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TRIAL CHAMBER II

Before: Judge Chang-Ho Chung, Presiding Judge
Judge Péter Kovács
Judge María del Socorro Flores Liera

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public

**Submissions by the Common Legal Representative of the Victims of the Attacks
pursuant to the 25 October 2022 Order and 25 November 2022 Decision**

Source: Office of Public Counsel for Victims (CLR2)

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

Legal Representatives of the Victims

Ms Sarah Pellet

Mr Tars Van Litsenborgh

Mr Dmytro Suprun

Unrepresented Victims

The Office of Public Counsel for Victims

Ms Paolina Massidda

States' Representatives

Counsel for the Defence

Mr Stéphane Bourgon

Ms Kate Gibson

Ms Benjamin Willame

**Unrepresented Applicants
(Participation/Reparation)**

Office of the Prosecutor

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Victims and Witnesses Unit

**Victims Participation and Reparations
Section**

Mr Philipp Ambach

Counsel Support Section

Detention Section

Trust Fund for Victims

Ms Franziska Eckelmans

Others

I. INTRODUCTION

1. The Common Legal Representative of the Victims of the Attacks (the “Legal Representative”) hereby submits his observations on the issue of transgenerational harm and on the estimated number of potential beneficiaries of reparations, pursuant to the “Order for the implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled ‘Reparations Order’” (the “25 October 2022 Order”)¹ and the “Decision on the Registry submission in compliance with the “Order for the implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled ‘Reparations Order’” (the “25 November 2022 Decision”).²

II. PROCEDURAL HISTORY

2. On 8 March 2021, Trial Chamber VI issued the “Reparations Order”.³ On 16 March 2021, the Presidency assigned the present case to the newly constituted Trial Chamber II (the “Chamber”).⁴

3. On 12 September 2022, the Appeals Chamber issued its Judgment on the appeals against the Reparations Order (the “Appeals Judgment”).⁵ The Appeals Chamber partially remanded the Reparations Order to the Chamber to the extent that it found that Trial Chamber VI failed to, *inter alia*: (i) make any appropriate determination in relation to the number of potentially eligible or actual victims of the award and/or to

¹ See the “Order for the implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled ‘Reparations Order’” (Trial Chamber II), [No. ICC-01/04-02/06-2786](#), 25 October 2022 (the “25 October 2022 Order”).

² See the “Decision on the Registry submission in compliance with the “Order for the implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled ‘Reparations Order’” (Trial Chamber II), [No. ICC-01/04-02/06-2794](#), 25 November 2022 (the “25 November 2022 Decision”); with Public Annex 1, [No. ICC-01/04-02/06-2794-Anx1](#).

³ See the “Reparations Order” (Trial Chamber VI), [No. ICC-01/04-02/06-2659](#), 8 March 2021.

⁴ See the “Decision assigning judges to divisions and recomposing chambers” (Presidency), [No. ICC-01/04-02/06-2663](#), 16 March 2021, p. 7.

⁵ See the “Judgment on the appeal against the decision of Trial Chamber VI of 8 March 2021 entitled “Reparations Order”” (Appeals Chamber), [No. ICC-01/04-02/06-2782 A4 A5](#), 12 September 2022 (the “Appeals Judgment”).

provide a reasoned decision in relation to its conclusion about that number; (ii) provide an appropriate calculation, or set out sufficient reasoning, for the amount of the monetary award against Mr Ntaganda; (iii) assess and rule upon victims' applications for reparations; (iv) lay out at least the most fundamental parameters of a procedure for the Trust Fund for Victims (the "TFV") to carry out the eligibility assessment; and (v) provide reasons in relation to the concept of transgenerational harm and the evidentiary guidance to establish such harm, the assessment of the harm concerning the health centre in Sayo and the breaks in the chain of causation when establishing harm caused by the destruction of that health centre, and the presumption of physical harm for victims of the attacks.⁶

4. On 25 October 2022, the Chamber issued the 25 October 2022 Order wherein it set in motion two separate processes aimed at addressing and implementing the Appeals Judgment: on the one hand, a procedure for the constitution of a sample, with a view to addressing issues (i)-(iv) of the Appeals Judgment (issues related to the sample); and on the other hand, a procedure for the receipt of additional submissions and evidence in relation to issue (v) (evidentiary issues). In particular, the Chamber instructed the parties and participants to provide further submissions and information on the issues related to transgenerational harm, specifically: (i) the scientific basis for the concept; (ii) the evidence needed to establish it; (iii) the evidentiary requirements to prove this type of harm; (iv) the need, if any, for a psychological examination of applicants and parents; (v) the need, if any, to exercise caution in assessing applications based on transgenerational harm; and (vi) whether Mr Ntaganda is liable to repair such harm.⁷ Furthermore, the Chamber instructed the parties and participants to submit additional submissions and possible evidence in relation to the actual damage and harm caused to the health centre in Sayo, the individual victims and the community as a whole for the loss of adequate healthcare

⁶ *Idem*, p. 11.

⁷ See the 25 October 2022 Order, *supra* note 1, para. 40.

provision, and the causal nexus between any harm and the crime of intentionally directing attacks against protected objects, namely the health centre in Sayo.⁸

5. On 25 November 2022, the Chamber issued a decision, *inter alia*, approving the sample as assembled by the VPRS (the “Sample”),⁹ and instructing the parties, the Prosecution, the TFV and the Registry to further complement their submissions and to provide any additional information or documentation in relation to the estimated total number of potential beneficiaries of reparations in the present case, along with an explanation of the methodology used to provide such an estimate within 60 days.¹⁰

6. On 12 December 2022, upon a request from the Defence,¹¹ the Chamber extended the deadline to provide submissions on the evidentiary issues until 30 January 2022.¹² In doing so, the Chamber emphasised that only the TFV is expected to provide submissions in relation to the amount of liability.¹³

7. On 17 January 2023, upon a request from the Defence,¹⁴ the Chamber, *inter alia*, decided to temporarily suspend the deadline for the Defence’s submissions and possible evidence on the issues relevant to the assessment of the actual damage and harm caused to the health centre in Sayo,¹⁵ and subsequently clarified that said deadline was temporarily suspended for all parties and participants.¹⁶

⁸ *Idem*, para. 42.

⁹ See the 25 November 2022 Decision, *supra* note 2, p. 23.

¹⁰ *Idem*, para. 37.

¹¹ See the “Defence request for an extension of the applicable time limit to file submissions referred to in the Implementation Order issued by Trial Chamber II”, [No. ICC-01/04-02/06-2798-Conf](#) and [No. ICC-01/04-02/06-2798-Red](#), 6 December 2022.

¹² See the “Decision on the Defence request for an extension of the applicable time limit to file submissions referred to in the Implementation Order issued by Trial Chamber II” (Trial Chamber II), [No. ICC-01/04-02/06-2803](#), 12 December 2022, p. 6.

¹³ *Idem*, para. 8.

¹⁴ See the “Request on behalf of Mr Ntaganda for disclosure of material relied upon in the Gilmore Expert Report”, [No. ICC-01/04-02/06-2812-Conf](#), 16 January 2023.

¹⁵ See the Email correspondence from the Chamber dated 17 January 2023 at 12:40.

¹⁶ See the Email correspondence from the Chamber dated 20 January 2023 at 16:04.

III. SUBMISSIONS

8. In accordance with the Chamber's abovementioned decisions, the present submissions focus on the following two topics: (i) issues related to transgenerational harm; and (ii) the estimated number of potential beneficiaries of reparations.

A. TRANSGENERATIONAL HARM

9. The Legal Representative notes that the Appeals Chamber found no error in Trial Chamber VI's finding that "*children of the direct victims may have suffered transgenerational trauma regardless of the date when they were born, if they can show that their harm is a result of the crimes for which Mr Ntaganda was found guilty*".¹⁷ Rather, the Appeals Chamber took issue with the fact that no detailed reasoning was provided in the Reparations Order in relation to the concept of transgenerational harm and the evidence required to prove it. In remanding the matter to the Chamber, the Appeals Chamber underlined that the Defence's submissions were left unaddressed by Trial Chamber VI, and provided guidance on the issues to be considered by the Chamber prior to reaching a conclusion on the matter of transgenerational harm.¹⁸

1. The scientific basis for the concept of transgenerational harm

10. In this section, the Legal Representative presents his observations in relation to "*the scientific basis for the concept of transgenerational harm*", as directed by the Chamber in the 25 October 2022 Order.

11. Clinicians, physicians and specialists agree that heightened levels of distress and psychopathology are found in the children of victims of trauma, even when the children themselves were not exposed to traumatic stress.¹⁹

¹⁷ See the Reparations Order, *supra* note 3, para. 182 (Emphasis added).

¹⁸ See the Appeals Judgment, *supra* note 5, paras. 471-481 and 575-578.

¹⁹ This phenomenon was first observed in relation to the children of Holocaust survivors, and it resulted in a testable and verified model of the mechanisms by which the traumas experienced by Holocaust

12. As summarised by Trial Chamber II in the *Katanga* case,²⁰ this finding led scientists to conduct research into the mechanics of *how* the trauma suffered by parents was transmitted to their children. One school of thought relies on the social transmission theory, which focuses on the impact of the upbringing and emotional learning on the child's emotional development.²¹ Over time, another theory emerged, the epigenetic theory, which complements the first one rather than contradicting it. The epigenetic theory attributes the intergenerational transmission of trauma to trauma-related neurobiological and psychophysiological alterations that are passed from one generation to the next.²² This theory provides a biological explanation for the intergenerational transmission of trauma and traumatic stress. The research

survivors impacted the functioning and well-being of future generations of offspring. See DANIELI (Y.), NORRIS (F. H.) & ENGDAHL (B.), [Multigenerational legacies of trauma: modelling the what and how of transmission](#), *American Journal of Orthopsychiatry*, Vol. 86(6), 2016, pp. 639-651. See also, YEHUDA (R.), HALLIGAN (S. L.) & BIERER (L.M.), Relationship of parental trauma exposure and PTSD to PTSD, depressive and anxiety disorders in offspring, *Journal of Psychiatric Research*, Vol. 35, 2001, pp. 261-270; and YEHUDA (R.), DASKALAKIS (N.P.), BIERER (L.M.), BADER (H.N.), KLENGEL (T.), HOLSBOER (F.) & BINDER (E.B.), [Holocaust exposure induced intergenerational effects on FKBP5 methylation](#), *Biological Psychiatry*, Vol. 80(5), 2016, pp. 372-380.

²⁰ See the "Public Redacted Version of Decision on the Matter of the Transgenerational Harm Alleged by Some Applicants for Reparations Remanded by the Appeals Chamber in its Judgment of 8 March 2018" (Trial Chamber II), [No. ICC-01/04-01/07-3804-Red-tENG](#), 19 July 2018, paras. 11-13 (the "*Katanga* Decision on Transgenerational Harm").

²¹ See CALICIS (F.), [La transmission transgénérationnelle des traumatismes et de la souffrance non dite](#), *Thérapie Familiale*, Vol. 27, 2006/3, pp. 229-242. See also BOSQUET ENLOW (M.), EGELAND (B.), CARLSON (E.), BLOOD (E.), & WRIGHT (R.), [Mother-Infant Attachment and the Intergenerational Transmission of Posttraumatic Stress Disorder](#), *Development and Psychopathology*, Vol. 26(1), 2014, pp. 41-65. Subsequently, the study of intergenerational trauma expanded to the experiences of groups others than Holocaust survivors and their family, such as Asian-Pacific Islanders who experienced cultural trauma. See BITH-MELANDER (P.), CHOWDHURY (N.), JINDAL (Ch.), & EFIRD (T.J.), [Trauma affecting Asian-Pacific Islanders in the San Francisco Bay area](#), *International Journal of Environmental Research and Public Health*, Vol. 14(9), pp. 1053 *et seq.*; and survivors of political violence among others. See WEINGARTEN (K.), [Witnessing the effects of political violence in families: Mechanisms of intergenerational transmission and clinical intervention](#), *Journal of Marital and Family Therapy*, Vol. 30(1), 2004, pp. 45-59.

²² See YEHUDA (R.), DASKALAKIS (N.P.), BIERER (L.M.), BADER (H.N.), KLENGEL (T.), HOLSBOER (F.), BINDER (E.B.), *op. cit. supra* note 19, pp. 372-380; BALE (T. E.), Epigenetic and transgenerational reprogramming of brain development, *Nature Reviews Neuroscience*, Vol. 16, 2015, pp. 332-344; BALE (T.E.), BARAM (T.Z), BROWN (A.S.), GOLDSTEIN (J.M.), INSEL (T.R.), MCCARTHY (M.M.), NEMEROFF (C.B.), & NESTLER (E.J.), Early life programming and neurodevelopmental disorders, *Biological Psychiatry*, Vol. 68(4), 2010, pp. 314-319; and BANGSER (M.), Obstetric fistula and stigma, *Lancet*, Vol. 367(9509), 2006, pp. 535 *et seq.*

further demonstrated that intergenerational trauma transmission not only presents in the second generation²³ but can also present itself in the third generation.²⁴

13. What these two theories unanimously agree on is that a relationship exists between the traumatic events that the parents were exposed to, and the behaviour of the children who were not exposed to the same trauma.²⁵ The scientific debates are limited to the question of *how* the trauma is passed from one generation to the other(s), without questioning the fact that it is transmitted.

14. The Legal Representative posits that it does not fall within his mandate or competence – nor within that of any legal professional – to take a position as to which theory better explains how trauma is transmitted most accurately. The existence of the transmission of trauma from trauma-exposed parents to their children who have not been exposed to traumatic stress is not disputed by experts and scientific debates are only focussed on explaining how this phenomenon exactly occurs.²⁶ The Legal Representative therefore suggests that the Chamber should limit itself to acknowledging the existence of the transmission of harm from one trauma-exposed generation to another, and to “*take note*” of the progressing scientific debates regarding the phenomenon of transgenerational transmission of trauma.²⁷

2. Establishing transgenerational harm in the present case

15. In this section, the Legal Representative presents his observations in relation to questions (ii)-(iv) posed by the Chamber in the 25 October 2022 Order, namely the

²³ See GRUNBERG (K.) & MARKERT (F.), A psychoanalytic grave walk-scenic memory of the Shoah. On the transgenerational transmission of extreme trauma in Germany, *American Journal of Psychoanalysis*, Vol. 72(3), 2012, pp. 207-222.

²⁴ See WINSHIP (G.) & KNOWLES (J.), The transgenerational impact of cultural trauma: linking phenomena in treatment of third generation survivors of the Holocaust, *British Journal of Psychotherapy*, Vol. 13(2), 1996, pp. 259-266.

²⁵ In reviewing the literature before it, Trial Chamber II in the *Katanga* case observed that in relation to the epigenetic theory, what remains open for discussion is how the unconscious trauma of a PTSD parent is transmitted to his or her child. See the *Katanga* Decision on Transgenerational Harm, *supra* note 20, para. 12.

²⁶ See *e.g.*, the *Katanga* Decision on Transgenerational Harm, *supra* note 20, para. 12

²⁷ *Idem*, para. 14.

type of evidence needed to establish transgenerational harm; the evidentiary requirements to prove this type of harm; and the need, if any, for a psychological examination of the children (*i.e.* the applicants) and their parents.

16. The Legal Representative notes the criteria proposed by the legal representative of victims in the *Katanga* case, which required that: (i) the direct victim suffered psychological harm as a result of a crime committed by the convicted person; (ii) the child of the direct victim suffers psychological harm; and (iii) the child's psychological suffering arises out of the trauma suffered by the parents.²⁸

17. He posits that these criteria are only partly apposite in the present case. Indeed, with regard to the first criterion, Trial Chamber VI found in the Reparations Order that a number of harms can be presumed, including a *presumption of psychological harm* suffered by direct victims of rape and sexual slavery; by indirect victims who are close family members of direct victims of crimes against child soldiers, and of crimes of rape and sexual slavery; by direct victims of the crimes of attempted murders and of any crime committed during the attacks who personally experienced the attacks; and by victims who lose their home or material assets with a significant effect on their daily life.²⁹ Therefore, in accordance with Trial Chamber VI's findings on this specific topic, which has not been overruled by the Appeals Chamber, it is presumed that virtually all victims of the attacks suffered psychological harm, and therefore this harm does not need to be proved further.

18. Turning now to the second and third criteria, the Legal Representative submits that the most appropriate legal test regarding the transmission of transgenerational trauma should be *whether it is more likely than not that the direct victim passed his or her trauma to his or her child, and/or this child's future off-spring, on the balance of probabilities.*

²⁸ See the "Observations du Représentant légal déposées conformément à l'Ordonnance enjoignant au Représentant légal des victimes et à l'équipe de la défense de Germain Katanga de déposer des observations suite à l'arrêt de la Chambre d'appel sur les réparations du 8 mars 2018 (ICC-01/04-01/07-3779)", [No. ICC-01/04-01/07-3788-Red](#), 16 April 2018, para. 35.

²⁹ See the Reparations Order, *supra* note 3, paras. 145-146.

In order to establish the likelihood of the transmission of trauma, the main factors to consider are the nature, intensity, extent and duration of the direct victim's psychological suffering.

19. The Legal Representative posits that the evidence available on the record is sufficient for the Chamber to conclude that it is more likely than not that virtually all direct victims of the crimes committed during the attacks passed their psychological trauma to their children.

20. Indeed, as demonstrated *supra*,³⁰ all scholars who studied the intergenerational transmission of trauma, regardless of their field of expertise, found that this phenomenon is likely to take place in contexts of extreme violence and mass-victimisation, which is precisely the case in the present situation. In other words, in the context of mass-victimisation, it is more likely than not that transgenerational harm occurs for the children of direct victims. In fact, this reality has been acknowledged by other tribunals confronted with situations of mass-victimisation. Notably, the Inter-American Court of Human Rights (the "IACtHR") recognised that situations of massive scale violence lead to multi-faceted harm, including transgenerational harm.³¹

³⁰ See, *inter alia*, LETSCHERT (R.) & van BOVEN (T.), "Providing Reparation in Situations of Mass Victimization Key Challenges Involved", in LETSCHERT (R.) *et al.* (eds.), *Victimological Approaches to International Crimes: Africa*, Intersentia, 2011, p. 165; PARMENTIER (S.) & WEITEKAMP (E.), "Political Crimes and Serious Violations of Human Rights: Towards a Criminology of International Crimes", in PARMENTIER (S.) & WEITEKAMP (E.) (Eds.), *Crime and Human Rights (Sociology of Crime, Law and Deviance, Vol. 9)*, Emerald Group Publishing Limited, 2007, p. 118.

³¹ See in this regard, IACtHR, *Gómez Palomino v. Peru*, [Judgment \(Merits, Reparations, and Costs\)](#), 22 November 2005, para. 146: "[t]he Court takes into account that serious violations of human rights as that at issue in the instant case, leave lingering after-effects on the victims and next of kin directly harmed, which also affect the new generations. Thus, the predicament of the current generations, directly affected by the violation of their human rights, affects future generations in different ways" (Emphasis added); *Tibi v. Ecuador*, [Judgment \(Preliminary Objections, Merits, Reparations and Costs\)](#), 7 September 2004, paras. 161 and 205, and Separate Concurring Opinion of Judge Sergio García-Ramírez, paras. 91-93; *Río Negro Massacres v. Guatemala*, [Judgment \(Preliminary Objection, Merits, Reparations, and Costs\)](#), 4 September 2012, para.162. In relation to sexual violence, see IACtHR, *Rosendo Cantú et al. v. Mexico*, [Judgment \(Preliminary Objection, Merits, Reparations, and Costs\)](#), 31 August 2010, paras. 138, 139, and 257, in

21. In the present case, the case record is replete with evidence demonstrating the mass-victimisation³² and the extremely violent *modus operandi* that was used during the attacks and as such this is sufficient to conclude that the psychological suffering of the direct victims of the crimes committed during the attacks was extremely grave and intense, increasing the likelihood of the transmission of their trauma to their children.

22. Indeed, in the Judgment, Trial Chamber VI found beyond reasonable doubt that Mr Ntaganda and other military leaders of the UPC/FPLC worked together and agreed on a common plan to drive out all the Lendu from the localities targeted during the course of their military campaign against the RCD-K/ML, and that they intended “*the destruction and disintegration of the Lendu community*”.³³ Mr Ntaganda was, *inter alia*, convicted for mass-crimes affecting entire communities, in particular intentionally directing attacks against civilians, persecution, forcible transfer of the population, and ordering the displacement of civilians.³⁴ Regarding acts of sexual violence, Trial Chamber VI held that “*the unfolding of the operations shows that these acts were, like the acts of killings and other acts of physical violence, a tool used by UPC/FPLC soldiers and commanders alike to achieve their objective to destroy the Lendu community in the localities under assault*”.³⁵ It also found that, by way of these acts of violence, the UPC/FPLC also intended “*to subject victims to [...] consequences that would go beyond the sexual violence itself*”.³⁶

23. In the Sentencing Judgment, Trial Chamber VI found – for the purpose of assessing the gravity of the crimes – that the scale of the crimes committed was either

which the IACtHR acknowledged the inter-generational consequences suffered by a baby of a few months old due to the rape of her mother.

³² 1836 victims of the attacks were admitted to participate as victims at trial, and this number in and of itself is an indication of the widespread nature of the crimes committed by Mr Ntaganda and the UPC/FPLC soldiers.

³³ See the “Judgment” (Trial Chamber VI), [No. ICC-01/04-02/06-2359](#), 8 July 2019, para. 808.

³⁴ *Idem*, pp. 535-538.

³⁵ *Idem*, para. 805.

³⁶ *Idem*, para. 806.

large or significant.³⁷ Further, in analysing the aggravating circumstances, Trial Chamber VI held that Mr Ntaganda's sentence should reflect the "*multi-layered victimisation*" imposed on the victims,³⁸ the "*particular cruelty*" of the commission of the crimes, and the "*repeated victimisation*" of some of the civilian victims of rape.³⁹ In this respect, Trial Chamber VI further noted that the UPC/FPLC victims of crimes of rape and sexual slavery "*suffered physical, psychological, psychiatric, and social consequences (ostracisation, stigmatisation and social rejection), both in the immediate and longer term*".⁴⁰ Finally, it held that as a result of the crimes under Counts 12 and 13, people were forcibly excluded from the economic and social life of their communities,⁴¹ in some cases for a prolonged period.⁴² The Legal Representative underlines that Trial Chamber VI only declined to consider the issue of transgenerational harm for the purposes of sentencing, due to "*the complex questions of causation involved in determining this type of harm to a beyond reasonable doubt standard*".⁴³

24. Finally, in the Reparations Order, Trial Chamber VI found that the victims in the present case suffered "*multi-dimensional harm due to the nature of the crimes, which entailed mass victimisation*".⁴⁴ This finding was not overruled by the Appeals Chamber.

25. Accordingly, on the basis of the foregoing, the Legal Representative posits that the crimes committed by Mr Ntaganda against the victims of the attacks, and the

³⁷ See the "Sentencing judgment" (Trial Chamber VI), [No. ICC-01/04-02/06-2442](#), 7 November 2019 (the "Sentencing Judgment"), paras. 47 (the scale of murder was large), paras. 56, 88, 98 (the scale of attacking civilians was relatively large or significant), paras. 139-140 (the scale of pillage was significant), and para. 145 (the scale of destruction was significant).

³⁸ See the Sentencing Judgment, *supra* note 37, footnote 220. See also footnote 413 in relation to the crime of forcible transfer and persecution.

³⁹ *Idem*, para. 130.

⁴⁰ *Ibid.*

⁴¹ *Idem*, para. 158. See also the Reparations Order, *supra* note 3, para. 154.

⁴² See the Reparations Order, *supra* note 3, para. 154.

⁴³ See the Sentencing Judgment, *supra* note 37, para. 113 and footnote 317.

⁴⁴ See the Reparations Order, *supra* note 3, para. 149.

ensuing harm caused to the direct victims left lingering effects, not only on the direct victims but on the future generations.

26. Indeed, for about 20 years after the events, the vast majority of the victims of the attacks have never received any sort of help and assistance for the purpose of addressing the immediate harm they suffered, and to alleviate their continuous suffering. Thus, absent any assistance to address the victims' suffering for such a prolonged period of time, the likelihood of the intergenerational transmission of trauma is multiplied, and very likely to extend beyond more than one generation.

27. There is enough evidence available on the case record for the Chamber to find — on the standard of the balance of probabilities — that it is more likely than not that the direct victims passed their trauma to their children due to the crimes committed by Mr Ntaganda and the UPC/FPLC soldiers with extreme violence, cruelty which occurred on a very large scale, and caused multi-layered immediate and long-term harm to the victims.

28. The Legal Representative posits that the nature and intensity of the harm suffered by the child (and correspondingly, the type of reparations) requires an evaluation of his or her personal circumstances — as opposed to a psychological evaluation — if only for the purpose of determining the appropriate reparations at the time of their award. As argued *supra*, it should only be established that it is more likely than not that the direct victim passed his or her trauma to his or her child, based on objectively justifiable factors such as the nature, intensity, extent and duration of the direct victim's psychological suffering. It is therefore not required to proceed with a psychological evaluation of the direct victim or his or her child. In fact, in the circumstances of the present case, when almost 20 years have elapsed after the events, the direct victim may have passed trauma to his or her child 15 years ago but the symptoms of trauma may have stopped manifesting today. Similarly, the child to whom trauma was transmitted may have suffered from psychological issues 10 years ago, but not presently, and may instead suffer from issues other than psychological

issues caused by transgenerational harm. It is also worth noting that even unconscious trauma can be passed to children.⁴⁵

29. In this regard, the Legal Representative reiterates his previous submissions that transgenerational harm can encompass not only psychological trauma but can also manifest itself in various other forms of harmful effects on the individual, family, and at community levels. On an individual level, psychological trauma incurred as part of transgenerational harm can manifest itself in the loss or diminution of cognitive and/or behavioural skills and capacities, *i.e.* capacity to study, learn, develop or build and maintain social relations, which can lead to the loss of socio-economic opportunities. On the family and community level, inherited trauma and social violence can affect the structure of families and communities, their way of life, and impact any cultural, social and community-related networks.⁴⁶

30. Consequently, the Legal Representative submits that for the purpose of the determination of the eligibility of the applicant alleging transgenerational harm, it will be incumbent on the TFV first, to establish whether it is more likely than not that the direct victim passed his or her trauma to his or her child (the applicant), based on objectively justifiable factors such as the nature, intensity, extent and duration of the direct victim's psychological suffering; and if in the affirmative, to proceed with evaluating the applicant's personal circumstances in order to determine his or her contemporaneous needs at the time of receiving the reparations. To proceed to this evaluation, a holistic approach should be applied, for instance like the one applicable *mutatis mutandis* to the gravity assessment under article 17(1)(d) of the Statute.⁴⁷

⁴⁵ See KELLERMANN (N)., [Epigenetic transmission of Holocaust Trauma: Can nightmares be inherited?](#), *Israel Journal of Psychiatry and Related Sciences*, Vol. 50(1), 2013, pp. 33-39.

⁴⁶ See the "Observations of the Common Legal Representative of the Victims of the Attacks on the Trust Fund for Victims' Updated Draft Implementation Plan", [No. ICC-01/04-02/06-2764-Conf](#), 18 May 2022, para. 16.

⁴⁷ See the "Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I entitled 'Décision relative à l'exception d'irrecevabilité pour insuffisance de gravité de l'affaire soulevée par la défense'" (Appeals Chamber), [No. ICC-01/12-01/18-601-Red OA](#), 19 February 2020, para. 94.

31. For the purpose of said holistic evaluation, two additional factors are also of relevance, namely the date of birth of the child, and the security situation in the area where the direct victims lived after the events they suffered from.⁴⁸ The Legal Representative posits that the closer the child's birth date is to the date of the crimes attributable to the convicted person, the higher the likelihood that the parents' trauma was transmitted to the child. This is even more so in respect of children born out of rape during the events, or children carried out by their mother during the events and born in the aftermath. This is not to say that the direct victims' trauma cannot be transmitted to a child born many years after the traumatic events, for instance should the parents' suffering be unaddressed and of a lengthy and continuous nature well after the events. In this respect, it is of relevance whether after the traumatic events the parents lived and gave birth to a child in a relatively safe area, and if in the affirmative no issue on the break in the chain of causation arises when establishing the likelihood of transgenerational harm.

3. Can Mr Ntaganda be held liable for transgenerational harm?

32. In this section the Legal Representative responds to question (vi) posed by the Chamber, namely whether Mr Ntaganda is liable to repair the transgenerational harm.

33. For the reasons set out below, the Legal Representative posits that it is established at the required standard that Mr Ntaganda is the proximate cause of the transgenerational harm suffered by the children of the direct victims of the attacks and that as such he should be held liable.

34. The Legal Representative recalls that the standard of causation is a "*but/for*" relationship between the crime and the harm, which requires that the crimes for which a person was convicted were the "*proximate cause*" of the harm for which reparations

⁴⁸ See the *Katanga* Decision on Transgenerational Harm, *supra* note 20, para. 29.

are sought.⁴⁹ This finding was not overruled by the Appeals Chamber and is therefore applicable as the standard of causation in relation to transgenerational harm.

35. Contrary to the Defence's submissions,⁵⁰ the case law of the Court makes it clear that the standard of causation does not require that the act posed by the convicted person be the *sole* cause of the harm.

36. Indeed, Trial Chamber II in the *Katanga* case found: "[t]his standard [of causation] is of particular importance when harm appears to have more than one cause. [...] [A]ccording to a wide range of case law, 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. In other words, if the person who committed the initial act could not have reasonably foreseen the event in question, the initial act cannot be considered to be the proximate cause of the harm suffered by the victim and, consequently, the person who committed the initial act cannot be held liable for the harm in question".⁵¹

37. Additionally, in evaluating whether a convicted person can be deemed the proximate cause of a specific harm, a Chamber must assess whether his acts are "*closely connected*" to the harm caused and "*significant enough*" to have caused it.⁵²

38. Concerning the issue of whether Mr Ntaganda could have reasonably foreseen the harm caused, it is worth recalling that in the *Katanga* case in which transgenerational harm issues were dealt with, Mr Katanga was convicted for his contribution "*in any other way*" through the "*commission of a crime by a group of persons acting with a common purpose*",⁵³ which prevented Trial Chamber II finding that the standard of causation was satisfied. Indeed, with such a form of contribution, it could

⁴⁹ See the Reparations Order, *supra* note 3, para. 132.

⁵⁰ See the "Defence Appellant Brief against the 8 March Reparations Order", [No. ICC-01/04-02/06-2675](#), 7 June 2021, para. 142.

⁵¹ See the *Katanga* Decision on Transgenerational Harm, *supra* note 20, para. 17.

⁵² *Idem*, para. 16.

⁵³ See the "Judgment pursuant to article 74 of the Statute", [No. ICC-01/04-01/07-3436-tENG](#), 7 March 2014, p. 658.

not be found that he could have reasonably foreseen that the initial act he posed would have led to transgenerational harm for the children of the direct victims of the attack.

39. In stark contrast with said case, Mr Ntaganda was found guilty for his essential contribution to the common plan aimed at the destruction and disintegration of the Lendu community. Accordingly, regardless of whether or not Mr Ntaganda was aware of the existence of transgenerational harm, in his intention to destroy the Lendu community, he could have reasonably foreseen that such a course of action to destroy the Lendu community would cause harmful effects to the Lendu future generations as a result of the immediate destruction of Lendu families and communities as a whole.

40. As regards the criterion 'significant enough act', it was established that the scale of the crimes committed by Mr Ntaganda and the UPC/FPLC soldiers was either large or significant.⁵⁴ As regards the criterion 'acts closely connected to harm', it is reasonable to conclude that, absent any other *significant* violent events between Mr Ntaganda's crimes suffered by the direct victim and the birth of the latter's child, this criterion is satisfied. The Legal Representative posits in this regard that the intensity, nature, extent and duration of the psychological suffering caused by the commission of Mr Ntaganda's crimes to the victims of the attacks greatly outweigh the consequences of crimes eventually committed by other perpetrators subsequently, due to the resumption of isolated incidents in 2017 or the resurgence of violence in Ituri in 2019. It is accordingly submitted that at the very least until 2017 there was no break in the chain of causation between Mr Ntaganda's crimes and the transgenerational harm caused to the direct victims of the attacks.

⁵⁴ See *supra* note 37.

4. Appropriate reparations and the need to exercise caution when evaluating applications claiming transgenerational harm

41. The Legal Representative posits that victims who suffered transgenerational harm should be provided with collective reparations with individualised components, like any other victim in the present case. Specific modalities of reparations for these victims are to be determined by the TFV at the implementation stage with the aim to address the victims' harms, specific needs and current individual situation, in order to achieve sustainable and long-term livelihood.⁵⁵ He reiterates that transgenerational harm is not limited to psychological harm only.⁵⁶

42. As noted by the Appeals Chamber, the Chamber is called upon to make a ruling on transgenerational harm in the absence of application forms submitted by individual victims.⁵⁷ The Legal Representative recalls that the reparations model as set in the Reparations Order is not application based. In the absence of an application claiming transgenerational harm, nothing precludes the Chamber establishing criteria for the assessment of said harm, and for these criteria to be applied by the TFV at the implementation stage, particularly given the abundance of evidence available on the case record demonstrating that it is more likely than not that the direct victims of the crimes committed during the attacks have transmitted their trauma to their children.

43. In accordance with the do no harm principle, no applications from new victims should be collected to avoid raising undue expectations. This is consistent with the Chamber's recent decision according to which the Registry is not expected to collect new applications for reparations.⁵⁸

⁵⁵ See the Reparations Order, *supra* note 3, paras. 189 and 194.

⁵⁶ See *supra* para. 29.

⁵⁷ See the Appeals Judgment, *supra* note 5, para. 481.

⁵⁸ See the 25 October 2022 Order, *supra* note 1, para. 25.

B. ESTIMATED NUMBER OF POTENTIAL BENEFICIARIES

44. The Legal Representative reiterates in full his previous submissions on estimating the total number of potential beneficiaries of reparations, the rationale behind his submission, and the estimated total number of potential beneficiaries as direct victims.⁵⁹

45. In particular, he reiterates that the most efficient and pragmatic method for the Chamber to estimate the number of potential beneficiaries of reparations eligible as *direct victims* is to rely on the population size of the affected villages at the time the crimes were committed.⁶⁰ The following evidence is in support of this approach. First, Trial Chamber VI found that Mr Ntaganda was convicted for, *inter alia*, mass-crimes affecting 13 communities,⁶¹ forcing inhabitants to flee;⁶² a great number of people who fled Mongbwalu arrived in the Walendu-Djatsi *collectivité* and were concentrated in Lipri, Kobu and Bambu,⁶³ while the objective of the operation in said villages was to destroy that triangle;⁶⁴ the crimes were committed with a predetermined aim to drive out all the Lendu from the localities targeted and to prevent their return, while Lendu constituting majority of the inhabitants of Mongbwalu and Sayo, and predominated

⁵⁹ See the “Corrigendum of the “Public Redacted Version of the ‘Submissions by the Common Legal Representative of the Victims of the Attacks on Reparations’” (ICC-01/04-02/06-2477-Red)”, [No. ICC-01/04-02/06-2477-Red-Corr](#), 20 November 2020 (the “CLR2 Reparations Submissions”), paras. 71-72; the “Public Redacted Version of the “Submissions by the Common Legal Representative of the Victims of the Attacks pursuant to the “Order to provide information on the impact of COVID-19 measures on operational capacity””, [No. ICC-01/04-02/06-2518-Red](#), 21 April 2020, paras. 15-16; the “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)”, [No. ICC-01/04-02/06-2633-Red](#), 21 December 2020 (the “CLR2 Final Submissions on Reparations”), paras. 112-115; the “Request of the Common Legal Representative of the Victims of the Attacks for an Order to the Registry to collect information pertaining to reparations”, [No. ICC-01/04-02/06-2624](#), 9 November 2020, paras. 17-30; the “Appeal Brief of the Common Legal Representative of the Victims of the Attacks against the Reparations Order”, [No. ICC-01/04-02/06-2674](#), 7 June 2021 (the “CLR2 Appeal Brief”), paras. 60, 64-73, 77, 81-82.

⁶⁰ See the CLR2 Appeal Brief, *supra* note 59, para. 77.

⁶¹ *Ibid.*

⁶² See the Judgment, *supra* note 33, paras. 497, 505, 537, 549, 571, 573, 585-586, 603, 604, 612, 615-617, 640.

⁶³ *Idem*, para. 549.

⁶⁴ *Idem*, para. 558.

in the villages of the Walendu-Djatsi *collectivité*.⁶⁵ Second, there are publicly available figures on the estimated population size of Mongbwalu in 2002 and 2004, according to which in 2002 the population of Mongbwalu was around 80,000 with the Lendu constituting the majority, and in 2004 it shrunk to 26,176.⁶⁶ Third, the Registry provided estimations on the number of inhabitants at the time of the events in some other affected villages (e.g. Kobu and Bambu).⁶⁷ Fourth, there is an estimate of 60,000 persons displaced in the *shika na mukono* operation, according to the evidence on the record.⁶⁸

46. Based on the above evidence, the Legal Representative reiterates his previous submissions that the estimated total number of potential beneficiaries as *direct victims* is at least 100,000.⁶⁹ He posits that should the Chamber not be inclined to order the collection of figures on the population size of all affected communities at the time of the events, it is nevertheless in a position to roughly estimate the number of potential beneficiaries as direct victims based on the evidence available on the record as referred to above, in particular the figures on the population size of Mongbwalu, Kobu and Bambu; and the estimated number of displaced persons in the *shika na mukono* operation. However, he reiterates the need to also take into account a likely very high number of an additional category of potentially eligible *direct victims*, acknowledged by Trial Chamber VI in its 15 December 2020 Decision and endorsed in the Reparations Order, namely the victims originating from any other location, provided they suffered harm in the forest or bush surrounding the affected locations under ‘positive findings’ at the time of the events.⁷⁰ In this regard, he wishes to draw the Chamber’s attention to the fact that during recent interactions with his clients for

⁶⁵ See the CLR2 Appeal Brief, *supra* note 59, para. 77.

⁶⁶ See the CLR2 Reparations Submissions, *supra* note 59, para. 71.

⁶⁷ See the CLR2 Appeal Brief, *supra* note 59, para. 64. The reference is made to the figures provided in Annex II to the “Registry’s Observations on Reparations”, [No. ICC-01/04-02/06-2475-Conf-AnxII-Red](#), 28 February 2020, pp. 12-13.

⁶⁸ See the CLR2 Appeal Brief, *supra* note 59, para. 81.

⁶⁹ *Idem*, para. 72.

⁷⁰ *Idem*, para. 66.

the purpose of supplementing their accounts, many of them indicated that when their respective villages were attacked, they fled the violence by escaping to the surrounding forest and/or bush, primarily in the Walendu-Djatsi *collectivité*. There, they endured difficult conditions for an average of several weeks and were further persecuted. Through his consultations with the victims, this appeared to be a common trend, including for the victims originating from villages other than those for which positive findings were made in the Judgment.

47. Finally, regarding the estimated number of potential beneficiaries of reparations as *indirect victims*, the Legal Representative reiterates his previous submissions that this estimation should be based on the average family composition of the victims, with due consideration for the traditional notion of family in the Democratic Republic of the Congo, which includes both close and remote relatives.⁷¹ He posits that the Chamber will be in a position to make such an estimate based on the information contained in the dossiers of the victims included in the Sample, in particular the family composition, and the number of the children of direct victims.

FOR THE FOREGOING REASONS, the Legal Representative respectfully requests the Chamber to take note of the present submissions.



Dmytro Suprun
Common Legal Representative of the Victims of Attacks

Dated this 30th day of January 2023
At The Hague, The Netherlands

⁷¹ See the CLR2 Final Submissions on Reparations, *supra* note 59, para. 114.