57. First, the LRV2 overlooks the fact that it was Trial Chamber VI who found that the extent of the destruction caused by the UPC/FPLC to the Sayo Health Center could not established, holding that it was not clear from the evidence "whether the centre was damaged as a result of the crime".[77] In a situation in which the Chamber had already found the available evidence insufficient to establish the damage suffered by the Center, a full assessment of the additional material relied upon by the expert was, at the very least, necessary.

58. Second, while the LRV2 correctly points out that Dr Gilmore based her conclusions on a variety of sources, he does not mention that all these sources are not only untested, but were never even made available to the Defence. In particular, *inter alia,* Dr Gilmore referred to "interviews" of various individuals, some of whom undefined[78] or with their identities redacted even in the confidential redacted version of the report,[79] and information gathered from unspecified "intermediaries".[80] The specific circumstances pertaining to the sources considered by Dr Gilmore called for a detailed assessment of their probative value.

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[75] *Prosecutor v. Germain Katanga*, Judgment pursuant to article 74 of the Statute, 07 March 2014, ICC-01/04-01/07-3436-tENG, para.94; *Prosecutor v. Mathieu Ngudjolo,* Judgment pursuant to article 74 of the Statute, 18 December 2012, ICC-01/04-02/12-3-tENG, para. 60; *Prosecutor v. Thomas Lubanga,* Judgment pursuant to article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, para. 112.
[76] Decision on Expert witnesses, para.8.
[77] Sentencing judgment, 7 November 2019, ICC-01/04-02/06-2442, para.153. This was also acknowledged by Dr Gilmore herself: Dr Gilmore report, para.161,168 and fn.637.
[78] Dr Gilmore report, fn.636.
[79] Dr Gilmore report, fn.657, 667, 669, 673, 676, 677, 678, 679, 680.
[80] Dr Gilmore report, fn.668.

59. Third, the long-lasting armed conflict in Ituri, including in the area surrounding the Sayo Health Center, is also a relevant circumstance rendering the determination of the damage suffered by the Center during the relevant time-frame particularly delicate. Indeed, it was Dr Gilmore herself who held that it would be "inappropriate and disproportionate for Mr Ntaganda to be liable for the full cost of a new health center"[81], despite then omitting to explain how her proposed damage quantifications reflected Mr Ntaganda's conduct and met the applicable probative standard. In light of the fact that there were repeated attacks in the area surrounding the health clinic, many of which occurred after the attack of November 2002,[82] the Trial Chamber should have included a reasoned assessment of how the expert's damage estimates reflected the principle of proportionality, with a specific focus on the causal link between the damage considered by the expert and the conduct for which Mr Ntaganda was convicted. No such assessment is present in the Reparations Order.

60. In conclusion, the LVR2's approach is simply untenable. Both the Trial Chamber's role as the trier of fact and the specific circumstances pertaining to Dr Gilmore's report required a proper assessment of the accuracy of her conclusions. Trial Chamber VI erred in solely relying on her report, which is entirely based on unreliable and untested evidence, thus falling short of the applicable standard of proof for reparations.

RESPECTFULLY SUBMITTED ON THIS 30th DAY OF SEPTEMBER 2021

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[81] Dr Gilmore report, para.168.
[82] F0300: T-221, 69-71.