

EXPERTS REPORT ON REPARATION

PRESENTED TO TRIAL CHAMBER VI, INTERNATIONAL CRIMINAL COURT

**Situation in the Democratic Republic of the Congo
In the case of The Prosecutor v. Bosco Ntaganda**

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INTRODUCTION

1. On 8 July 2019, Trial Chamber VI (“Chamber”) of the International Criminal Court (“ICC” or “Court”) issued its Judgment, convicting Mr. Bosco Ntaganda of the war crimes and crimes against humanity of murder, attempted murder, and intentionally attacking civilians; rape and sexual slavery; pillage, attacking protected objects, and destroying the adversary’s property; forcible transfer of population and ordering the displacement of the civilian population; persecution; and conscripting and enlisting children under the age of 15 years into armed forces or groups and using them to participate actively in hostilities.¹
2. On 14 May 2020, the Chamber appointed Dr. Karine Bonneau, Dr. Sunneva Gilmore, Eric Mongo Malolo and Dr. Norbert Wühler as experts to assist it on five issues relating to reparations in this case.² The Chamber set out these issues as follows:
 - a) The scope of liability of the convicted person;
 - b) The scope, extent and evolution of the harm suffered by both direct and indirect victims, including the long-term consequences of the crimes on the affected communities and including the potential cost of repair;
 - c) Appropriate modalities of reparations;
 - d) Sexual violence, in particular sexual slavery, and the consequences thereof on direct and indirect victims; and
 - e) Any other matter deemed relevant after the consultation of the Registry with the parties on the list of experts.³
3. The Chamber suggested that,

“[b]ased on the experience in other reparation proceedings before the Court, it may be useful for the Experts to consider addressing, *inter alia*, the following issues: the types of harm that should be remedied on a priority basis, if any; in relation to SGBV, the types of collective reparations that could benefit victims who may not be easily identified due to the stigma attached to these crimes; and the

¹ Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, “Judgment”, 8 July 2019, ICC-01/04-02/06-2359 (“Conviction Judgment”).

² Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, “Public Redacted Version of ‘Decision Appointing Experts on Reparations’”, 14 May 2020, ICC-01/04-02/06-2528-Red (“Decision Appointing Experts”), para. 9.

³ *Ibid.*, paras 1 and 11.

impact of the approaches recommended by the Experts on potential perceptions of inequality between victims, and any potential perceptions of inequality in the context of the broader local community”.⁴ Considering the unique nature of SGBV crimes, the Chamber also invited the experts to address the modalities of engagement with victims of such crimes.⁵

4. The Chamber further stated that the appointed experts should endeavour to submit a joint report, but that such report may contain sections on some of the issues identified by the Chamber that are authored only by one or by some of the experts.⁶ Three of the appointed experts are submitting the present report jointly (they are in this report referred to as “the Experts”). A separate “Expert Report on Rape, Sexual Slavery and Attacks on Healthcare” is submitted by Dr. Sunneva Gilmore (“Gilmore Expert Report”).

1. The Experts

5. The following are the brief biographies of the Experts submitting this report, highlighting their qualifications and expertise in the area of reparation.

Karine Bonneau, Ph.D.

6. Qualified lawyer MA and PHD, with over 20 years of experience in human rights organisations. Karine is currently Senior Programme Manager at the Global Survivors Fund (GSF), responsible for developing and coordinating the GSF pilot projects in various countries, including the Democratic Republic of Congo (DRC), which aim at providing individual and collective interim reparative measures to survivors of conflict-related sexual violence and engaging with relevant stakeholders to advocate for national reparation programmes. Prior to joining the Fund, she was the Director of the International Justice Desk at the International Federation for Human Rights (FIDH) for over 13 years. She advocated for a victims-centred approach in criminal proceedings for international crimes including before the ICC, and contributed to FIDH litigation. She led specific projects on victims of sexual crimes to justice and reparation in DRC and the Central African Republic. She has

⁴ *Ibid.*, fn. 34.

⁵ *Ibid.*, para. 14.

⁶ *Ibid.*, para. 11.

spent more than 20 years working as a human rights lawyer and advocate in human rights organisations (FIDH, CODEPU, REDRESS TRUST, Amnesty International) in the field of victims' rights and access to justice and reparation; documentation of international crimes including sexual crimes; and accountability and international justice. She participated actively in the negotiation of the ICC founding texts focusing on their provisions on victims participation and reparation. She holds a PhD on the right to reparation in international law and in Chile. She is the author of various publications and participated in many panels in the field of human rights, international criminal law, and reparation.

Eric Mongo Malolo

7. Agricultural engineer by education, with 30 years of experience working with communities in Ituri, DRC, as a member of various NGOs and civil societies, including experience in working with community leaders [REDACTED]

Norbert Wühler, Ph.D.

8. Qualified lawyer with over 30 years of experience in international dispute settlement and in national and international claims and reparation programs. He was legal adviser to the President of the Iran-United States Claims Tribunal, chief of the Legal Service of the United Nations Compensation Commission (UNCC), and director of the Reparations Department of the International Organization for Migration (IOM). He was also chair of the Appeal Board of the World Intellectual Property Organization (WIPO) and a member and chair of the Kosovo Property Claims Commission (KPCC). He provided legal and policy advice on the design and directed the implementation of large-scale reparation programs, *inter alia* in Bosnia and Herzegovina, Colombia, Germany, Guatemala, Iraq, Kenya, Nepal, Palestine, Sierra Leone and Yemen. He was chair of an Independent Panel of Experts on Victim Participation at the International Criminal Court (ICC) and [REDACTED]
[REDACTED] He is a member of the board of the Global Fund for Survivors of Conflict-related Sexual Violence (Global Survivors Fund).

2. Methodology of work

9. In the preparation of their report, the appointed experts had, in addition to the non-confidential file of the *Ntaganda* case, access to other case files relevant for reparation, including in *Al-Mahdi*, *Bemba*, *Katanga* and *Lubanga*. They also had access to several of the expert opinions submitted in these cases.
10. The possibilities of the appointed experts to access all information in and outside the Democratic Republic of Congo (“DRC”) relevant to responding to the Chamber’s requests was severely hampered by the restrictions due to the COVID-19 pandemic and the security situation in Ituri. No field visit was possible, and meetings with victims to obtain information as to their current views and concerns and with all other stakeholders had to be held remotely using digital communication tools. Results from the sampling of potential beneficiaries of reparations to be prepared by the Registry were not obtained, as expected, in time to integrate any conclusions therefrom into their reports. Through the member of the appointed experts [REDACTED] they were, however, able to organize a roundtable with a number of NGOs [REDACTED]
[REDACTED]
[REDACTED].
11. Beyond the case files to which they had access, the Experts also conducted desk-research of relevant literature on key issues relevant for the report. Each of them contributed to this report bearing in mind their relevant areas of expertise. In the preparation of their reports, and not being able to have in-person meetings, the appointed experts communicated with each other, and with relevant sections of the Court, by email [REDACTED] and through telephone and video conferences. Endeavouring to file a joint report required a greater level of coordination between them, with the additional challenges posed by remote communication, including the need for English to French interpretation and vice versa. The Chamber acknowledged these and the other challenges when it partially granted a request of the appointed experts to extend the deadline for the submission of their report.⁷

⁷ Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, “Decision on Request for an Extension of Time for Filing of Experts’ Report”, 20 July 2020, ICC-01/04-02/06-2553 (“Decision on Request for an Extension”).

3. Structure of the Report

12. This report contains five sections. The first section deals with eligibility and identification of victims. The second section deals with the scope and evolution of the harm resulting from the crimes for which Mr. Ntaganda was convicted. The third section focuses on the forms of reparation and prioritization of victims. The fourth section addresses the scope of Mr. Ntaganda's liability. Finally, the fifth section summarizes the conclusions and recommendations for the Chamber in the determination of reparation in the case against Mr. Ntaganda.

SECTION 1 – THE UNIVERSE OF MR. NTAGANDA'S VICTIMS ELIGIBLE FOR REPARATIONS

13. The first issue which the Experts address is which victims are eligible to benefit from reparations in this case and what the number of such victims is. How many beneficiaries the reparations awarded will have to reach is not only a matter for the implementation of the reparations, but a factor already to be considered in deciding what reparations are appropriate in the circumstances of a particular case. This applies both to individual and collective reparations.⁸

14. The level of the information available is different for victims of the attacks and former child soldier victims, and also with respect to identified and unidentified victims. This section will first review the conditions that must be fulfilled for victims of Mr. Ntaganda generally to be eligible for reparations. It will then examine to what extent these conditions are present for victims or groups of victims that have so far been identified, and what can be said about other victims that have so far not yet been identified.

1.1. The conditions of eligibility

15. For a victim to qualify for reparation in this case, the following conditions must be fulfilled: (i) the victim must have suffered harm as a result of one or more of the

⁸ As determined by the Appeals Chamber in *Lubanga* with respect to collective reparations: "One of the factors that a trial chamber must consider in deciding what reparations are 'appropriate' for the purposes of article 75(2) of the Statute is how many victims are likely to come forward and benefit from collective reparations programs during the implementation phase. In its inquiry, a trial chamber must endeavour to obtain an estimate that is as concrete as possible". Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable'", 18 July 2019, ICC-01/04-01/06-3466-Red ("*Lubanga* Judgment on Appeals against Decision Setting Size of Reparations Award"), para. 224.

crimes of which Mr. Ntaganda has been declared guilty, and (ii) these crimes must have been committed in certain defined locations in the DRC (iii) from on or about 6 August 2002 to on or about 31 December 2003.

1.1.1. Harm suffered as a result of a crime of which Mr. Ntaganda has been declared guilty

16. As a general principle, it is recognized that victims, direct and/or indirect of serious international crimes, may suffer multiple types of harm. Those harms can affect individuals, families, communities, as well as succeeding generations.⁹ Organizations or institutions may also be affected by international crimes and experience losses as a result. Mr. Ntaganda has been found guilty of murder, rape and pillage. Victims of these crimes have suffered different types of harm. Section 2 below on harm provides a detailed description of the different forms of harm that victims within each of the categories of Mr. Ntaganda's crimes have suffered. This analysis shows that each of these crimes caused some form of harm to a person or persons subjected to the crime. For the purpose of establishing eligibility for reparations, there is thus no need to identify and prove the specific harm suffered by a particular victim. In line with relevant international jurisprudence dealing with similar situations, the Experts consider that harm must be presumed for every person who was subjected to one of Mr. Ntaganda's crimes. This is clearly the case for direct victims. The Experts submit that a presumption of harm should also apply to indirect victims.¹⁰

17. A different question is which persons qualify as indirect victims of the crimes for which Mr. Ntaganda was convicted. This depends on the category of crime. Details of these qualifications and the types of harm suffered by indirect victims are discussed below in the section 2 on harm.

1.1.2. Family members and legal successors

18. Discussing the various harms suffered by direct and indirect victims within the different categories of crime in relation to reparation requires a careful understanding

⁹ Y. Danieli, "The Diagnostic and Therapeutic Use of the Multi-generational Family Tree in Working with Survivors and Children of Survivors of the Nazi Holocaust", in: J. P. Wilson and B. Raphael (eds.), *International Handbook of Traumatic Stress Syndromes*, Stress and Coping Series, D. Meichenbaum, Series Editor, (NY, Plenum Publishing, 1993), pp. 889-898.

¹⁰ Inter-American Court of Human Rights ("IACtHR"), *Rio Negro Massacre v. Guatemala*, "Judgment on Admissibility, Merits, Reparations and Costs", 2 September 2012, para. 308; IACtHR, *Ituango Massacres v. Colombia*, "Judgment on Admissibility, Merits, Reparations and Costs", 1 July 2006, paras 374, 390(f).

of the concept of the family in the DRC, particularly in order to understand which family members should be eligible for reparation with respect to which types of harm. In defining victims, paragraph V8 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (the “Basic Principles”) provides that:

“Where appropriate, and in accordance with domestic law, the term ‘victim’ also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.”¹¹

19. Identifying the “immediate family” of a victim for purposes of awarding reparation is an obvious issue in the case of murder, but it is also relevant to the case of rape, especially for children of rape victims, and even to certain effects of pillage. The Experts consider that the cultural understanding and the social structures in the DRC should determine the concept of family relevant for reparation purposes in the case of Mr. Ntaganda. Accordingly, “family” in the DRC tends to include both the immediate, or nuclear, family and the extended family. Dimensions of cultural understanding and social structures may lead to different conclusions depending on the category of crime at issue.

20. The Chamber has already dealt with the concept of family in the DRC, albeit in a different context.¹² In its decision on the resumption of actions where an applicant died after having been accepted for participation at trial, the Chamber followed the jurisprudence of other Chambers that have allowed family members of victims or other closely-connected individuals to resume the actions initiated by the deceased victims.¹³ The Chamber authorized a successor to participate in place of the deceased victim if the successor provided evidence of (i) the death of the deceased victim; (ii) his or her relationship to the deceased victim; and (iii) a mandate by the deceased victim’s family members authorizing the successor to continue the actions on behalf of the

¹¹ UN General Assembly, “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”, 16 December 2005, UNGA Res 60/147 (“UN Basic Principles”).

¹² See, for example, Fourth decision on victims’ participation in trial proceedings, 1 September 2015, ICC-01/04-02/06.

¹³ *Ibid.*, para. 8.

deceased victim.¹⁴ The Chamber considered that an applicant can be presumed to represent the family where the applicant is, for example, the spouse of a deceased victim; an only surviving child of a deceased victim, where the child has reached the age of eighteen and the deceased victim was either unmarried or the victim's spouse is already deceased; or the parent of an unmarried deceased victim who either has no children or whose children are below the age of eighteen.¹⁵

21. The Experts submit that family members¹⁶ of a victim who was already found eligible to receive the Standard Compensation Amount (SCA)¹⁷ and who died before the compensation payment reached him or her, should be entitled to that compensation.¹⁸ It is recognized that non-financial forms of reparation are personal to the victim. One key purpose of the SCA that the Experts recommend for all victims, however, is to make up for the consequences of pillage on the family, and it would therefore not be justified to deprive the family of this benefit only because of the passage of time until it materializes. More victims will die the longer it takes to deliver reparation and, as has been the case in other reparation programs,¹⁹ families might well perceive the delay in providing compensation as intentional should this obligation cease with the death of the original victim.

¹⁴ *Ibid.*, para. 8.

¹⁵ *Ibid.*, para. 8, fn. 10.

¹⁶ Which members of the family would receive the compensation is a question that the Chamber will have to answer. The Experts submit that it should be the spouse and the children in equal shares. It would in that case be left to them how they would let the extended family share in the benefits from the compensation payment. The Experts do not recommend that the entitlement to the compensation be governed by the domestic law of DRC. In programs where small amounts of compensation were at stake, a "self-contained regime" of legal succession has proved to be more efficient; see N. Wühler and H. Niebergall, *Property Restitution and Compensation: Practices and Experiences of Claims Programs*, IOM (2008), pp. 103 ff. In some countries where a husband who has more than one wife is forcibly disappeared or unlawfully killed, the policy provides equal reparations to all spouses, rather than having them share. This was the case in Morocco; see Rabat Report: The Concept and Challenges of Collective Reparation, (ICTJ, 2009). The Experts consider that if the victim dies without a spouse/s and/or children, the parents should be entitled to the SCA as the "immediate family".

¹⁷ For more on SCA, see *infra* section 3 on Appropriate Modalities of Reparation.

¹⁸ If the victim who died would still have had the items that were pillaged at the moment of death, those items would have transferred to the family. It should be no different for the compensation that replaces such items. On the treatment given to family members as successors in the jurisprudence of the Inter-American Court and European Court of Human Rights as well as in various domestic reparation programmes, see R. Rubio-Marín, C. Díaz and C. Sandoval, "Repairing Family Members: Gross Human Rights Violations and Communities of Harm", in: R. Rubio-Marín, (ed.), *The Gender of Reparations: Unsettling Sexual Hierarchies while Redressing Human Rights Violations*, (Cambridge, Cambridge University Press, 2009) ("Repairing Family Members"), pp. 215-290, at pp. 225-231, 262, 268.

¹⁹ Personal experience of one of the Experts, for instance in the German Forced Labour Compensation Program, where legal successors received lesser amounts than surviving victims.

22. The Experts further submit that a somewhat similar procedure for the resumption of actions should be used when family members of a deceased victim of pillage seek the compensation in his or her stead. This will include the receipt and assessment of the applications by the Registry (excluding the mandate that was required for participation), and the approval by the Chamber of the Registry's assessment, "barring a clear and material error apparent in the Registry's assessment".
23. A question that is different from the participation situation is whether the respective share of the compensation should be paid out to each eligible family member or whether one or more members would be authorized to receive the compensation on behalf of the family. This is a difficult decision, as both approaches have advantages, but also pose challenges: the first option ensures that each eligible family member receives his or her share, but the processing is complicated and time-consuming. The second option is more streamlined, but the risk is greater that some or all of the other family members do not receive their share.²⁰ One way to try and mitigate the drawbacks of both options could be to pay the compensation to the spouse if he or she is among the surviving family members, with the obligation to pay the respective shares to the rest of the family. Where there is no surviving spouse, the compensation could be paid to the adult children of the deceased victim, with the same obligation.²¹ When the respective beneficiary/ies are identified, it should be ensured that the reparation is indeed received by the members of the immediate family and the dependents of the victim concerned.²² A last question in either case would then be whether or not compliance with this obligation should – and could – be monitored.

²⁰ In the German Forced Labour Compensation Program, some of the partner organizations of the German Foundation followed the first approach (for instance IOM); others used the second approach since they weighed the pros and cons operating in their "jurisdiction" differently.

²¹ One possibility is for the TFV to formulate rules on the distribution and receipt of compensation and other forms of reparation at the stage of implementing the Court's final order of reparations, taking into account the different considerations the Experts lay out here. The TFV may also, at that point, require the LRVs to update the Fund and the Court on the personal status of the surviving victim/s as well as indirect victims who applied for reparation.

²² See *supra* note 16. In the event that Congolese law on *ayant droit* would be found to be relevant, it should be ensured that the ultimate objective of the reparation is preserved. For victims rejected or stigmatized by their husbands or (part of) their family, the prior relationship between the deceased and these family members should be taken into account so that the reparation does not benefit them, but those family members who were dependents of the deceased.

1.1.3. Crimes committed in certain locations in the DRC

24. The geographical areas where the attacks must have been committed has been described by the Chamber in the Judgment on Conviction as certain towns and villages in two *collectivités*, i.e., the Banyali-Kilo *collectivité* and the Walendu-Djatsi *collectivité*. In the description of the targets of the February 2003 assaults, the Chamber used the term “surrounding villages”;²³ with respect to other locations, the Chamber spoke of “surrounding areas”. The Experts submit that this geographical scope is sufficiently clear when linked to a specific location.²⁴ It should be the same for the purpose of reparations, but the above listing of locations of the crimes should not be regarded as exhaustive. This would be relevant in the event that victims who have not yet been identified will come forward and apply for reparations. In that case, the question could arise which locations beyond those in the above list should be accepted as within the geographical area where the crimes concerned were committed.

1.1.4. Crimes committed from 6 August 2002 to 31 December 2003

25. Victims are eligible to reparations only based on crimes committed from on or about 6 August 2002 to on or about 31 December 2003. This provides a sufficiently clear temporal framework; the slightly flexible “on or about” language does not pose a challenge if applied consistently.²⁵

1.2. Victims admitted for participation at the trial in the *Ntaganda* case

26. A total of 2,132 victims were admitted for participation at the trial of Mr. Ntaganda. Included in these are 1,849 victims of the attacks and 283 child soldier victims. Considering the reduction in the geographical scope in the Judgment on Conviction, it is likely that not all these victims will be eligible for reparations.²⁶ For the purpose of estimating the total number of eligible victims, the Experts assume that 2,132 is the

²³ Conviction Judgment, *supra* note 1, paras 566-567.

²⁴ The Registry has sought the Chamber’s guidance with respect to the coverage of some of these locations in Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, “Annex I to its First Report on Reparations”, 30 September 2020, ICC-01/04-02/06-2602-Conf-AnxI-Red (“Registry’s First Report on Reparations”), paras 6 ff.

²⁵ The Registry has sought the Chamber’s guidance as to the outside limits of this temporal framework, *ibid.*, paras 11 ff.

²⁶ The Chamber has instructed the Registry to finalize as soon as practicable the assessment of how many of the participating victims may potentially be eligible for reparations given the scope of the Judgment; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, “First Decision on Reparations Process”, 26 June 2020, ICC-01/04-02/06-2547 (“First Decision on Reparations Process”), para. 29.

maximum potential number for this group of participating victims.²⁷ Considering the fact that the types and modalities of reparations have not yet been decided, the Chamber has determined that “a further assessment as to the eligibility of the participating victims falling within the scope of the Judgment is not required at this stage”.²⁸ The participating victims are also not required to file a new application form in order to be considered as potential reparations beneficiaries.²⁹

1.3. Victims eligible for reparations in the *Lubanga* case

27. A total of 425 victims had been determined to be eligible for reparations at the time the final reparations order was issued in the *Lubanga* case. Trial Chamber II found that there was evidence of hundreds or even thousands of additional victims of Mr. Lubanga’s crimes, and thus allowed for additional victims to be identified during the implementation phase, which is ongoing. The Registry is still in the process of finalising the assessment of how many of these victims are also potentially eligible for reparations in the *Ntaganda* case,³⁰ and no final figures are yet available in the public filings of the Registry.³¹ These victims can be treated as potential beneficiaries, and their consent to be so considered can be sought at the implementation stage.³²

1.4. Unidentified victims potentially eligible

28. The numbers elaborated in the preceding paragraphs do not reflect the totality of potential beneficiaries of reparations in the present case. It is clear that there are still as yet unidentified potentially eligible victims, but no precise figures are available. Estimates vary greatly and range from “at least approximately 1,100”³³ to “a minimum

²⁷ While this is a “significant number” (*ibid.*, para. 24), it is significantly lower, for example, than the more than 5,000 victims who had participated in the *Bemba* case before the reparation phase ended when Mr. Bemba was acquitted.

²⁸ First Decision on Reparations Process, *supra* note 26, para. 29.

²⁹ For the presumption of the victims’ willingness to be so considered, *ibid.*, para. 30.

³⁰ Here again, the Chamber has instructed the Registry to finalise as soon as practicable the assessment of how many victims eligible for reparations in the *Lubanga* case are also potentially be eligible for reparations in the *Ntaganda* case; First Decision on Reparations Process, *supra* note 26, para. 29.

³¹ The Registry had noted in Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, “Annex I to the Registry’s Observations on Reparations”, 28 February 2020, ICC-01/04-02/06-2475-AnxI, (“Registry’s Observations on Reparations”), para. 37 that, with the *Lubanga* reparations process still ongoing, the numbers were subject to further change. Updated figures for eligible *Lubanga* victims have been redacted in the Registry’s First Report on Reparations, *supra* note 24, para. 18.

³² *Ibid.*, para. 31.

³³ *Ibid.*, para. 25.

of 100,000 across all locations affected by Mr. Ntaganda's crimes".³⁴ The mapping of potential reparations beneficiaries undertaken by the Registry had provided useful information and the Chamber has encouraged the Registry to explore ways to finalise this process as soon as possible.³⁵ Further indications of the size of the pool of potential new beneficiaries can be expected from the sampling exercise that the Registry is embarking on.³⁶

1.5. Summary

29. To sum up, it can be estimated that at least approximately 3,500 victims of Mr. Ntaganda are potentially eligible for reparations. How many indirect victims (mostly children and other close family members) may in addition be eligible could not be ascertained by the Experts.

SECTION 2 – THE SCOPE, EXTENT AND EVOLUTION OF THE HARM SUFFERED BY VICTIMS OF MR. NTAGANDA

2.1. Harm and forms of harm

30. The second issue on which the Chamber instructed the Experts to provide their report is the harm that victims suffered as a result of the crimes for which Mr. Ntaganda was convicted, and specifically, the scope, extent and evolution of the harm suffered by both direct and indirect victims, including the long-term consequences of the crimes on the affected communities and including the potential cost of repair.³⁷ After a brief discussion of the concept of harm as it is generally recognized when serious crimes are at stake, this section will set out the details required by the Chamber with respect to the harm that victims suffered under the various crimes for which Mr. Ntaganda was convicted. Before, the Experts will explain what information and data was available to them in respect of the harm, and they will put forward factors that should be considered in its assessment.

³⁴ Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, "Public Redacted Version of the 'Submissions by the Common Legal Representative of the Victims of the Attacks on Reparations'", 28 February 2020, ICC-01/04-02/06-2477-Red ("Submissions by the Common Legal Representative of the Victims of Attacks on Reparations"), para. 72.

³⁵ First Decision on Reparations Process, *supra* note 26, para. 34.

³⁶ For details of this exercise and on the usefulness of sampling generally, see *infra* section 2.2.

³⁷ Decision Appointing Experts, *supra* note 2, para. 1.

31. While the concept of harm has not been defined by the Rome Statute or in the Rules of Procedure and Evidence, Trial Chamber I in *Lubanga* does refer to “hurt, injury and damage”³⁸ suffered as a result of the commission of an international crime. According to that Chamber, “the harm does not necessarily need to have been direct, but it must have been personal to the victim”.³⁹
32. The Court has been addressing the various types of harm that can ensue in its jurisprudence on a case-by-case basis. So far it has recognised that there are three predominant types of harm: material, physical and psychological.⁴⁰ In addition, it has considered allegations of other types of harm, such as *sui generis* harm and *transgenerational harm*.⁴¹ In the *Al Mahdi* case, it found new forms of harm, recognising the damage to protected buildings and its consequential economic loss.⁴²
33. It is recognized that victims, direct and/or indirect,⁴³ of serious international crimes may suffer multiple types of harm. Those harms can affect individual victims, families and communities, including succeeding generations.⁴⁴ Organizations or institutions may also be affected by international crimes and experience harm as a result.
34. As a general rule, individual harm could be pecuniary or non-pecuniary. The Inter-American Court, the international tribunal with the richest jurisprudence on reparation for gross human rights violations, understands pecuniary damage to be “the loss of or detriment to the victims’ income, the expenses incurred as a result of the facts, and

³⁸ Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, “Decision Establishing the Principles and Procedures to be Applied to Reparations”, 7 August 2012, ICC-01/04-01/06-2904 (“*Lubanga* Decision on Reparations Principles and Procedures”), para. 228.

³⁹ *Ibid.*

⁴⁰ Trial Chamber II, *The Prosecutor v. Germain Katanga*, “Order for Reparations pursuant to Article 75 of the Statute”, 24 March 2017, ICC-01/04-01/07-3728 (“*Katanga* Reparations Order”), para. 74.

⁴¹ *Ibid.*, pp. 132-136.

⁴² Trial Chamber VIII, *The Prosecutor v. Ahmad Al Faqi Mahdi*, “Reparations Order”, 17 August 2017, ICC-01/12-01/15-236 (“*Al Mahdi* Reparations Order”), paras 72-83.

⁴³ Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation”, 18 January 2008”, 11 July 2008, ICC-01/04-01/06-1432 (“*Lubanga* Judgment on Appeals against Decision on Victim’s Participation”), para. 32; and Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, “Redacted version of “Decision on ‘Indirect Victims’”, 8 April 2009, ICC-01/04-01/06-1813 (“*Lubanga* Decision on Indirect Victims”), para. 50.

⁴⁴ For detailed descriptions of how serious international crimes affect their victims, families, communities and succeeding generations, see Y. Danieli, “The Treatment and Prevention of Long-term Effects and Intergenerational Transmission of Victimization: A Lesson from Holocaust Survivors and their Children, in: C. R. Figley (ed.), *Trauma and its Wake* (NY, Brunner/Mazel, 1985); and Y. Danieli, “Multicultural, Multigenerational Perspectives in the Understanding and Assessment of Trauma”, in: J. P. Wilson & C. Tang (eds.) *The Cross-Cultural Assessment of Psychological Trauma and PTSD*, (New York: Springer, 2007), pp. 65-89.

the monetary consequences that have a causal nexus with the facts of the [...] case”.⁴⁵

Pecuniary damage includes loss of earnings/income, lost pensions, loss or damage to property, loss or damage to livestock, expenses to pay for treatment and medicines to address physical or psychological harm, stigma-related consequent losses, funeral expenses, expenses incurred by victims looking for loved ones or trying to obtain justice and reparation, as well as lost opportunities.⁴⁶

35. Non-pecuniary or moral harm is the result of “suffering and distress caused to the direct victims and their next of kin, and the impairment of values that are highly significant to them, as well as other sufferings that cannot be assessed in financial terms”.⁴⁷ Non-pecuniary harm thus encompasses “the impairment of the victim’s mental integrity”.⁴⁸

36. Non-pecuniary damage often happens as a result of the suffering caused by the commission of an international crime⁴⁹ and/or of witnessing the perpetration of the crime,⁵⁰ of changes in living conditions,⁵¹ damage to reputation, harm to the integrity of the family, damage to the life plan of a victim, or stigma-related suffering. These traumatic losses are likely to result in psychological harm, where the victims develop serious mental health problems such as Posttraumatic Stress Disorder (PTSD), depression or generalized anxiety. Generalizing to a way of life, they become an integral part of her/his personality and mode of being in the world. They also influence parenting and affect the children’s psychosocial development and adaptation, thereby becoming intergenerational.⁵²

⁴⁵ IACtHR, *Bámaca-Velasquez v. Guatemala*, “Judgment on Reparations and Costs”, 22 February 2002, para. 43.

⁴⁶ The concept of “loss of a life plan” will be dealt with in sections 2.3, 2.4 and 2.5 *infra*.

⁴⁷ IACtHR, *Case of the Street Children (Villagrán-Morales et al.) v. Guatemala*, “Judgment on Reparations and Costs”, 26 May 2011, para. 84; and *Caso Miembros de la Aldea Chichupac y Comunidades Vecinas del Municipio de Rabinal v. Guatemala*, “Judgment on Merits, Reparations and Costs”, 30 November 2016, para. 324.

⁴⁸ C. Sandoval and M. Duttwiler, “Redressing Non-pecuniary Damages of Torture Survivors,” in: C. Sandoval, G. Gilbert and F. Hampson (eds.), *The Delivery of Human Rights: Essays in Honour of Professor Sir Nigel Rodley* (Oxford, Routledge, 2011), pp. 114-136, at p. 118.

⁴⁹ IACtHR, *Velasquez-Rodriguez v. Honduras*, “Reparations and Costs, Judgment”, 21 July 1989, para. 27 and *Aloeboetoe v. Suriname*, “Judgment on Reparations and Costs”, 10 September 1993, para. 52.

⁵⁰ *Aloeboetoe v. Suriname*, *supra* note 48, para. 309.81.

⁵¹ IACtHR, *García-Asto and Ramírez Rojas v. Peru*, “Judgment on Preliminary Objections, Merits, Reparations and Costs”, 25 November 2005, para. 267.

⁵² Y. Danieli, F. Norris, V. Muller-Paisner, S. Kronenberg and J. Richter, “The Danieli Inventory of Multigenerational Legacies of Trauma, Part II: Reparative Adaptational Impacts”, 85(3) *American Journal of Orthopsychiatry*, (2015b), pp. 229-237; and, Y. Danieli, F. Norris and Engdahl, “Multigenerational Legacies of

37. The victim's family may also experience damage as a result of an international crime.

Family harm could be considered additively keeping in mind each member of the family, but could also be seen as the harm suffered by the family unit as such. While on most occasions international tribunals opt to recognise harm to the family unit in relation to individual victims,⁵³ it is important to also recognise harm to the family unit for either cultural or religious reasons or because there is clear evidence in a case that the family unit as such has experienced significant harm. For example, the Inter-American Court has recognised pecuniary harm to the family unit as such

“when there is a substantial change in the conditions and quality of life of the victims as a result of exile or relocation, suspended studies, expenditures to find a new job, loss of valuables, as well as damages to the physical and emotional health of the family”.⁵⁴

The award of reparation to individual members of the family for family harm could coexist with reparations for harm suffered by the family unit as such.

38. Communities can also suffer harm for pecuniary and non-pecuniary damages as recognised by the Court in the *Lubanga*,⁵⁵ *Katanga*⁵⁶ and *Al Mahdi cases*.⁵⁷ Institutions and organisations can also suffer pecuniary harm which might, as a consequence, cause pecuniary and non-pecuniary harm to individual persons.

2.2. Information relevant to the harm suffered by victims of Mr. Ntaganda

39. The Chamber stated in its First Reparations Decision that “significant information relevant to the five elements of the reparations order is available in the case record”.⁵⁸ With respect to the scope, extent and evolution of the harm suffered by the victims of Mr. Ntaganda, including the long-term consequences, the Experts

Trauma: Data-Based Integrative Modeling of the What and How of Transmission”, 86(6) *American Journal of Orthopsychiatry* (2016), pp. 639-651.

⁵³ For a detailed analysis of how international tribunals have dealt with family members in relation to reparations for gross human rights violations, see C. Sandoval, R. Rubio-Marin and C Diaz, *supra* note 48, pp. 215-290.

⁵⁴ *Ibid.*, p. 260.

⁵⁵ Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the Appeals against the ‘Decision Establishing the Principles and Procedures to be Applied to Reparations’ of 7 August 2012”, 3 March 2015, ICC-01/04-01/06-3129, (“*Lubanga* Judgment on Appeals against Decision on Reparations Principles and Procedures”), paras 153, 162, 212.

⁵⁶ *Katanga* Reparations Order, *supra* note 40, paras 288-295.

⁵⁷ *Al Mahdi* Reparations Order, *supra* note 42, paras 45, 53, 67, 86, 90, 134.

⁵⁸ First Decision on Reparations Process, *supra* note 26, para. 24.

found that the picture is not uniform. As far as former child soldier victims of Mr. Ntaganda are concerned, to the extent that they would also be eligible for reparations in the *Lubanga* case, the volume and detail of the information concerning their harm in the record in that case is indeed significant. This stems from the fact that the reparations procedure in *Lubanga* is completed and that the description of the harm, both in the filings in that part of the procedure and in the information available from the victims concerning the reparations they are seeking in the *Lubanga* case, is quite detailed and has been provided as one of the key elements underlying the determination of the appropriate reparations. Nevertheless, the Experts would have preferred to confirm the picture of the harm from these sources through in-person meetings with victims and other relevant actors in the DRC. Because of the restrictions due to the COVID-19 pandemic and the volatile security situation in Ituri, a field mission was, however, not possible. While the experts could conduct interviews with a number of actors at least through digital communication tools, no such interviews were possible with victims of this category.⁵⁹

40. The situation was more challenging with respect to victims of the attacks. On the one hand, since the reparation procedure in *Ntaganda* is less advanced than the one in *Lubanga*, the information on harm in the record is not linked to reparations but rather to participation. As far as victim applications for participation are concerned, only 38 forms have a section on reparations, and only ten of those forms were available to the Experts in a redacted version. On the other hand, the Conviction Judgment and the Sentencing Judgment in *Ntaganda* contain descriptions of the harms suffered by certain of the victims of the attacks. Facilitated by the Common Legal Representative of the victims of the attacks, the experts were able to conduct interviews through digital communication tools at least with a small number of victims of the attacks who had participated at the trial and who recounted the harms they suffered at the time of the crimes, but who importantly also described the

⁵⁹ The Trial Chamber recognized the challenges of remote communication, compared to in-person meetings, and the impossibility of organizing a field mission; see Decision on Request for an Extension, *supra* note 7, paras 4, 6.

evolution of these harms and their continuing effects and long-term consequences.⁶⁰

In addition, the Common Legal Representative made available to the experts a version of the matrix that the VPRS has prepared in the context of the sampling exercise it is undertaking, and in which the Common Legal Representative listed the details of the harm that he collected from the forms of the representative sample of participating victims of the attacks that is included in that matrix.⁶¹

41. Lastly, the experts organized a roundtable through their member [REDACTED]. At this roundtable, representatives of a number of NGOs [REDACTED]
[REDACTED]
[REDACTED].

2.3. Factors to consider in the assessment of the harm suffered by victims of Mr. Ntaganda

42. In assessing the harms suffered by the victims of Mr. Ntaganda, a number of factors need to be considered, including the time expired since the crimes were committed and their long-term consequences, the extreme gravity of the crimes, the complexities of the harm and its consequences, and the security context in DRC. Most of these factors also determine what is required to link the harm to the crimes committed.

43. Between 1999 and 2003, Ituri province was the epicentre of massacres and other serious crimes under international law, referred to as "the Ituri conflict" or "the Ituri

⁶⁰ The Trial Chamber noted the difficulties encountered by the experts in having remote meetings with victims for the purpose of obtaining information as to their current views and concerns, for reasons outside their control; Decision on Request for an Extension, *supra* note 7, paras 4, 6.

⁶¹ Different than what the Trial Chamber expected in July 2020, no information obtained from the sample itself, whether from participating victims or from new potential reparations beneficiaries, became available in time for the Experts to integrate any conclusions therefrom into their report; see Decision on Request for an Extension, *supra* note 7, para. 7. Sampling is a technique that is very common in claims and reparation programs, particularly those involving larger numbers of claims. (Cf., for instance, H. Das and H. Van Houtte, *Post-War Restoration of Property Rights under International Law, Volume II: Procedural Aspects* (Cambridge, Cambridge University Press, 2008), chapter "Precedent Setting and common Issue Determination"; see also P. Karrer, "Mass Claims Proceedings In Practice – A Few Lessons Learned", 23 *Berkeley Journal of International Law* (2005), pp. 463 ff., at 470: "Before issuing any primary decisions, one should test one's approach on a sample. The sample must of course be representative of the entire claims population, and it must be large enough to allow a reliable forecast of the entire outcome".) The earlier in the process a sample is selected and reviewed, the better informed the subsequent stages can be organized and the faster the claims can be resolved. In the context of the reparation procedure at the ICC, the Experts recommend a wider use of sampling at an earlier stage than is the current practice. Within the challenging framework of the current procedure (no information on reparation issues in the application forms for participation; the number and particular profiles of the not yet identified victims; restricted access to victims due to the COVID-19 pandemic and the security situation in Ituri; and uncertainty about the outcome of the appeal against the conviction), the Chamber in the present case is now trying to move the process forward with the help of this technique.

war". The crimes against humanity and the war crimes committed by Mr. Ntaganda took place in this context. As summarized in the UN Mapping Report,

“[v]ery few Congolese and foreign civilians living on the territory of the DRC managed to escape the violence, and were victims of murder, maiming, rape, forced displacement, pillage, destruction of property or economic and social rights violations”.⁶²

44. The record of this case shows, and the Experts’ interviews with various interlocutors have confirmed, that the victims of Mr. Ntaganda have to date received no assistance from the State or the Trust Fund for Victims. The extreme gravity of the harm suffered at the time is compounded by the long-term consequences of such unaddressed harms, their individual and collective impact in a society where communities have such an important role in the organisation of the society, and the stigma and rejection of certain categories of victims (in particular victims of sexual violence, former child soldiers, and their children). Added to that is the impoverishment of the victims and the dismantlement of families and communities, the effects of which are aggravated by the recurrence of such crimes due to the insecurity in the region until today and the related risk for the new generations/children of the victims.
45. Eastern DRC and the Ituri region have endured a volatile security situation and repetitive conflicts since 1999 until today. Many civilians have been direct victims of several conflicts, and descendants of the victims of crimes committed during the first conflict are now direct victims of recent crimes. The recent return as a hero by Thomas Lubanga could reactivate the trauma suffered by victims and create new trauma for the children of victims, and it may, according to some views expressed to the Experts, also impact the way former child soldiers will be able and willing to continue the reparation process.
46. Following new attacks [REDACTED] since March 2020, the ICC had greater difficulties to access potential new beneficiaries, and restrictions due to the COVID-19 pandemic have made it very difficult for ICC Staff to travel to or within the DRC.

⁶² OHCHR, “Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed within the Territory of the Democratic Republic of the Congo between March 1993 and June 2003”, August 2010, (“UN Mapping Report”), para. 127.

This has made access of the victims to and participation in the reparations process even more challenging.

47. Mr. Ntaganda has been condemned to a sentence of 30 years, the highest sentence pronounced so far by the Court, *inter alia* because of the extent of the damage that he caused, in particular the harm caused to the victims and their families.⁶³ The Court recognized a long list of aggravating circumstances which show the extreme gravity of the harms and their long-term consequences. The extreme seriousness of the crimes carried with it an extreme seriousness of the harm suffered, multiform and transgenerational, with long-term consequences that also resulted in the loss of life plan.

48. As to the evidentiary standard for the assessment of the harm, the Experts submit that no assessment of each individual victim's harm is appropriate or indeed required. Such an assessment would not be desirable for two reasons: first, the lack of documentary evidence of harm and the length of time it would take to determine, in an adequate way, each individual claim. Given the nature of the crimes and the situation of the victims since, they cannot reasonably be expected to have documentary evidence. The victims have been waiting for almost two decades to obtain reparations, and such a process would only lead to an undue additional increase of the duration of the proceedings without generating additional information or knowledge. Of equal importance, an individual assessment of the harm is also not necessary in view of the standardized nature of the reparations recommend for the victims. The Experts therefore submit that, for these reasons and taking into account evidence available concerning the situation of the victims as a whole, the form and extent of the harm suffered by former child soldiers and victims of the attacks should be presumed.⁶⁴ The sample ordered by the Chamber

⁶³ Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, "Sentencing Judgment", 7 November 2019, ICC-01/04-02/06-2442 ("Sentencing Judgment"), para. 16.

⁶⁴ See also the reference to paragraph 91 of the *Katanga* Appeal Judgment in the First Decision on Reparations, *supra* note 26, para. 46. The use of presumptions is a frequent feature of claims and reparation programs. While the factual circumstances and the legal framework are different in every program, the reasons for the use of presumptions are very similar and correspond to those described here. As stated by Niebergall in her comparative overview of how reparation claims programs deal with these evidentiary issues: "The use of presumptions has proven to be of particular importance in the area of causality, concretely in cases where claimants had to establish a causal link between their loss and certain events or actions." H. Niebergall, *Overcoming Evidentiary Weaknesses in Reparation Claims Programmes*, in: C. Ferstman, M. Goetz,

will serve to confirm the patterns in the application forms and the extent of the harm and will thus further support the use of presumptions.

2.4. The harm suffered by victims of the attacks

49. There is little dispute in law or in practice that various forms of harm may take place and coexist with one another, particularly when serious international crimes are at stake.⁶⁵ With respect to the victims of the attacks, their Common Legal Representative expressed this in the following terms:

“The victims of the crimes in the present case suffered multi-dimensional harm by virtue of the fact that entire communities were targeted in the perpetration of these crimes, such as attacks against the civilian population and/or persecution, and/or forcible transfer and/or forced displacement of entire villages in combination with pillage and/or destruction of private property and protected objects, and in many cases murder, attempted murder, and sexual violence”.⁶⁶

50. The key findings in the Trial Chamber’s Judgment on the Conviction with respect to harm are summarized in the Summary of Trial Chamber VI’s judgment. The Trial Chamber found that

“Mr. Ntaganda and other military leaders of the UPC/FPLC [.... acted according to] the common plan to drive out all Lendu from the localities targeted during the course of their military campaign against the RCD-K/ML. [They] wanted to destroy and disintegrate the Lendu community and ensure that the Lendu could not return to the villages that were attacked. This involved the targeting of civilians by way of acts of killing and raping, as well

A. Stephens (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, (Leiden, Nijhoff, 2009), pp. 145 ff., at 160. One of the examples that Niebergall describes arose out of a very different situation than the reparations process in *Ntaganda*. Nevertheless, the technique used there to establish the causal link between the crime and the loss or harm is very much the same as the one recommended here: “Based on its historical research and the claims review conducted, the Property Claims Commission developed a presumption regarding this causality in the form of a grid of geographical extension and timeframe. If the loss happened during a certain period in a certain territory [...], then it was presumed that the loss happened due to the involvement of [the perpetrator]”. *Ibid.* Exactly the same is proposed here for the victims who were in a certain location during a certain timeframe and suffered a certain harm.

⁶⁵ Y. Danieli, “Conclusions and Future Directions”, in: Y. Danieli (ed.), *International Handbook of Multigenerational Legacies of Trauma* (Springer, 1998), pp. 669-689.

⁶⁶ Submissions by the Common Legal Representative of the Victims of the Attacks on Reparations, *supra* note 34, para. 39.

as the targeting of their public and private properties, through acts of appropriation and destruction”.⁶⁷

During the so-called *ratissage* operations, “house-to-house searches were carried out during which persons were abducted, intimidated, and on several occasions killed. UPC/FPLC soldiers looted a variety of items, such as mattresses, and removed the roofs of some houses”.⁶⁸ “As part of the assaults [...] UPC/FPLC soldiers destroyed houses [...] some houses were burned down, specifically those with thatched roofs”.⁶⁹ “Some of the women captured by UPC/FPLC soldiers were raped by them. Some of them were killed, either when they attempted to resist or after they were raped”.⁷⁰

“UPC/FPLC commanders, including Mr Ntaganda ordered their troops to engage in conduct that resulted in the displacement of a significant part of the civilian population. The population was shot at while trying to flee [...] Many [...] fled, going to the bush and to other places [...] While in the bush, those who had fled lived in difficult conditions, with limited access to food, medication, and shelter. The Lendu could not return to their houses during the time the UPC/FPLC controlled the villages concerned”.⁷¹

51. In the Sentencing Judgment, the Trial Chamber detailed a number of the harms and also pointed to some of their continuing effects. As summarized in the Summary of Trial Chamber VI’s sentencing judgment,

“[t]he murder irreversibly impacted not only the direct victims but also those who witnessed them, the victims’ family members, and relatives left behind. Some individuals who survived or witnessed the murders and attempted murders that Mr Ntaganda was convicted of still bear permanent scars, both physical and psychological, including long-term memory loss, neurological disturbances and extensive physical scarring”.⁷²

⁶⁷ ICC, “Summary of Trial Chamber VI’s Judgment in the Case of *The Prosecutor v. Bosco Ntaganda*, Issued 8 July 2019”, para. 25.

⁶⁸ *Ibid.*, para. 34.

⁶⁹ *Ibid.*, para. 35.

⁷⁰ *Ibid.*, para. 36.

⁷¹ *Ibid.*, para. 38.

⁷² ICC, “Summary of Trial Chamber VI’s Sentencing Judgment in the Case of *The Prosecutor v. Bosco Ntaganda*, Issued on 7 November 2019”, para. 17.

52. “Victims [of sexual violence crimes] suffered physical, psychological, psychiatric, and social consequences, such as ostracisation, stigmatisation and social rejection, both in the immediate and longer term. For example, a 13-year-old girl victim of rape [...] suffered injuries which took several months to heal and required surgery years later and incurred a long-lasting fear which caused her to drop out of school. [Other] civilian victims of rape [...] suffer from Post-Traumatic Stress Disorder, experience issues with sexuality and distortions of self-image.”⁷³
53. As regards pillage, “[m]any civilians were affected by the looting and they were sometimes left without anything.”⁷⁴ “The destruction of houses deprives civilians of a private place, a shelter and a sense of security”.⁷⁵
54. Below, the experts describe the harms suffered by the victims of the attacks from the various crimes, as they have been elaborated in submissions to the Court and in interviews that the experts conducted with a number of interlocutors. These included different sections of the Court, representatives of the DRC Government, international organizations, and NGOs working in Ituri who participated in a roundtable in Bunia. The patterns that emerged were confirmed in the interviews with the victims whom the experts managed to talk to. Since no results have yet been available from the sample that the Chamber has ordered, the interviews with the victims were particularly important to gauge the continuing effects and the long-term consequences of the harms suffered.
55. In its decisions on the applications for participation, the Chamber confirmed that the respective victims suffered some harm as a result of the crimes for which Mr. Ntaganda was found guilty. The documents and the accounts referred to in the immediately preceding paragraph make clear that all these victims suffered multiple forms of harm. What has not been established either by the Chamber or through the above-referenced materials is the type and extent of the harm suffered by each individual victim. If the goal in the reparations process were to award and implement reparations to each victim based on an assessment of his or her individual situation, then the specific harm would need to be determined for each eligible victim. The

⁷³ *Ibid.*, para. 28.

⁷⁴ *Ibid.*, para. 32.

⁷⁵ *Ibid.*, para. 34.

Experts submit that this is neither feasible nor desirable in the context of reparations for the victims of Mr. Ntaganda.

56. An assessment of each individual victim's harm and the extent of the harm is not desirable for two reasons: the lack of documentary evidence of harm and the length of time it would take to determine, in an adequate way, each individual claim.
57. The Experts consider that it is unlikely that another individual review of the victims' applications with a view to determine each specific harm would yield more beneficial results than have been obtained through the review that VPRS and the Chamber performed during the participation phase. This is owed to the lack of documentary evidence that victims would be able to collect. Such a lack of evidence is to be expected, given the circumstances of the crimes and the types of harms suffered as a result. Lack of supporting evidence has been a challenge in other parts of the world in relation to similar crimes. The general response has been to set up domestic reparation programs where the standard of proof is fully alleviated and presumptions are used to ensure that victims have access to redress.⁷⁶ A representative sample like the one ordered by the Chamber will serve to confirm the patterns in the forms and extent of the harm and will thus further support the use of presumptions.⁷⁷ The Experts submit that forms and extent of harm should be presumed for the types of harm within each category of crime, as set out in detail in the following sub-sections.
58. The Experts submit that a further harm assessment is not required also in view of the standardized nature of the reparations that they recommend for the victims. In addition, the delay that would result from an individual harm assessment would be out of proportion to the very limited additional knowledge that such an exercise could be expected to produce. It would be also particularly problematic bearing in mind that victims will have waited for almost two decades to obtain redress from Mr. Ntaganda for the harm they suffered as a result of his crimes.
59. In the following sub-sections the Experts describe the harms they found that victims of Mr. Ntaganda's crimes have suffered, of both pecuniary and non-pecuniary nature.

⁷⁶ United Nations, "Guidance Note of the Secretary-General – Reparations for Conflict-Related Sexual Violence", June 2014, ("UN Guidance Note"), p. 14; R. Rubio-Marin and C. Sandoval, "Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the Cotton Field Judgment", 33 *Human Rights Quarterly* (2011), pp. 1062-1091, at pp. 1084-1091.

⁷⁷ On the use of sampling in other reparation programs, see *supra* section 2.2.

The Experts also considered that, even if it is neither possible nor desirable to fully assess the extent of the damage suffered by each individual victim in the case, it is important to provide a thorough account of the harms they suffered that are evident from the record and were communicated to the experts by the victims. A full account of the harms and victimhood caused by Mr. Ntaganda constitutes an important measure of satisfaction for victims.

2.4.1. Murder

60. Numerical information with respect to the types of harms that participating victims of the attacks stated they suffered is contained in the Registry's Observations on Reparations. According to these figures, almost half of the victims across all categories incurred material losses, and more than 40 percent suffered psychological harm.⁷⁸ Of the participating victims of murder and attempted murder, 43 percent state material losses and more than 50 percent psychological harm.

61. The two main types of harm that victims affected by murder or attempted murder suffered are psychological harm and material losses. The Experts agree with the Common Legal Representative who submits that eligible victims

“should not be limited to the nuclear family but also be accepted in case of more remote family relations since the socio- cultural perception of the family unit is different and in general much wider in the affected region. Close dependence and relations between ‘remote’ family members is considered the norm. In this regard, in the *Katanga* case, the Trial Chamber held that the loss of a family member is a traumatic experience entailing psychological suffering to both close and remote family members”.⁷⁹

The psychological harm experienced often still persists today and seriously affects those concerned. It entails trauma and severe depression, sometimes leading to the victim's withdrawal from the family or community. “The childhood of children affected by murders - be it because their parent died, because they were themselves victims of an attempted murder, or because they witnessed atrocious murders - is almost always

⁷⁸ Registry's Observations on Reparations, *supra* note 31, para. 40.

⁷⁹ Submissions by the Common Legal Representative of the Victims of Attacks on Reparations, *supra* note 34, para. 36.

severely disrupted.”⁸⁰ Each of the victims among those interviewed by the experts who had lost a family member was still traumatized today, showing a variety of different symptoms. The psychological harm was even more acute when a family member initially survived an attempted murder, but subsequently died due to a lack of medical care after having fled in the bush. In these cases, the victim felt partly responsible for the death because he or she was not able to arrange for the needed care. The Trust Fund posits that, in addition,

“[a]ll victims, no matter whether children or adults, who suffered from behavioural disorders as a result of psychological harm have, in turn, suffered from and in many cases continue to suffer from a loss of productive capacity and reduced socio-economic opportunities, which were further aggravated by their, in most cases, limited access to basic social services such as schooling and health care [...]”⁸¹

62. Where the murdered relative was the provider or contributor to providing for the family unit, the relatives also suffered material harm. This included in the first place the loss of the means to support themselves. In turn, widows, parents, children or other affected family members had to take on the role of provider or contributor to providing for the family. Often this meant that children stopped going to school since they had to support the family or could not afford it anymore. Where adults provided for dependents of the murdered relative, their standard of living was affected and development opportunities were lost for them. Two of the victims whom the experts interviewed stated that women or even girls in their family prostituted themselves since otherwise the family would not have sufficient means to support itself. Each of the victims whom the experts interviewed and who had lost a family member reported that their situation continued to be precarious to date and that they needed reparations urgently. In the case of attempted murder, the victims also suffered from physical harm, and where this had long-term consequences, their standard of living was affected and development opportunities were lost as well.

⁸⁰ Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, “Trust Fund for Victims’ Observations relevant to Reparations”, 28 February 2020, ICC-01/04-02/06-2476 (“TFV Observations relevant to Reparations”), para. 80.

⁸¹ *Ibid.*, para. 81.

63. Murder also destroyed the social cohesion that existed before in the community, created inter-ethnic tension and exacerbated divisions between ethnic groups in a community. In particular, the murder of Abbé Bwanalonga, for which Mr. Nataganda was convicted as the direct perpetrator, had a deep psychological impact on the community in general, as well as on the witnesses of the crime. As the Trial Chamber noted, it “became notorious amongst the clergy and the population”.

2.4.2. Rape and sexual slavery

64. As explained in the UN Mapping Report,

“[i]t is important to stress that women and children were the main victims of the most serious violations of human rights and international humanitarian law committed primarily against the civilian population of the DRC [...] Violence in the DRC was accompanied by the systematic use of rape and sexual assault by the combatant forces [...] The unequal place of women in society and the family also encouraged sexual violence in wartime”. As stated by the Special Rapporteur on Violence Against Women, its Causes and Consequences, “[s]exual violence in armed conflicts in the DRC is fuelled by gender-based discrimination in the society at large”.⁸²

65. The Chamber found that rape and sexual slavery were committed as crimes against humanity and war crimes, a weapon of war committed with huge brutality against civilian victims of the attacks.⁸³

66. As a result, victims suffer multiple harms and immediate and long-term, even permanent, consequences including physical, psychological, psychiatric and social consequences (ostracisation, stigmatisation and social rejection).⁸⁴ External and internal wounds which take several months or years to heal and required surgery years later. Contraction of HIV and other diseases, disabilities, but also intense emotional harm and anguish, stress, sadness, all the harms amounting to deep post-

⁸² UN Mapping Report, *supra* note 62, paras 526, 530, 533 ; see also Report of the Panel on Remedies and Reparations for Victims of Sexual Violence in the Democratic Republic of Congo to the High Commissioner for Human Rights, March 2011.

⁸³ See for the victims of the attacks, Sentencing Judgment, *supra* note 63, paras 99-101.

⁸⁴ See *ibid.*, paras 103-107; Submissions by the Common Legal Representative of the Victims of the Attacks on Reparations, *supra* note 33, para. 44 ; TFV Observations relevant to Reparations, *supra* note 78, paras 83-87. See also Gilmore Expert Report.

stress disorder. The Experts agree with the Common Legal Representative that “psychological and emotional harm is to be presumed in any event”.⁸⁵

67. In addition, as explained by an expert heard by the Chamber “universal, core and perhaps most pervasive experience of sexual violence for women who have been raped or sexually assaulted is that of shame”.⁸⁶ Indeed, in DRC victims of rape and other forms of sexual violence suffered huge stigmatisation. They are rejected by their husband, family and community. This social stigma also applies to children born out of rape.⁸⁷ They may have to leave their home, their activities, and have to resume another life elsewhere, under the mark of stigma. The youngest had trouble coming back to school being subject to stigma and mockeries, and also feeling different and self-isolated themselves.⁸⁸ The intense and long-term trauma, physical disease and stigmatisation of victims made it very difficult or even impossible for them to get married, to have a family life, and it impacted also on their reproductive capacity, which also influences the way women are seen in the Congolese society.

68. The Experts concur with the Common Legal Representative of the Victims of the Attacks that such harm constitutes a loss of life plan, loss of life chances to be repaired as such.⁸⁹

69. The effects are reperculated on the victims’ own children including children born out of rape, who feel the same rejection and social stigma, and thus difficulties in accessing school and education. The Experts believe that the transgenerational harm should be recognized for the children of the raped victims of the attacks as for the children of the former child soldiers.⁹⁰ But not only have direct victims of rape suffered but also indirect victims such as their next of kin, including their children, husband/wife, parents and close family members who have also experienced non-pecuniary harm as

⁸⁵ Submissions by the Common Legal Representative of the Victims of the Attacks on Reparations, *supra* note 34, para. 38.

⁸⁶ Sentencing Judgment, *supra* note 63, para.105.

⁸⁷ They are totally excluded and called by nickname such as “snake children”; *ibid*.

⁸⁸ *Ibid*, para. 104: The “13-year-old victim incurred a long-lasting fear, which caused her to drop out of school (...) [H]er life changed. She became very ashamed and she could no longer play with her friends and her school results suffered [...] as a result of what she had experienced. On occasion she would go to school, then she would leave class whilst other children continued to study. She was virtually isolated from what went on at school”.

⁸⁹ Submissions by the Common Legal Representative of the Victims of Attacks on Reparations, *supra* note 34, para. 44.

⁹⁰ See on the harm of former child soldier victims *infra* section 2.5 and Gilmore Expert Report.

the result of the rape and its aftermath. Indeed, rape in DRC conflicts often happened in front of family members and the victims' communities, who had to witness and saw their loved ones brutally violated without being able to help them, or they even have themselves been forced to rape their mother, sister, or daughter. Forced incest has been a characteristic of rape in the DRC conflict.

70. In addition to non-pecuniary harms, victims of rape and sexual slavery also suffered pecuniary harms. Rapes, sexual slavery and other crimes of sexual violence have long-lasting socio-economic implications for the victims and their families. Victims often have to rebuild their life in a new place and new home, with new activities, losing their previous income and life conditions because of the social stigma against victims of sexual violence. This first results from the HIV and other medical treatment they had to go through, and the need to pay a new rent. But they also incur the loss of income resulting from the change in their life and the lives of their families, and in particular their children that live with them and of whom they have to take care.

2.4.3. Persecution and abduction

71. To the extent that the victim abducted was the provider of the family, similar harm as the one suffered in the case of murder applies. Where the abducted person was another family member, psychological harm and trauma occurred. Often, persecuted victims fled into the bush. There they suffered from the difficult conditions in the bush, including lack of food, shelter and medication. Some of them were shot at and injured while they were fleeing.

2.4.4. Pillage

72. The scale of the pillage, destruction and looting of property was extensive and significant. One of the goals of the attacks was to destroy whole villages and to prevent the return of the inhabitants to these villages. Of the participating victims of pillage, 60 percent state material losses and more than one third psychological harm.
73. Typically, pillage and destruction of properties was accompanied by intentional attacks on civilians, displacements or persecution. Houses were burnt or destroyed by other means, or they were seriously damaged which meant that victims lost their dwellings and family homes. In the process, the victims also lost documents such as identity cards, birth certificates, diplomas, and property ownership titles. Inventory

and household goods were destroyed together with the houses, or they were looted before the houses were burnt or destroyed. Often the items looted represented the bulk, if not all, of the victims' possessions. Most of them were engaged in subsistence farming or small scale business and suffered significant losses due to the pillage of tools, the pillage of livestock and agricultural produce, devastation of farming land, or physical injury preventing them to continue their farming activities.⁹¹ "Extensive pillaging caused livelihood stress due to the lack of food resulting from the destruction of crops and the inability to generate income [...]"⁹²

74. During the attacks victims often fled first into the bush where they had to endure harsh living conditions, and then to other villages or towns that were safe from Mr. Ntaganda's troops. Until today, many of the victims still have no place to go back to in the communities where they came from, and they have no means to rebuild their homes. The victims whom the experts interviewed also were afraid to return to their places since they feared for their safety.

75. Victims who suffered from pillage and who often were left with nothing are still struggling today to support themselves and their children. Many had to interrupt or could not start school, and in that way they lost the opportunity to commence an income-generating activity. They also have no or very limited access to health care.

76. The experts' interviews with victims confirmed the Trust Fund's assessment that, "in addition to material harm, property crimes caused psychological harm when the loss of material assets had a significant effect on the victim's daily life, either through the destruction of their dwelling, or of their means of securing an income, such as livestock or agricultural production."⁹³

This psychological harm was still present today in the victims whom the experts interviewed.

77. "Property crimes against both individuals and communities entail reduced socio-economic opportunities. This has led to limited access to education and healthcare, further aggravated by the fact that the Sayo health centre was the object of an

⁹¹ Submissions by the Common Legal Representative of the Victims of Attacks on Reparations, *supra* note 34, para. 65.

⁹² TFCV Observations relevant to Reparations, *supra* note 80, para. 91.

⁹³ *Ibid.*, para. 89.

attack which left it at least partly destroyed [....]⁹⁴ “As a result of the destruction of community property (hospitals, churches, schools) victims lost access to health care, schooling and religious practice.”⁹⁵

2.4.5. Displacement

78. The harm suffered in connection with forced displacement, attacking civilians, persecution and/or forcible transfer was material and psycho-social. It was mostly linked to harm suffered prior to or concurrent with the displacement, from pillage and murder or attempted murder. Most of the victims were displaced from their homes and communities, initially in connection with the attacks. For some of them, their ordeal started in the bush around their villages, others set out directly on long journeys – sometimes on foot - to other villages or towns. Often they had to leave again the places where they had found refuge after the first displacement since they could not support themselves and the family members who were with them in those places.⁹⁶ Many of the victims ended up [REDACTED] where they still are today.⁹⁷
79. Expressions used by the victims whom the experts interviewed to describe their current situation of displacement ranged from “being on the run” to “surviving in the bush”, “having to beg for food”, “ending up in poverty”, and “not knowing how to survive”. Most victims have no prospect of returning home, and some families are permanently separated. Many of the victims themselves and/or their children had to give up or could not start schooling or vocational training, depriving them of the opportunity subsequently to engage in income-generating activities.
80. The long-term consequences of the victims’ situation are going beyond negative economic impacts, causing psycho-social harm and grief over the loss of their homes and means of life, cultural infrastructure and social and community-related networks. These consequences also caused transgenerational harm beyond the victims themselves. “Victims included elderly persons and children who were lost or abandoned, and who remained unaccompanied with no help or means of making a

⁹⁴ *Ibid.*, para. 90.

⁹⁵ Submissions by the Common Legal Representative of the Victims of Attacks on Reparations, *supra* note 34, para. 45.

⁹⁶ UN Mapping Report, *supra* note 62, para. 673.

⁹⁷ Further displacements [REDACTED] occurred during 2020, possibly also involving victims of Mr. Ntaganda.

living.”⁹⁸ Based on its consultations and experiential insights, the Trust Fund submits that “the forcible displacement of population struck at the very foundation of the local social and cultural fabric. It affected not only individuals’ sense of belonging and identity, but also their means of life and their safety. Civil society partners argued that, in some cases, the harm experienced as a result of displacement additionally provided a breeding ground for inner and inter-community conflicts with long-term effects.”⁹⁹

2.4.6. Summary

81. The harms suffered by the victims of the attacks are summarized in the following.

82. Harm suffered by direct victims:

- i. Physical injury;
- ii. Psychological harm and trauma;
- iii. Interruption and loss of schooling;
- iv. Reduced socio-economic opportunities;
- v. Separation from families;
- vi. Material loss.

83. Harm suffered by indirect victims:

- i. Psychological harm and trauma experienced as a result of the loss of a family member;
- ii. Transgenerational harm: psychological and material harm suffered by children born out of rape;
- iii. Interruption and loss of schooling;
- iv. Material deprivation that accompanies the loss of a family member’s contributions.

84. Communal harm:

- i. Disruption of social cohesion in the community and between ethnic groups.

2.5. The harm suffered by former child soldier victims

Context

⁹⁸ TFV Observations relevant to Reparations, *supra* note 80, para. 92.

⁹⁹ *Ibid.*, para. 93.

85. As underlined in the United Nations Mapping Report on the most severe crimes committed in DRC:

“The wars in the DRC were also marked by the systematic use of children associated with armed groups and forces (CAAFAG) by all parties to the conflict. According to child protection agencies working in the disarmament, demobilisation and reintegration (DDR) of children, at least 30,000 children were recruited or used by the armed forces or groups during the conflict. These statistics make the DRC one of the countries in the world with the highest incidence of CAAFAG.”¹⁰⁰

Multiple reasons may explain why the phenomenon of child recruitment has been so intense and on a large scale in the different conflicts in the DRC.¹⁰¹ Between 2001 and 2003, the armed groups in Ituri through well organised and intense campaigns recruited thousands of children, based in particular on their (alleged) ethnic belonging, who were therefore taken to military training camps and used in hostilities. Particularly vulnerable, these children were threatened, punished, executed, tortured and subjected to inhuman and degrading treatment, and were victims of rapes, sexual slavery, and other conflict-related sexual violence, among other crimes under international law¹⁰².

86. In 1998, the ICC Statute had made significant progress in international criminal law by expressly qualifying as a war crime the acts of conscripting or enlisting of children under the age of fifteen years into the national armed forces or into armed groups or of using them to participate actively in hostilities, in either international or internal armed conflicts.¹⁰³ And in its early years, the ICC prosecuted some of the main Chief leaders acting in Ituri, Thomas Lubanga (UPC), Bosco Ntaganda (UPC) Germain Katanga (FRPI) and Mathieu Ngudjolo Chui (FNI).¹⁰⁴ After Thomas Lubanga in 2012

¹⁰⁰ UN Mapping Report, *supra* note 62, para. 673.

¹⁰¹ *Ibid.*, paras 685-686.

¹⁰² *Ibid.*, paras 704-712.

¹⁰³ Rome Statute, Articles 8.2.b)(xxvi) and 8.2.e)(vii). While both conscription and enlistment are forms of recruitment that result in the incorporation of a child into an armed force or group, whether by compulsion (conscripting) or on an alleged voluntary basis (enlistment), it is well established in international law that it is not possible to distinguish between voluntary and forced recruitment in the case of children under the age of 15, and that a child's consent does not constitute a legitimate defence. Therefore, both should be dealt with together including for the harm assessment; Conviction Judgment, *supra* note 1, para. 1107.

¹⁰⁴ See in particular UN Mapping Report, *supra* note 62 and Conviction Judgment, *supra* note 1, para. 360.

and Germain Katanga in 2014, the ICC convicted Bosco Ntaganda for conscripting and enlisting children under the age of 15 years into an armed group between on or about 6 August 2002 and 31 December 2003, and using them to participate actively in hostilities between on or about 6 August 2002 and 30 May 2003. In the Sentencing Judgment, the Trial Chamber insisted on the gravity of the crime of conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities as "it subjects them to combat and the associated risks to the children's life and well-being entailed therein, including being wounded or killed". The Chamber established that the fact of having been associated with an armed group as a child under 15 would have a significant impact on them, as well as in particular the removal of children from their families.¹⁰⁵ Therefore the Chamber considered that the "harsh living conditions" to which children were submitted - including threats, including to their life, monitoring of movement, and severe punishments, including beatings and executions - constituted aggravating circumstances for establishing the sentence, their living conditions which "could only have the impact of increasing their vulnerability".¹⁰⁶ The Chamber considered the "cumulative victimisation" of the former child soldiers who have also been victims of rape and sexual slavery,¹⁰⁷ rapes and sexual slavery of the former girls child soldiers happened also during training and daily life in UPC/FPLC camps, and also during the assignment as an escort to a UPC/FPLC commander.¹⁰⁸ The Chamber found Mr. Ntaganda responsible as an indirect co-perpetrator for the rape of a nine-year-old girl, and the rape and sexual slavery of a girl under 15 years of age at Camp Bule, and of a girl under the age of 15 assigned as a bodyguard to a commander, the three of them testifying before the Court.¹⁰⁹

87. This extreme vulnerability, increased by the extreme violence endured by former child soldiers, caused direct and indirect harms, with long-term effects on direct victims but also on their families, present and future, and their communities, as indirect victims.

¹⁰⁵ Sentencing Judgment, *supra* note 63, paras 179, 185.

¹⁰⁶ *Ibid.*, para. 193.

¹⁰⁷ *Ibid.*, para. 194.

¹⁰⁸ Conviction Judgment, *supra* note 1, para. 984.

¹⁰⁹ Sentencing Judgment, *supra* note 63, para. 93.

2.5.1. Harm suffered by direct victims

Physical harm

88. Children under the age of 15 have been shot and died on the battlefield, and have also been executed during the training, “even for no reasons”, when they tried to flee.¹¹⁰ Many were seriously wounded, on the battlefield and in the camps during their training and resulting from their harsh living conditions.¹¹¹ The lack of adequate medical support, and their very young age at the time of the wounds had permanent consequences on their bodies and health, even today . As witness ██████ explained:

“I was wounded on my right leg. I received a gunshot wound (...) did receive treatment, but I still feel pain in my leg today. Especially when I walk for a long period of time, I feel pain in my leg. The bullet remained lodged in my leg. I did not receive any stitches; rather a dressing was put on the wound”.¹¹²

89. Too young to escape and unable to carry their heavy weapons with them, the youngest child soldiers suffer from physical disabilities including a deformation of the spine and whole body, different shoulder heights, and bending of the shoulders due to the heavy weight of the weapons they carried as children.¹¹³

90. Former child soldiers bear permanent scars and suffer intense permanent or chronic disease. ‘█████ was struck on the head with a machete by a UPC/FPLC soldier as he tried to flee the Kobu massacre. He was later found by his family members, who took him home. ██████’s injuries had long-term, serious consequences”. According to Ms Sophie Gromb-Monnoyeur, an expert in forensic medicine and clinical examination, ██████’s skull was significantly deformed as a result of his injury and he exhibited long-term memory loss, vertigo and neurological disturbance.¹¹⁴

¹¹⁰ Conviction Judgment, *supra* note 1, para. 416; Sentencing Judgment, *supra* note 63, para. 179.

¹¹¹ Conviction Judgment, *supra* note 1, para. 416. See also NGO roundtable organized by the experts ██████. See also TFV Observations relevant to Reparations, *supra* note 80.

¹¹² Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Testimony of ██████, 12 November 2015, ICC-01/04-02/06 (“Testimony of ██████”), pp. 25-26 < https://www.icc-cpi.int/Transcripts/CR2016_00008.PDF > (accessed 24 October 2020).

¹¹³ Experts interview with member of the Common Legal Representative 1 (CLR 1) team.

¹¹⁴ Sentencing Judgment, *supra* note 63, para. 50.

91. The living conditions of the former child soldiers and lack of access to adequate medical facilities contributed also to the development of infections and serious and chronic illnesses, in some cases leading to death.¹¹⁵

92. In addition, female but also male former child soldiers suffered from physical harms, diseases and permanent disabilities directly resulting from repeated rapes, other forms of sexual violence and sexual slavery they were submitted to and whose effects still last until today.¹¹⁶

93. Direct physical harms also resulted from the common use of drugs and alcohol while still being children. █████ explained the direct impact upon his health of smoking hemp and drinking alcohol on a regular basis while in the militia.

“By virtue of the fact that I smoked, I feel pain in my rib cage and in my lungs. And my lungs are not in a good state (...) You know, it's not a good thing to smoke hemp because it destroys your spirit. And a lot of people who made use of this substance were a little bit off-kilter (...) There was no moment in particular. No opportune moment to smoke hemp. We would smoke it at any time.”¹¹⁷

As a consequence, some former child soldiers are still dependant today.¹¹⁸

94. These physical harms impacted the former child soldiers' entire health and increased the psychological harm suffered by survivors.¹¹⁹

Psychological harm

¹¹⁵ See Participation form DRC-OTP-2078-2252-R01.riv.pdf. NGO roundtable organized by the experts █████. TFFV Observations relevant to Reparations, *supra* note 80, para. 94: “Physical manifestations of harm affecting child soldiers include disabilities, fistulas, wounds or ulcerations, mutilation and even death”. In the very similar *Lubanga* case, the Trust Fund for Victims put forward: “In terms of the harm affecting the health of former child soldiers, the following manifestations were identified [...] Physical disabilities as a result of war injuries (e.g. loss of limbs or loss of hearing due to firing heavy weaponry), and assault and battery; (...) Physical (...) damage from abuse of drugs and alcohol; On-going medical problems due to lack of access to health care and malnutrition during the time as child soldiers; and sexually transmitted diseases and injuries due to rape as well as sexual activity at a young age, because of the particular situation in the militia camps conducive to such experience, during the time as child soldiers”; Trial Chamber II, *The Prosecutor v. Thomas Lubanga Dyilo*, 3 November 2015, ICC-01/04-01/06-3177-Red “Filing on Reparations and Draft Implementation Plan” (“*Lubanga* Filing on Reparations and Draft Implementation Plan”), para. 65.

¹¹⁶ For details, see Gilmore Expert Report.

¹¹⁷ Testimony of █████ *supra* note 112.

¹¹⁸ See TFFV Observations relevant to Reparations, *supra* note 80.

¹¹⁹ See also Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, “Submissions on Reparations on behalf of the Former Child Soldiers”, 28 February 2020, ICC-01/04-02/06-2474 (“Submissions on Reparations on behalf of Former Child Soldiers”), pp. 15-16.

95. The brutal and traumatic separation from their families and rupture of their life from their loved ones and the lack of access to education provoked an immediate state of anxiety and sadness, but also had a long-term psychological impact. Likewise, their inclusion in a conflictual environment, submitted to the most severe crimes under international law, further exposed the former child soldiers to an environment of violence, fear and deep trauma. As elaborated by the expert Dr Schauer on different occasions before the Court,

“[c]hildren of war and child soldiers are a particularly vulnerable group and often suffer from devastating long-term consequences of experienced or witnessed acts of violence. Child war survivors have to cope with repeated traumatic life events, exposure to combat, shelling and other life threatening events, acts of abuse such as torture or rape, violent death of a parent or friend, witnessing loved ones being tortured or injured, separation from family, being abducted or held in detention, insufficient adult care, lack of safe drinking water and food, inadequate shelter, explosive devices and dangerous building ruins in proximity, marching or being transported in crowded vehicles over long distances and spending months in transit camps. This experience can hamper children’s healthy development and their ability to function fully even once the violence has ceased”.¹²⁰

96. The Experts heard the story of a child soldier participating in the present case who was forced to kill his father who had reached the training camps where his son was kept, to free him and bring him back home.¹²¹ Rapes and sexual slavery of former girl child soldiers sexually enslaved and repeatedly raped cause severe psychological trauma.¹²² As direct consequences of these multiple traumas endured, former child soldiers developed psychopathological mechanisms such as depression, dissociation, suicidal behaviour, which characterise post-traumatic stress that tends to persist,

¹²⁰ Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, “Annex 1 to: Report of Ms. Elisabeth Schauer following the 6 February 2009 ‘Instructions to the Court’s Expert on Child Soldiers and Trauma’”, 25 February 2009, ICC-01/04-01/06-1729-Anx1 (“*Lubanga Elisabeth Schauer Report*”), p. 3. See also *Lubanga* Filing on Reparations and Draft Implementation Plan, *supra* note 115, para. 65 (“In terms of the harm affecting the health of former child soldiers, the following manifestations were identified [...]; Psychological disorders; Physical and psychological damage from abuse of drugs and alcohol”).

¹²¹ Experts interview with member of the Common Legal Representative 1 (CLR 1) team.

¹²² For details, see Gilmore Expert Report.

possibly for the remainder of the individual's life. "During childhood and adolescence mind and brain are particularly plastic and hence, stress has the greatest potential to affect cognitive and affective development".¹²³

97. These behaviours obviously impact on the life and the relationships of the former child soldiers with their family and community when they are relocated, and their capacity or not to reintegrate into their previous life impacts the whole community. They develop mechanisms of aggressiveness within their families and communities. "Former child soldiers have difficulties in controlling aggressive impulses and have little skills to handle life without violence. These children show ongoing aggressiveness within their families and communities even after relocation to their home villages".¹²⁴
98. As a result, and at the same time of their conscription and enlistment and participation in hostilities, former child soldiers faced social harm.

Social harm

Rejection and stigmatisation

99. Former child soldiers have suffered rejection and stigmatization by the community and their own families because of their alleged involvement in the commission of serious crimes, and their consequences on their actual behaviour.¹²⁵ From the trauma they suffered, the former child soldiers often become aggressive with their families, and the latter may not recognise these former child soldiers as the child they had before the events and life becomes difficult if not impossible. Their families often reject them, as "families cannot stand them anymore".¹²⁶
100. Rejection comes also from the communities as part of a wider stigmatization.

¹²³ *Lubanga* Elisabeth Schauer Report, *supra* note 120, pp. 17-20. See also *Lubanga* Filing on Reparations and Draft Implementation Plan, *supra* note 113, paras 271,276 ("Psychological harm affects all victims in this case (although the manifestations of this harm may vary in degree). For example, once it has been established that a child participated in military activities it can be presumed to have suffered some form of psychological harm", and "childhood exposure to war has been linked to a much broader range of sequelae, including higher rates of physical illness with a wide range of bodily symptoms, depression and suicidality, dissociation and de-realization, impaired cognitive, functioning and developmental delays"). See also NGO roundtable organized by the experts on 11 August 2020 in Bunia; and TFW Observations relevant to Reparations, *supra* note 80.

¹²⁴ *Lubanga* Elisabeth Schauer Report, *supra* note 120, p. 21; see also Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, "Decision on Sentence pursuant to Article 76 of the Statute", 10 July 2012, ICC-01/04-01/06-2901 ("*Lubanga* Decision on Sentence"), para. 41.

¹²⁵ NGO roundtable organized by the experts [REDACTED]

¹²⁶ Experts interview with member of the Common Legal Representative 1 (CLR 1) team.

101. The Experts were also told that former child soldiers may also exhibit behaviour that is not normal, even violent, because of continued addiction but also as some exalt their military exploits carried out in the armed group in the past, which may be considered by the community as a risk for the youngest generation of creating a desire for them to join current armed groups as well.¹²⁷ This may be reinforced by the fact that they did not live anything else and have lost so many opportunities that they are convinced this is the only part in their life that they can talk about. This stigmatization creates a cycle of rejections, and a feeling of rejections and self-isolation.¹²⁸ This is reinforced by a lower status, the absence of real opportunities of improving professional and private life and difficulties of adaptation and reinsertion, with the consequential loss of a life plan and transgenerational harms.¹²⁹ This stigmatisation was increased following sexual violence, for female former child soldiers who were perceived as having lost their dignity and social status as a result of being raped or assumed to have been raped, and, as a result, have been most of the time unable to settle into communities, in their family due to the shame and stigma associated with sexual violence. Their personal situation was worsened by the fact that many of them returned from their experience as child soldiers with children, which greatly affected their ability to become self-reliant.¹³⁰
102. Rejection and social stigma had repercussions in the child soldiers' intimate life and their capacity to build a family life. As explained by a female former child soldier,

¹²⁷ See also NGO roundtable organized by the experts [REDACTED]

¹²⁸ In the context of the *Lubanga* case which covered the same period and nature of criminality, the participants in consultations organized by the Trust Fund of Victims "reported that the forced introduction to violent practices (...) left a lasting mark on many former child soldiers. Many are still called by a nickname acquired during their time with the armed forces. This again reflects the prejudice by their communities, which they continue to be subjected to, and which, in part, is based on the local perception that former child soldiers as a result of the horrors that they were exposed to continue to be fond of handling weapons and using violence, lies and deception in everyday life"; *Lubanga* Filing on Reparations and Draft Implementation Plan, *supra* note 115, para. 64.

¹²⁹ On transgenerational harm, see *supra* section 2.4.2. and Gilmore Expert Report.

¹³⁰ TFV Observations relevant to Reparations, *supra* note 80; "[Consultations in Ituri] further highlighted other elements that may negatively affect the psychological wellbeing of a former child soldier, including stigma and lower social status. [...] [F]ormer child soldiers, upon returning to their homes, have often discovered that they have been relegated to a lower status than people who were previously their peers. The experts cautioned in this regard that while lower social status can also affect adults who experienced war, this effect is particularly harmful for children and adolescents, who are at a life stage, where support from their community is particularly influential in shaping their long-term adult trajectories, including the social support that will be afforded to (or withheld from) their own children. In other words, the negative psychological impact of having been a child soldier may have repercussions into next generation *Lubanga* Filing on Reparations and Draft Implementation Plan, *supra* note 115, paras 277, 256. See also Gilmore Expert Report.

who feels that her “future is compromised” and that she will not be able to have a normal life: “if she found a partner, this partner would abandon her when finding out that she was ‘in the militia’”.

“My life is still massively affected by it. I stopped my studies, I didn't study anymore. These days, what can somebody do if they haven't got any studies? My life was ruined. My life was ruined. I caught illnesses, diseases. This violence that I suffered makes me suffer enormously. It's very difficult, very difficult for me”.¹³¹

Furthermore social stigma clearly has a gender dimension and is particularly strong against girls and young women, not only because they have been raped, or the assumption that they have been raped but also because of “their diminished social status. These include: their status as child soldiers; their perceived loss of ‘chastity’ and ‘dignity’, highly valued attributes assigned to females in these communities; and their social status as unwed mothers”.¹³² Stigmatization plays an important role in the Congolese context. Naming it will imply for the victims the recognition of this specific harm and will open the way to reparation, which will be an incentive to enable better mutual acceptance between former child soldiers and their community.

Loss of life plan

103. The concept of “life plan”, first developed by the Inter-American Court of Human Rights in the *Loayza Tamayo* case,

“deals with the full self-actualisation of the person concerned and takes account of her calling in life, her particular circumstances, her potentialities, and her ambitions, thus permitting her to set for herself, in a reasonable manner, specific goals, and to attain those goals. The concept of a ‘life plan’ is akin to the concept of personal fulfilment, which in turn is based on the options that an individual may have for leading his life and achieving the goal that he sets for himself.”¹³³

¹³¹ Sentencing Judgment, *supra* note 63, para. 184.

¹³² *Lubanga* Filing on Reparations and Draft Implementation Plan, *supra* note 115, para. 94.

¹³³ IACtHR, *Loayza-Tamayo v. Peru*, “Reparations and Costs”, 27 November 1998, paras 147-148; see also para. 150 (“It is reasonable to maintain, therefore, that acts that violate rights seriously obstruct and impair the

Former child soldiers have been deprived of their childhood which includes a familiar environment beneficial to proper education, making it very difficult or impossible to receive a basic education, study and find a profession upon their return.¹³⁴

104. Although some former child soldiers were able to go to university, study and obtain their diploma, others were unable to complete their studies or obtain a diploma due to the difficulties to study or lack of adequate resources. It is also well established that the trauma invariably suffered by child soldiers also negatively impacts their education, the development of cognitive and social skills and their abilities, and thus prospects of employment.¹³⁵ Further stigmatization and rejection of the girls former child soldiers ends up completely destroying their life plan.
105. In its judgment on the reparation size in the *Lubanga* case, the Appeals Chamber stressed that “the need to recognise and address, as one type of harm, in the projects being implemented, the damage to a life plan/the project of life, which these children may have suffered”. Again, the Appeals Chamber recalled this concept in the *Lubanga* Amended Reparations Order noting that “the concept of ‘damage to a life plan’, adopted in the context of State responsibility at the IACtHR, may be relevant to reparations at the Court”. In identifying the harm to direct victims of, specifically, Mr. Lubanga’s crimes, the Appeals Chamber included “[i]nterruption and loss of schooling” and “[t]he non-development of ‘civilian life skills’ resulting in the victim being at a disadvantage, particularly as regards employment”. The Appeals Chamber emphasised that “it is crucial, in the reparations provided, that the specific situation of the children at issue in this case is recognised and that their harm is appropriately remedied through the particular reparations provided”.¹³⁶ The Experts agree with the CLR 1 that the “loss of a life plan” should be included for reparation

accomplishment of an anticipated and expected result and thereby substantially alter the individual’s development. In other words, the damage to the ‘life plan’, understood as an expectation that is both reasonable and attainable in practice, implies the loss or severe diminution, in a manner that is irreparable or reparable only with great difficulty, of a person’s prospects of self-development”).

¹³⁴ Consultation in Ituri by the Trust Fund for Victims emphasized that child soldiers were “deprived of their family environment [child soldiers were also deprived of physical integrity, well-being, sporting, cultural and recreational activities, and of positive adult role models that are important for the healthy development of a child into an adult”; *Lubanga* Filing on Reparations and Draft Implementation Plan, *supra* note 115, paras 63, 67.

¹³⁵ *Lubanga* Elisabeth Schauer Report, *supra* note 120.

¹³⁶ See *Lubanga* Judgment on Appeals against Decision Setting Size of Reparations Award, *supra* note 8, para. 38.

purposes, which will indeed recognize the exact harm suffered by former child soldiers.¹³⁷

Other material harm

106. As for the victims of the attacks, former child soldiers suffered the loss of all their goods and animals during the attacks, including destruction of houses and properties.¹³⁸
107. Psychological and physical harm suffered by former child soldiers, including their loss of childhood, interruption of the schooling, difficulties to find their own place in the families and communities when they came back, added to their stigmatisation and therefore lack of support by their families and communities, led to material and economic harm, and “the difficulty to participate in the economic activities of their communities.”¹³⁹

2.5.2. Harm suffered by indirect victims

108. The type and gravity of the harms suffered by former child soldiers under 15 undoubtedly caused harm to their families and communities. As expressed by Judge Ibáñez Carranza in the *Lubanga* case, the harm caused to children who were conscripted and enlisted “transcends to impact the relatives of those children as well as the social fabric, cohesion and future of their communities. Indeed, by harming children, who represent a community’s youngest generation, the crimes may harm those expected to be in charge of the community in the future.”¹⁴⁰

¹³⁷ Experts interview with member of the Common Legal Representative 1 (CLR 1) team. Submissions on behalf of Former Child Soldiers, *supra* note 119, para. 45 (“[The Project of life concept] is particularly relevant to reflect aspects of the harm endured by former child soldiers and especially those children who, in addition, were sexually abused. The active involvement of children below 15 in military activities, exposing them to fear, anxiety and inhuman treatment creates significant psychological trauma that persists long after their demobilisation from the armed group. It may also have adverse effects on brain development, and delays in cognitive, language, and academic skills, impairing the child’s learning abilities and affecting later performance in school, the workplace, and the community. Victims are deprived of vital aspects of their childhood, such as education and family life. Former child soldiers who were raped and became pregnant during their time in the militia face the same and additional major disruptions. In addition to the harms outlined *supra*, they are often rejected by their families and communities, unable to marry, denied access to productive activities and schooling, hence their life plan is seriously impaired”).

¹³⁸ See Participation form DRC-OTP-2078-2281-R01.riv.pdf. See also TFV Observations relevant to Reparations, *supra* note 80.

¹³⁹ *Lubanga* Filing on Reparations and Draft Implementation Plan, *supra* note 115, paras 256, 296.

¹⁴⁰ Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, “Separate Opinion of Judge Luz del Carmen Ibáñez Carranza”, 16 September 2019, ICC-01/04-01/06-3466-AnxII, para. 141.

Physical and psychological harm

109. Family members are the first indirect victims. They lost their child, a possibility of a family life. Intense psychological trauma may also be at the origin of the development of medical disease and an alteration of their capabilities. Families also most often lost the possibility of a well-balanced relationship in particular when their child reintegrated into their life, due to the intense harms of former child soldiers exposed above, and in particular the fact that children have become brutal and aggressive towards their elders, their lack of understanding, and the behaviour caused by their (feeling of) rejection by the community.¹⁴¹

Material harm

110. Trauma borne by close family members in particular may first affect their productivity.¹⁴² Families may also have lost a possibility of income earner and support, in particular in the broad family's sense as it prevails in the DRC. Material suffering may also result from the aggressiveness on the part of the former child soldiers that are relocated to their families and communities¹⁴³ This material repercussions may go beyond families to impact the entire community "because child soldiers were not able to go to school and had difficulties after their return to reintegrate into school, the communities lack young people with a minimum of literacy and education at present, affecting the socio-economic prospects of communities as a whole."¹⁴⁴ In addition to the trauma suffered by families of former child soldiers, Dr Schauer explained that "psychological exposure and suffering from trauma can cripple individuals and families even into the next generations. After having experienced organized violence, affected parents can leave an imprint in their grandchildren's generation".¹⁴⁵

Transgenerational harm

¹⁴¹ NGO roundtable organized by the experts [REDACTED] TFCV Observations relevant to Reparations, *supra* note 80.

¹⁴² *Lubanga* Filing on Reparations and Draft Implementation Plan, *supra* note 115, para. 296.

¹⁴³ Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, "Order for Reparations (amended)", 3 March 2015, ICC-01/04-01/06-3129-AnxA ("Lubanga Amended Reparations Order"); *Lubanga* Filing on Reparations and Draft Implementation Plan, *supra* note 115, para. 294.

¹⁴⁴ *Lubanga* Filing on Reparations and Draft Implementation Plan, *supra* note 115., para. 295.

¹⁴⁵ *Lubanga* Elisabeth Schauer Report, *supra* note 120, p. 25; *Lubanga* Decision on Sentence, *supra* note 124, para. 41.

111. The Experts submit that the transgenerational harm must be taken into account when assessing the harm in the case of former child soldiers.¹⁴⁶ As explained by their legal representative, this is particularly true as the crimes have been committed 18 years ago and will be even more by the time of the implementation of reparations.¹⁴⁷ Dr Elisabeth Schauer clearly defined the cascading impact from each direct victim onto their relatives who became indirect victims of the events.¹⁴⁸ In a nutshell, transgenerational harm is “a phenomenon, whereby social violence is passed on from ascendants to descendants with traumatic consequences for the latter”, as recognized by the Court.¹⁴⁹
112. Consultation in Ituri organised by the Trust Fund for Victims also highlighted that “lower social status is particularly harmful for children and adolescents, who are at a life stage where support from their community is particularly influential in shaping their long-term adult trajectories, including the social support that will be afforded to (or withheld from) their own children. In other words, the negative psychological impact of having been a child soldier may have repercussions into the next generation.”¹⁵⁰
113. In the Experts’ view, specific attention needs to be given to children of former child soldiers: their specific harm should also been recognized and open the way to reparations.¹⁵¹ First, all children suffered the consequences of the direct harms suffered by their parents and families. They often are left to themselves, as their parents cannot take care of them either, making them more vulnerable to criminality and even the possibility of being conscripted and enlisted in actual armed groups as

¹⁴⁶ See also section 2.5 and Gilmore Expert Report.

¹⁴⁷ Submissions on behalf of Former Child Soldiers, *supra* note 119, para. 47.

¹⁴⁸ “She underlined the existence of an intergenerational cycle of dysfunction that traumatised parents set in motion, with a transgenerational handing-down of trauma owing to the fact that violent and neglectful caretaker-models deform the psyche and can also impact on the next generation. Traumatized parents, who leave in constant and unresolved fear, unconsciously adopt a frightening behaviour. This affects the child’s emotional behaviour, attachment and well-being, increasing the risk that they will suffer post-traumatic stress disorder, mood disorders and anxiety issues”; *ibid.*, para. 48; Lubanga Elisabeth Schauer Report, *supra* note 120, p. 25.

¹⁴⁹ Trial Chamber II, *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-tENG (“*Katanga* Decision on Transgenerational Harm”), para. 10.

¹⁵⁰ Lubanga Filing on Reparations and Draft Implementation Plan, *supra* note 115, para. 277.

¹⁵¹ See also *infra* Section 3.4.

well.¹⁵² Second, children born out of rape are often rejected by their mothers, as they remind them of the rape and of her former life as a child soldier. But, like their mothers who are stigmatised for having been raped, these children born while their mothers were child soldiers and were born out of rape, are stigmatized as well.¹⁵³ They are rejected by their family and community, often called with the nick name of “snake children”. The vast majority are not registered, do not have legal status, and therefore do not have Congolese nationality and are considered as foreigners, which in itself can be very discriminatory given the importance of ethnicity in Ituri. Rejected, they are neglected, abandoned, malnourished, with no or limited access to health care, and they receive no education. Children born of these rapes can also be considered a danger to the future of society. When rejected by their mothers and their family, some of these children live with the militia at risk of becoming child soldiers. Children born out of rape may also be orphaned, when their mother died from disease including HIV or were HIV positive themselves and did not receive Antiretroviral Therapy, without the possibility to access treatment. Their whole life is impacted by these crimes.¹⁵⁴

114. Taking into account rule 85.a of the Rule of Procedure and Evidence, the Trial Chamber in the *Lubanga* case also recalled that where an indirect victim intervenes to prevent one of the crimes alleged against the accused, the loss, injury or damage suffered by the person intervening may be sufficiently linked to the direct victim’s harm by the attempt to prevent the child from being further harmed as a result of a relevant crime.¹⁵⁵

¹⁵² NGO roundtable organized by the experts [REDACTED]; experts interview with member of the Common Legal Representative 1 (CLR 1) team; VPRS field office staff; TFV Observations relevant to Reparations, *supra* note 80.

¹⁵³ Sentencing Judgment, *supra* note 63, para. 113.

¹⁵⁴ NGO roundtable organized by the experts [REDACTED] experts interview with member of the Common Legal Representative 1 (CLR 1) team; VPRS field office staff; Sentencing Judgment, *supra* note 63, para. 113; *Lubanga* Elisabeth Schauer Report, *supra* note 120, p. 25. See also Macherie Ekwe and National Movement of Survivors of Sexual Violence in DRC, *SEMA* movie, 2020, <https://youtu.be/prHyALts56YL>; Saskia Violette, *Le destin des enfants serpents du Congo, un éternel combat*, RTBF, 2018, Louis Guinamard, *Survivantes*, Ed de l’Atelier, 2010. TFV Observations relevant to Reparations, *supra* note 80.

¹⁵⁵ *Lubanga* Amended Reparations Order, *supra* note 143, para. 190.

2.5.3. Summary

115. Having in mind the similarities between this case and the *Lubanga* case which have been recognized by all parties and ICC organs in these reparation proceedings,¹⁵⁶ the Experts submit, as a minimum, that the same types of harms as identified by the Appeal Chamber in the *Lubanga* case are present in this case.¹⁵⁷ In addition, the Experts propose to expand this list of harms to better reflect the reality of the harms suffered as a result of the crimes of conscription, enlistment and use of child soldiers to participate actively in hostilities, as follows (expansions in bold):

Harm suffered by direct victims:

- i. Physical injury¹⁵⁸ and trauma;
- ii. Psychological trauma and the development of psychological disorders, such as, inter alia, suicidal tendencies, depression, and dissociative behaviour;
- iii. Interruption and loss of schooling;
- iv. Separation from families;
- v. **Loss of childhood and loss of Life Plan;**
- vi. Exposure to an environment of violence and fear;
- vii. **Material harm;**
- viii. Difficulties socialising within their families and communities, including **stigmatization;**
- ix. Difficulties in controlling aggressive impulses; and
- x. Non-development of “civilian life skills” resulting in the victim being at a disadvantage, particularly as regards employment.

Harm suffered by indirect victims:

- i. Psychological suffering **and medical disease** experienced as a result of the sudden loss of a family member;
- ii. Material deprivation that accompanies the loss of the family member’s contributions;

¹⁵⁶ See in particular Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, “Public Redacted Version of ‘Defence Submissions on Reparations’”, 28 February 2020, ICC-01/04-02/06-2479”, 6 March 2020, ICC-01/04-02/06-2479-Red (“Defence Submissions on Reparations”), para. 60; Submissions on behalf of Former Child Soldiers, *supra* note 119, para. 41.

¹⁵⁷ See also Submissions on behalf of Former Child Soldiers, *supra* note 119, paras 40, 45.

¹⁵⁸ This includes diseases and disabilities.

- iii. Loss, injury or damage suffered by the intervening person from attempting to prevent the child from being further harmed as a result of the relevant crime;
- iv. Psychological and material sufferings as a result of the aggressiveness on the part of the former child soldiers being relocated to their families and communities;
- v. **Transgenerational harm: physical and psychological harm suffered by children of former child soldiers and physical, psychological and material harm suffered by children born out of rape.**

SECTION 3 – APPROPRIATE MODALITIES OF REPARATIONS

116. In this Section, the Experts will develop forms and modalities of reparation that will address most meaningfully the harms suffered by the victims in the present case.
117. Before detailing specific forms of reparations for each of the crimes for which Mr. Ntaganda has been convicted, the Experts first address certain general aspects of the reparation process before the Court that are relevant for this case.

3.1. General considerations on modalities and process of reparation

118. One of the major contributions of the ICC Statute has been its innovative development of the rights of victims in international criminal law. For victims of the most serious crimes under international law the right to participate in ICC proceedings and to reparations has been recognized. This reparative mandate is based on the principle that international justice cannot only be retributive but shall also be reparative in order to constitute a more complete, efficient and meaningful justice system. The rights and the role of the victims as part of the criminal justice process are recognized.¹⁵⁹
119. While Art 75 of the ICC Statute provides that the Court shall establish principles relating to reparations including restitution, compensation and rehabilitation, the

¹⁵⁹ See, for example, F. Benedetti, K. Bonneau, J. Washburn, *Negotiating the International Criminal Court, New York to Rome, 1995 1998*, (Leiden, Nijhoff, 2014); M. Cohen, *Realizing Reparative Justice for International Crimes from Theory to Practice*, (Cambridge, Cambridge University Press, 2020); C. Ferstman, M. Goetz, S. Alan, *Reparations for Victims of Genocide Crimes against Humanity and War Crimes, System in Place and System in the making*, 2nd Ed., (Leiden, Nijhoff, 2020); R. Lee (ed.) *The International Criminal Court the Making of the Rome Statute: Issues, Negotiations, Results*, (The Hague, Boston, Kluwer Law International, 1999); G. Bitti and G. Gonzalez Rivas, "Reparations Provisions for Victims under the Rome Statute of the International Criminal Court", in *Redressing Injustice through Mass Claims*, International Bureau of the Permanent Court of Arbitration, (Oxford, Oxford University Press, 2006), pp. 299-322.

travaux préparatoires give more content to the concept of reparation and its process of implementation. It states that both “victims” and “reparations” should be defined in accordance with the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power (GA Res 40/34 of 29 November 1985) and the examples of paragraphs 12 to 15 of the Draft (at that time) Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of International Human Rights Law and International Humanitarian Law, which correspond to Principles 19 to 23 of the Basic Principles and Guidelines which include restitution, compensation, rehabilitation and satisfaction.¹⁶⁰ In international law and national justice systems, the objective of reparation in principle is *restitutio in integrum*, “restoring the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred.”¹⁶¹

120. The case law of the ICC has been diverse in this respect. The right to reparation, in its substance and its process, has been defined differently in the cases against Thomas Lubanga, Germain Katanga, Ahmad Al Faqi Al Mahdi, Bosco Ntaganda, and to some extent Jean-Pierre Bemba (even if the reparation process came to an early end due to Mr. Bemba’s acquittal). The Experts suggest some basic principles that should be applied in the present case, and which should also help to strengthen and clarify future reparation procedures at the ICC.
121. To start with, given the gravity of the crimes, the time elapsed since they were committed in 2002 and 2003, which means that these crimes still impact today the next generation (the children of the former child soldiers, the children of the child victims), and the persistence of insecurity and conflict in Ituri, it is true that victims cannot be brought back to their original situation before the crimes were committed, and therefore that complete reparation (*restitutio in integrum*) is not possible.¹⁶²
122. That being said, reparations, in the case of large scale, massive serious crimes, imply the recognition of the harm done, of the victims and of the responsibility of the

¹⁶⁰ See, for instance, F. Benedetti, K. Bonneau, J. Washburn, *supra* note 159, p. 158.

¹⁶¹ UN Basic Principles, *supra* note 11, Principle 19.

¹⁶² See *ibid.*; Permanent Court of International Justice, *Chorzow Factory* (Merits) (Germany v. Poland), 13 September 1928, Series A, no. 17, 47; P. De Greiff, “Justice and Reparations”, in *Reparations: Interdisciplinary Inquiries*, J. Miller and R. Kumar (eds.), (Oxford, New York, Oxford University Press, 2007), pp. 153-175.

perpetrators, and deal with the consequences of the crimes in the victims' life, addressing victims' needs in order to repair *their* harm. "Measures [of reparation] should be aimed at restoring the rights that were violated, helping to deal with the consequences of the violations, and promoting social reintegration".¹⁶³

123. As the experts in *Bemba* stated,¹⁶⁴

"[i]nstead, reparation is better conceptualized and communicated to victims as the acknowledgment by the international community of the harms they suffered and, where the convicted perpetrator willingly participates, recognition by the perpetrator of responsibility for those harms. [In this way,] the Court can establish conditions that will make the fulfilment of its reparations mandate more realistic. Laying this down as a principle can contribute to managing the expectations of victims. It may also help avoid irresolvable debates over what amount of money would be the equivalent of certain harms".

The Experts share this view.

124. But the following statement in the expert report in *Bemba* is equally pertinent.

"The Court should convey to victims and to other stakeholders in this and future reparations proceedings that reparations are meant principally to acknowledge the harm suffered by victims, rather than to restore the victims to their prior situation and, for the convicted person, to recognize responsibility for that harm. Having said that, the Experts also consider it important for the

¹⁶³ C. Berstain, *Acompañar los Procesos con las Víctimas : Atención Psicosocial en las Violaciones de Derechos Humanos* (Programa Promoción de la Convivencia, 2012), p. 84.

¹⁶⁴ Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, "Expert Report on Reparation", 20 November 2017, ICC-01/05-01/08-3575-Corr2-Red ("Bemba Expert Report on Reparation"), para. 139. For their recommendations of reparations for victims of the attacks, the Experts in the present case found the findings and recommendations in the expert report in *Bemba* relevant. The Experts are mindful of the differences in the populations and communities concerned, the ethnic dimensions of the conflict and the aims of the attacks led by Mr. Ntaganda, as well as cultural and political conditions that influenced the crimes and their circumstances. Nevertheless, there are significant similarities in the crimes committed, the harms suffered and the reparations sought by victims of the attacks in the *Bemba* and *Ntaganda* cases. In both, the main crimes committed against this category of victims were murder, rape and pillage, accompanied by or resulting in displacements and often separation of families. It is not surprising then that the harms these victims suffered as a result of these crimes were also similar. What is more, victims of Mr. Ntaganda live in similarly precarious conditions, and they have sought the same types of reparations as those sought by victims in *Bemba*. The numbers of potential beneficiaries are relatively large in both cases, and in *Ntaganda* reparations will have to be implemented in a security environment that is as volatile as the one in the Central African Republic.

Court to attempt to materially repair the harm done to victims and in doing so, find ways to help transform the social and economic circumstances of their community or society so as to ensure both their livelihood and wellbeing. This is particularly important with respect to those harms that are of such nature that if they are not addressed urgently or in the appropriate manner, can lead to even more serious or permanent harm”.¹⁶⁵

125. In other words, “by characterizing reparations as acknowledgement of harm and recognition of responsibility rather than reinforcing the view that reparations should restore victims to their prior situation, the Court can establish conditions that will make the fulfilment of its reparations mandate more realistic”.¹⁶⁶
126. It is the Experts’ opinion that the condition for achieving these objectives of reparation is to conduct a meaningful consultation process. This will be elaborated in the following section.

3.1.1. Reparation to be delivered through a mandatory and meaningful consultation process

127. The Experts submit that the Chamber in this case, and other chambers in the future, should endorse and implement the principle established in *Katanga* that “it is paramount (...) to heed the expectations and needs voiced by the victims in the various consultation exercises” for the purpose of reparation as well.¹⁶⁷
128. Carlos Beristain explains that
- “[r]eparation from a legal perspective includes a number of rights. But from the practical and psychosocial point of view, what is also important is that it be carried out in a manner consistent with their meaning and that compliance be effective for the victims, reparation should be the most tangible manifestation of the (...) efforts to remedy the harm they have suffered.”¹⁶⁸
129. As already mentioned in the Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed

¹⁶⁵ *Bemba* Expert Report on Reparation, *supra* note 164, paras 142-143.

¹⁶⁶ *Ibid*, para. 140.

¹⁶⁷ *Katanga* Reparations Order, *supra* note 40, para. 266.

¹⁶⁸ Beristain, *supra* note 163.

within the territory of the Democratic Republic of the Congo between March 1993 and June 2003 August 2010, published 10 years ago, it is worth reminding that:

"As reparations have a greater impact on victims than any other transitional justice measure, a consultation process must be undertaken before any initiative is begun in this area. As a victims' representative reminded us using Gandhi's words: "Everything you're doing for me, without me, is done against me (...)" Consultation of victims should at a minimum cover the most important issues linked to reparations: the scope of application of any reparation programme, the types of reparations to be granted, procedures for carrying out the programme and the utility of an emergency programme. Such a programme should in any case bring together the rights of victims and the obligations (...) on the one hand, and the expectations of victims and the severe budgetary restrictions (...) on the other".¹⁶⁹

As full reparations are not possible and harms are so intimate, deep and with transgenerational impact on the daily lives of Mr. Ntaganda's victims over the last twenty years and will be for years to come, reparation proceedings might have a positive effect only and if victims feel part of it and feel to be effectively heard, which means they also know exactly the scope of the ICC's mandate and its limitations.

"In order to have a positive impact, care must be taken with the compliance process and the criteria for how the reparation is made effective. The process of recovery does not occur only through the measure, but through the process of participation and adaptation of that measure to the needs of the victims. In other words, the what (measure) is just as important as the how it is carried out".¹⁷⁰

130. As victims have rights under the ICC system, they are not only resources or beneficiaries. And to effectively exercise their right to reparation, they need to be granted the means to do it. As Pablo de Greiff, at the time UN Special Rapporteur for the Promotion of Truth, Justice, Reparation and Guarantee of Non Repetition, explained: "

¹⁶⁹ UN Mapping Report, *supra* note 62, paras 1098-1099.

¹⁷⁰ Beristain, *supra* note 163, p.88.

It is crucial to keep in mind, however, that victims are not merely resources for transitional justice processes. The legitimacy argument in favour of victim participation rests on the premise that participation in itself is a positive experience for victims, which in turn has the potential to support the sustainability of transitional justice measures. Participation provides a measure of recognition to victims not only as victims but as rights holders (...). In addition, participation opens up space for victims in the public sphere, a space that has often been denied to them.”¹⁷¹

131. The process of obtaining reparations should itself be empowering and transformative, giving to victims the opportunity to assume a proactive role in obtaining reparations. The UN Guidance Note on reparations for Conflict-related Sexual Violence eloquently states that “participation of and consultations, with victims will ensure that reparations have the intended impact, are perceived as such, and that there is ownership of the process. This is also important to ensure that reparations are accessible and that they do not exclude or marginalize any group of victims”.¹⁷²
132. Meaningful participation and consultation of victims should be included in the different steps of the procedure of reparation: mapping, design, implementation, monitoring and evaluation. Consultation of victims at every stage of the reparation process will enable to define the process itself, through focus group, individual interview or group interview. Victims will be empowered to understand and explain what could be and could not be reparation. Adhering to the process will legitimize it. By giving victims a voice to define what measure will effectively repair their harm, will start the reparative process, and who else apart from them can truly know it? Victims consultation will be able to organise the implementation, considering security conditions, interaction between different groups and ethnicities. It will also contribute to managing the expectations of victims, help to answer the debates over what amount of money would be the equivalent of the harms, and make sure that

¹⁷¹ The UN Special Rapporteur on the Promotion of Truth Justice, Reparation, and Guarantees of Non-repetition, Report on Victim Participation in Transitional Justice Measures, A/HRC/34/62, 2016, para. 81.

¹⁷² UN Guidance Note, supra note 74, p. 10.

reparations are correctly implemented (in time and manner) reaching their real objective. It would be a gage of sustainability for the measures put in place.¹⁷³

133. “Victim participation in reparation programmes is not possible without effective outreach, information and access. Strategies need to be designed in order to overcome cleavages related to differences between urban and rural populations, indigenous and other cultural and ethnic groups, linguistic factors and literacy rates. No matter how neat a blue print for reparation might be, it is unlikely that a reparation programme can fulfil its fundamental aim of providing recognition and fostering civic trust if it is simply foisted on victims.
134. Victim participation can help increase the “fit between the benefits on offer and the expectations of victims. Regarding symbolic reparations, both individual and collective, the benefits cannot fail to speak to their intended targets, among others, on pain of the message floundering completely”.¹⁷⁴
135. The Court should design the different steps of the process of reparation before its start. This would include meaningful consultation of victims in all its different phases. An inclusive consultation process will in the present case help identify the priorities and shape the programme in line with the actual situation on the ground in the DRC, while also respecting the right to the defence.¹⁷⁵
136. The Experts propose the following principles to organise meaningful consultation with victims, including victims of sexual violence: Raising awareness about the right to reparation and outreach to ensure victims are aware of their rights and of the processes taking place to deal with their harm, through focus group, individually and collectively, about their rights and the proceedings and means that victims, literate or not, can understand and relate to and in a culturally appropriate manner. It is important to keep in mind that the lack of information helps to spread rumours and misunderstandings which are creating expectations and tensions including between communities. From the interviews the Experts had with victims it became clear that

¹⁷³ See also the UN Special Rapporteur on the Promotion of Truth Justice, Reparation, and Guarantees of Non-repetition, Report on Victim Participation in Transitional Justice Measures, A/HRC/34/62, 2016, paras 81-83.

¹⁷⁴ Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, Report on Reparation, A/69/518, 14 October 2014 (“Report on Reparation”), paras 76-77.

¹⁷⁵ UN Mapping Report, *supra* note 62, para. 1104. See also REDRESS Trust, “No Time To Wait: Realizing Reparation for Victims before the International Criminal Court”, January 2019.

they have little or no knowledge of either the definition and potential meaning of reparation or the different steps of the process.

137. Some focus group should also be organised with [REDACTED] to agree on the process, avoid stigmatisation and encourage social cohesion. The Court should conduct parallel consultations for former child soldiers and victims of the attacks, with a specific gender component to facilitate the participation of victims of conflict-related sexual violence.
138. Ensure confidentiality and security. The Court should consult with victims ensuring their security and protection. It should identify location and means that will ensure that victims do not feel at risk to speak. With the hero's return of Thomas Lubanga in Ituri, the pressure on former child soldiers to withdraw or not to proceed with the reparation process might intensify. Such a situation already happened in the past, where some UPC members disrupted a meeting that was taking place with former child soldiers. Consultations need to take place in confined and secure area that no one can freely access.
139. Do no harm and respect. The Court should take measures which do not harm victims, do not create further stigmatisation or re-victimization. Victims should be able to receive psychosocial support during or after interview and group consultations as this process could revive trauma and psychological disorder. This does not mean psychologists for all victims that the ICC does not have the capacity to organise but, but also some forms of mutual support or active listening. Stereotypes on victims also often imply that victims are considered as the ones who are always demanding too much and do not know the 'reality' of what is, or is not, possible in terms of reparation. This approach needs to be reversed. Victims need to be listened and considered with respect, as the persons who know more than anyone else their situation and their needs and the best way to repair their harms, who know what reparation is possible and useful, also in particular as they would have received the necessary information about their rights and the Trust Fund of Victims' financial limitations.¹⁷⁶

¹⁷⁶ See also Beristain, *supra* note 163, pp. 49-50.

140. Access to victims. Working with victims requires regular contact with victims, including through a field presence. Should budgetary constraints limit travel of victims' legal representatives [REDACTED] victims consultation would be organised with field members of the victims legal representative teams. The security context and the different pandemics (COVID-19, Ebola) have already affected the way the Court interacts with victims in this case, with impossibilities to conduct field missions and to directly meet with victims. However, creative ways to organise direct consultation, including through intermediaries and in some cases with the involvement of NGOs working with victims or [REDACTED] without substituting the ICC mandate and role. This consultation process towards the implementation of the victims' rights to reparation would not only be in conformity with existing international standards,¹⁷⁷ but would also ensure a meaningful process and give more sense and value to reparation decided and implemented.

3.1.2. Considerations specific to victims of crimes of sexual violence

141. This will be the first time that the ICC will order reparation to victims of rape and sexual slavery, and the first time also that Congolese victims of such crimes will actually benefit from judicial reparation. The Experts believe that the Court should acknowledge this as an opportunity to recognize the profound stigmatisation of victims. Stigma of victims of sexual violence is also related to the status of women in DRC society.¹⁷⁸ Like the Experts in the *Bemba* case, the Experts in the present case consider that the Chamber's decision on reparations for victims of rape and sexual slavery will constitute a historic opportunity to a) make visible all the harms the victims have suffered; b) deliver satisfaction as a form of redress to victims, given that the Court would fully acknowledge the harms they have endured; and c) provide victims with other forms of reparation that could make a significant reparative difference in their own lives, those of their families and communities, having an impact perhaps even more broadly in the DRC society as a whole.

¹⁷⁷ See the Registry's Observations on Reparations, *supra* note 31, para. 6.

¹⁷⁸ See UN Mapping Report, *supra* note 62, para. 533.

142. The Experts encourage the Court to take its inspiration from the last decade of significant developments,¹⁷⁹ of the better understanding and acknowledgement of harm resulting from the practice of rape as a weapon of war, used at direct and indirect victims including against the community to destroy and dismantle them, and of the proposed framework and methodology to implement comprehensive and meaningful reparations. As these harms are multiform and transgenerational with long term-effect anchored in the society, reparation should also satisfy the variety of needs, individual and collective.
143. Considering the specific nature of crimes of sexual violence, and after the specific expression of interests of the Trust Fund for Victims in particular, the Chamber invited the experts to address the modalities of engagement with victims of such crimes.¹⁸⁰
144. The Experts first reiterate that meaningful consultation of victims at an early stage and during all stages of the reparation process, as explained in the above section, should apply entirely to victims of sexual violence.¹⁸¹ This is reaffirmed by the UN Guidance Note on Reparations for Conflict-related Sexual Violence which stress the importance of consultation of victims of conflict-related sexual violence in the design and implementation of reparations, and in particular:
- the need to involve and consult victims of such crimes at every key step of the reparations procedure with the provision of adequate information through accessible means; to conduct a participatory assessment that is sensitive to specific issues related

¹⁷⁹ Refer in particular to the UN Guidance Note, *supra* note 76; the Office of the Special Representative of the Secretary General on Sexual Violence in Conflict; the African Commission for Human and People's Rights, Guidelines on Combating Sexual Violence and its Consequences in Africa, 2017; Nairobi Declaration on Women's and Girls' right to a Remedy and Reparation ("Nairobi Declaration"), 19- 21 March 2007; Report on Reparation, *supra* note 171; the General Comment on the Right to Health and the General Comment on the Right to Sexual and Reproductive Health of the UN Committee on Economic, Social and Cultural Rights ("CESCR") Committee on Economic, Social and Cultural Rights, General Comment N. 14 (2000), *The Right to the Highest Attainable Standard of Health* (Article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2000/4, 11 August 2000 ("CESCR Committee, General Comment N. 14"); and General Comment N. 22 (2016) on the Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/22, 2 May 2016, the General Recommendation on women in conflict prevention, conflict and post-conflict situations of the Committee on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), Committee on the Elimination of Discrimination against Women, General Recommendation N. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations, CEDAW/C/GC/30, 1 November 2013.

¹⁸⁰ Decision Appointing Experts, *supra* note 2, para. 14. Trust Fund for Victims Observation on Reparation, expressing interest in the Experts addressing "modalities of engagement with such victims, including victims' identification and verification procedures, considering their potential reluctance to come forward"; TFV Observations relevant to Reparations, *supra* note 80, para. 141.

¹⁸¹ See *supra* Section 3.1.1.

to gender, age and cultural diversity among others; to take into account large numbers of obstacles that prevent female and male victims of sexual violence from being involved and benefitting, while addressing bias and stigma; to recognise indirect victims, such as family members, children or partners, and children born as a result of pregnancy from rape; to not further stigmatise or traumatise; and to tailor rules accordingly, allowing for flexible procedures and evidentiary standards.¹⁸²

145. Victims of sexual violence, because of the long term and multiple traumas combined with stigma, may require a most comprehensive approach, in order to do no harm and enable full expression. As survivors in various localities know each other, it is firstly important to work at the survivors level and with the ones who are the closest to them, [REDACTED] medical centers, the ones who know and understand their realities and with whom they will interact in confidence and trust.
146. This approach would combat the common but wrong assumption that victims of sexual violence will not come forward, will not identify themselves for the purpose of accountability or reparations (privately and publicly) and the tendency to infantilize victims.¹⁸³ Good practices show that will do it as much as the process is designed for that purpose. Creating safe space and implementing specific training on the Do Not Harm approach will be the minimum standard for any persons interacting with such victims.
147. In the DRC in particular, there are very experienced local NGOs working on a daily basis with victims of sexual violence, including in the most remote areas. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

¹⁸² UN Guidance Note, *supra* note 76. See also, for instance, the Nairobi Declaration, *supra* note 179.

¹⁸³ In an Experts meeting on accountability and reparation for sexual and gender-based violence at the ICC and in other proceedings, “participants cautioned against the perception that victims of SGBV are necessarily more vulnerable or hesitant to tell their story. Assumptions among investigators that victims do not want to speak about SGBV or testify, often turn into a self-fulfilling prophecy (...) While it is important to recognise the impact of the stigma and trauma associated with sexual violence, there is a risk of infantilizing victims of SGBV or treating them paternalistically. Participants felt strongly that victims of sexual violence are not inherently less capable of making informed decisions about speaking to investigators than equally vulnerable victims of other crimes and that well-intended efforts to avoid re-traumatisation have the potential to inadvertently exacerbate both the stigma and side-lining of these crimes”, in: FIDH Report, “Unheard, Unaccounted: Towards Accountability for Sexual and Gender-Based Violence at the ICC and Beyond”, 2018, pp. 34-35.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁸⁴ [REDACTED]

[REDACTED]

[REDACTED]¹⁸⁵

148. On the contrary, designing and implementing reparation programmes without proper engagement and consultation of victims of sexual violence will in turn result in inadequate programming which does not include the right stakeholder and leads to further exclusion, and the implementation of a reparation process which is not transformative but even more harmful.

3.1.3. Individual and collective reparations

149. From the different mechanisms of transitional justice, “reparations are the only measure designed to benefit victims directly. Reparations constitute an effort that is explicitly and primarily carried out on behalf of victims.”¹⁸⁶ As stated by the former UN Special Rapporteur on the Right to Truth, Justice and Reparation: “The term ‘collective reparation’ is ambiguous, as ‘collective’ refers to both the nature of the reparation (i.e. the types of goods distributed or the mode of distributing them) and the kind of recipient of such reparation (i.e., collectivities)”.¹⁸⁷ Reparations in their complexity and specificity really need to address victims’ rights and needs, and therefore so-called collective reparation may also include individual reparative measures. Complementary, individual and collective reparations serve different purposes, and therefore “collective reparations are not a substitute for individual reparations”.¹⁸⁸

¹⁸⁴ See <https://mouvement-survivantes-rdc>. The National Movement in DRC is part of the international survivors movement called the SEMA Network.

¹⁸⁵ See Report of the Secretary General to the Security Council on Conflict-related Sexual Violence, S/2020/487, 3 June 2020.

¹⁸⁶ Report on Reparation, *supra* note 174, para. 10.

¹⁸⁷ *Ibid*, para. 38.

¹⁸⁸ UN Guidance Note, *supra* note 76, p. 7.

150. In the DRC, as explained in the UN Mapping Report, the acceptance of collective reparation is not always an easy task and a creative approach may be needed to make sure that reparations have the expected impact on the victims' life:

"The principle of collective reparations is, however, highly controversial, on the basis that if they are material, their reparative nature is not always very clear. Clearly, a programme of collective reparations would not satisfy victims who are seeking individual reparations. Transparent information and the involvement of NGOs and local authorities should help to communicate the thinking behind collective measures. In order to manage the victims very high expectations, certain kinds of individual reparations should be envisaged and discussed with the communities for the direct victims of serious bodily injury (...) A comprehensive and creative approach to the issue of reparation is clearly required. All the victims of serious violations of human rights and international humanitarian law are entitled to some form of reparation. Even if it seems as though collective reparation is easier to implement, individual reparation must nevertheless be considered in some cases, particularly those in which the consequences of the violations continue to have a major impact on the lives of victims. Some victims will continue to seek reparation via legal channels, but this will not be the case for the vast majority of victims who, without the establishment of a purpose-built mechanism, will never be able to access the reparations they are owed."¹⁸⁹

151. Once again, the Experts recommend to follow the *Katanga* principles which, in addition to organise consultations with victims, decided, on the basis of those consultations with victims, to refrain from issuing measures as part of the Reparation Order that victims do not favour: "On consultation, the victims specifically rejected certain modalities, such as commemorative events, broadcasts of the trial, the erection of monuments or the tracing of missing persons", and on the contrary sought awarding "collective reparations designed to benefit each victim, in the form

¹⁸⁹ UN Mapping Report, *supra* note 62, paras 1107, 1110, 1125.

of support for housing, support for an income-generating activity, support for education and psychological support”.¹⁹⁰

152. It is important to first acknowledge that victims of Mr. Ntaganda have been living in extreme conditions, without any support, including from any assistance programme of the Trust Fund for Victims since the crimes have been committed. But they know how to manage the little they have been living with during all these years and how precious and vital livelihoods are.
153. Rather than engaging in the sometimes overly dogmatic and theoretical debate about the distinction between collective and individual reparations, the Experts recommend to focus on the concrete measures that are the most appropriate for the victims of Mr. Ntaganda.¹⁹¹ It became clear from the Experts’ interviews with victims and organisations working with victims, that victims do not expect a large amount of money and are more aware than anyone that they cannot be restored to their prior situation.¹⁹² Victims have stressed that they need some packages which would include, depending on their harm, a certain amount of money, some livelihood support, access to education, medical and psychological support and a campaign against stigmatisation of former child soldiers and victims of gender-based crimes, in particular.¹⁹³ Again, no one else knows better than they themselves what they need and what reparation shall and shall not be.

¹⁹⁰ *Katanga* Reparations Order, *supra* note 40, paras 301-302.

¹⁹¹ For a recent comprehensive study in this area cf. D. Odier-Contreras Garduno, “Collective Reparations: Tensions and Dilemmas Between Collective Reparations with the Individual Right to Receive Reparations, Intersentia”, 84 *Human Rights Research Series*; in particular Chapter IV (“Collective Reparations in International Criminal Law”). A concise summary of key considerations apposite also to the present case is contained in the Observations of the REDRESS Fund in the *Bemba* case, which have been summarized by REDRESS as follows: “As REDRESS noted in its *Bemba* submissions, there may be particular contexts in which individual awards are more appropriate even for large numbers of victims, including when victims do not perceive their suffering as collective; where the relevant harms are clear and quantifiable; when the victims have moved from the locations where the harm took place and would not be able to access collective reparation; or where collective reparation programmes in the particular context reinforce stigma (though this can be problematic for individual reparations programmes as well). Collective awards may be more appropriate in situations of clear violations of collective rights; or to address the individualised harm of a large number of persons; or when it is the best way to remedy the harm (for example, to provide treatment facilities for victims); or when memorialisation (or other forms of satisfaction) and guarantees of non-repetition are what the victims really want” (footnotes omitted). REDRESS, “No Time to Wait: Realising Reparations for Victims before the International Criminal Court”, *supra* note 175, page 55.

¹⁹² Like in other comparable contexts, victims here have, however, expressed a preference for at least a reasonable sum of money. For more details, see *infra* section 3.3.3.

¹⁹³ For reactions of beneficiaries to a similar form of reparations awarded in the *Katanga* case, see M. Goetz, Victims Experiences of the International Criminal Court, *infra* note 229, at 442: “The idea of receiving collective

3.1.4. Implementing reparations in the DRC

154. In DRC, victims of crimes under international law never received reparation. But solidarity mechanisms exist that victims could use to benefit from financial reparation.

Reparations in the DRC

155. From the widespread and systematic crimes committed in the DRC, only a tiny minority has been prosecuted. Although victims may be entitled to receive some form of compensation, in none of these cases reparations have effectively implemented. Victims cannot pay the high fees called "*droits compensatoires*" which are proportional to the amount of the compensation awarded and must be paid to receive this compensation. Other legal and practical hurdles make it impossible for victims to exercise this right. In one emblematic case, reparation has been implemented by the United Nations directly.¹⁹⁴
156. The Experts have taken note of recent commitments made by the Government, in particular the Minister for Human Rights and the Special Advisor to the President on Violence against Women, including to set up a Reparation Fund and transitional justice mechanisms. The Experts encourage this new approach and encourage a constructive dialogue between the Government and the ICC government to effectively work in synergy towards the implementation of the reparation due to victims in this present case, and in the other cases related to the situation in the DRC.
157. However, even in the absence of a reparative mechanism, existing solidarity mechanisms may be very helpful in the implementation of a reparation package and in particular of financial reparation.

service-based benefits *in addition* to the so-called 'symbolic' lump sum seemed much more palatable. There was much enthusiasm for the cash reparations on behalf of the victims. As put by a legal representative: They were very satisfied. What was more surprising is what they had done with the money. As a majority, the money was used to pay school fees, or arrears of school fees. Some families invested the money and used the capital to make a profit".

¹⁹⁴ See FIDH Report, "Victims of Sexual Crimes rarely get Justice and never Get Reparations", 2013 ; Avocats sans Frontières, "La Réparation des Crimes Internationaux en Droit Congolais", 2014 ; Trial and others, "L'urgence pour la RDC de solder sa dette envers les victimes de crime de masse et revoir sa politique de réparation", October 2020; UN Secretary-General on Sexual Violence in Conflict, A/67/792-S/2013/149, 14/03/2013, para. 116 ; Report of the Panel on Remedies and Reparations for Victims of Sexual Violence in the Democratic Republic of Congo to the High Commissioner for Human Rights, 2011.

Solidarity mechanisms to implement financial reparation

158. In the DRC, forms of cooperatives have been successfully organised in solidarity funds called “Mutuelle de solidarité” (MUSO) or AVEC, for instance. These are designed to support economic reintegration and / or cohesion of the group. They are managed by a coordinator from within the group and aim at saving and managing the funds contributed by the members, thereby creating solidarity between the members of the group.¹⁹⁵ These entities have proven a real success in the DRC and should be closely looked at by the Trust Fund, in order to put in place sustainable reparation mechanisms, supporting meaningful and transformative reparation.

3.2. Urgent reparations on a priority basis

159. In its decision appointing the experts, the Trial Chamber noted that: “Based on the experience in other reparations proceedings before the Court, it may be useful for the Experts to consider addressing, inter alia, the following issues: the types of harm that should be remedied on a priority basis, if any”.¹⁹⁶ In the *Lubanga* case, the Trial

¹⁹⁵ MUSO is an entity bringing together members of a community based on a simple idea: pooling their savings in order to finance projects and help each other. MUSO is organized around three boxes, whose usefulness is symbolized by 3 colors: green, red and blue. - The green box: The green box is the old age insurance box. The members contribute uniformly and regularly an amount determined at the general assembly. The money contributed is then distributed equitably in credits among the members who have requested it. The latter repay their credit with a participation in the costs (“PAF”), in order to allow the group to benefit from the profits of the income-generating activity (“AGR”) carried out thanks to the credit. Thus, the resources of the green fund are constantly increasing. The interest of the green fund for members is twofold: to have funds to work while they have the strength to do so, and then to withdraw them in old age so that they do not depend solely on their families. The contribution to this fund is therefore recoverable, for this purpose, each contribution paid by a member is noted in his individual contribution book. - The red box: The red box has been nicknamed by the MUSO the “red eye box”, which can express great happiness as well as great misfortune. The red box is the solidarity box. The members contribute uniformly and regularly an amount determined at the general assembly. The money contributed is then used to help or rescue one or more members in the event of a serious or joyful event. It is up to the members to determine the cases in which they wish to express their solidarity through symbolic financial assistance. The contribution to the red fund is not recoverable, which is why we advise the MUSOs to start working with the green fund before setting up the red fund, in order to avoid individuals who seek only to benefit from the spirit of solidarity of a group. - The blue box: The blue box is the box for relations with the outside world. Thanks to this caisse, members have the possibility of receiving outside financing or depositing money to make a group purchase. This caisse allows members to transfer money that is not their own from outside the group to the green caisse, or money that they have pooled together to the outside. The AVEC fund does not include the same solidarity mechanisms focusing on economic reintegration and not social solidarity. H. Masheka, “Fiche pratique pour une Muso, réinsertion, socio économique, Fondation Panzi”. See also for instance, Clinique doctoral d’Aix, “Indemnisation et réparation des victimes de violences sexuelles en RDC”, April 2020, p. 90;

UNDP Notes : <https://www.undp.org/content/undp/en/home/ourwork/ourstories/Rubaya-MuSo.html> , <https://www.cd.undp.org/content/rdc/fr/home/ourwork/povertyreduction/successstories/Rubaya-MuSo.html>,

¹⁹⁶ Decision Appointing Experts, *supra* note 2, para. 11 and n. 34.

Chamber found that “priority may need to be given to certain victims who are in a particularly vulnerable situation or who require urgent assistance.”¹⁹⁷

160. In the present case, the Experts see the need to give priority to victims of rape who are HIV-positive, including HIV-positive children born of rape as well as to the partners of victims of rape who have also been infected with HIV/AIDS. The Experts agree with the experts in the Bemba case who

“also consider[ed] it important for the Court to attempt to materially repair the harm done to victims and in doing so, find ways to help transform the social and economic circumstances of their community or society so as to ensure both their livelihood and wellbeing. This is particularly important with respect to those harms that are of such nature that if they are not addressed urgently or in the appropriate manner, can lead to even more serious or permanent harm. The Experts recommend that the Court provide such urgent reparation measures to avoid permanent damage for HIV-positive victims of sexual violence.”¹⁹⁸

The Experts in the present case embrace this recommendation.¹⁹⁹

161. This is the first case before the Court where victims of sexual violence are scheduled to receive reparations. It presents an opportunity for the Court, not only to ensure that these reparations, like all other reparations ordered by it, will be appropriate and effective, but to accord to these victims the priority that they are owed considering the atrocious character of the crimes as well as their haunting and life-threatening consequences.
162. The Experts recommend that persons who were victims of sexual violence who are HIV-positive should, along with their children who are HIV-positive, receive lifetime

¹⁹⁷ *Lubanga* Amended Reparations Order, *supra* note 143, para. 19.

¹⁹⁸ *Bemba* Expert Report on Reparation, *supra* note 164, para. 143.

¹⁹⁹ To accord particular categories or groups of victims priority is a common feature of claims and reparation programs. In the German Forced Labour Compensation Programme, for instance, older survivors were prioritized over younger heirs/legal successors. Similarly, when it turned out that the funds available for the program were not sufficient to pay all victims, preference was given to victims who had suffered especially serious harms. See N. Wühler, “Additional Program Lines”, in: G. Saathoff, U. Gerlant, F. Mieth, N. Wühler (eds.), *The German Compensation Program for Forced Labor: Practice and Experiences* (2017), pp. 128 ff., at 132. At the United Nations Compensation Commission, individual claimants with smaller losses were given priority over individual claimants with bigger losses, both in the processing of the claims and in their payment. UNCC Governing Council Decision 1 (Criteria for Expedited Processing of Urgent Claims), 2 August 1991, UN Security Council, S/AC.26/1991/1.

access to anti-retroviral (ARV) medication, similar lifetime access to medication to counter illness linked to HIV or HIV/AIDS, and food assistance for at least 12 months. The Court should recognize that access to first, second and third-line ARVs is essential to the fulfilment of the human right to health and the right to life of the affected victims in this case. In addition, for the treatment to be both effective and humane, the victims taking ARV drugs must eat regularly. This is a core element of the right to health that any victim with HIV/AIDS has, and particularly in the special situation of vulnerability of such victims in the DRC. This is also the interpretation by the Committee on Economic, Social and Cultural Rights to Article 14 of the Covenant on Economic, Social and Cultural Rights on the right to health.²⁰⁰ Thus victims should receive food assistance during the same period of time. Alongside access to ARV drugs and to food assistance, HIV-positive victims should as well have access to mental health rehabilitation. This is particularly important as victims of sexual violence suffer from stigmatisation for having been raped and for being HIV-positive, which isolates them even more and prevents them from accessing due care.

163. Victims of rape and their children who are HIV-positive should be given urgent reparation as soon as possible, before any other forms of reparation are ordered or implemented, and, arguably, even before the judgment on the appeal/s filed in this case is handed down.²⁰¹ This urgent implementation would satisfy the UN Secretary General Guidelines on Reparation for Victims of conflict-Related Sexual Violence specifically address in particular the need to provide such measures to victims of sexual violence.²⁰²
164. There are various ways through which delivery of and access to ARV can be prioritized for the relevant victims in this case. This could be done via State institutions, when they exist and operate effectively. But given that this might rarely be the case in remote areas in particular, the delivery should be made through civil society organisations, through their one-stop centre or local clinics or through humanitarian organisations but relying on their already existing presence at the

²⁰⁰ CESCR Committee General Comment N. 14, *supra* note 179, paras. 4 and 43.b in particular.

²⁰¹ While there is no precise data available to the Experts on how many of the victims are HIV positive, it will be a small number. The Registry has reported that 70 of the participating victims of the attacks have stated that they have been raped; Registry's Observations on Reparations, *supra* note 30, para. 40. No information exists how many of these have HIV/AIDS. The Experts have no figures for former child soldiers.

²⁰² UN Guidance Note, *supra* note 76, point 7.

community level. This should be done in accordance with the Do Not Harm Approach.

165. The Registry has described another group of victims as particularly vulnerable. In its First Report on Reparations, it lists as one of the basic assumptions on which the preparation of the sample was predicated the following: “That there are victims whose advanced age and/or health conditions impair their mobility and living standards. This places them in an extremely vulnerable situation as this also impedes access to information and the possibility to undertake any income-generating activities”.²⁰³ Such victims could also benefit on a priority basis from urgent reparations. Absent any further information on the types of health conditions and the age distribution, the Experts do not feel in a position to recommend any particular measures for such victims.

3.3. Reparations for victims of the attacks

166. In this section, the Experts set out their recommendations of the modalities of reparations that are appropriate for the victims of the attacks.²⁰⁴ As invited by the Chamber, they discuss which groups of victims should be awarded reparations on a priority basis and what such reparations should be.²⁰⁵ In relation to victims of sexual violence, they also identify the types of collective reparations that can benefit victims who may not be easily identified due to the stigma attached to these crimes,²⁰⁶ and they address the modalities of engagement with victims of such crimes.²⁰⁷ When recommending particular types and forms of reparations, the experts have considered their impact on potential perceptions of inequality between victims and any potential perceptions of inequality in the context of the broader local community.²⁰⁸
167. When deciding on the modalities and the process of reparations, there are factors that must be taken into account with respect to all categories of victims in this case. These have been addressed in section 3.1 above, including the availability of relevant information; the need for consultations of the victims; the time elapsed since the

²⁰³ Registry’s First Report on Reparations, *supra* note 24, para. 25, ix.

²⁰⁴ See Decision Appointing Experts, *supra* note 2, paras 1, 11.

²⁰⁵ *Ibid.*, para. 11, fn. 34.

²⁰⁶ *Ibid.*, para. 11, fn. 34.

²⁰⁷ *Ibid.*, para. 14.

²⁰⁸ *Ibid.*, para. 11, fn. 34.

commission of the crimes and the current situation of the victims; access and security issues; questions of individual versus collective reparations; domestic avenues to seek reparations and complementarity of domestic and international efforts; and solidarity mechanisms in DRC that will be available for beneficiaries of reparations in this case.²⁰⁹

3.3.1. Considerations specific to reparations for victims of the attacks

168. Specifically with respect to reparations for the victims of the attacks for which Mr. Ntaganda has been responsible, an important factor is that, given the nature of the harms that these victims suffered, namely murder, rape, pillage and displacement, full restitution is in most cases not possible. The UN Basic Principles provide that “restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred.”²¹⁰ In the circumstances of the present case, it is for many victims not possible to bring them back to their original situation before the crimes were committed.²¹¹

169. As mentioned above in section 3.1,

“the Court must attempt to materially repair the harm done to victims and in doing so, find ways to help transform the social and economic circumstances of their community or society so as to ensure both their livelihood and wellbeing. This is particularly important with respect to those harms that are of such nature that if they are not addressed urgently or in the appropriate manner, can lead to even more serious or permanent harm. The Experts recommend that the Court provide such urgent reparation measures to avoid permanent damage for HIV-positive victims of sexual violence.”²¹²

The Experts in the present case embrace these recommendations as well.²¹³

²⁰⁹ See *supra* section 3.1.4.

²¹⁰ UN Basic Principles, *supra* note 11, Principle 19.

²¹¹ For a more detailed explanation, see *supra* section 3.1.

²¹² *Bemba* Expert Report on Reparation, *supra*, note 164, para. 143.

²¹³ That the prioritization of certain victim categories and the use of urgent measures has been a common feature in many reparation contexts is explained *supra* in section 3.2.

3.3.2. Urgent reparations for HIV-positive rape victims and their children

170. In section 3.2 above, the Experts have pointed out that there are harms that are of such a nature that if they are not addressed urgently, can lead to even more serious or permanent harm. This is true for the harms suffered by victims of sexual violence, especially when these victims were left without assistance or a remedy for a long time after the violations occurred. This is the situation in the present case for HIV-positive victims of the attacks who suffered rape and sexual slavery. The Experts therefore recommend that reparation measures should be provided on a priority basis for these victims and their children, to avoid permanent damage to them.

3.3.3. Individual standardized reparations for victims of the attacks

171. In a quest for precise individual justice, one might attempt to verify the loss of each physical item and of each other loss suffered by the victims, and to assess a value for each such item and loss. This is what was done in the unique circumstances of the *Katanga* case where a limited number of victims were affected by crimes that occurred during a very short time in a very confined location. This approach is not feasible in the present case, however.

172. Many of the victims of the attacks were displaced from their homes and from the villages and communities where they lived until the attacks occurred. These displacements occurred either in the context of forcible transfers and deportations or persecutions and abductions, or because the victims fled murder or attempted murder, rape and pillaging which accompanied the attacks.²¹⁴ Much of what they owned was destroyed or taken away and many were left with nothing.²¹⁵ They often spent the first part of their journeys in the bush in very trying conditions. After they had made their way to other villages or towns further afield, many found themselves without the means to satisfy their basic needs and those of the children and other family members who had fled with them. Because of further violence and fighting during the years following their initial displacements, and/or because they could not

²¹⁴ Registry's Observations on Reparations, *supra* note 31, para. 40: 1,076 of the 1,849 victims of the attacks who participated in the proceedings stated murder or attempted murder, and of those, 43 percent claimed material losses; 70 of the 1,849 victims of the attacks who participated in the proceedings suffered sexual violence, and of those, 21 percent claimed material losses.

²¹⁵ *Ibid.*: 1,184 of the 1,849 victims of the attacks who participated in the proceedings suffered forced displacements and pillaging; of those, 60 percent claimed material losses.

make a living for themselves and their children, they were displaced again, sometimes more than once.²¹⁶ Without assistance either from the Government or the Trust Fund for Victims, many are struggling to date to find the means to afford accommodation and feed themselves, their children and other accompanying family members.²¹⁷ All these victims were traumatized by the ordeal they went through and many have still not been able to overcome this trauma.²¹⁸

173. Given the similarity of the harms that the victims of the attacks suffered and of their continuing impact on their lives today, and further having in mind that a relatively large number of beneficiaries is expected to qualify for reparations²¹⁹ and that these are spread across different locations [REDACTED],²²⁰ the Experts recommend a standard reparation package (SRP)²²¹ for each victim of the attacks. This package includes a standard compensation amount (SCA) to cover material harms; an amount for livelihood assistance; and an amount to cover the moral damage suffered by each victim. The Experts further recommend that the SRP be combined with the collective reparation measures as set out below in section 3.3.4.²²²

Standard reparation package (SRP) and standard compensation amount (SCA)

174. Considering the conditions in which they still live today as a result of what happened to them almost twenty years ago, it is very understandable that practically all victims of the attacks look to reparations as a way to bring some relief to their destitute

²¹⁶ This was also the case with several of the victims that the Experts interviewed.

²¹⁷ The Experts have heard in several of the interviews they conducted that girls as young as 13 years prostituted themselves in an effort to contribute to the survival of the family.

²¹⁸ These harms and losses do not need to be proven by every individual victim of the attacks. Rather they are to be presumed, considering the types of the crimes committed, the circumstances in which the harms and losses occurred, and the time that has elapsed since they were suffered. See *supra* section 2.3.

²¹⁹ See the estimates of the total expected number of beneficiaries *supra* in section 1.

²²⁰ [REDACTED]

²²¹ On the dichotomy in reparation programs between complexity and standardization, see *Bemba* Expert Report on Reparation, *supra* note 164, paras 176 ff. Applying the criteria used there, the SRP would fall into the category of reparations that provide for “a standardized set of benefits for all victims within each category of violations (for example, pillage) or within each type of harm (for example, the loss of livelihood, regardless of the crime that caused it)”; *ibid.*, para. 176.

²²² The Experts are conscious of the different views on the relative benefits and drawbacks of individual vs. collective reparations, both inside the Court and generally. For the reasons explained, it is their view that a significant individual component should be included in the combination of these two types of reparations that they recommend for this case.

situation. What they seek first and foremost is a sum of money that they intend to spend in the first place to satisfy their basic livelihood needs.²²³ What is also clear from the accounts that were available to the Experts is that those victims who have children want to use reparation awards to pay for their schooling. Victims also hope that reparations would help pay for their own education or for vocational training that would allow them to engage in an activity which would provide them with a sustainable income. It will also go some way to restoring their dignity of being able to care for themselves.²²⁴

175. The standard compensation amount (SAC) that the Experts recommend will not be more than a symbolic payment.²²⁵ But it will still contribute to materially repairing the harms by allowing the victims to alleviate at least some of their ongoing consequences through the use of this money for one or more of the stated purposes, according to what they would view as their most pressing needs.²²⁶
176. In every situation where a compensation amount is awarded, a value must be assigned to the harm and the cost of the corresponding attempt to repair that harm must be estimated, unless a fixed amount is determined. An effort is required to assign values to, as the UN Basic Principles describes them, harms that are “economically assessable.”²²⁷ Different legal systems have established various ways of calculating the value of certain types of losses, even those that are seemingly resistant to pecuniary

²²³ Similarly, in *Katanga*, the victims overwhelmingly expressed their preference for obtaining financial compensation to help them address the harm they suffered, including physical and psychological harm, material losses, lost opportunities and costs of medical as well as psychological care. See also *Bemba* Expert Report on Reparation, *supra* note 164, para. 149: “Expectations involving reparations almost always centre on receiving compensation or money”.

²²⁴ See for the same consideration *ibid.* at para. 150: “But it is also important to understand that victims are coming from (and still are in) situations of extreme, dehumanizing poverty. Their expectations are not necessarily about getting substantial amounts of money or of being restored to their prior situation. For some of those we spoke to in interviews and focus group discussions, the expectation is of just being acknowledged through reparations and seen as persons with dignity who need help with their health and living conditions”.

²²⁵ Compensation should be considered when (i) the economic harm is sufficiently quantifiable; (ii) an award of this kind would be appropriate and proportionate (bearing in mind the gravity of the crime and the circumstances of the case); and (iii) this result is feasible in view of the availability of funds; UN Basic Principles, *supra* note 11, Principle 20.

²²⁶ See also the following recommendation in OHCHR, “Report of the Panel on Remedies and Reparations for Victims of Sexual Violence in the Democratic Republic of Congo to the High Commissioner for Human Rights”, March 2011 for this category of victims: “Funding to support victims of sexual violence should go directly to victims of sexual violence to help them address the basic needs they have as a result of the harm they have suffered. These needs include health care, housing, education for themselves and their children, and a sustainable means of livelihood” (recommendations, para. 5).

²²⁷ UN Basic Principles, *supra* note 11, Principle 20.

estimation, such as the loss of a life. In some cases, awards of compensation for harms resulting from human rights violations or from crimes corresponding to those in this case have used national jurisprudence, regional human rights court rulings and analogous valuations, such as those in insurance law or workplace regulations. Since the beginning of the years 2000, there have been more than 50 cases in the courts in the DRC (mostly military courts in the East of the country) where perpetrators of war crimes and crimes against humanity have been condemned and damages have been awarded to victims. The amounts awarded range from a few thousand to hundreds of thousands of US dollars, for instance in cases of murder and rape. Recent research found “a relatively standardized amount of 5,000 US dollars” applied in a number of these cases.²²⁸

177. Customary justice in the DRC provides remedies as part of a very different system where reparation is part of a process that is aimed at leading to reconciliation and resolution of a specific conflict.

“Most rural victims are most familiar with customary justice in the first instance. In Ituri, the customary justice has a well-structured hierarchy of harms and corresponding compensation quantified by a specific number of cows (each worth approximately 600 USD). For instance, to compensate for a death, the perpetrator or his family will need to pay the victims’ next of kin a number of cows determined on the basis of various factors”.²²⁹

The Expert [REDACTED] has confirmed that, for compensation in the case of loss of a life, negotiations start with a minimum of ten cows; and in the case of the burning down of a house or another loss of property, they typically start with six cows (with the value of a cow being between 500 USD and 600 USD).

²²⁸ The results are summarized in a Policy Brief published by TRIAL and others in October 2020 on “L’urgence pour la RDC de solder sa dette envers les victimes de crime de masse et revoir sa politique de réparation”. The research found that almost 28 million US dollars have been awarded to more than 3,300 victims. Due to the cumbersome procedures and the high costs associated with the enforcement of these damage awards, to date none of these victims have managed to obtain any of these amounts.

²²⁹ M. Goetz, “Victims’ Experiences of the International Criminal Court’s Reparations Mandate in the Democratic Republic of Congo”, in: C. Ferstman, M. Goetz, S. Alan (eds.), *Reparations for Victims of Genocide, Crimes against Humanity and War Crimes, Systems in Place and Systems in the Making*, 2nd ed. (Leiden, Nijhoff, 2020), pp. 415 ff., at 419. Goetz continues: “In the customary context, it is only after there has been reparation that it is possible for the victim to come face to face with the perpetrator for an apology or reconciliation to be contemplated [footnote omitted]. Reparation is part of a process which first involves effective resolution of the harm and can then result in reconciliation”. *Ibid.*

178. The victims that the Experts could interview mentioned different amounts they thought would be an appropriate financial reparation, ranging from 1,000 to 10,000 USD. The CLR2 put forward the following: “As regards the cost estimate of the average harm, it is submitted that these should be estimated at the same level, so as to not prejudice victims in this case vis-à-vis victims in the *Lubanga* and *Katanga* cases who were awarded 8,000 USD and 12,635 USD respectively”.²³⁰

“Notably, in *Katanga*, the Chamber determined the awards in relation to individual types of harm, for example determining psychological harm connected to the death of a near relative was reckoned *ex aequo et bono* at 8,000 and 4,000 USD [footnote omitted], the award for a house at 500 USD, the award for business premises at 300 and 800 USD, the average amount for livestock at 524 USD, that for harvest and fields at 150 USD and physical harm at 250 USD [footnote omitted], which in respect of all 297 eligible persons totalled 3,752,620 USD and averaged at 12,635 USD per capita”.²³¹

“To remain within these parameters, given the same geographical and temporal context in which people were victimised and comparable levels of harm sustained, it is submitted that the per capita cost of repair should be taken to average 10,000 USD per capita in the present case”.²³²

In *Katanga*, the Chamber also awarded each of the 297 victims an additional 250 USD for moral damages. Amounts put forward by the Legal Representatives of the Victims to Trial Chamber II in *Lubanga* ranged from an estimate of the harm “at a minimum of EUR 10,000 per direct victim”²³³, to an average harm of 6,000 USD calculated on the basis of the estimated number of victims and the total amount sufficient to repair the harm.²³⁴ According to submissions by the OPCV, the average value of the harm suffered by each victim would be 2,000 USD.²³⁵ In every case, however, these sums included the estimated costs of significant collective reparations programs. The TFV

²³⁰ Submissions by the Common Legal Representative of the Victims of the Attacks on Reparations, *supra* note 34, para. 73.

²³¹ *Ibid.*, para. 74.

²³² *Ibid.*, para. 75.

²³³ As referred to for the Victims V01 by the Appeals Chamber in the *Lubanga* Judgment on Appeals against Decision Setting Size of Reparations Award, *supra* note 8, para. 113.

²³⁴ As referred to for the Victims V02 by the Appeals Chamber, *ibid.*, para. 114.

²³⁵ *Ibid.*, para. 115.

offered estimations for the cost of various forms of rehabilitation services²³⁶, not however for values of harms.²³⁷

179. Like the experts in *Bemba*, the Experts in the present case find that the numbers of victims in the present case are so high and the extent of the harm they suffered is so varied that any attempt to extract a satisfactory amount to all or even to most will be counter-productive and will require more time which will, in turn, further delay the distribution of reparations. Instead, the Experts adopt what they consider to be a more reasonable and practical approach, taking into account that the harms caused as a result of Mr. Ntaganda's crimes were detrimental to the victims' and their families' right to an adequate standard of living, including their health, education, food, clothing and need to repair pillaged houses.²³⁸
180. The Experts hesitate themselves to put forward a specific figure of a standard compensation amount. Like the experts in *Bemba*, they would recommend to assign a pecuniary value to an adequate standard of living, given the totality of harms inflicted on the universe of victims of the attacks. That value should then be used as the standard amount of compensation for each eligible beneficiary. Based on that value, and taking into account the costs of housing, education, what may be needed to initiate a source of livelihood, and corresponding values.
181. In that sense, the standard compensation amount (SCA) represents a "floor" amount of compensation for material harms suffered by each victim. The SCA is meant to take into account but not necessarily meant to correspond to the cost of living conditions in DRC.²³⁹ Since they currently have no reliable way of measuring what the minimum

²³⁶ TFV Observations relevant to Reparations, *supra* note 78, para. 130.

²³⁷ In its recent report to the Assembly of States Parties on its activities for the period 1 July 2019 to 30 June 2020, the TFV announced: "For its next submission, which is due in December 2020, the Trust Fund has started to collect information about past and current projects of the Trust Fund and of similar projects that aim at redressing harm similar to that referred to in the verdict. Such information aims to assisting the Trial Chamber in assessing the costs required to redress this harm and to determine the liability of the convicted person"; ICC, Assembly of States Parties, "Report to the Assembly of States Parties on the Projects and the Activities of the Board of Directors of the Trust Fund for Victims for the Period 1 July 2019 to 30 June 2020", 16 September 2020, ICC-ASP/19/14, para. 40.

²³⁸ International Covenant on Economic, Social and Cultural Rights ("ICESCR"), Article 11 (1), ratified by the CAR states that: "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions."

²³⁹ For income and/or salary in the DRC, the Experts also found different figures. According to Goetz, the average annual income in 2009 ranged from 395 to 785 USD (*supra* fn. 224, at 442). According to the TRIAL

living costs would be in particular [REDACTED] the Experts recommend to the Court to fix the standard compensation amount using considerations of equity and information to be gathered from relevant [REDACTED] resource persons and bodies. In the Experts' opinion, the amount of [REDACTED] would seem to represent a reasonable estimate of the compensation for material harm suffered by victims of the attacks, without making a claim that this symbolic amount can repair all those harms at this point.

182. The Experts also propose to assign a standard value to moral harm for all victims, given the inherent difficulty of quantifying such harm. They suggest an amount of [REDACTED] for this value.

Compensation for moral damage

183. While the standard compensation amount will not fully repair the material harm done to victims, there is no amount that can correspond to the indignity, suffering and non-pecuniary damage they themselves underwent or experienced seeing their spouses, children, siblings or other family members murdered, being raped or dying as they fled their pillaged homes. The amount of [REDACTED] that the Experts propose as an award for this moral damage is symbolic; but it is important that it goes with the standard compensation amount so that both material and symbolic forms of reparation are delivered simultaneously.

Use of the MUSO system

184. The Experts further recommend that the Court encourage reparation beneficiaries to pool their compensation payments in a "Mutuelle de solidarité" (MUSO) or AVEC. These are cooperatives organized as solidarity funds that are designed to support economic reintegration and/or cohesion and to help their members gain greater and more sustainable access to livelihood materials or a modest source of capital for agricultural or commercial use.²⁴⁰ The Experts recommend to increase the SCA by [REDACTED] when it is pooled in a MUSO. The details of carrying out and monitoring this

Policy Brief, the monthly average salary in 2012 was 90,758 FC (95 USD) (supra fn. 223, at fn. 15, citing ILOSTAT). According to ILOSTAT, the monthly minimum salary in 2011 was 36,400 FC, <https://bit.ly/3cUawC>.

²⁴⁰ For details, see supra section 3.1.

process can be done by the implementing institution together with [REDACTED] NGOs that have been working with victims.

Payment and delivery of the SRP

185. The pay out of financial compensation could raise security concerns, [REDACTED]
[REDACTED]
[REDACTED]. If the latter was chosen, a pay out in instalments would mitigate the security risk. On the other hand, depending on their particular situation and their preferences of the use of the money, the victims might need the whole amount for a meaningful investment to start a sustained income-generating activity.
186. Another challenge in the implementation of individual payments will be that the recipients are spread across a wide area [REDACTED]²⁴¹. Currently, both the VPRS and the CLR 2 have information about the whereabouts of the participating victims, with the CLR 2 presumably in possession of more up-to-date information. It can be expected that the same will be the case with newly identified victims. Whether all eligible victims will remain traceable throughout the implementation of the reparations in this case cannot be predicted, though, given the precarious and changing security situation [REDACTED] and the likely time it will take to complete such implementation.
187. As to the concrete method or methods of pay out of reparation amounts, the Trust Fund and its implementing partners will be best-placed to identify what is most appropriate in the particular circumstances.
188. The Experts emphasized earlier that the “do no harm” principle must be a factor in this case. The modalities of distributing the standard compensation amount (and urgent forms of reparation [REDACTED] should also not add to the insecurity and hardship that victims, like many other DRC citizens, currently face. It should not be expected that many victims have a bank account. [REDACTED] will require travel from remote areas sometime for more than one day. Given the poor state of many of the roads from and to the more remote areas, and considering the difficult security situation, this seems a very challenging option.

²⁴¹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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3.3.4. Collective reparations for victims of the attacks and indirect victims

192. The standardized individual reparation of the SRP that the Experts recommend above should be complemented by a set of collective reparations targeted towards the continuing effects of the harms of the victims of the attacks after almost 20 years and their current needs and wishes. As noted above, comprehensive information in this respect is still lacking and gaps are now being closed through the sampling exercise ordered by the Chamber.²⁴⁶ On the other hand, there is considerable consensus that, bearing in mind the typical harms suffered by the vast majority of the victims and their so far expressed aspirations, access to a minimum set of services and support must be made available to them.
193. In line with the approach adopted by the Appeals Chamber in its judgment on reparations in *Katanga*, the goal here is
- “to define the harms and to determine the appropriate modalities for repairing the harm caused with a view to, ultimately, assessing the costs of the identified remedy. The Appeals Chamber considers that focusing on the cost of repair is appropriate, in light of the overall purpose of reparations, which is indeed to repair.”²⁴⁷
- While they are not in a position to assess themselves the costs of the collective reparations they are recommending in this section, the Experts propose access for the victims of the attacks to the following remedies: schooling and vocational training; medical and psychological care; and a sustainable means of livelihood.²⁴⁸

²⁴⁶ See *supra* section 2.2.

²⁴⁷ Appeals Chamber, *The Prosecutor v. Germain Katanga*, “Judgment on the Appeals against the Order of Trial Chamber II of 24 March 2017 Entitled ‘Order for Reparations pursuant to Article 75 of the Statute’”, 8 March 2018, ICC-01/04-01/07-3778-Red (“*Katanga* Judgment on Appeals against Reparations Order”), para. 72.

²⁴⁸ For the aggregate value of similar services ordered by the Trial Chamber in *Lubanga*, the Chamber determined *ex aequo et bono* an average amount per victim of USD 8,000; see Trial Chamber II, *The Prosecutor v. Thomas Lubanga Dyilo*, “Correct Version of the ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’”, 21 December 2017, ICC-01/04-01/06-3379-Red-Corr-ENG (“*Lubanga* Decision Setting the Size of the Reparations Award”), para. 247. The Appeals Chamber concisely summarized the information that the Trial Chamber took into account in reaching this amount, including various cost figures and estimates of examples of specific collective reparation put forward in submissions in that case; see *Lubanga* Judgment on Appeals against Decision Setting Size of Reparations Award, *supra* note 8, paras 109-121. The OPCV, for instance, had provided information about, inter alia, the average annual school fees, annual university tuition, literacy courses and language training; the OPCV also set out the costs of vocational

194. There will be several challenges in the implementation of such reparations, [REDACTED]. These include: distribution of the beneficiaries over different locations; availability of the required infrastructure and whether it can be used for reparations; access to remote areas; benefiting victims of the attacks without creating or re-enforcing inequalities among victims and between victims and the communities they live in, or return to. On the other hand, if reparations can be implemented in a way that they strengthen the infrastructure and capacity of existing entities or even build new ones, this will also benefit other members of the community and thus help to reduce divisions and foster reconciliation and healing. The Experts hope that, despite all the difficulties, this can be achieved for the reparations that they recommend in the following.

Access to schooling and vocational training

195. That the attacks interrupted their schooling, or that they were prevented from going to school in the first place, and that this led in turn to their exclusion from professional opportunities and to their often destitute situation was for the victims among the worst consequences of the crimes. Many felt this even more acute for their children who never had the chance of a decent education.²⁴⁹ The first measure that the Experts therefore recommend is access to schooling and vocational training, for both victims and their children. Whether this can be better achieved through the free use of existing institutions or the creation of new opportunities will depend on the location and situation of the victims concerned.

Other support for income-generating activities

196. It is striking – and very much in line with the experiences in other reparation contexts as well – how much the victims here want to be able again to support themselves and their children and families, being forced to live in the very difficult conditions resulting from the crimes committed against them, and how they are viewing reparations as something that they are rightly entitled to and that will help

training, costs of access to psychological care, costs of medical care and costs of detoxification programmes; *ibid.*, para. 115. These are the same kinds of services that the Experts recommend in the present case.

²⁴⁹ Being able to send their children to school is among the highest priorities in particular also of the victims of sexual violence. Those among them who have contracted HIV/AIDS are deeply concerned over what will happen to their children when they die.

them achieve this. One important aspect of the collective reparations in this case is therefore that they should assist victims on their way to self-support, whether through education and training as described above, or by providing start-up kits, farming tools and seeds etc.,²⁵⁰ or through the support of collective or cooperative activities in which the victims can participate. Combined with the means from the SRP that the Experts recommend for each victim, these measures should help repair the harm that they suffered.

Access to medical and mental health care for all victims of the attacks

197. All the victims of the attacks were traumatized by the ordeal they went through and many have still not been able to overcome this trauma. The same is true for their children many of whom were very young at the time, or were only born during their displacement from their homes. This measure of collective reparations should cover at least one year of mental health services, ideally by paying for State-run counselling. This cost should be channelled directly to the State health authorities so that existing capacity can be expanded rather than separately established for purposes of this case. This can include training of more local mental health professionals as well as creating a mobile clinic for their operations in remote areas.²⁵¹ If a State-run service is not feasible, the funding can be channelled to especially-trained national non-government organizations that have worked with victims before. The importance of sustainable local mental health services cannot be overemphasized.

Free HIV-AIDS testing and sustainable psychosocial support for rape victims with HIV

198. For the victims of rape and sexual slavery, the Experts recommend free access to HIV-AIDS testing on a regular basis, including the possibility of mobile HIV-AIDS testing facilities if and when the security situation permits.²⁵² These victims should also benefit from sustainable psychosocial support and mental health care.²⁵³

²⁵⁰ Several of the victims whom the Experts interviewed mentioned that they do not have access to water or that it is too expensive for them to buy water. For them, a water pump or another access to water would be an important component of reparations. Other members of the community would also benefit from such a collective reparations measure which could, as a shared resource, also contribute to reconciliation. See also

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²⁵² One question that has come up in other reparations programs in which forms of material reparations, usually a social service are offered, is whether those who are not technically meant to be its beneficiaries can

Rehabilitation of the health centre in Sayo

199. In the context of the first operation, the health centre in Sayo was intentionally attacked and severely damaged. During the military activities, attacking such a protected object disrupted the ability of medical personnel to care for the sick and wounded. This is what happened when the Sayo health centre was attacked and a number of patients were unable to leave by themselves. Since the Sanyo health centre served a large area, the continuing impact of this attack was that its services were not available to many other patients.
200. According to information obtained by the VPRS field staff, rehabilitation of the health centre was undertaken in various stages. In 2005, an NGO organized and paid for the repair of the operations theatre and the post-operation room. Thereafter, progressive repairs could be done between 2007 and 2020 with local contributions. While these led to significant improvements of the state of the centre, to date, still only minor operations can be undertaken.
201. The Experts recommend here that the full remaining rehabilitation of the health centre of Sayo be ordered as a measure of collective reparations for which Mr. Ntaganda is liable. In addition, to the extent that this is still feasible, the persons and entities who contributed to the progressive repair works since 2005 should be reimbursed their contributions. The fact that others have undertaken to remedy – partly or completely – the harm caused by a perpetrator does not absolve the convicted person from his or her responsibility for reparations.²⁵⁴ Mr. Ntaganda is liable for this reparation measure.

Building a community centre to be named after Abbé Bwanalungwa

202. Abbé Bwanalungwa, a Catholic priest of an advanced age at the Mongbwalu parish, was shot and killed by Mr. Ntaganda himself. Abbé Bwanalungwa was held in high respect, not only by members of his parish, but by others in the community as well.

avail of the service. The position taken by the Experts here is that those persons who suffer from the same harm that the victims of the crimes in this case suffered, i.e. those who may be HIV-positive, whether or not as a consequence of sexual violence, should be able to access this service. Not only is this in line with a non-discriminatory approach to providing access to health care; but this can help counter stigma directed at victims of rape in the DRC and, in particular, stigma directed at victims of rape in this case, both men and women.

²⁵³ For details, see Gilmore Expert Report.

²⁵⁴ See also *Al Mahdi* Reparations Order, *supra* note 42, para 65: “Remedial efforts by a third party in the time elapsed between the destruction and the issuance of the reparations order do not alter the amount of damage originally done.”

Several victims proposed that a community centre should be built that would be named after Abbé Bwanalungwa, to honour his memory, but also to serve as a means to foster the reconciliation between the different sectors of the community that the Abbé had worked for. While the vast majority of the victims are opposed to erecting monuments, mausoleums etc., this proposal is an excellent example of a symbolic reparation going beyond memory and creating value for the future, and the Experts therefore recommend its implementation.

3.3.5. Summary

203. The recommendations of the Experts as to the modalities of the reparations for the victims of the attacks are summarized in the following.

204. Consultation:

- a. Consult victims of the attacks on the design of the reparation framework and its implementation.

205. Urgent reparations for victims of rape with HIV (victims raped, their children and spouses with HIV):

- a. Lifetime access to first, second and third-line regime antiretroviral (ARV) drugs
- b. Emergency food assistance for a minimum of twelve months. This assistance can take the form of (i) cash, (ii) food vouchers, or (iii) food transfers for food.

206. The standard reparation package for all victims of the attacks:

- a. A standard compensation amount (SCA) to cover all material harms of each victim [REDACTED]
- b. Livelihood assistance to be used for joining a MUSO [REDACTED]
- c. An amount to cover the unquantifiable moral damage suffered by each victim – [REDACTED]

207. Collective/community reparations:

- a. Access to schooling and vocational training
- b. Other support for income-generating activities
- c. Access to medical and mental health care for all victims of the attacks for at least one year
- d. Free access to HIV-AIDS testing on a regular basis for victims of rape with HIV

- e. Sustainable psychosocial support and mental health care for victims of rape with HIV
- f. Cost of promoting awareness programs (via meetings in communities, radio and printed materials) to address the stigmatization of rape victims and their children within their communities and beyond
- g. Remaining rehabilitation and reimbursement of the cost of previous repair of the health centre in Sayo
- h. Building and naming a community centre after Abbé Bwanalungwa.

3.4. Reparations for former child soldier victims

208. In this section, the Experts set out their recommendations of the modalities of reparations that are appropriate for the former child soldier victims of Mr. Ntaganda.²⁵⁵ This includes which types of harm should be remedied on a priority basis.²⁵⁶ In relation to SGBV, they address what types of collective reparations can benefit victims who may not easily be identified due to the stigma attached to these crimes,²⁵⁷ and they address the modalities of engagement with victims of such crimes.²⁵⁸ In their recommendations of particular types and forms of reparations, the Experts have considered their impact on potential perceptions of inequality between victims and any potential perceptions of inequality in the context of the broader local community.²⁵⁹
209. When deciding on the modalities and the process of reparations, there are factors that must be taken into account with respect to all categories of victims in this case. These have been addressed in section 3.1 above, including the availability of relevant information; the need for consultations of the victims; the time elapsed since the commitment of the crimes and the current situation of the victims; access and security issues; questions of individual versus collective reparations; domestic avenues to seek reparations and complementarity of domestic and international

²⁵⁵ See Decision Appointing Experts, *supra* note 2, paras 1, 11.

²⁵⁶ *Ibid.*, para. 11, f. 34.

²⁵⁷ *Ibid.*, para. 11, fn. 34.

²⁵⁸ *Ibid.*, para. 14.

²⁵⁹ *Ibid.*, para. 11, fn. 34.

efforts; and solidarity mechanisms in DRC that will be available for beneficiaries of reparations in this case.²⁶⁰

3.4.1. Considerations specific to reparations for former child soldier victims

210. Specifically with respect to reparations for the former child soldiers who have been enlisted, conscripted, used in hostilities when they were under the age of 15, submitted to a wide range of crimes including murders, tortures, rapes, sexual slavery, persecution and other inhuman acts, and consequently lost their childhood and plan of life, restitution is absolutely impossible.²⁶¹ Reparation should address the consequences of the harm suffered by the victims and contribute to rebuild their lives, conveying the recognition of such harms and their impact on the lives of direct and indirect victims of these crimes.
211. A number of former child soldiers who are victims in the case against Mr. Ntaganda were already found to be eligible for reparations in the Lubanga case.²⁶² The parties have different views as to the impact of this overlap on the entitlement of these victims on the reparations in the present case.²⁶³ However, the Experts agree with the Registry that these victims are still entitled to reparation in the present case and that this will not lead to “over compensation”.²⁶⁴ In addition, the Experts believe that some of the former child soldiers’ harms, which were not recognised as such in the Lubanga case, should be addressed in the present case, such as the loss of life plan, and the transgenerational harm suffered by children of the former child soldiers, in particular the harms suffered as a consequence of sexual violence.²⁶⁵
212. It is the Experts’ opinion that the principles on reparations established by the Appeals Chamber in *Lubanga* should also be applied as a general framework in the

²⁶⁰ See *supra* section 3.1.

²⁶¹ UN Basic Principles, *supra* note 11, Principle 19 (“restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred”).

²⁶² See *supra* section 1. This concerns victims who participated in the present case, but it may also apply to yet unidentified victims.

²⁶³ See, on the one hand, Defence Submissions on Reparations, *supra* note 156, para. 30; and on the other hand, Submissions on Reparations on behalf of Former Child Soldiers, *supra* note 119, para.55.

²⁶⁴ Registry’s Observations on Reparations, *supra* note 31, paras 17-18 (“The reparation awards that the Child Soldier victims may be entitled to will, by virtue of being a complement, be less than full restitution in both proceedings – and therefore will not lead to over-compensation. This is also consistent with the *Lubanga* Appeals Chamber’s ruling that its reparations order was not intended to affect the rights of victims to reparations in other cases, whether before the ICC or national, regional or other international bodies”).

²⁶⁵ See *supra* section 2.

present case.²⁶⁶ This results from the generic definition of reparation, under the UN Principles and Guidelines on the Rights to Reparation and Remedy of victims for serious violations of international human rights law and international humanitarian law, and the holistic approach of reparation which is the most wanted by the victims.²⁶⁷ The Appeal Chamber principles are the following: "restitution; compensation; rehabilitation "directed at facilitating their reintegration into society (...) should include education and vocational training, along with sustainable work opportunities that promote a meaningful role in society", the rehabilitation should "[address] the shame that child victims may feel, and (...) be directed at avoiding further victimisation" and "include their local communities" ; with the assistance of States parties, "other forms of reparation such as such as establishing or assisting campaigns that are designed to improve the position of victims; by issuing certificates that acknowledge the harm particular individuals experienced; setting up outreach and promotional programmes that inform victims as to the outcome of the trial; and educational campaigns that aim at reducing the stigmatisation and marginalisation of the victims of the present crimes "[contributing] to society's awareness of the crimes (...) and the need to foster improved attitudes towards events of this kind, and ensure that children play an active role within their communities", "measures to address the shame felt by some former child soldiers, and to prevent any future victimisation".²⁶⁸

213. However, the Experts recommend to consult with victims in the present case.²⁶⁹ The difficult process of implementation of reparations in the *Lubanga* case which has not yet been completed, as well as the time expired since the crimes were committed, may influence victims' needs, wishes and perceptions of reparation. In addition, in the present case, there is a gender aspect that was not present in the *Lubanga* case.
214. The Experts consider that reparation to former child soldiers should repair the consequences of the lost childhood of the former child soldiers, the loss of their life plan and the different categories of harm that they suffered, i.e., psychological,

²⁶⁶ Since Mr. Lubanga was not convicted for rape and sexual slavery, the Trial Chamber reparation principles contain nothing on these crimes.

²⁶⁷ See Submissions on behalf of Former Child Soldiers, *supra* note 119, para. 69.

²⁶⁸ *Lubanga* Amended Reparations Order, *supra* note 143, para. 67.

²⁶⁹ See *supra* section 3.1 on the principle of consultations.

physical, material and social, as well as harms suffered by indirect victims, including children of the former child soldiers. Collective reparations shall include well-designed and meaningful campaigns against stigmatisation and for better mutual understanding and living together.

3.4.2. Urgent reparations for HIV-positive rape victims and their children

215. In section 3.2 above, the Experts have pointed out that there are harms that are of such a nature that if they are not addressed urgently, can lead to even more serious or permanent harm. This is true for the harms suffered by victims of sexual violence, especially when these victims were left without assistance or a remedy for a long time after the violations occurred, which is the situation in the present case. As they are recommending for rape and sexual slavery victims of the attacks,²⁷⁰ the Experts therefore recommend that reparation measures should be provided on a priority basis for HIV-positive former child soldiers victims of rape and sexual slavery and their children to avoid permanent damage to them.

3.4.3. Individual standardized reparations for former child soldier victims

216. The same kinds of considerations that lead the Experts to recommend a standardized measure of reparations for victims of the attacks²⁷¹ also make them recommend this form of reparation for former child soldier victims of Mr. Ntaganda. Most of these victims did not return to their families or communities, which were often displaced after the attacks to different places [REDACTED]. The rejection and stigmatisation of former child soldiers made it also very difficult for them to live back together with their families. All these victims were deeply traumatized by the ordeal they went through and are still living with this trauma, its impact on their daily life and on the life of their own children, some of them born out of rape while they were child soldiers, and without any support. Many are struggling to date to live, work and to find the means to afford accommodation and feed themselves, their children and other accompanying family members.²⁷²

²⁷⁰ Cf. *supra* section 3.3.2.

²⁷¹ See *supra* section 3.3.3.

²⁷² These harms and losses do not need to be proven by every individual former child soldier victim. Rather they are to be presumed, considering the types of the crimes committed, the circumstances in which the harms and losses occurred, and the time that has elapsed since they were suffered. See *supra* section 2.3.

217. In view of the similarity of the harms that the former child soldier victims suffered and of their continuing impact on their lives today, and further that they are spread across different locations [REDACTED] the Experts recommend a standard reparation package (SRP) for each former child soldier victim of Mr. Ntaganda. This package includes a standard compensation amount (SCA) to cover material harms; an amount for livelihood assistance; and an amount to cover the moral damage suffered by each victim. The Experts further recommend that the SRP be combined with the collective reparation measures as set out in section 3.4.4 below, benefiting also to indirect victims.

Standard reparation package (SRP) and standard compensation amount (SCA)

218. Considering the conditions in which they still live today as a result of what happened to them almost twenty years ago, it is very understandable that practically all former child soldier victims look to reparations as a way to bring some relief to their situation. Experts heard from the legal representatives' team of the child soldier victims who are in closest contact with them that their clients most want reparation which would directly impact on their own life and the life of their children, and which includes an individual and compensatory component.²⁷³

219. As explained by the legal representatives:

"They overwhelmingly expressed a preference for individual reparations, although they would also accept collective reparations with an individual component. They seek financial aid, to be used for different purposes, including returning to their towns or (re)building their houses and most importantly to provide for their children whom they designate as the indirect victims of the crimes they suffered as a result of the damage to their parents' "life plan" following their recruitment in the UPC/FPLC in 2002/2003. They also expect that reparations will help them and their children to finish their studies (Baccalaureate and University)".²⁷⁴

²⁷³ Interview with the team of former child soldiers' legal representatives.

²⁷⁴ Submissions on behalf of Former Child Soldiers, *supra* note 119, para. 69.

This was echoed in meetings with several interlocutors [REDACTED] insisting on livelihood needs, medical and psychological support, vocational training and education of the former child soldiers and their children.²⁷⁵

220. The standard compensation amount (SCA) that the Experts recommend is such a reparation measure with an individual and compensatory component. While it is far from being a “full” compensation, it will be a symbolic payment,²⁷⁶ with a direct impact on their own life and the life of their children, alleviating some of the ongoing consequences, according to what the victims would consider as their more pressing needs.²⁷⁷
221. As to the question what amount of compensation would be appropriate for former child soldiers, the Experts refer to the considerations and detailed figures in section 3.3.3 above. In that sense, the standard compensation amount (SCA) represents the “floor” amount of compensation for material harms suffered by each victim. The SCA is meant to take into account but not necessarily meant to correspond to the cost of living conditions in DRC.²⁷⁸ Since there is no current and reliable method of measuring what the minimum living costs would be [REDACTED] [REDACTED] the Experts recommend to the Court to fix the standard compensation amount using considerations of equity and information that they gathered in interviews and discussions with different [REDACTED] resource persons. The Experts also used information that their colleague from DRC provided based on his knowledge of and experience with the situation [REDACTED]. In the Experts’ judgment, the amount of [REDACTED] represents a reasonable symbolic estimate of

²⁷⁵ For instance, during the NGO Roundtable organized by the experts [REDACTED]

²⁷⁶ Compensation should be considered when (i) the economic harm is sufficiently quantifiable; (ii) an award of this kind would be appropriate and proportionate (bearing in mind the gravity of the crime and the circumstances of the case); and (iii) this result is feasible in view of the availability of funds; UN Basic Principles, *supra* note 11, Principle 20.

²⁷⁷ See also the following recommendation in OHCHR, “Report of the Panel on Remedies and Reparations for Victims of Sexual Violence in the Democratic Republic of Congo to the High Commissioner for Human Rights”, March 2011, para. 5 for this category of victims: “Funding to support victims of sexual violence should go directly to victims of sexual violence to help them address the basic needs they have as a result of the harm they have suffered. These needs include health care, housing, education for themselves and their children, and a sustainable means of livelihood”.

²⁷⁸ For income and/or salary in the DRC, the Experts also found different figures. According to M. Goetz, the average annual income in 2009 ranged from USD 395 to USD 785 (*supra* note 229, at 442). According to the TRIAL Policy Brief, the monthly average salary in 2012 was FC 90,758 (USD 95) (*supra* note 228, at fn. 15, citing ILOSTAT). According to ILOSTAT, the monthly minimum salary in 2011 was FC 36,400, <https://bit.ly/3cUawC>.

the material harm suffered by former child soldiers victims, without making a claim that this amount can repair all those harms at this point.

222. The Experts also propose to assign a standard value to moral harm for all victims, given the inherent difficulty of quantifying such harm. They suggest an amount of [REDACTED] for this value.

Use of the MUSO system

223. The Experts further recommend that the Court encourage reparation beneficiaries to pool their compensation payments in a “Mutuelle de solidarité” (MUSO) or AVEC. In DRC such cooperatives have been successfully organised as solidarity funds, designed to support economic reintegration and / or cohesion of the group, and to help their members gain greater and more sustainable access to livelihood materials or a modest source of capital for agricultural or commercial use. They are normally managed by a coordinator within the group.²⁷⁹

224. The consultation organised by the Experts clearly recommended to bring former child soldiers together in such cooperatives that they themselves will have chosen so that they can better manage their activities which will then be more sustainable.²⁸⁰

[REDACTED] suggested that the demobilisation was not properly done in Ituri for many years as it used to focus only on an individual support, and as they were lacking community support these programmes were not successful. That is why they now favour putting in place such cooperatives where former child soldiers, including sometimes with other community members, can associate to develop their economic and livelihood activities.²⁸¹

225. The Experts recommend to increase the SCA by [REDACTED] when it is pooled in a MUSO. The details of carrying out and monitoring this process can be done by the implementing institution together with [REDACTED] NGOs that have been working with victims.

Compensation for moral damage

²⁷⁹ For a more detailed presentation of the MUSO system, see *supra* section 3.1

²⁸⁰ Interview with former child soldiers’ legal representatives team; and NGO Roundtable organized by the experts, [REDACTED]

²⁸¹ [REDACTED]

226. While the standard compensation amount will not fully repair the material harm done to victims, there is no amount that can correspond to the indignity, suffering and non-pecuniary damage they themselves underwent or experienced being enlisted, being conscripted, and used to participate in hostilities, and being victims of rapes and sexual slavery, torture and inhuman treatment. The amount of [REDACTED] that the Experts propose as an award for this moral damage is symbolic; but it is important that it goes with the standard compensation amount so that both material and symbolic forms of reparation are delivered simultaneously.

Payment and delivery of the SRP

227. The implementation of individual compensatory payments may face some challenges. The first one relates to the volatile situation in the region. In this respect, the solidarity or credit-based cooperative methods of delivery through the MUSO system would probably be safer than the dispensation of cash. If the latter was chosen, a pay out in instalments would mitigate the security risk. On the other hand, depending on their particular situation and their preferences of the use of the money, the victims might need the whole amount for a meaningful investment to start a sustained income-generating activity.
228. The second challenge relates to the fact that beneficiaries are located in a wide area [REDACTED] Based on information gathered by the Experts, currently, both the VPRS and the CLR I have information about the whereabouts of the participating victims. It should be expected that the same will be the case with newly identified victims. Whether all eligible victims will remain traceable throughout the implementation of the reparations in this case cannot be predicted, given the precarious and changing security situation in and around Ituri.
229. At the beginning of this section, the Experts emphasized why the “do no harm” principle must be a factor in this case. The modalities of distributing the standard compensation amount (and urgent forms of reparation [REDACTED]) should also not add to the insecurity and hardship that victims, like many other DRC citizens, currently face.
230. The Experts concur with the UN that

“[...] if individual compensation awards are granted, the Trust Fund for Victims may also need to provide programmes for beneficiaries on basic financial literacy and negotiate with banks or mobile money providers on the transfer to and use of funds by beneficiaries. Once again, such issues should not be seen as obstacles to individual awards of compensation, but rather as having the further ability to transform the lives of victims”.²⁸²

These plans will need to be discussed with victims and the implementing partners as not all of the victims may be able to use this service as they are illiterate.

231. These consultations and the implementing plan shall also address the specific question of ensuring sustainability of the reparations. The Experts do not believe that the argument (heard at least from one source) that former child soldiers suffering from alcohol or drug addiction should not receive an SRP is valid. The implementing partners shall be involved in guaranteeing effective implementation and sustainability of the reparations, including through supporting the victims to manage such funds despite the difficulties.²⁸³

3.4.4. Collective reparations for former child soldier victims and indirect victims

232. The standardized individual reparation of the SRP that the Experts recommend should be complemented by a set of collective reparations targeted towards the continuing effects of the harms of former child soldiers victims after almost 20 years and their current needs and wishes. These collective reparations shall also address the needs and wishes of the indirect victims, i.e., family members including their own children who suffered specific harms.²⁸⁴
233. There will be several challenges in the implementation of such reparations as well, related in particular to distribution of the beneficiaries over different locations; availability of the required infrastructure and whether it can be used for reparations; access to remote areas; benefiting former child soldiers and their families without

²⁸² See *supra* section 3.1 and section 3.3.3, and Trial Chamber III, “Joint Submission by the United Nations Containing Observations on Reparations pursuant to Rule 103 of the Rules of Procedure and Evidence”, 17 October 2016, ICC-01/05-01/08-3449, para. 49.

²⁸³

²⁸⁴ See *supra* section 2.4.

creating or re-enforcing inequalities among victims and between victims and the communities they live in, or return to, [REDACTED]. On the other hand, if reparations can be implemented in a way that they strengthen the infrastructure and capacity of existing entities or even build new ones, this will also benefit other members of the community and thus help to reduce divisions and foster reconciliation and healing. The Experts believe that, despite all the difficulties, this can be achieved for the reparations that they recommend in the following.

234. While they are not in the position to calculate the costs of these reparations, the Experts recommend victims access to livelihood activities, medical and psychological support, access to training and education and participation in symbolic reparation processes.
235. These reparations are also very similar to the forms of reparations that the Trust Fund proposed in the *Lubanga* case, i.e., individual and/or collective medical and psychological support, projects of small business activities, micro credit schemes including through MUSO, community therapy activities, vocational training and learning programmes.²⁸⁵ This should be further explored in consultation with the victims in the present case to find the best solution appropriate to answer their needs.²⁸⁶

Access to schooling, university education and vocational training

236. Enlisted or conscripted before the age of 15, former child soldiers brutally interrupted their schooling and lost (opportunities of) their life plan. Many of them were not able to return to school or university, once demobilised, due to the lack of access, adequate means, trauma etc.
237. While some former child soldiers had the opportunity to study, others were unable to finish their studies due to a lack of resources. This specific form of reparations would then make the difference in their life to enable them to pay for university, finish their studies and obtain their diploma.²⁸⁷

²⁸⁵ *Lubanga* Filing on Reparations and Draft Implementation Plan, *supra* note 115, para. 302.

²⁸⁶ These activities were also emphasized in the consultation organized by the Trust Fund in the Framework of Reflection on Prejudices and Modalities for Reparations in the Bosco Ntaganda case from 24 to 25 January 2020 in Bunia; TFV Observations relevant to Reparations, *supra* note 80.

²⁸⁷ Interview with former child soldiers' legal representatives team.

238. This aspect of reparations would also make it possible for former child soldiers to access alphabetisation, primary and secondary education, or education programmes and vocational training depending on their needs and making possible to return to a life with more professional opportunities.²⁸⁸ This will be a key driving factor for the reintegration into the community and their family.
239. Moreover, former child soldiers are very concerned by the situation of their own children, for whom they could not ensure access to schooling and education, and who also suffer from a transgenerational harm.²⁸⁹
240. The first measure that the Experts therefore recommend is access to schooling and vocational training, for both victims and their children. Whether this can be better achieved through the free use of existing institutions or the creation of new opportunities, specific to the needs of former child soldiers, will depend on the location and situation of the victims concerned.

Other support for income-generating activities

241. Due to the crimes suffered and their continued consequences and trauma, former child soldiers have to survive in very difficult conditions, taking care alone of their children born out of rape and sometimes a whole family. They see the reparation as something they are entitled to in order to (re)build their lives and the main opportunity to address their basic needs and the ones of their dependants, through education and training support, but also through support for income-generating activities.
242. The Experts have heard that former child soldiers seek a financial support to receive training and develop income-generating activity, such as training as beautician, hairdresser, sewing, training in fishing, computer science, breeding, mechanics, motorcycle cab and agricultural activities.²⁹⁰ Managing these activities through solidarity mechanisms existing in DRC will be a factor of sustainability. Combined

²⁸⁸ *Ibid.*; NGO Roundtable organized by the experts [REDACTED]. See also Submissions on behalf of Former Child Soldiers, *supra* note 119, para. 71; and Lubanga Filing on Reparations and Draft Implementation Plan, *supra* note 115, para. 70.

²⁸⁹ See *supra* section 2.4.

²⁹⁰ Interview with former child soldiers' legal representatives team; NGO roundtable organized by the experts [REDACTED] Lubanga Filing on Reparations and Draft Implementation Plan, *supra* note 115, para. 71.

with the means from the SRP that the Experts recommend for each victim, these measures should help repair the harm that they suffered.

Access to medical and mental health care for former child soldiers and indirect victims

243. Former child soldiers continue to suffer from permanent trauma, medical diseases and psychological disorders which necessitate the adoption of urgent medical and psychological rehabilitation measures. Access to medical rehabilitation programmes should include medical treatment and surgery. Access to psychological rehabilitation programmes should include trauma-based counselling and mental health support and treatment, but also recreational and artistic activities. These programmes should include a component of treatment for those who suffer from drug and alcohol addiction issues. Former child soldiers themselves seek these forms of reparation.²⁹¹
244. As the consequences are so deep and part of the former child soldiers' adult construction, they also have a clear impact and negative effect on their children, born during or after their recruitment and participation in hostilities, as explained above who suffer from a transgenerational harm. That is why not only should former child soldier victims benefit from medical and psychological support, but their children should as well.²⁹² For many child soldiers, meaningful reparation would only result from the reparation done to their children who then could really change their life and not bear the stigma and long-term consequences (medical, psychological, material and societal) of this crime.²⁹³
245. Such support should also be provided to former child soldiers' families and parents, and family therapy sessions would help them to build better family relationships and understandings.
246. These services should be provided by well-trained professionals and experts in addressing mental health issues related to the specificity of the harms suffered by former child soldiers, and victims of sexual violence, and indirect victims.

Collective and symbolic reparations

²⁹¹ Interview with former child soldiers' legal representatives team; NGO roundtable organized by the experts [REDACTED]. See also Submissions on behalf of Former Child Soldiers, *supra* note 117, para. 72. See also *Lubanga* Filing on Reparations and Draft Implementation Plan, *supra* note 115, para. 69.

²⁹² Interview with former child soldiers' legal representatives team; NGO roundtable organized by the experts [REDACTED]. See also Submissions on behalf of Former Child Soldiers, *supra* note 117, para. 71.

²⁹³ Interview with former child soldiers' legal representatives team.

247. Raising awareness and sensitization about the crimes of conscripting and enlisting children under the age of 15 and their participation in hostilities, its meaning, realities and consequences would support rehabilitation and would be an important part of satisfaction. This would contribute to reducing the stigma and acknowledge the reality of the harms suffered by former child soldiers and facilitate their reintegration, and also the reintegration of their children, into families and communities. This should also include the harms suffered by former child soldiers' families or even communities to enable a mutual better understanding. Given the permanent insecurity in Ituri, this could also have a certain effect against the repetition of this crime. These activities should be designed after consultation with the victims and the communities depending on their needs. This could take the form of educational and awareness raising campaigns and workshops against stigmatisation of former child soldiers, children born out of rape and victims of sexual violence, using community centres to be built, radio programmes, and theatre plays. This could also be organised through itinerant activities and community centers depending on the location and needs of the victims and communities.
248. The Experts also heard that other forms of collective reparations clearly divide former child soldiers. Should the Court decide to include them, they should be defined following a careful and in-depth consultation process, respecting the communities and ethnic sensitivities, and be gender inclusive, to avoid in particular any re-stigmatisation. The Experts were told that former child soldiers strongly opposed any form of symbolic reparation (such as mausoleums etc.), "that they would destroy" if there was no other means of reparation corresponding effectively to their harms and needs.²⁹⁴

3.4.5. Summary

249. Consultation:
- a. Consult former child soldier victims on the design of the reparation framework and its implementation.
250. Urgent reparations for victims of rape and sexual slavery with HIV (victims raped, their children and spouses with HIV):

²⁹⁴ Interview with former child soldiers' legal representatives team.

- a. Lifetime access to first, second and third-line regime antiretroviral (ARV) drugs
 - b. Emergency food assistance for a minimum of twelve months. This assistance can take the form of (i) cash, (ii) food vouchers, or (iii) food transfers for food.
251. The standard reparation package for all former child soldier victims:
- a. A standard compensation amount (SCA) to cover all material harms of each victim – [REDACTED]
 - b. Livelihood assistance to be used for joining a MUSO – [REDACTED]
 - c. An amount to cover the unquantifiable moral damage suffered by each victim – [REDACTED]
252. Collective reparation:
- a. Access to schooling and vocational training for former child soldiers and their children
 - b. Other support for income-generating activities for former child soldiers
 - c. Access to medical and mental health care for all former child soldiers for a least one year and their children
 - d. Access to collective family therapy for all former child soldiers and indirect victims
 - e. Free access to HIV-AIDS testing on a regular basis for victims of rape with HIV
 - f. Sustainable psychosocial support and mental health care for victims of rape with HIV
 - g. Cost of promoting communities and families centered sensitization and awareness programmes (meetings within communities and families; radio; printed material; itinerant activities; building community centres) aimed at reducing the stigmatisation of former child soldiers, of victims of sexual violence and their children, including the children born out of rape, within their community and beyond, and at managing conflicts between former child soldiers and their communities and families.

SECTION 4 – THE SCOPE OF MR. NTAGANDA’S LIABILITY

253. The final issue the Court asked the Experts to comment on was the scope of the liability of Mr. Ntaganda. The extent of the harms caused by Mr. Ntaganda and the

forms of reparation to address them have been discussed in the previous sections. While they have recommended a standard reparation package (SRP) and a standard compensation amount (SCA) for each eligible victim, the Experts have not assigned a monetary value to each type of harm and each form of reparation they have recommended. Consequently, they have not put forward an amount for the sum-total of the harms caused by Mr. Ntaganda and of the corresponding reparations. As the Chamber has recalled in its decision appointing the Experts, the decision on the amount of Mr. Ntaganda's liability will be based on the extent of the harm suffered by the victims and the cost of the repair, and in assessing these elements, the Chamber may seek the assistance of experts.²⁹⁵ Independently of this amount, the scope of Mr. Ntaganda's liability can be determined considering the circumstances of this case.

254. In addition to determining the scope of liability of Mr. Ntaganda, in this section of the report the Experts discuss the possible impact of a *novus actus interveniens* and whether any benefits the victims may receive domestically or internationally might limit or reduce the liability of Mr. Ntaganda.²⁹⁶
255. The jurisprudence of the Court on the extent and scope of the liability of a convicted person has established the following principles:
 - a. that it is the responsibility of the convicted person to redress the harm caused as a result of the crimes for which the person was convicted;
 - b. that the indigence of the convicted person is no obstacle to establishing the extent of the liability of the person;²⁹⁷
 - c. that in cases of indigence, the liability of the person is not limited to non-monetary reparations;²⁹⁸
 - d. that the liability of the convicted person in relation to the forms of reparations ordered always has to be established by the Chamber and made known to the person;²⁹⁹ and,

²⁹⁵ Decision Appointing Experts, *supra* note 2, para. 13. In assessing these elements, the Chamber may seek the assistance of experts.

²⁹⁶ In the words of the Defence in the *Bemba* case, this should ensure that "the convicted person is not providing cumulative benefits in a manner inconsistent with the principles of reparations." Trial Chamber III, *The Prosecutor v. Jean Pierre Bemba Gombo*, Defence Observations on Reparations, ICC-01/05-01/08, 31 October 2016 ("*Bemba* Defence Observations on Reparations"), para. 103.

²⁹⁷ *Lubanga* Decision on Reparations Principles and Procedures, *supra* note 38, paras 102-105.

²⁹⁸ *Ibid.*, para. 240.

- e. that the scope of the liability of the person “must be proportionate to the harm caused and, inter alia, his or her participation in the commission of the crime for which he or she was found guilty, in the specific circumstances of the case.”³⁰⁰

256. To date, the Court has determined the extent of the financial liability of the convicted person in the cases of *Katanga*, *Al-Mahdi* and *Lubanga*. In *Katanga*, the Court determined that the extent of the harm in financial terms was USD 3,752,620 and considered that Mr. Katanga’s liability reached USD 1,000,000.³⁰¹ This figure was the result of the analysis carried out by the Chamber with respect to the factual and legal implications of Mr. Katanga’s participation as an accessory to the crimes that took place in the attack in Bogoro on 24 February 2003, and based on the assessment of each head of harm that the Chamber performed.³⁰²
257. In *Al Mahdi*, the Court identified the types of relevant harm caused by the destruction of nine mausoleums and a mosque in Timbuktu, Mali, in 2012 for which Mr. Al Mahdi was convicted as co-perpetrator of the war crime of wilfully directing attacks against historical or religious sites. The Court then “reasonably approximat[ed]” the costs of the harms found and established the liability of Mr. Al Mahdi at EUR 2,700,000.³⁰³ In contrast to *Katanga*, in *Al Mahdi* the Chamber appears to have made him financially liable for all the harm caused as a result of the destruction of cultural and religious property and the ensuing harms such as consequential economic loss, and not just for a part of it.
258. In *Lubanga*, Trial Chamber II established the convicted person’s monetary liability based on what it assessed as the “average harm” suffered by the victims without specifying the “precise ingredients” of the harm individually suffered by the victims. It set an amount of USD 8,000 *ex aequo et bono* for each of the 425 identified eligible victims (USD 3.4 million), and an amount of USD 6.6 million for harm suffered by

²⁹⁹ *Ibid.*, paras 1 and 32.

³⁰⁰ *Ibid.*, para. 118.

³⁰¹ *Katanga* Reparations Order, *supra* note 40, paras 239, 264.

³⁰² *Ibid.*, para. 257.

³⁰³ *Mahdi* Reparations Order, *supra* note 42, para. 134.

victims not yet identified. The Appeals Chamber confirmed that Mr. Lubanga was liable for the full amount of USD 10 million.³⁰⁴

259. A key element in understanding the different treatment given to the extent of the liability in the above cases is the principle of joint and several liability, also known as *responsabilité solidaire* or *in solidum*. According to this principle, each person who is jointly liable for the harm caused is fully liable for the full extent of the harm, but may take recourse action against the other persons responsible to recover part of what he or she has paid. This principle was rejected by the Trial Chamber in *Katanga*³⁰⁵ which applied the several liability principle, making the convicted person responsible only for the share of his or her responsibility. The Appeals Chamber in *Katanga*, on the other hand, held that

“in principle, the question of whether other individuals may also have contributed to the harm resulting from the crimes for which the person has been convicted is irrelevant to the convicted person’s liability to repair that harm. While a reparations order must not exceed the overall cost to repair the harm caused, it is not, per se, inappropriate to hold the person liable for the full amount necessary to repair the harm”³⁰⁶

The principle of joint and several liability also appears to have been used in *Al-Mahdi*, and it was used by Trial Chamber II in *Lubanga*.

260. The Experts believe that the Court should apply the principle of joint and several liability also in the case of Mr. Ntaganda. A decision based only on several liability would hinder the right to reparation that victims have under the Rome Statute. Victims who often have been waiting for up to two decades to obtain reparation from the Court, and who are living in a highly vulnerable situation and in urgent need of redress, would have to seek justice even against unknown perpetrators, in and outside their country, to ensure that their right to reparation is fulfilled to the fullest extent.³⁰⁷ This

³⁰⁴ *Lubanga* Judgment on Appeals against Decision Setting Size of Reparations Award, *supra* note 8.

³⁰⁵ *Katanga* Reparations Order, *supra* note 40, para. 263.

³⁰⁶ *Mahdi* Reparations Order, *supra* note 42, para. 178.

³⁰⁷ Trial Chamber III, *The Prosecutor v. Jean Pierre Bemba Gombo*, “Observations by the Redress Trust Pursuant to Article 75(3) of the Statute and Rule 103 of the Rules”, 17 October 2016, ICC-01/05-01/08-3448, para.23.

would render meaningless their right to effective reparation and would have the potential to undermine the Court's reparation scheme.³⁰⁸

261. As a consequence, and to prevent an interpretation of the principle that deprives victims of their right to reparation, the Experts submit that any assessment of the participation of the convicted person in the commission of the crimes should bear in mind the following factors:

- a. the mode of the criminal responsibility of the person in the commission of the crimes for which he was convicted;
- b. the gravity of the crimes committed and the extent of the harm caused to victims; and
- c. recognising the concurrent responsibility of other persons, even if their responsibility has not been determined by a tribunal.

4.1. The mode of Mr. Ntaganda's criminal responsibility in the commission of the crimes for which he was convicted³⁰⁹

262. Mr. Ntaganda and other military leaders of the UPC/FPLC worked together and agreed on a common plan to drive out all Lendu³¹⁰ from the localities targeted during the course of their military campaign against the RCD-K/ML. Mr. Ntaganda and his co-perpetrators wanted to destroy and disintegrate the Lendu community and ensure that the Lendu could not return to the villages that were attacked. As a result of the way the UPC/FPLC was organized and the position of the co-perpetrators within the organization, the Chamber considered that the conduct of those who committed the crimes on the ground, namely the individual UPC/FPLC soldiers and in some cases Hema civilians, must be attributed to the co-perpetrators as if it were their own acts.

³⁰⁸ The REDRESS Trust saw this potential "[...] particularly apposite in the context of international crimes, where hundreds or thousands of persons may be culpably complicit in or have contributed to the crimes that led to the harms inflicted on the victims. It is difficult to see how the principle of reducing reparations on the basis of concurrent responsibility can be operationalised without seriously and unjustly reducing reparations to victims. To do so would also put the unduly burdensome *onus* on the victims to pursue all of the multiple offenders who may have played a part in the crime in order to recover full reparation for the harm they suffered." *Ibid.*, para. 23.

³⁰⁹ The following description is largely taken from the Court's "Summary of Trial Chamber VI's Judgment in the Case of *The Prosecutor v. Bosco Ntaganda*", issued 8 July 2019.

³¹⁰ Some of the victims of the attacks were also from other ethnic groups.

263. In relation to Mr. Ntaganda's conduct, the Chamber found that he fulfilled a very important military function in the UPC/FPLC. He was one of the key leaders and his role was determinative in the UPC/FPLC's ability to set up a strong armed group that was capable of driving the Lendu population from certain areas. It was Mr. Ntaganda who devised the tactic for the successful takeover of the important village of Mongbwalu after previous failures of the UPC/FPLC to achieve this. Mr. Ntaganda rallied the troops prior to battle and he gave direct orders to the troops prior and during the operations.
264. In addition to his direct orders to target and kill civilians, Mr. Ntaganda endorsed criminal conduct of his soldiers by way of his own conduct. With his own actions, he showed his troops how the orders were to be implemented with regard to the treatment of the Lendu civilians.
265. Mr. Ntaganda was also involved in large-scale recruitment drives conducted by the UPC/FPLC. He made calls for young people to join the UPC/FPLC ranks and follow military training, and he also stated that parents and families should provide their children to the group. Those under 15 took part in combat operations and were used as bodyguards or personal escorts by the commanders, including Mr. Ntaganda.

4.2. The gravity of the crimes committed and the extent of the harm caused to victims

266. In his role initially as the FPLC's Deputy Chief of Staff in charge of Operations and Organization, and then as Chief of Staff, Mr. Ntaganda was instrumental in the organization and conduct of the attacks that caused the harms suffered by the victims in this case. He gave direct orders and by his own conduct endorsed the criminal acts of the soldiers he commanded.
267. Mr. Ntaganda's responsibility as military commander for the commission of the crime of murder is of a severe gravity. His action as military commander led his troops to take away the life of civilians thereby harming those close to the murdered person, often his/her next of kin. Such acts happened in villages or in victims' homes, often in front of their loved ones, and took place together with acts of pillaging and rape. Victims' next of kin suffered not only the loss of their loved ones, but also from the brutal ways in which they were murdered. Many of the surviving victims were also deprived of the economic support from those murdered.

268. Pillage that Mr. Ntaganda ordered and condoned happened in a systematic manner throughout the locations where the attacks took place, and this caused grave harm to the vast majority of the victims. Pillage occurred in connection with “ratissage” operations when houses were damaged, burnt or otherwise destroyed. Many victims lost not only their livelihood but their means of survival, such as animals, livestock, tools or vehicles. Victims also lost their personal, often emotionally-laden goods such as mattresses, pieces of clothing, mobile phones, and family mementoes.
269. Of particular gravity was the harm caused by the sexual violence, both suffered by child soldiers and by victims of the attacks. The Rome Statute and the Rules of Procedure of the Court duly recognise the gravity of rape, sexual slavery and other sexual crimes for which Mr. Ntaganda was convicted.³¹¹ Rape has generated irreparable harm in all its victims, their families, the next generations, and their communities. Women, men and children who were raped or held in sexual slavery not only have gone through a highly traumatic situation that resulted in physical injuries and severe, long-term psychological harm, but also lost their loved ones, partners and children in particular and, often, their communities. Because of the socio-cultural pervasive stigma and discrimination attached to rape, the husbands or partners of the rape victims abandoned them, and their children were either abandoned with them as “theirs”-- rather than the non-raped partner’s – children, or removed from them, as the raped victims were seen as “contaminated” people if they got HIV-AIDS. Various victims of rape gave birth to children who carried both the legacy of rape and the HIV-AIDS. They are also terribly affected by discrimination and stigma.

4.3. Concurrent responsibility of other persons

270. Even if the Chamber applies the principle of joint and several liability, the Experts consider that it might still be important for the Chamber to refer to concurrent responsibility as a recognition that others bear also responsible for the crimes that took place.
271. Concurrent criminal or other type of responsibility is often at stake when international crimes are committed, and may be taken into account when assessing the extent of

³¹¹ See, for example, Articles 36(8)(b), 42(9), 43(6), 54(1)(b), and 68(1) to (2) of the Statute; and Rules 16(1)(d), 17(2)(a)(iv), 17(2)(b)(iii), 17(3), 19(f), 63(4), 70, 72(1), 86, 88(1), 88(5), and 112(4) of the Rules.

criminal and civil liability of the convicted person. This section examines the question whether Mr. Ntaganda's civil liability might be impacted by the existence of concurrent responsibility in the commission of the crimes.

4.3.1. The FPLC troops and Mr. Ntaganda

272. Mr. Ntaganda was one of the most senior commanders of the FPLC troops during the period when the attacks took place. Nevertheless, it was the members of the FPLC troops who carried out murder, pillage, rape and the other crimes against the civilian population in a systematic and indiscriminate manner, and they are therefore also responsible for these crimes. However, these troops were under Mr. Ntaganda's command, and he gave orders to commit the crimes at issue. The fact that he was less personally engaged in violent conduct in the second operation than in the first one does not mean that his culpability for the crimes is diminished; rather, his conduct during the first operation further increases his culpability. Mr. Ntaganda's responsibility must not be reduced because of the concurrent responsibility that the FPLC and/or its soldiers have.³¹²

4.3.2. Mr. Lubanga's responsibility

273. Mr. Ntaganda played a key and active role in the recruitment and enlisting of children under the age of 15 years into the FPLC and for using them to participate actively in hostilities. The fact that Mr. Lubanga as the Commander-in-Chief of the FPLC had overall responsibility for these activities (and was convicted for this crime) does not take away from Mr. Ntaganda's liability in this respect.

4.3.3. The responsibility of the DRC

274. State responsibility in connection with the commission of the crimes for which Mr. Ntaganda was convicted may be another factor to weigh when establishing Mr. Ntaganda's liability. Civil responsibility of the State for what happened during the recruitment and use of child soldiers and during the attacks on its territory remains to be determined by a tribunal other than the ICC, as it lacks jurisdiction, or by the State itself through its government or its national courts.

³¹² On the application of this principle in the comparable situation in the *Bemba* case, see Trial Chamber III, *The Prosecutor v. Jean Pierre Bemba Gombo*, "Submission by QUB Human Rights Centre on Reparations Issues Pursuant to Article 75 of the Statute", 17 October 2016, ICC-01/05-01/08-3444, para. 100.

275. There may be a responsibility of the DRC as a result of not acting to prevent, prosecute the perpetrators, or support and provide victims with adequate measures to cope with their harms after the crimes took place and ensure reparation to them. Indeed, the DRC has obligations as a State to respect and ensure the fulfilment of civil and political rights as well as economic, social and cultural rights of its citizens.³¹³ Ensuring the respect of human rights has been defined by international jurisprudence and international standards as including the obligation to prevent, prosecute and redress.³¹⁴ With respect to the right to reparation, the DRC as a State had the obligation to act in a prompt manner to provide victims with remedies and reparations for the harm suffered,³¹⁵ but has until now not engaged in any transitional justice mechanism nor a reparations programme. Judicial reparations have never been implemented due to the numerous financial, legal and factual obstacles of the enforcement proceedings. In addition, while the State has been condemned *in solidum* in some cases, it never executed the judgement or paid reparation to the victims concerned.³¹⁶
276. For example, and in particular, victims who were raped and as a result were infected with HIV/AIDS, should have been provided, in a timely manner, with access to adequate healthcare as well as to essential medicines. Since such access to adequate health treatment has not taken place, the harms caused to victims have further deteriorated. It is also important to note that “it is particularly incumbent on States parties and other actors in a position to assist, to provide international assistance and

³¹³ The DRC has ratified most relevant UN human rights treaties such as the International Covenant on Civil and Political Rights (1981), the International Covenant on Economic, Social and Cultural Rights (1981), the Convention on the Elimination of All Forms of Discrimination against Women (1991), and the Convention on the Rights of the Child (1992), the African Charter for Peoples and Human Rights (1982).

³¹⁴ See the consistent jurisprudence of the IACtHR on this well-established principle since the *Case Velasquez v. Uruguay*, 29 July 1988, Serie C n°4, para.174, and also *Case Paniagua Morales v. Guatemala*, 8 March 1998 Serie C 37, para.173, *Case Caballero Delgado v. Colombia*, Serie Cn°22, 8 December 1995, para.58 ; and also from the UN Committee of Human Rights, Communication N°161/1983, *Joaquim Herrera Rubo v. Colombia*, suppl. N°40, A/43/40 ; Commission Africaine, Directives et Principes sur le Droit à un Procès Equitable et à l'Assistance Judiciaire en Afrique, 24 October 2011.

³¹⁵ African Commission for Human and People's Rights, *Case Bissangou v. Congo*, confirming that the right to reparation includes the right to obtain the enforcement of the judgment: “[t]he right to be heard guaranteed by Article 7 of the African Charter includes the right to the execution of a judgment (...). To interpret Article 14 any other way would lead to situations which are incompatible with the rule of law. As a result, the execution of a final judgment passed by a Tribunal or legal court should be considered as an integral part of the right to be heard which is protected by Article 7”.

³¹⁶ See also *supra* Section 3.1.3.

cooperation, especially economic and technical which enable developing countries to fulfil their core and other obligations” such as essential primary health care, minimum essential food, essential drugs, etc.³¹⁷

277. The DRC is now in the process of discussing various transitional justice processes, including the establishment of a general Reparations Fund for victims of international crimes and in particular crimes of conflict related sexual violence.³¹⁸ Whether and to what extent such a Fund would also address reparations for victims of Mr. Ntaganda is not clear. However, in line with the principle of joint and several liability, any potential responsibility of the DRC should not reduce the liability of Mr. Ntaganda.

4.4. *Novus actus interveniens*

278. It is alleged that conflicts that occurred in Ituri after the commission of Mr. Ntaganda’s crimes and are still ongoing today, have caused the re-victimization of at least some of his victims and that Mr. Ntaganda cannot be liable for the harm caused by others. The theory of *novus actus interveniens* refers to the existence of new intervening acts that can break the chain of causation to acts for which the defendant was liable. The Experts consider that in the case of Mr. Ntaganda the theory does not apply, given that these are two different sets of acts, both of which happened without any intervening causes, and generated harm that can be determined and measured as the Experts explain in section 2 of this report.

4.5. Other benefits obtained by victims since the time they were harmed

279. Victims of Mr. Ntaganda’s crimes have not received any form of reparation for the harm these crimes caused them. The right to reparation requires that those responsible for the harm provide full, prompt and adequate redress for it or that, in their absence, the State repairs the victims in solidarity and seeks from the perpetrator of the crimes to recover the payment for the harm.³¹⁹ To date, neither Mr. Ntaganda nor the DRC have provided reparations to Mr. Ntaganda’s victims.

³¹⁷ CESCR Committee, General Comment N. 14, *supra* note 179, paras 43,45.

³¹⁸ Various initiatives exist within the government, supported by the Special Adviser to the President in charge of Youth and Violence against Women. They are also part of the implementation plan of the Joint Communiqué and its addendum between the UN and DRC on conflict-related sexual violence. See for instance <https://cas-info.ca/2020/08/droits-humains-andre-lite-et-mukwege-echangeant-sur-lurgence-de-rendre-operationnel-le-fonds-dindemnisation-des-victimes-de-crimes-graves>.

³¹⁹ UN Basic Principles, *supra* note 11, Principle IX.16 and 17.

280. Every interlocutor that the Experts spoke with, including each of the victims they could interview, confirmed that Mr. Ntaganda's victims have received no support or assistance since the crimes occurred. This is echoed in the submissions of the Legal Representatives and is confirmed by the Registry in its recent First Report on Reparations.³²⁰ Even if there would have been some assistance, this would not have been a form of reparation. It would have been provided to victims either as humanitarian assistance or as a way to help them with their most urgent needs. In either case such benefits would have come from NGOs or international organizations. Important authority and jurisprudence confirm that humanitarian assistance or other types of help to victims in times of conflict or displacement should not be confused with reparation.

4.6. Priority for reparations over other obligations owed by Mr. Ntaganda

281. The Experts note that the Chamber did not impose fines or forfeiture of proceeds against Mr. Ntaganda. Should assets of Mr. Ntaganda be forfeited in the future, the Experts submit that priority must be given to reparations for victims before any other debts to the Court are considered. This follows from Rule 221 (2) of the Rules of Procedure and Evidence, and this rule applies no matter what the competing demand may be. Enforcing this priority will solidify the role of the Court as a key actor of reparative justice. Such understanding would also be in line with the spirit of the Rome Statute.

4.7. Summary

282. Having regard to the considerations set out in this section, the Experts submit that the Court should apply the principle of joint and several liability and that Mr. Ntaganda should respond for all the harm he caused to victims even if others, such as the DRC State or the FPLC troops, share concurrent responsibility for repairing the harms done.

SECTION 5 – CONCLUSIONS AND RECOMMENDATIONS

283. The following are the key conclusions and recommendations the Experts offer the Court in its consideration of reparation in the case of Mr. Bosco Ntaganda:

³²⁰ Registry's First Report on Reparations, *supra* note 24, para. 25 and n. 40.

Eligibility

1. At least 3,500 victims should be expected to be determined as eligible for reparations in this case.
2. This number includes a maximum of (but probably less than) 2,132 victims of the attacks who participated at trial; a yet unknown number of former child soldier victims; and an estimated minimum 1,000 so far unidentified victims of the attacks.
3. These victims are all presumed to have suffered harm as a result of at least one of the crimes committed by Mr. Ntaganda.
4. Victims are direct or indirect victims and include family members.
5. Family members of eligible victims of rape and murder committed during the attacks, and of former child soldier victims, are also eligible for reparations. The Court should take into account the concept of family in the DRC.
6. Family members of eligible victims who die before receiving compensation for pillage are entitled to receive the compensation in their stead. As a general rule, the compensation should be paid out to the surviving spouses and adult children, with the obligation to pay on to the other family members their respective shares.³²¹

Harm

7. The victims of Mr. Ntaganda's crimes suffered various types of material and non-material harm, including medical, psychological and social harms.
8. An individual assessment of each victim's harm and the extent of the harm is neither feasible nor desirable due to the lack of documentary evidence, and the length of time it would take to assess each individual claim. Therefore, presumptions should be used.
9. The Experts recommend a wider use of sampling at an earlier stage of the reparation procedure than is the current practice.

³²¹ For victims rejected or stigmatized by their husband or (part of) their family, the prior relationship between the deceased and these family members should be taken into account so that the reparation does not benefit them, but those family members who were dependents of the deceased.

10. Victims of the attacks who suffered from pillage and displacement and who often were left with nothing are still struggling today to support themselves and their children. Many had to interrupt or could not start school, and in that way they lost the opportunity to commence an income-generating activity. They also have no or very limited access to health care.
11. Psychological harm is still present today in these victims, and its long-term consequences have also caused transgenerational harm beyond the victims themselves.
12. For former child soldier victims, the disruption of their life and the lack of schooling had had immediate and long-term effects. They developed psychopathological mechanisms such as depression, dissociation and suicidal behaviour. Upon their return, they suffered rejection and stigmatization by the community and their own families.
13. The loss of a life plan should be recognized and included for reparation purposes.
14. Transgenerational harm must be taken into account when assessing the harm in the case of former child soldiers.
15. Victims of rape have been re-victimised. They were not only raped but they have also been victims of all their sociocultural structures: their spouses, families, communities and their State as they have faced stigma, discrimination, and ostracism. The degree of harm they have suffered has been greater when, in addition to rape, they were infected with HIV/AIDS and/or had a child as a result of rape.
16. Children born of rape are in a highly vulnerable situation: many with HIV/AIDS, they are stigmatised, alone, poor, uneducable and unmarriageable.
17. The Experts have attempted to be very detailed in their analysis of the different forms of harm (pecuniary and not pecuniary) suffered by victims as this in and of itself should be a form of satisfaction to victims. The Chamber should consider doing the same in its order on reparation.

Forms of reparations

18. Victims must be consulted on the design and implementation of the reparations framework.

19. The Chamber should be mindful of the victims' overwhelmingly uniform request and expectation that they be provided financial compensation as one form of reparation.
20. Each eligible victim should receive a standard compensation amount (SCA) [REDACTED] equivalent to [REDACTED] for material damages.
21. If the beneficiary of the SCA uses this compensation to join a MUSO, he or she should receive an additional amount equivalent to [REDACTED]
22. Each eligible victim should receive a standard compensation amount equivalent to [REDACTED] for non-pecuniary damage.
23. HIV-positive victims of rape should receive, on a priority basis, the following: lifetime access to ARV drugs, emergency food assistance for 12 months, and access to psychosocial and/or mental health care for at least 2 years. These measures should be implemented urgently, given the precarious health/life situation in which rape victims with HIV/AIDS are. HIV-positive children and HIV-positive spouses of victims of rape should also receive, on a priority basis, the same additional reparations.
24. The following types of collective reparations are recommended, based on *per capita* amounts or cost of the service:
 -) Access to schooling and vocational training
 -) Other support for income-generating activities
 -) The cost of providing access to medical and mental health care for at least one year
 -) Access to collective family therapy for former child soldiers and indirect victims
 -) Free access to HIV-AIDS testing on a regular basis for victims of rape with HIV
 -) Sustainable psychosocial support and mental health care for victims of rape with HIV
 -) Cost of promoting awareness programs (via meetings in communities, radio and printed materials,) to address the stigmatization of rape victims and their children within their communities and beyond

25. The Chamber should apply the principle of joint and several liability in the case of Mr. Ntaganda.
26. This principle should be interpreted using the following three grounds:
 -) the mode of the criminal responsibility of the person in the commission of the crimes for which he or she was convicted;
 -) the gravity of the crimes committed and the extent of the harm caused to victims; and
 -) recognising the concurrent responsibility of other persons, even if their responsibility has not been determined by a tribunal.
27. Mr. Ntaganda is fully responsible for all harm caused by the crimes for which he has been convicted even if others share concurrent responsibility.
28. It is important to recognise that in crimes of this magnitude and gravity others share concurrent responsibility. The Experts believe that it is important both in relation to Mr. Ntaganda but also in relation to the victims, that the Court refer, in particular, to the responsibility of the DRC as an important element of concurrent responsibility that should be addressed by other bodies, international or domestic.
29. Assets of Mr. Ntaganda that may still be forfeited should be used as a matter of priority for reparations, before any other debt to the ICC.

Signed by the Experts on 29 October 2020,



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