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**International
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TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung

SITUATION IN UGANDA

IN THE CASE OF *THE PROSECUTOR v. DOMINIC ONGWEN*

Public

**Trust Fund for Victims' Submission pursuant to the "Decision on the Registry
Additional Information on Victims" of 16 December 2022, ICC-02/04-01/15-2024**

Source: The Trust Fund for Victims

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

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**Victims Participation and Reparations
Section**

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I. RELEVANT PROCEDURAL HISTORY

1. On 12 September 2022, in the case of *The Prosecutor v. Bosco Ntaganda* (“the *Ntaganda* case”), the Appeals Chamber issued its Judgment on the appeal against the decision of Trial Chamber VI of 8 March 2021 entitled “Reparations Order” (“*Ntaganda* Appeals Judgment”), remanding and partially reversing the Reparations Order on the basis 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; (ii) assess and rule upon victims’ applications for reparations; and (iii) provide reasons in relation to the concept of transgenerational harm and the evidentiary guidance to establish such harm.¹

2. On 27 September 2022, the Common Legal Representative of Victims (“CLR”) and the Legal Representatives of Victims (“LRV”) (all together the “Legal Representatives”) submitted their Joint Request in the present case on behalf of victims for leave to submit supplementary observations on issues arising from the *Ntaganda* Appeals Judgment (the “Joint Request”).²

3. On 7 October 2022, the Defence submitted its response to the Joint Request, requesting that it be rejected, or to be granted the right to respond should the Chamber decide to entertain further submissions.³

4. On 25 October 2022, in the *Ntaganda* case, Trial Chamber II issued an Order deciding to implement the *Ntaganda* Appeals Judgment by, *inter alia*, (i) assessing and ruling upon a limited but representative sample of victims’ dossiers; and (ii) requesting submission from the parties and participants, including the Victims

¹ *The Prosecutor v. Bosco Ntaganda*, Judgment on the appeal against the decision of Trial Chamber VI of 8 March 2021 entitled “Reparations Order”, 12 September 2022, [ICC-01/04-02/06-2782](#) (“*Ntaganda* Appeals Judgment”).

² Joint Request on behalf of Victims for Leave to Submit Supplementary Observations on Reparations, 27 September 2022, [ICC-02/04-01/15-2011](#).

³ Defence Response to the Joint Request of the Legal Representatives, 7 October 2022, [ICC-02/04-01/15-2013](#).

Participation and Reparations Section (“VPRS”) and the TFV, on issues related to, *inter alia*, transgenerational harm.⁴

5. On 16 November 2022, the Chamber informed parties, participants, and the Registry that it is considering to proceed in the present case in a similar fashion as the way Trial Chamber II is proceeding in the *Ntaganda* case, and requested the Registry, through VPRS, to provide information regarding: a) the total number of applications for participation and/or reparations received in the case; and b) the total representation, within the applications received, regarding gender, age and the main groups of the victims of the case.⁵ On 22 November 2022, the Registry submitted the requested information on victims’ applications (“Registry Additional Information”).⁶

6. On 16 December 2022, the Chamber issued its Decision on the Registry Additional Information on Victims (“Decision on Registry Additional Information”).⁷ In the Decision on Registry Additional Information, the Chamber additionally instructed the Trust Fund for Victims (“TFV” or “Trust Fund”), alongside the parties, Office of the Prosecutor, and Registry, to make any additional submissions, within sixty days of the decision’s notification, on (1) the estimated total number of potential beneficiaries of reparations and the methodology used to make such calculations; and, (2) issues related to transgenerational harm, in particular: (a) the scientific basis for the concept of transgenerational harm; (b) the evidence needed to establish it; what the evidentiary requirements are for an applicant to prove this type of harm; the need, if any, for a psychological examination of applicants and parents; the need, if any, to exercise caution in assessing applications based on transgenerational harm; and (c) whether Mr Ongwen is liable to repair such harm in the specific context of the case.⁸

⁴ *The Prosecutor v. Bosco Ntaganda*, Order for the implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled “Reparations Order”, 25 October 2022, [ICC-01/04-02/06-2786](#) (“*Ntaganda* Order”).

⁵ Email from Trial Chamber IX Communications, 16 November 2022, at 15:01.

⁶ Registry Additional Information on Victims, 21 November 2022 (notified on 22 November 2022), [ICC-02/04-01/15-2019](#) (“Registry Additional Information”).

⁷ Decision on the Registry Additional Information on Victims, 16 December 2022, [ICC-02/04-01/15-2024](#) (“Decision on Registry Additional Information”).

⁸ Decision on Registry Additional Information, para. 31.

II. SUBMISSIONS

7. The Trust Fund hereby provides its submissions, pursuant to the Decision on Registry Additional Information, on (1) the estimated total number of potential beneficiaries of reparations and the methodology used to make such calculations, and (2) issues related to transgenerational harm.

1. Estimated total number of potential beneficiaries of reparations and the methodology used to make such calculations

8. The TFV wishes to reiterate and respectfully recall its earlier submission that any current exercise to determine the number of potential beneficiaries prior to the implementation of reparations will be inexact. In the Trust Fund's experience of reparation programming, potential beneficiaries continue to come forward at various stages of implementation, including as a result of outreach conducted to identify beneficiaries, once a programme is operational and beneficiaries begin to receive reparations, and as a deadline for identification of potential beneficiaries and collection of applications approaches. Thus, any numbers submitted or considered at this stage are approximates or an educated guess based on the information collected from various sources and stakeholders.

9. That said, the TFV understands that the Trial Chamber requires an estimate of the number of potential beneficiaries at this stage in order to determine the amount of liability of the convicted person. Given the request of the Trial Chamber, the TFV proffers the following submissions. The TFV's views are guided by the experience of its Uganda based staff which has been working in relation to northern Uganda with the Trust Fund or other entities for fifteen years.

10. The TFV notes with appreciation the estimated numbers offered by the Registry, and Legal Representatives, in the course of proceedings. The Registry's Mapping Report, compiled on the basis of meetings conducted by VPRS with local leaders or intermediaries on the estimate numbers of victims potentially eligible for reparations, and indicating figures and estimates provided by the Legal

Representatives where available, put forth the following figures, reiterated in the Registry's Additional Information submission: a maximum of approximately 50,000 individuals residing in the IDP camps at the time of the attacks, and 10,000 individuals as a rough indicator for victims of the thematic crimes.⁹ The Mapping Report estimate of the total number of potential beneficiaries of reparations is therefore 66,700.¹⁰

11. Having considered the estimates provided in the Mapping Report, the TFV has no reason to doubt that the estimated total number of potential beneficiaries of reparations put forth by the Registry constitutes an approximate number of potential beneficiaries for reparations in this case.

12. The Trust Fund notes that with regard to the victims of the attacks, it seems that the Registry, the CLR, the LRVs, and the Trust Fund have rather similar views on the number of potential victims. In the Trust Fund's view, this is an element the Trial Chamber should factor in when assessing the reliability of the information before it.

13. *Victims of the attacks on the IDP camps.* While it was noted in the Mapping Report that the figures cited in the context of the attacks on the camps were "only partly supported by documents and/or corroborated with other sources",¹¹ consensus as to the approximation of the upper limit of potential beneficiaries for the attacks on the Lukodi (6,000) and Abok (13,000) IDP camps was reached between the Registry and LRVs.¹² Less of a consensus was reached with respect to the population of the Odek and Pajule IDP camps; Registry estimates stated up to 7,700 and 30,000 respectively, while figures put forth by the LRVs on Odek IDP camp – 2,956 individuals that may be eligible - were indicated as inconclusive,¹³ and the CLR noted

⁹ Annex I to "Registry's Mapping Report and Submission on Reparations" 6 December 2021, [ICC-02/04-01/15-1919-AnxI](#), para. 31 ("Mapping Report"); Registry Additional Information, fn. 20-24 where the total rough estimate of the number of victims of the attacks on the camps comes to 56,700. The estimated number of victims of the thematic crimes is presented as 10,250 in the Mapping Report on the basis of a calculation of an estimate of all individuals abducted in total according to one report divided by the 4 LRA brigades.

¹⁰ Registry Additional Information, fn. 20-24; Decision on Registry Additional Information, para. 22; Mapping Report, para. 31.

¹¹ Mapping Report, para. 46.

¹² *Ibid.*, paras 35 and 42.

¹³ *Ibid.*, paras 37-8.

that an additional 908 households of potential beneficiaries had been identified in the context of the Pajule IDP camp, including victims of the attack against the camp and thematic crimes victims.¹⁴

14. The TFV concurs with the assessment that it is highly likely that all those resident at the camps at the time of the attacks are potential beneficiaries of reparations, considering the scope of the conviction. In the Trust Fund's view, the figure of 50,000 constitutes an approximate minimum number of victims of the attacks, as this is an estimate of only those resident at the camps at the time of the attacks, and does not account for individuals who were visiting the camps in the relevant period.¹⁵

15. *Victims of the thematic crimes.* None of the interlocutors consulted as part of the mapping exercise was able to provide estimate numbers of victims of the thematic crimes potentially eligible for reparations.¹⁶ Although a wide array of reports and other documentary evidence was considered by the Registry in the Mapping Report, numbers contained therein refer to abductees of all four LRA brigades, and consequently there are no specific records of, and no way to extract information relevant to, the child abductions, recruitments and (children born out of) sexual and gender-based violence committed within the temporal and geographical scope of the conviction against Mr Ongwen.¹⁷ The estimated total number of victims of the thematic crimes provided in the Mapping Report – approximately 10,000 – was offered as a ballpark figure of potential beneficiaries, based on the rough estimate number of children and adults abducted between 2002 and 2006, noting that overlap likely exists between victims of the attacks and victims of the thematic crimes, the extent of which cannot be easily nor conclusively determined at this stage.¹⁸

¹⁴ *Ibid.*, para. 44.

¹⁵ *Ibid.*, paras 36, 43. The mapping report indicates between 100 and 200 visitors to Odek IDP camp (para. 36), and a "large number of visitors" to Pajule IDP camp (para. 43).

¹⁶ *Ibid.*, para. 49.

¹⁷ *Ibid.*, para. 55.

¹⁸ Mapping Report, paras 55-56.

16. The Trust Fund is of the view that the above mentioned general figure can be considered as a minimum estimate, noting that potential victims coming forward may be a few hundreds more or less, approximately distributed as presented in the Mapping Report or differently.

2. Transgenerational harm

17. The Trial Chamber instructed the TFV to provide further submissions and information on the following issues related to transgenerational harm: (a) the scientific basis for the concept of transgenerational harm; (b) the evidence needed to establish it; what the evidentiary requirements are for an applicant to prove this type of harm; the need, if any, for a psychological examination of applicants and parents; the need, if any, to exercise caution in assessing applications based on transgenerational harm; and (c) whether Mr Ongwen is liable to repair such harm in the specific context of the case.¹⁹

a) The scientific basis for the concept of transgenerational harm

18. The Trust Fund recalls the Trial Chamber's finding in its Order for Reparations against Mr Katanga that transgenerational harm can be circumscribed as "a phenomenon, whereby social violence is passed on from ascendants to descendants with traumatic consequences for the latter".²⁰

19. Academic and scientific literature on the phenomenon of transgenerational harm reveals two leading schools of thought regarding the scientific basis of transgenerational transmission of trauma, namely the epigenetic transmission theory and the social transmission theory. Both theories advance a scientific explanation as

¹⁹ Decision on Registry Additional Information, para. 31.

²⁰ *The Prosecutor v. Germain Katanga*, Order for Reparations, 24 March 2017, [ICC-01/04-01/07-3728-tENG](#), para. 132 ("Order for Reparations").

to how a parent's exposure to trauma can be transmitted from parent to child, who was not directly exposed to the parent's traumatic experience.²¹

20. The epigenetic transmission theory focuses on the study of transgenerational transmission of epigenetic marks that are retained in our genetic material as a result of traumatic events experienced by parents.²² In this regard, multiple studies conducted by different researchers have demonstrated an increased risk for children to develop post-traumatic stress disorder ("PTSD") as adults in the situation where their parents are suffering from PTSD themselves.²³ However, some researchers have warned that "it is not possible to attribute intergenerational effects in humans to a single set of biological or other determinants at this time".²⁴

21. The social transmission theory, on the other hand, focuses on the impact traumatic experiences of parents as main caregivers may have on their child's emotional development during the period of upbringing.²⁵ In doing so, this theory explains how caregiving behaviour of parents is impacted by their traumatic experience and how this directly affects the child's emotional conduct.²⁶ In this regard, the social transmission school shows that when a child is raised by a parent suffering from a psychopathology or exposed to trauma, the likelihood of the child showing the

²¹ *The Prosecutor v. Germain Katanga*, Decision on the Matter of the Transgenerational Harm Alleged by Some Applicants for Reparations Remanded by the Appeals Chamber in its Judgment of 8 March 2018, 19 July 2018, [ICC-01/04-01/07-3804-Red-t-ENG](#), paras. 11-13 ("Decision on the Matter of Transgenerational Harm"); E. Dozio, M. Feldman, C. Bizouerne, E. Drain, M. Laroche Joubert, M. Mansouri, M. Roso Moro and L. Ouss, "The Transgenerational Transmission of Trauma: The Effects of Maternal PTSD in Mother-Infant Interactions", 11 *Frontiers in Psychiatry* (2020), p. 1, at p. 2.

²² *Katanga*, Decision on the Matter of Transgenerational Harm, para. 11; P. Gacka, "Remote Victimisation and the Proximate Cause. Transgenerational Harms Before the International Criminal Court", 22 *International Criminal Law Review* (2022), p. 438, at p. 445. See also R. Yehuda and A. Lehrner, "Intergenerational Transmission of Trauma Effects: Putative Role of Epigenetic Mechanisms", 17 *World Psychiatry* (2018), pp. 243-257.

²³ S. Matthews and D. Phillips, "Minireview: Transgenerational inheritance of the stress response: A new frontier in stress research", 151 *Endocrinology* (2010), pp. 7-13. R. Yehuda, J. Schmeidler, E. Labinsky, A. Bell, A. Morris, S. Zelman and R. Grossman, "Ten-year follow-up study of PTSD diagnosis symptom severity and psychosocial indices in aging Holocaust survivors", 119 *Acta Psychiatrica Scandinavica* (2009), pp. 25-34.

²⁴ R. Yehuda and A. Lehrner, "Intergenerational Transmission of Trauma Effects: Putative Role of Epigenetic Mechanisms", 17 *World Psychiatry* (2018), p. 243, at p. 243.

²⁵ *Katanga*, Decision on the Matter of Transgenerational Harm, para. 11.

²⁶ *Katanga*, Decision on the Matter of Transgenerational Harm, para. 13; P. Gacka, "Remote Victimisation and the Proximate Cause. Transgenerational Harms Before the International Criminal Court", 22 *International Criminal Law Review* (2022), p. 438, at p. 446.

same symptoms of trauma as the parent, and responding with disorganised attachment behaviour and emotional and behavioural disorganisation, increases considerably.²⁷

22. The Trust Fund notes that the Trial Chamber already referred to these two theories during the reparations phase in the *Katanga* case.²⁸

b) Matters regarding the assessment of transgenerational harm

23. Regarding the required standard of proof for reparations, the Trust Fund notes that the standard of the “balance of probabilities”, according to which “the applicant must show that it is more probable than not that he or she suffered harm as a consequence of one of the crimes of which [...] was convicted”,²⁹ is well-settled in the Court’s case law today.³⁰ As regards the standard of causation, the Court has systematically relied, in its jurisprudence, on the “but-for” test, combined with the requirement that “the crimes of which the person was convicted were “the proximate cause” of the harm for which the reparations are sought”.³¹

24. Furthermore, the Trust Fund notes that in the Reparations Order in the *Katanga* case, the Court – by having regard to the case law of the Inter-American Court of Human Rights and the United Nations Claims Commission - deemed it appropriate

²⁷ E. Dozio, M. Feldman, C. Bizouerne, E. Drain, M. Laroche Joubert, M. Mansouri, M. Roso Moro and L. Ouss, “The Transgenerational Transmission of Trauma: The Effects of Maternal PTSD in Mother-Infant Interactions”, 11 *Frontiers in Psychiatry* (2020), p. 1, at p. 2. See also M. Bosquet Enlow, B. Egeland, E. Carlson, E. Blood and R. Wright, “Mother-Infant Attachment and the Intergenerational Transmission of Posttraumatic Stress Disorder”, 26 *Development and psychopathology* (2014), pp. 41-65. See also F. Calicis, “La transmission transgénérationnelle des traumatismes et de la souffrance non dite”, 27 *Thérapie familiale* (2006), pp. 229-242.

²⁸ *Katanga*, Decision on the Matter of Transgenerational Harm, paras. 11-14.

²⁹ *Katanga*, Order for Reparations, para. 50.

³⁰ *The Prosecutor v. Thomas Lubanga Dyilo*, Order for Reparations, 3 March 2015, [ICC-01/04-01/06-3129-AnxA](#), para. 65 (“Order for Reparations”). *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, 3 March 2015, [ICC-01/04-01/06-3129](#), paras 81-84. *Katanga*, Order for Reparations, paras 47-50. *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Reparations Order, 17 August 2017, [ICC-01/12-01/15-236](#), para. 44 (“Reparations Order”).

³¹ *Lubanga*, Order for Reparations, para. 59. *Katanga*, Order for Reparations, paras 162-163. *Al Mahdi*, Reparations Order, para. 44.

to rely on presumptions in cases where it is difficult for applicants to gather evidence needed to establish the causal nexus between the harm suffered and the crime.³²

25. In this regard, the Trust Fund wishes to draw the Trial Chamber's attention to one of the arguments invoked by the Legal Representative of Victims Document in Support of the Appeal against the Order for Reparations in the *Katanga* case. They submitted that the Trial Chamber should have presumed the establishment of a causal nexus between the transgenerational harm suffered by a child and the crimes for which the accused was convicted in the event that the harm suffered by one or both of the child's parents is linked to the crimes convicted.³³ The justification relied upon was that "a parallel could be drawn with the reasoning, predominantly accepted at the Court, that the death of a close person to the indirect victim causes the victim harm provided a close relationship is established with the direct victim – whose death has to be proven".³⁴ In other words, the harm suffered by the victim is *presumed* to be established by virtue of such a relationship in the given situation. By applying this reasoning *mutatis mutandis* to the situation of transgenerational harm, the psychological harm suffered by a child should be presumed on the basis of the establishment of the harm suffered by the child's parent(s) - i.e. the direct victim(s) - whose psychological harm has been established, and the establishment of a parent-child relationship. Accordingly, it is this close relationship between the child and the child's parent(s) that leads to the presumption that the psychological harm suffered by the child is linked to the harm suffered by the child's parent(s) of which a causal link had been established with the crimes for which the person was convicted.

26. Despite the fact that the Appeals Chamber, in its Judgment on the appeals against the *Katanga* Reparations Order, was unconvinced with the LRV's argument that the Trial Chamber should have presumed a causal link between the children's

³² *Katanga*, Order for Reparations, paras 57-61.

³³ *The Prosecutor v. Germain Katanga*, Document in Support of the Appeal against the Order for Reparations under Article 75 of the Statute with its Annex II, 27 June 2017, [ICC-01/04-01/07-3745-tENG](#), paras 46-49 ("Document in Support of the Appeal").

³⁴ *Ibid.*, para. 47.

psychological harm and the crimes for which the person was convicted and considered that, in order to succeed with his argument on appeal, “the LRV would have had to demonstrate that, based on the evidence before the Trial Chamber, no reasonable trier of fact could have refused to draw such a presumption”,³⁵ the Appeals Chamber underlined that its finding must not be understood as a definite conclusion that it would have been *wrong* for the Trial Chamber to make such a presumption: the question before the Appeals Chamber was *only* whether it was wrong for the Trial Chamber not to have done so.³⁶

27. Correspondingly, considering that the Appeals Chamber in the *Katanga* case did not close the door for Trial Chambers to rely on said presumption in similar cases in the future, the Trust Fund submits that the reasoning explained above could be adopted by the Trial Chamber in the present case. This, in particular in a situation where the direct victims did not receive such limited appropriate psychological support to mitigate the negative effects on the next generations, as was available in northern Uganda since 2006.

28. In that case, the applicant would have to demonstrate a) his or her psychological suffering; b) the psychological harm suffered by the applicant’s parent(s); c) the causal nexus between the applicant’s parent(s)’s harm and the crimes for which Mr Ongwen was convicted; and d) their parent-child relationship. When successfully done, the applicant’s transgenerational harm could be presumed by the Trial Chamber on the basis of this parent-child relationship. Given that the psychological effects of transgenerational harm may only manifest late in life, the Trial Chamber may wish to consider whether it is sufficient to demonstrate points b) to d).

29. In the *Katanga* Reparations Order, the Trial Chamber relied on (1) the medical certificates attached to the applications for reparations and on (2) an Expert Report.³⁷

³⁵ *The Prosecutor v. Germain Katanga*, Public redacted Judgment on the appeals against the order of the 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. 236.

³⁶ *Ibid.*, para. 236.

³⁷ *Katanga*, Document in Support of the Appeal, para. 31.

This has been interpreted as meaning that “[t]he only limitation on the scope of transgenerational victimisation identified and put into practice by the Court so far is that victim-applicants should be able to produce and submit an evidentiary material properly supporting their claims”.³⁸ The Trust Fund recalls that the *Katanga* Trial Chamber relied on medical certificates and an Expert report because those were the supporting documents submitted to it.

30. It is important to note that the *Katanga* case is very different to the present case when it comes to the number of victims that applied for reparations in comparison to the potential size of the victim population in *Ongwen*. The Trust Fund is of the view that it would be highly costly and time intensive in a case of this magnitude to collect medical certificates and/or psychologist expertise for each potential applicant.

31. Rather, the TFV considers that providing psychological support to the direct victims and their families, which may be provided by way of group or family therapy, is a first essential step to mitigating transgenerational harm for the next generation. The programme can be, in addition, established in a way that allows the implementing partner(s)’s psychologists to assess whether descendants of the direct victims require psychological treatment and to provide such treatment, if the scope of the programme (availability of funds) so allows.

32. If a determination of eligibility of the descendants were considered necessary by the Trial Chamber, the Trust Fund could proceed to a legal assessment of the indirect victims who suffered transgenerational harm, on the basis of the information provided by the implementing partner’s psychologist(s) and submit a list of positively assessed beneficiaries for the Trial Chamber’s approval.

33. To conclude, the Trust Fund strongly favours a presumption of transgenerational harm in this case and a practical approach to their eligibility to the

³⁸ P. Gacka, “Remote Victimisation and the Proximate Cause. Transgenerational Harms Before the International Criminal Court”, 22 *International Criminal Law Review* (2022), p. 438, at p. 473.

programme and to how best address the psychological harm suffered by the descendants of the direct victims.

c) Mr Ongwen's liability to repair transgenerational harm in the context of his conviction

34. In the TFV's view, it is reasonable to consider that Mr Ongwen could have, when committing the crimes over the several years for which he has been convicted, reasonably foreseen the impact this would have on direct victims' descendants. The Trust Fund considers that it may not be unreasonable to assume that the closer the date of birth of the applicant to the date of the commission of the crime(s), the more likely it is that said crime(s) had an impact on the applicant concerned.³⁹ However, an expert psychologist on transgenerational harm may be best suited to advise on the matter.

III. CONCLUSION

35. The Trust Fund respectfully requests the Trial Chamber to take these submissions into account in deciding on the order for reparations in this case.



Franziska Eckelmans
Acting Executive Director of the Trust Fund for Victims

Dated this 17th of February 2023

At The Hague, The Netherlands.

³⁹ *Katanga*, Decision on the Matter of Transgenerational Harm, para. 29.