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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**

**Common Legal Representative of the Former Child Soldiers' additional submissions on the issue of transgenerational harm and on the estimated potential number of reparations beneficiaries**

**Source:** Office of Public Counsel for Victims (CLR1)

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

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## I. INTRODUCTION

1. The Common Legal Representative of the Former Child Soldiers (the “Common Legal Representative”) hereby submits her observations on the issue of transgenerational harm suffered by children of direct victims in the present case and in relation to the estimated number of beneficiaries, 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”),<sup>1</sup> 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”).<sup>2</sup>

2. In relation to the scientific basis for the concept of transgenerational harm, the Common Legal Representative posits that it does not fall within her mandate to take a position on the most appropriate scientific explanation of **how** trauma is transmitted from one generation to another and posits that Trial Chamber II (the “Trial Chamber”) should limit itself to acknowledge the undisputed existence of this phenomenon and to ‘take note’ of the scientific debates surrounding the question of how the concept operates.

3. Concerning the evidence required to establish such harm and the corresponding need to exercise caution in ruling on applications based on transgenerational harm, the Common Legal Representative posits that the evidence available on the record is more than sufficient to establish that transgenerational harm should be presumed for the children of all former child soldiers (direct victims) in the present case, regardless of

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<sup>1</sup> 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’”, [No. ICC-01/04-02/06-2786](#), 25 October 2022 (the “25 October 2022 Order”).

<sup>2</sup> 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; with Public Annex 1, [No. ICC-01/04-02/06-2794-Anx1](#) (the “25 November 2022 Decision”).

their date of birth and provided that they can establish that they are the child of a direct victim of the case.

4. Concerning whether Mr Ntaganda can be held liable to repair transgenerational harm, the Common Legal Representative submits that the standard of causation does not require that the act posed by the accused be the **sole** cause of the harm, and that the violent *modus operandi* of the crimes, their large scale nature and Mr Ntaganda's degree of involvement are such that it was reasonably foreseeable that his crimes would cause damages beyond the direct victims, extending to their families, including their future children.

5. The Common Legal Representative acknowledges that no application-based evidence has been presented but she underlines, on the one hand, that the evidence adduced is sufficient, and, on the other hand, that no applications were collected in order to not unduly raise the victims' expectations pending a final decision on the issue.

6. Lastly, in relation to the estimated potential number of beneficiaries, the Common Legal Representative recalls her previous submissions on the matter and submits that the number estimated in the *Lubanga* case<sup>3</sup> must be adjusted to take into account that children of former child soldiers should be recognised as indirect victims.

## II. PROCEDURAL HISTORY

7. On 8 March 2021, Trial Chamber VI issued the "Reparations Order".<sup>4</sup> On 16 March 2021, the Presidency assigned the present case to the newly constituted Trial Chamber.<sup>5</sup>

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<sup>3</sup> See the "Observations on the Appointed Experts' Reports and further submissions on reparations on behalf of the Former Child Soldiers" [No. ICC-01/04-02/06-2632](#), 18 December 2020, (the "CLR1 Final Submissions on Reparations"), paras. 34-43.

<sup>4</sup> See the "Reparations Order" (Trial Chamber VI), [No. ICC-01/04-02/06-2659](#), 8 March 2021.

<sup>5</sup> See the "Decision assigning judges to divisions and recomposing chambers" (Presidency), [No. ICC-01/04-02/06-2663](#), 16 March 2021, p. 7.

8. On 12 September 2022, the Appeals Chamber issued its Judgment on the appeals against the Reparations Order (the “Appeals Judgment”).<sup>6</sup> The Appeals Chamber partially remanded the Reparations Order to the Trial Chamber to the extent that it found that the Trial Chamber 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 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”.<sup>7</sup>

9. In its 25 October 2022 Order, the Trial Chamber 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 of addressing issues (i) to (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).

10. As per the Trial Chamber’s instructions, the Common Legal Representative will submit her observations on the sampled applications by 2 March 2023.<sup>8</sup>

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<sup>6</sup> 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”).

<sup>7</sup> *Idem*, p. 11.

<sup>8</sup> 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; with Public Annex 1, [No. ICC-01/04-02/06-2794-Anx1](#), para. 34(b)-(h).

11. In relation to issue (v) of the Appeals Judgment, the Trial Chamber directed, in the 25 October 2022 Order, that within sixty days of its issuance:

(a) The TFV provide data in relation to the cost of programme and any other relevant information for the estimation of the amount of the monetary award in the present case;<sup>9</sup>

(b) The parties and participants, the Registry, the TFV and the appointed experts provide additional information concerning the 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;<sup>10</sup> and

(c) The parties and participants, the DRC Government and the appointed experts submit further 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 loss of adequate healthcare provision, and the causal nexus between any harm and the crime of intentionally directing attacks against protected objects, namely the health centre in Sayo.<sup>11</sup>

12. In the 25 November 2022 Decision, the Trial Chamber added that the parties, the Prosecution, the TFV and the Registry can complement their submissions, providing any additional information or documentation, in relation to the estimated total number

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<sup>9</sup> See the 25 October 2022 Order, *supra* note 1, para. 38.

<sup>10</sup> *Idem*, para. 40.

<sup>11</sup> *Idem*, para. 42.

of potential beneficiaries of reparations in the present case, along with an explanation of the methodology used to provide such estimate.<sup>12</sup>

13. On 12 December 2022, upon a request from the Defence,<sup>13</sup> the Trial Chamber extended the deadline to make submissions on a certain number of issues until 30 January 2023.<sup>14</sup> In doing so, the Trial Chamber insisted that **only the TFV** is expected to provide submissions in relation to the amount of liability.<sup>15</sup>

### III. SUBMISSIONS

14. In line with the Trial Chamber's decisions, the present submissions focus on the two following issues concerning the interests of Former Child Soldiers and which can be reasonably expected from their legal representative: (i) issues related to the notion of transgenerational harm; and (ii) issues concerning the estimated number of beneficiaries.

#### A. TRANSGENERATIONAL HARM

15. The Common Legal Representative notes that the Appeals Chamber found no error regarding the fact that the Trial Chamber recognised 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*".<sup>16</sup> 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

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<sup>12</sup> See the 25 November 2022 Decision, *supra* note 2, para. 37.

<sup>13</sup> 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.

<sup>14</sup> 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.

<sup>15</sup> *Idem*, para. 8.

<sup>16</sup> See the Reparations Order, *supra* note 4, para. 182 (emphasis added).

to the Trial Chamber, the Appeals Chamber underlined the Defence's submissions left unaddressed by the Trial Chamber and provided guidance on the issues to be considered by the Trial Chamber prior to reaching a conclusion on the matter of transgenerational harm.<sup>17</sup>

16. The Common Legal Representative provides observations relevant to the establishment of all issues underlined by the Appeals Chamber and posits that the Trial Chamber should find that Mr Ntaganda can be held liable for transgenerational harm suffered by the direct victims' offspring in the present case, regardless of their date of birth, and that this harm shall be presumed.

### 1. The scientific basis for the concept of transgenerational harm

17. 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.<sup>18</sup>

18. As summarised by Trial Chamber II in the *Katanga* case,<sup>19</sup> this finding led scientists to conduct research into mechanics of **how** the trauma suffered by parents was transmitted to their children and offspring. A first school of thought relies on the social transmission theory which focuses on the impact of the upbringing and

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<sup>17</sup> See the Appeals Judgment, *supra* note 6, paras. 471-481, and 575-578.

<sup>18</sup> 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 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.

<sup>19</sup> 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").



emotional learning on the child's emotional development.<sup>20</sup> Over time, a second school of thought (the epigenetic transmission theory) – complementary to the first one rather than contradictory – emerged, attributing the intergenerational transmission of trauma to the trauma-related neurobiological and psychophysiological alterations that are passed from one generation to the next.<sup>21</sup> This school of thought provides a biological explanation for the intergenerational transmission of trauma and traumatic stress. As research developed, it was further demonstrated that intergenerational trauma is transmitted not only to the second generation,<sup>22</sup> but also to the third generation.<sup>23</sup>

19. These two schools of thought unanimously agree on the existence of a relationship between the traumatic events that the parents are exposed to and the behaviour of the children who were not exposed to the experience.<sup>24</sup> The scientific

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<sup>20</sup> 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.

<sup>21</sup> See 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; 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.*

<sup>22</sup> 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.

<sup>23</sup> See WINSHIP (G.) & KNOWLES (J.), "The trans-generational 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.

<sup>24</sup> In this regard, the Common Legal Representative underlines that in comprehensively reviewing the literature before it, Trial Chamber II in the *Katanga* case rightfully observed – in relation to the epigenetic

debates are therefore limited to the question of **how** the trauma is passed on from one generation to the other(s) without questioning the fact that it is transmitted.

20. The Common Legal Representative posits that it does not fall within her mandate nor abilities – nor within those of any legal professional – to take a position as to which theory is better able to explain the phenomenon with the most accuracy. Suffice to say, the existence of transmission of trauma from a trauma-exposed parent to his or her child who was not exposed is not disputed and scientific debates solely focus on the mechanisms of the phenomenon. The Common Legal Representative therefore contends that the Trial Chamber should limit itself to acknowledge the existence of the transmission of harm from one trauma-exposed generation to another and ‘take note’ of the scientific debates surrounding the issue of how this concept operates.<sup>25</sup>

## 2. Establishing transgenerational harm in the *Ntaganda* case

21. For the reasons set out below, the Common Legal Representative posits that transgenerational harm should be presumed for the children and grandchildren of **all the direct victims** of the present case, regardless of their date of birth and provided that they can establish that they are the child of a direct victim of the case.

### *Appropriateness of resorting to presumptions*

22. The Common Legal Representative recalls the rationale underpinning recourse to presumptions and refers to her final submissions in this regard.<sup>26</sup> In short, presumptions can be resorted to when the circumstances are such that adducing evidence in a form other than by providing a coherent and credible narrative would

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theory – that what remains open however is **how** exactly the **unconscious** trauma of a PTSD parent can be transmitted to his or her child, but that the very existence of the phenomenon is no longer disputed. See the *Katanga* Decision on Transgenerational Harm, *supra* note 19, para. 12.

<sup>25</sup> See the *Katanga* Decision on Transgenerational Harm, *supra* note 19, para. 14.

<sup>26</sup> See the CLR1 Final Submissions on Reparations, *supra* note 3, paras. 65-70.

prove nearly impossible. In the present case, the Trial Chamber has established that certain harms can be presumed,<sup>27</sup> and this finding was not disturbed on appeal.<sup>28</sup>

23. The Common Legal Representative adds that the fact that it is demonstrated that certain crimes and certain sets of circumstances are found to (more) often (than not) result in certain harms should be taken into account when ruling on whether a certain harm can be presumed as a result of certain crimes.

*Presumption of transgenerational harm*

24. The Common Legal Representative posits that there is no reason to depart from this approach when considering transgenerational harm. In fact, the complex and multi-faceted nature of this harm is such that recourse to presumptions is even more justified, as requiring that specific evidence be adduced would *de facto* lead to the absurd result that no ‘applicant’ would be in a position to establish it, twenty years after the facts.

25. As demonstrated *supra*,<sup>29</sup> all scholars who studied the intergenerational transmission of trauma, regardless of their field of expertise, have 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. Put simply, in 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 progressively acknowledged by other tribunals confronted with situations of mass-victimisation. Notably, the Inter-American Court of Human Rights recognises that situations of

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<sup>27</sup> See the Reparations Order, *supra* note 4, paras. 141-147.

<sup>28</sup> With the exception of the finding that physical harm can be presumed for victims of the attacks. See the Appeals Judgment, *supra* note 6, p. 11.

<sup>29</sup> See *supra* paras. 17-20 See also, *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; and 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.

mass violence lead to multi-faceted harm including transgenerational harm.<sup>30</sup> Additionally, research has shown that even unconscious trauma can be passed on to the children.<sup>31</sup>

26. In the present case, the case-record is replete with evidence demonstrating the mass-victimisation<sup>32</sup> and the extremely violent *modus operandi* that were used against former child soldiers, and as such this suffices to conclude that they passed on trauma to their children and grandchildren.

27. Concerning the violent *modus operandi* used against the children, the Trial Chamber found that 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.**<sup>33</sup> The Trial Chamber also found that **children born as a result of sexual violence** faced

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<sup>30</sup> 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 which the Inter-American Court of Human Rights acknowledged the inter-generational consequences on a few months old child of the rape suffered by her mother.

<sup>31</sup> 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.

<sup>32</sup> In this regard, the Common Legal Representative underlines that the number of participating victims (284 former child soldiers) constitutes in and of itself an indication of the widespread nature of the crime. Further, with regard to the scale of the commission of the crime, in its sentencing decision, when considering the issue of the gravity of the crime, the Trial Chamber ruled that it could not establish the scale of the recruitment and use on the beyond reasonable doubt standard. However, it took into account the fact that the crime occurred over a prolonged period of time and that multiple commanders had escorts who were children. See the “Sentencing judgment” (Trial Chamber VI), [No. ICC-01/04-02/06-2442](#), 7 November 2019 (the “Sentencing Decision”), para. 183. The standard applicable in the present circumstances (reparations) is no longer that of beyond reasonable doubt but that of balance of probabilities and these elements in themselves are sufficient to establish that the recruitment and use took place on, at least, a significant scale.

<sup>33</sup> See the Sentencing Decision, *supra* note 32, para. 130.

rejection from their community,<sup>34</sup> and that **the fact of having been associated with an armed group as a child under 15 had a significant impact on victims.**<sup>35</sup>

28. Finally, in the Reparations Order, the Trial Chamber found that the victims in the present case suffered “*multi-dimensional harm due to the nature of the crimes, which entailed mass victimisation*”.<sup>36</sup> This finding was not disturbed by the Appeals Chamber.

29. Accordingly, on this basis, the Common Legal Representative posits that these crimes and ensuing harm caused to the direct victims left lingering effects not only on the direct victims, but also on the future generations.

30. Moreover, there is absolutely no evidence available on the case record that any intervention took place for the purpose of alleviating the suffering of the direct victims as they carried on with their life. Thus, as time elapsed without any external assistance, the risks associated with intergenerational transmission of trauma automatically increased.

31. Additionally, the passage of time is such that proceeding to a psychological evaluation of the applicant or of the parent (direct victim) in 2023 would not be conducive to the determination of whether the harm was indeed suffered at a certain point in time after the commission of the crime. Indeed, a parent may have suffered moral harm and passed it on, but this may have stopped manifesting 20 years after the crime. Accordingly, a psychological examination of the applicant or the direct victim would be wholly unnecessary.

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<sup>34</sup> *Idem*, para. 113.

<sup>35</sup> *Idem*, para. 184. The Common Legal Representative underlines that the Trial Chamber merely declined to consider the issue of transgenerational harm for the issue of sentencing, noting the complex questions of causation involved in determining this type of harm to a beyond reasonable doubt standard. See the Sentencing Decision, *supra* note 32, para. 113 and footnote 317. It is noted in this regard that: (i) the standard of proof at reparations stage is no longer the beyond reasonable doubt standard but that of balance of probabilities; and (ii) the issue of the causation is easily resolved in the present case, as discussed further *infra*. Concerning the violent *modus operandi* used against the children, see also the “Judgment” (Trial Chamber VI), [No. ICC-01/04-02/06-2359](#), 8 July 2019, *inter alia*, paras. 787 and 789.

<sup>36</sup> See the Reparations Order, *supra* note 4, para. 149.

32. In sum, the evidence available on the case record establishes to the required standard that the crimes committed by Mr Ntaganda and his co-perpetrators were of extreme violence and cruelty, occurred on a very large scale and caused multi-layered harm to the Former Child Soldiers. As such, the Trial Chamber should conclude that transgenerational harm is more likely than not to have been suffered by the children of the direct victims.

### 3. Mr Ntaganda can be held liable for transgenerational harm

33. For the reasons set out *infra*, 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 Former Child Soldiers and that it is sufficient for him be held liable.

34. The Common 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 [an accused] was convicted were the ‘proximate cause’ of the harm for which reparations are sought*”.<sup>37</sup> This finding was not disturbed in Appeals<sup>38</sup> and is applicable to making findings in relation to the transgenerational harm.

35. Contrary to the Defence’s submissions,<sup>39</sup> the jurisprudence of the Court makes it clear that the standard of causation does not require that the act posed by the convicted person is the **sole** cause of the harm.

36. Indeed, as established by Trial Chamber II in the *Katanga* case, “[t]his standard [of causation] is of particular importance when harm appears to have more than one cause. The Chamber notes that, according 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

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<sup>37</sup> See the Appeals Judgment, *supra* note 6, para. 566.

<sup>38</sup> *Idem*, paras. 567-569.

<sup>39</sup> See the “Defence Appellant Brief against the 8 March Reparations Order”, [No. ICC-01/04-02/06-2675](#), 7 June 2021, para. 142.

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*".<sup>40</sup>

37. Additionally, in evaluating whether a convicted person can be deemed to be 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.<sup>41</sup>

38. The Common Legal Representative notes that no detailed guidance exists in the jurisprudence of the Court as to what constitutes a "*significant enough*" and "*close*" connection between the act and the harm. She posits however that it is reasonable to conclude that, absent any violent events between the crime and the harm, the crimes committed by Mr Ntaganda are significant enough and closely connected to the harm suffered. Additionally, the Common Legal Representative informs the Trial Chamber that contacts with her clients have shown that the resumption of hostilities in 2017 has revived the trauma that they suffered and that they now live in the constant fear that their children be recruited in the militia, thereby experiencing the same tragic events as they did back in 2002-2003.

39. In the present case, and contrary to the situation in the *Katanga* case, the Legal Representative posits that the establishment of the standard of causation is relatively straightforward. The fact that other incidents occurred subsequent to the commission of the crime does not necessarily cause a break in the chain of causation – including if it can be demonstrated that they had an impact on the transgenerational harm – provided that (i) Mr Ntaganda could have reasonably foreseen that his crime would cause harm to the direct victims but also to their children; and (ii) that his acts are closely connected and significant enough to be the cause of the harm.

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<sup>40</sup> See the *Katanga* Decision on Transgenerational Harm, *supra* note 19, para. 17 (emphasis added).

<sup>41</sup> *Idem*, para. 16.

40. 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 issues related to transgenerational harm were dealt with, Mr Katanga was convicted for a modest contribution – the provision of weapons to the militia which attacked Bogoro. This basis for conviction prevented Trial Chamber II, at the time, from finding that the standard of causation was respected. Indeed, such a modest contribution could not enable the Chamber to determine that Mr Katanga could have reasonably foreseen that the initial act he posed would have led to transgenerational harm of the children of the direct victims of the attack.

41. In stark contrast with said case, Mr Ntaganda was found guilty for his essential contribution to the common plan consisting in raising an army of children and controlling them by using extremely violent methods. Accordingly, whether or not he was aware of the existence of the concept of transgenerational harm as such, he could have reasonably expected that his crimes would lead to trauma beyond the direct victims.

42. Regarding the connection between his acts and the harm and the issue of whether it is significant enough to have caused the harm, the Common Legal Representative recognises that the resurgence of the conflict in 2017 possibly breaks the chain of causation in that it makes it hardly feasible to determine whether the transgenerational harm suffered by children born after this date emanates – sufficiently – from a trauma suffered by the direct victim as a result of the crimes of Mr Ntaganda or as a result of other subsequent events. No such issue arises in relation to children born prior to the resurgence of the conflict, whose parents experience violence and trauma as a result of the crimes committed by the convicted person.

43. The Legal Representative recognises that traumatic events experienced by the direct victim prior to the crimes committed by Mr Ntaganda can also have an impact on the establishment of the standard of causation, in that they render it more difficult to assess whether Mr Ntaganda's crimes are significant enough to have caused the



transgenerational harm. The Legal Representative recalls however that even if there had been isolated episodes of violence prior to the period of the charges and the crimes committed by Mr Ntaganda, said episodes did not remotely compare with the level of violence experienced during the time served by the Former Child Soldiers in the UPC/FPLC. In fact, victims continued to go about their lives and to reside in the towns where they were subsequently attacked by Mr Ntaganda and his troops. Thus, even if in some marginal cases there exists a reasonable possibility to assume that direct victims might suffer from psychological harm arising out of these events, the level of trauma experienced as a result of being forced to join the militia is substantially higher than anything suffered before, if any.

#### **4. Appropriate reparations and the need to exercise caution when evaluating applications based on transgenerational harm**

44. The Common Legal Representative maintains her submissions according to which transgenerational harm is most appropriately repaired by way of a collective reparations measure aimed at ensuring access to education for the former child soldiers, their siblings in certain instances (for instance when the former child soldier was unable to support their family) and their children.<sup>42</sup> She adds that these reparations could serve as a form of symbolic recognition by the Court that these children are also a victim of Mr Ntaganda and that, as such, they did suffer harm caused by him.

45. Incidentally, recognising that children of direct victims have suffered transgenerational harm also constitutes a way to acknowledge the moral harm suffered by direct victims. Indeed, 20 years after the commission of the crimes, when asked about the appropriate reparations, direct victims tend to indicate that alleviating the harm they suffered has become nearly impossible. Most of them, if not all, express however the fact that the most appropriate form of reparations for their suffering would be to ensure that their children will never suffer from a similar life

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<sup>42</sup> See the CLR1 Final Submissions on Reparations, *supra* note 3, paras. 86-87.

experience and that they can study. Additionally, and as underlined *supra*, since the resurgence of the conflict, direct victims are terrified that their children be abducted or otherwise incited to join militias.<sup>43</sup> Accordingly, the Common Legal Representative posits that payment of scholar fees for all the direct victims' children is an appropriate form of reparations, be it in recognition of their suffering or as the most appropriate form of reparations for the suffering suffered by their parents whose life plan/the project of life was permanently damaged by their traumatic experience in the UPC/FPLC.

46. The Common Legal Representative observes that, as noted by the Appeals Chamber, the Trial Chamber is called upon making a ruling on transgenerational harm in the absence of application forms submitted by individual victims. She notes in this regard that no such applications could have been collected without unduly and unnecessarily raising the victims' expectations. That being said, the Common Legal Representative reports that contacts with her clients have shown that their children do suffer the consequences of the crimes suffered by their parents, which is the very reason why she argued from the start of the reparations proceedings that they should be entitled to reparations.<sup>44</sup> Additionally, the evidence available in the case record is amply sufficient to find that children of the direct victims suffered transgenerational harm.

## **B. ESTIMATED POTENTIAL NUMBER OF BENEFICIARIES**

47. In relation to the potential number of beneficiaries, the Common Legal Representative recalls her prior submissions to this effect, in which she set out the factors to be taken into account in order to reach a reliable estimate.<sup>45</sup>

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<sup>43</sup> See *supra* para. 38.

<sup>44</sup> See, in particular, the "Submissions on Reparations on behalf of the Former Child Soldiers", [No. ICC-01/04-02/06-2474](#), 28 February 2020, paras. 47-51. See also the CLR1 Final Submissions on Reparations, *supra* note 3, paras. 55-64.

<sup>45</sup> See the CLR1 Final Submissions on Reparations, *supra* note 3, paras. 34-43.

48. Additionally, she submits that this number should be adjusted to take into account the fact that children of direct victims should be considered as indirect victims of the case. She draws the Trial Chamber's attention to the fact that, in the context of her contacts with her clients (in particular with those deemed eligible for urgent reparations and admitted in the IDIP), the Common Legal Representative has enquired about the number of children they have. It appears that, on average, her clients have four children, which should all be deemed eligible for the purpose of receiving support for the payment of school fees. The Common Legal Representative posits that this estimate is a rather conservative one as it arises out of the consultations of 64 of her clients over the last few months, with two of them having had no children. Open sources data show however that *on average* women have at least six children, which in the view of the Common Legal Representative is a more reliable estimate.<sup>46</sup>

Respectfully submitted,



Sarah Pellet  
Common Legal Representative of the  
Former Child Soldiers

Dated this 30<sup>th</sup> day of January 2023  
At The Hague, The Netherlands

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<sup>46</sup> See, *inter alia*, the fertility rate in 2002 (6.7 children per woman) and in 2020 (6.2 children per woman) according to the data collected by the [World Bank](#).