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No. ICC-01/04-02/06 A4-A5
Date: 12 September 2022

THE APPEALS CHAMBER

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

IN THE CASE OF THE PROSECUTOR v. BOSCO NTAGANDA

Public document

Judgment
on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled "Reparations Order"

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

Legal Representatives of Victims
Ms Sarah Pellet
Mr Tars Van Litsenborgh

Mr Dmytro Suprun
Ms Fiona Lau

Counsel for the Defence
Mr Stéphane Bourgon
Mr Benjamin Willame

Trust Fund for Victims
Ms Franziska Eckelmans

REGISTRY

Registrar
Mr Peter Lewis

Victims Participation and Reparations Section
Mr Philipp Ambach

The Appeals Chamber of the International Criminal Court,

In the appeals of the common legal representative of the victims of the attacks (ICC-01/04-02/06-2674) and the Defence of Mr Bosco Ntaganda (ICC-01/04-02/06-2675) against the decision of Trial Chamber VI entitled "Reparations Order" of 8 March 2021 (ICC-01/04-02/06-2659),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

1) The "Reparations Order" is partially reversed to the extent that Trial Chamber VI failed to (i) make any appropriate determination in relation to the number of potentially eligible or actual victims of the award and/or to provide a reasoned decision in relation to its conclusion about that number; (ii) provide an appropriate calculation, or set out sufficient reasoning, for the amount of the monetary award against Mr Ntaganda; (iii) assess and rule upon victims' applications for reparations; (iv) lay out at least the most fundamental parameters of a procedure for the Trust Fund for Victims to carry out the eligibility assessment; and (v) provide reasons in relation to the concept of transgenerational harm and the evidentiary guidance to establish such harm, the assessment of harm concerning the health centre in Sayo and the breaks in the chain of causation when establishing harm caused by the destruction of that health centre, and the presumption of physical harm for victims of the attacks.

2) The matter is therefore remanded to Trial Chamber II, which is directed to issue a new order for reparations, taking into account the terms of this Judgment.

3) The remainder of the arguments of the Defence and Victims Group 2 are rejected.

REASONS

I. KEY FINDINGS

1. The requirement for chambers to provide a reasoned opinion equally applies in the context of reparations proceedings.

2. A trial chamber is required to provide an intelligible calculation or explanation of the amount of an award for reparations based upon the available body of facts and information before it.

3. The Appeals Chamber notes that, while it held in the *Katanga* case that ruling on *all* applications for reparations is not necessary in cases involving a large number of such applications, its holding must be seen in light of the award for reparations made in that case and the fact that that award had a limited correlation with the *Katanga* trial chamber's findings on the individual applications. The Appeals Chamber is, however, of the view that there will be other cases in which the circumstances may well be different in that a trial chamber's findings on individual applications may have a greater bearing on the award. In such cases, it will be desirable for a trial chamber to rule on the information contained in the applications.

4. The applications for reparations not only trigger the reparations proceedings, but they are also an important source of information for the trial chamber's determination of the award. In particular, information contained in applications for reparations may be crucial to assess the types of harm alleged, which, in turn, is relevant to a determination of the appropriate modalities for repairing the harm caused with a view to, ultimately, assessing the costs of the identified remedy.

5. Reparations proceedings are judicial proceedings, resulting in a judicial order fixing a monetary award for which the convicted person is held liable. A trial chamber's determination of the award for reparations must be based on a sufficiently strong evidential basis. In other words, the available body of facts and information, which may include, *inter alia*, the decision on conviction, sentencing decision, submissions by the parties or *amici curiae*, expert reports and the applications for reparations, must be sufficiently robust in order for a trial chamber to make the required findings as to the fundamental parameters of the award. This relates in particular, where applicable, to

the actual or an appropriately estimated number of victims, and, in any event, to the precise scope of the convicted person's liability. The trial chamber must also issue a reasoned decision which appropriately explains the basis for the award.

6. The type of the award – collective, individual or both – is, along with other factors, a relevant consideration to be taken into account in the exercise of a trial chamber's discretion as to whether to rule on individual applications and the extent of its reliance on such applications.

7. While there may be instances where it is appropriate to proceed without ruling on any applications, there may be cases in which the evidential basis other than that contained in applications for reparations will be insufficient. In those latter circumstances, a trial chamber is *required* to rule upon applications for reparations to determine whether the relevant alleged facts have been established to the applicable standard.

8. The information gleaned from applications may represent the strongest and most direct available evidence on which to base, in particular, a monetary award. In this sense, ruling on applications ensures that any monetary award for reparations against a convicted person will be grounded on tangible, concrete evidence, from applicants who have in fact come forward seeking that their harm be repaired. The Appeals Chamber considers that, in the absence of a sufficiently strong evidential basis coming from sources other than applications, ruling upon applications is the fairest and most transparent manner in which to make an order for reparations. In particular, this approach allows for the identification of the types of harm at issue (based on specific claims of such harm) and, equally importantly, may provide potentially crucial information in relation to the number of victims who wish to receive reparations, thus forming a sound basis for the calculation of the award.

9. In order to ensure that applications for reparations are received, the VPRS and the legal representatives of victims may assist a trial chamber in gathering such applications. It also seems advisable, as suggested by Trial Chamber VI in a recent decision in the *Said* case, for trial chambers, already to seek and identify victim applicants, and collect their applications, from the early stages of proceedings; in fact,

rule 94(2) of the Rules and regulation 56 of the Regulations of the Court suggest this approach and aim to advance reparations proceedings with all expedition.

10. There may be cases in which there is, or there appears to be, a high number of potential beneficiaries and it is thus not desirable to set out findings in respect of all applications. The Appeals Chamber also notes that there may be circumstances in which, despite concrete efforts, it will not be possible to receive applications from all potential beneficiaries within a given period of time, but that they are likely to come forward in the future. In these circumstances, a trial chamber may elect instead to rule only on a sample of applications for reparations and then proceed to estimate how many more potential beneficiaries will come forward in the future. In such cases, the information contained in the sample of applications for reparations may be essential to a determination of the types of harm and the cost to repair the harm with respect to all beneficiaries, including those who come forward only at the implementation stage of the proceedings. Ruling on applications from a sample, which must be a representative one, may allow a trial chamber to extrapolate the makeup of the entire group of beneficiaries, according to the types of harm suffered by victims from each sub-group. This, in turn, is relevant to the ultimate determination of the amount of the award.

11. The Appeals Chamber recalls that, in certain cases, the TFV, rather than the Trial Chamber, may identify victims and verify their eligibility. Regulation 62 of the Regulations of the TFV expressly provides for such identification and assessment by the TFV. Therefore, the delegation of authority in this respect to the TFV does not, on its own, constitute an error.

12. Ensuring the application of the "do no harm" principle is of the utmost importance in the implementation of reparations.

13. The Appeals Chamber emphasises that, as noted in its previous jurisprudence, when making a decision as to the eligibility of a victim for reparations, the enquiry is whether the relevant facts have been established to the applicable standard of proof. This standard of proof must be met, regardless of whether or not a victim has been in a position to provide supporting documentary evidence.

14. Ultimately, the enquiry is whether the relevant facts have been established to the applicable standard of proof; this will govern the assessment of an application. In

other words, an application will not be granted, with or without supporting documentation, if the application (and other information and evidence) does not support the claim being made.

15. Harm cannot be attributed to a convicted person if a break in the chain of causation is established in a particular case. If this break is shown, based on the circumstances of the protracted armed conflict, then causation will not have been established. The Trial Chamber and the TFV will be required to assess, when presented with claims for reparations, whether the chain of causation has been established, and whether specifically alleged events, as a result of the protracted armed conflict, break that chain; if it is not established to the requisite standard that the harm alleged by a victim has been caused by the convicted person, because of a break in the chain of causation related to, for example, the protracted armed conflict, or, in fact, for any other reason, then this claim would have to be rejected.

16. Although it is a matter of evidence as to whether a claimant satisfies the Trial Chamber, or the TFV under the Trial Chamber's review, that he or she meets the requisite standard of proof to establish both his or her harm and relationship to the direct victim, the Appeals Chamber considers that, leaving the concept of significant importance undefined could result in the TFV having to define this legal concept, before it can carry out its administrative implementation task. Thus, the Appeals Chamber finds that, in determining whether a direct victim was of significant importance to an applicant requesting to be recognised as an indirect victim, the Trial Chamber and the TFV shall be guided by the criterion of special bonds of affection or dependence connecting the applicant with the direct victim, which captures the essence of inter-personal relations, the destruction of which is conducive to an injury on the part of indirect victims.

17. The harm that children born out of rape and sexual slavery suffer – although emerging only after being born – is a *direct* result of the commission of the crimes of rape and sexual slavery. Such harm can include the children being psychologically affected as a result of learning about the violent circumstances surrounding their conception, and being socially stigmatised and rejected by the community, not knowing who their fathers were. He or she can also suffer materially through, for example, loss of job prospects and social exclusion, and be physically injured, for example, if he or

she suffers from HIV/AIDS or another illness transmitted from the offender. The harm is both directly linked to the crime (as it would not have happened "but for" the crime) and was entirely foreseeable at the time the crime was committed. This type of victim – a child born out of rape/sexual slavery – is a unique type of victim, and also one that has suffered a unique type of harm that merits being recognised for what it is: direct harm inflicted on the child.

18. The Appeals Chamber notes that the criteria for classification as a direct or indirect victim are indeed legal criteria that have been determined by the Trial Chamber and in this judgment, and that victims' satisfaction is not *per se* a factor to consider in according a particular classification of victimhood. Nevertheless, identifying a particular harm as causing direct or indirect victimhood acknowledges the harm suffered by individual applicants, in the sense of acknowledging them as either direct or indirect victims. In the view of the Appeals Chamber, as long as an applicant meets the requirements to fall within the definition of a direct victim, it is not an error to consider more generally that such classification, and as a result acknowledgment of harm in that way, could suffice as a form of satisfaction in a particular case. The Appeals Chamber recalls that in the reparations process, "[m]easures of satisfaction should aim at remedying moral or non-physical harm suffered by victims of human rights violations" and that, with such measures, "victims of atrocious crimes receive social recognition that the crimes occurred, that the crimes harmed them, and that they are victims and survivors of such crimes". Furthermore, the Appeals Chamber is of the view that in the case of children born out of rape and sexual slavery, being recognised as direct victims can serve not only as a measure of satisfaction but also as a guarantee of non-repetition of their harm.

II. INTRODUCTION

19. This Appeals Chamber judgment concerns appeals filed by the Defence and one of the two groups of victims in this case, against the reparations order issued by the Trial Chamber on 8 March 2021.[1] The Trial Chamber issued this order against Mr Ntaganda and assessed his liability for reparations at 30 million USD.[2] The order

[1] *See*, in general, Victims Group 2's Appeal Brief; Defence Appeal Brief; Impugned Decision.
[2] Impugned Decision, p. 97.

was issued following Mr Ntaganda's conviction for his conduct, as a high level member of the UPC and its military wing, the FPLC, in the events that took place in Ituri district of the DRC from on or about 6 August 2002 to on or about 31 December 2003.[3] Mr Ntaganda was found guilty of five counts of crimes against humanity (murder and attempted murder, rape, sexual slavery, persecution, forcible transfer and deportation) and thirteen counts of war crimes (murder and attempted murder, intentionally directing attacks against civilians, rape, sexual slavery, pillage, ordering the displacement of the civilian population, conscripting and enlisting children under the age of 15 years into an armed group and using them to participate actively in hostilities, intentionally directing attacks against protected objects, and destroying the adversary's property).[4]

20. In its appeal, the Defence raises thirteen grounds of appeal against the order for reparations,[5] while Victims Group 2 raise seven.[6] The various grounds of appeal allege errors as to specific evidentiary issues related to how applications for reparations[7] should be assessed, in addition to those affecting broader issues challenging the very approach taken by the Trial Chamber to the reparations proceedings in this case.

21. The issues raised in the many grounds of appeal are both complex and contain extensive overlap, both internally, within the individual appeals, but also as between both appeals. Such issues include allegations that many of the Defence submissions were overlooked and the Impugned Decision was not sufficiently reasoned, that the Defence did not have the opportunity to challenge the eligibility of victims to benefit from reparations, as it neither had access to the applications of potential beneficiaries nor the opportunity to make observations thereon. Other novel and complex issues

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[3] Conviction Judgment, paras 1, 32.
[4] Conviction Judgment, para. 1199, pp. 526-530, 535-538.
[5] The Defence originally filed its notice of appeal with fifteen grounds of appeal. In the Defence Appeal Brief, para. 14, it provided notice that it no longer wished to pursue its fifth ground of appeal, in which it had argued that the Trial Chamber "erred by adopting an erroneous definition of victims of the crime of attack against the civilian population and persecution" (*see* Defence Notice of Appeal, p. 11). The Defence Appeal Brief also makes no specific mention of the thirteenth ground of appeal, in which the Defence had argued that the Trial Chamber "committed a mixed error of law and fact by concluding that collective reparations with individualised components is the most appropriate type of reparations to address the harms caused by the crimes for which Mr Ntaganda was convicted" (*see* Defence Notice of Appeal, p. 16).
[6] Victims Group 2's Appeal Brief, pp. 13-58.
[7] The Appeals Chamber notes that rule 92 of the Rules refers to a "victim's request for reparations", while the Impugned Decision and the appellants refer to "applications" (*see*, *e.g.*, Impugned Decision, para. 140, Defence Appeal Brief, para. 5, Victims Group 2's Appeal Brief, para. 88). The Appeals Chamber will thus use interchangeably the terms "request(s)" and "application(s)" for reparations in this judgment.

raised include those relating to questions of whether transgenerational harm should be recognised at the Court, whether children born out of rape and sexual slavery are direct victims of the crimes of which Mr Ntaganda was convicted, and whether persons to whom a direct victim was of significant importance may qualify as indirect victims.

22. Given the complexity and overlap between the grounds of appeal, they will be grouped to enable proper and full consideration of the issues raised. Therefore, they will be addressed in the following order:

a) *The applicability of the requirement to provide a reasoned opinion at the reparations stage*: namely, the second ground of the Defence appeal, relating to the Defence submission that the Trial Chamber did not provide reasoning for some of its findings in the Impugned Decision,[8] which also pertains to other grounds of appeal and will thus be addressed together with each of any such grounds;

b) *Grounds of appeal relating to the number of potentially eligible beneficiaries of the award for reparations*: namely the fourteenth ground and part of the second ground of the Defence appeal and the first, third and fourth grounds of Victims Group 2's appeal, relating to the accuracy of the estimate of the number of victims in this case;[9]

c) *Grounds of appeal challenging the amount of the award for reparations*: namely, the fifteenth ground and part of the second ground of the Defence appeal, and the second, fourth and fifth grounds of Victims Group 2's appeal, relating to how the Trial Chamber calculated the monetary award against Mr Ntaganda;[10]

d) *Grounds of appeal relating to applications for reparations, the eligibility assessment and delegation of functions to the TFV*: namely, the tenth, eleventh and twelfth grounds and part of the second ground of the Defence appeal, and the sixth ground of Victims Group 2's appeal;[11]

[8] *See infra* paras 45-63.
[9] *See infra* paras 64-174.
[10] *See infra* paras 175-274.
[11] *See infra* paras 275-419.

e) *Grounds of appeal on evidentiary issues*:

i) The third ground of the Defence appeal, relating to the "do no harm" principle;[12]

ii) Most of the fourth ground and part of the second ground of the Defence appeal, raising four issues: the interpretation of the concept of transgenerational harm; evidentiary criteria concerning claims in relation to transgenerational harm; requirements in relation to the provision of documentary evidence to support an application for reparations; and the assessment of harm concerning the health centre in Sayo;[13]

iii) Part of the third ground and the ninth ground of the Defence appeal, relating to breaks in the chain of causation when establishing harm, both generally, and also specifically, in relation to transgenerational harm and the harm caused by destruction of the health centre in Sayo;[14]

iv) The sixth and seventh grounds and part of the second ground of the Defence appeal, relating to the categorisation of persons as direct or indirect victims (persons to whom a direct victim was of "significant importance", but with whom they did not have a close personal relationship, and children born out of rape and sexual slavery);[15]

v) The remainder of the fourth ground and the entirety of the eighth ground of the Defence appeal, relating to the use of presumptions when assessing applications by victims for reparations;[16] and

f) *Grounds of appeal challenging the timeliness of the Impugned Decision*: namely, the seventh ground of Victims Group 2's appeal along with the first ground of the Defence appeal.[17]

[12] *See infra* paras 420-456.
[13] *See infra* paras 457-550.
[14] *See infra* paras 551-582.
[15] *See infra* paras 583-661.
[16] *See infra* paras 662-717.
[17] *See infra* paras 718-743.

23. For reasons further elaborated below in this judgment, the Appeals Chamber finds that the Trial Chamber erred in failing to: (i) make any appropriate determination in relation to the number of potentially eligible or actual victims of the award and/or to provide a reasoned decision in relation to its conclusion about that number; (ii) provide an appropriate calculation, or set out sufficient reasoning, for the amount of the monetary award against Mr Ntaganda; (iii) assess and rule upon victims' applications for reparations; (iv) lay out at least the most fundamental parameters of a procedure for the TFV to carry out the eligibility assessment; and (v) provide reasons in relation to (a) the concept of transgenerational harm and the evidentiary guidance to establish such harm, (b) the assessment of harm concerning the health centre in Sayo and (c) the breaks in the chain of causation when establishing harm caused by the destruction of that health centre, and the presumption of physical harm for victims of the attacks. The remainder of the arguments of the Defence and Victims Group 2 are rejected.

24. Finally, as a preliminary issue, the Appeals Chamber notes that the Chambers Practice Manual requires an appeal against an order for reparations to be determined within 10 months of the date of the filing of the response to the appeal brief, in cases in which no oral hearing is held.[18] Any extension of that 10 month period must be limited to exceptional circumstances and be explained in detail in a public decision.[19] In the present case, the three responses to the two appeal briefs were filed on 9 August 2021. This Judgment is therefore being delivered just over three months after the 10 month period that is stated in the Chambers Practice Manual to apply.

25. The Appeals Chamber points out, however, that the three responses in the present appeals did not represent the final substantive submissions, given that (i) the Appeals Chamber acceded to the request of the Defence to submit a reply to the response of both groups of victims to its appeal brief, which was filed on 30 September 2021; (ii) the Appeals Chamber granted the TFV's request to make observations on both appeals, those observations being filed on 30 September 2021; and (iii) the Appeals Chamber permitted the parties to respond to the TFV's Observations, with those responses being filed on 25 October 2021. This Judgment is therefore being

[18] Chambers Practice Manual, para. 90.
[19] Chambers Practice Manual, para. 93.

issued only a little over 10 months after the last substantive filings in this case were received; namely, when the Appeals Chamber was fully briefed.

26. In any event, the Appeals Chamber observes, by reference to the grounds of appeal that have been outlined above and that are extensively addressed below, that this is, by some distance, the most extensive appeal in relation to reparations that it has had to address. The two appellants have, between them, raised 20 grounds of appeal in relation to a wide variety of complex and highly significant issues. In light of the importance of those issues both to the victims and the Defence, the Appeals Chamber deemed it to be essential to give detailed consideration to the numerous arguments that were raised in order to resolve the appeals in a manner that fully respected the rights of all of the parties and the fairness of the proceedings as a whole, while still acting as expeditiously as possible.

27. The procedural history of the proceedings is set out in Annex A to this judgment. Annex B contains a list of the materials cited and designations used in this judgment.[20]

III. STANDARD OF REVIEW ON APPEAL AND SUBSTANTIATION OF ARGUMENTS

28. The present appeals raise questions of law, fact and procedure in addition to the exercise of the Trial Chamber's discretion. Such questions were also raised in the cases of *The Prosecutor v. Thomas Lubanga Dyilo* and *The Prosecutor v. Germain Katanga*, and respectively addressed in the 2019 *Lubanga* Appeals Chamber Judgment on Reparations and in the *Katanga* Appeals Chamber Judgment on Reparations. The Appeals Chamber finds it appropriate to apply the standards of review set out in those judgments.[21]

A. Errors of Law

29. With respect to alleged legal errors:

> [T]he Appeals Chamber will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial

[20] *See* Annex A: Procedural History; and Annex B: Table of designations and cited materials.
[21] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, paras 27-33; *Katanga* Appeals Chamber Judgment on Reparations, paras 38-45.

> Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision.
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> [An Impugned Decision] is "materially affected by an error of law" if the Trial Chamber "would have rendered a [decision] that is substantially different from the decision that was affected by the error, if it had not made the error".[22]

B. Errors of Fact

30. With respect to alleged errors of fact:

> [The Appeals Chamber] will not interfere with factual findings of the first-instance Chamber unless it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts, or failed to take into account relevant facts. As to the "misappreciation of facts", the Appeals Chamber has also stated that it "will not disturb a Pre-Trial or Trial Chamber's evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it".[23]

31. In relation to the standard of review regarding errors of fact, the Appeals Chamber underlines that factual findings in a decision under article 74 of the Statute are entered in light of a standard of proof ("beyond reasonable doubt" in accordance with article 66(3) of the Statute) that is different from that applicable to decisions under article 75 of the Statute ("balance of probabilities"), which applies to reparations proceedings. That is why a different standard of review is applied in relation to alleged errors of fact in appeals against reparations orders from that which applies to errors of fact in final appeals against decisions under article 74 of the Statute.

32. With regard to presumptions of fact drawn by a trial chamber in reparations proceedings, the Appeals Chamber has previously emphasised that "the reasonableness of a factual presumption drawn by a trial chamber in reparation proceedings will depend upon the circumstances of the case".[24] As for the standard of appellate review regarding factual presumptions, the Appeals Chamber has further observed:

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[22] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 28, *referring to* *Katanga* Appeals Chamber Judgment on Reparations, para. 39, *quoting* *Lubanga* A5 Appeals Chamber Judgment, paras 18-19 (footnotes omitted).
[23] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 27, *referring to* *Katanga* Appeals Chamber Judgment on Reparations, para. 41, *quoting* *Lubanga* A5 Appeals Chamber Judgment, para. 21.
[24] *Katanga* Appeals Chamber Judgment on Reparations, para. 76.

On appeal, bearing in mind the standard of review, a party challenging a factual presumption must demonstrate that no reasonable trier of fact could have formulated the presumption in question in light of the particular set of circumstances in that case.[25]

C. Procedural Errors

33. With respect to alleged procedural errors:

such errors may occur in the proceedings leading up to an impugned decision. […] However, as with errors of law, the Appeals Chamber will only reverse [the Impugned Decision] if it is materially affected by the procedural error. In that respect, the appellant needs to demonstrate that, in the absence of the procedural error, the [Impugned Decision] would have substantially differed from the one rendered.[26]

D. Errors in discretionary decisions

34. With respect to alleged errors in discretionary decisions:

The Appeals Chamber recalls that it will not interfere with a Chamber's exercise of discretion merely because the Appeals Chamber, if it had the power, might have made a different ruling. The Appeals Chamber will only disturb the exercise of a Chamber's discretion where it is shown that an error of law, fact or procedure was made. In this context, the Appeals Chamber has held that it will interfere with a discretionary decision only under limited conditions and has referred to standards of other courts to further elaborate that it will correct an exercise of discretion in the following broad circumstances, namely where (i) it is based upon an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abuse of discretion. Furthermore, once it is established that the discretion was erroneously exercised, the Appeals Chamber has to be satisfied that the improper exercise of discretion materially affected the impugned decision.[27]

35. In respect of the abuse of discretion, the Appeals Chamber has stated:

[T]he Appeals Chamber may interfere with a discretionary decision [when it] amounts to an abuse of discretion. Even if an error of law or of fact has not been identified, an abuse of discretion will occur when the decision is so unfair or unreasonable as to "force the conclusion that the Chamber failed to exercise its discretion judiciously". The Appeals Chamber will also consider whether the first

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[25] *Katanga* Appeals Chamber Judgment on Reparations, para. 77.
[26] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 29, *referring to* *Katanga* Appeals Chamber Judgment on Reparations, para. 40, *quoting* *Lubanga* A5 Appeals Chamber Judgment, para. 20.
[27] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 31, *referring to* *Katanga* Appeals Chamber Judgment on Reparations, para. 43, *quoting* *Kenyatta* OA5 Appeals Chamber Judgment, para. 22, *referring to* *Kony et al.* OA3 Appeals Chamber Judgment, paras 79-80; *Banda* OA5 Appeals Chamber Judgment, para. 30; *Ongwen* OA3 Appeals Chamber Judgment, para. 35.

> instance Chamber gave weight to extraneous or irrelevant considerations or failed to give weight or sufficient weight to relevant considerations in exercising its discretion. The degree of discretion afforded to a Chamber may depend upon the nature of the decision in question.[28]

E. Substantiation of arguments

36. As to the issue of substantiation of arguments, the Appeals Chamber notes that regulation 58(2) of the Regulations requires the appellant to refer to "the relevant part of the record or any other document or source of information as regards any factual issue" and "to any relevant article, rule, regulation or other applicable law, and any authority cited in support thereof" as regards any legal issue. It also stipulates that the appellant must, where applicable, identify the finding or ruling challenged in the decision with specific reference to the page and paragraph number.

37. In addition to these formal requirements, an appellant is obliged to present cogent arguments that set out the alleged error and explain how the trial chamber erred.[29] In alleging that a factual finding is unreasonable, an appellant must explain why this is the case, for example, by showing that it was contrary to logic, common sense, scientific knowledge and experience. In their submissions on appeal, it will be for the parties and participants to draw the attention of the Appeals Chamber to all the relevant aspects of the record or evidence in support of their respective submissions relating to the impugned factual finding. Furthermore, an appellant is required to demonstrate how the error materially affected the impugned decision. Whether an error or the material effect of that error has been sufficiently substantiated will be determined on a case-by-case basis.[30]

IV. APPLICABLE LAW

38. This section contains the main applicable provisions to the reparations proceedings under appeal. Further provisions and jurisprudence which are applicable to specific grounds of appeal will be presented under the relevant sections below.

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[28] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 32, *referring to* *Katanga* Appeals Chamber Judgment on Reparations, para. 44, *quoting* *Kenyatta* OA5 Appeals Chamber Judgment, para. 25.
[29] *Lubanga* Appeals Chamber Judgment on Conviction, para. 30; *Kony* OA3 Judgment, para. 48.
[30] *Gbagbo and Blé Goudé* A Appeals Chamber Judgment, para. 74; Appeals Chamber Judgment on Conviction, para. 48; Appeals Chamber Judgment on Sentencing, para. 33; *Lubanga* Appeals Chamber Judgment on Conviction, para. 31.

39. Article 75 of the Statute provides:

> 1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.
>
> 2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.
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> 3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.
>
> 4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.
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> 5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.
>
> 6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

40. Rule 94 of the Rules reads as follows:

> 1. A victim's request for reparations under article 75 shall be made in writing and filed with the Registrar. It shall contain the following particulars:
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> (a) The identity and address of the claimant;
>
> (b) A description of the injury, loss or harm;
>
> (c) The location and date of the incident and, to the extent possible, the identity of the person or persons the victim believes to be responsible for the injury, loss or harm;
>
> (d) Where restitution of assets, property or other tangible items is sought, a description of them;
>
> (e) Claims for compensation;
>
> (f) Claims for rehabilitation and other forms of remedy;
>
> (g) To the extent possible, any relevant supporting documentation, including names and addresses of witnesses.
>
> 2. At commencement of the trial and subject to any protective measures, the Court shall ask the Registrar to provide notification of the request to the person or persons named in the request or identified in the charges and, to the extent possible, to any

interested persons or any interested States. Those notified shall file with the Registry any representation made under article 75, paragraph 3.

41. Rule 97 of the Rules provides:

> 1. Taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both.
>
> 2. At the request of victims or their legal representatives, or at the request of the convicted person, or on its own motion, the Court may appoint appropriate experts to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations. The Court shall invite, as appropriate, victims or their legal representatives, the convicted person as well as interested persons and interested States to make observations on the reports of the experts.
>
> 3. In all cases, the Court shall respect the rights of victims and the convicted person.

42. Rule 98 of the Rules reads:

> 1. Individual awards for reparations shall be made directly against a convicted person.
>
> 2. The Court may order that an award for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim. The award for reparations thus deposited in the Trust Fund shall be separated from other resources of the Trust Fund and shall be forwarded to each victim as soon as possible.
>
> 3. The Court may order that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate.
>
> 4. Following consultations with interested States and the Trust Fund, the Court may order that an award for reparations be made through the Trust Fund to an intergovernmental, international or national organization approved by the Trust Fund.
>
> 5. Other resources of the Trust Fund may be used for the benefit of victims subject to the provisions of article 79.

43. Regulation 54 of the Regulations of the TFV provides:

> When the Court orders that an award for reparations against a convicted person be deposited with the Trust Fund or made through the Trust Fund in accordance with rule 98, sub-rules 2 to 4, of the Rules of Procedure and Evidence, the Secretariat shall prepare a draft plan to implement the order of the Court, to be approved by the Board of Directors.

44. Regulation 55 of the Regulations of the TFV reads:

> Subject to the order of the Court, the Trust Fund shall take into account the following factors in determining the nature and/or size of awards, inter alia: the nature of the crimes, the particular injuries to the victims and the nature of the evidence to support such injuries, as well as the size and location of the beneficiary group.

V. THE APPLICABILITY OF THE REQUIREMENT TO PROVIDE A REASONED OPINION AT THE REPARATIONS STAGE

A. Defence submissions before the Appeals Chamber

45. Under its second ground of appeal, the Defence submits that the Trial Chamber "erred in failing to provide a reasoned opinion".[31] Referring to the 2015 *Lubanga* Appeals Chamber Judgment on Reparations, the Defence submits that the Trial Chamber correctly identified the five essential elements that must be included in a reparations order.[32] However, the Defence contends that, for the Appeals Chamber to be able to review a decision impugned on appeal and for the convicted person to be able to exercise his or her right to appeal, it was imperative that the Trial Chamber issued a reasoned opinion.[33]

46. The Defence submits that article 74 of the Statute requires decisions, including reparations orders, to be issued in writing and to contain a reasoned statement of the trial chamber's findings on the evidence and conclusions.[34] It argues that the importance of the findings made in a reparations order are reflected in article 82(4) of the Statute, which provides for the convicted person's right to appeal the order.[35] Referring to previous judgments of the Appeals Chamber, as well as those of the ICTY, the ECtHR and the IACtHR, the Defence argues that the right to a reasoned opinion is one of the guarantees of the right to a fair trial, and to have fair and impartial proceedings.[36]

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[31] Defence Appeal Brief, p. 20.
[32] Defence Appeal Brief, para. 60.
[33] Defence Appeal Brief, para. 61.
[34] Defence Appeal Brief, para. 62.
[35] Defence Appeal Brief, para. 65.
[36] Defence Appeal Brief, paras 62-68, *referring to* 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 248; *Lubanga* OA5 Appeals Chamber Judgment, para. 20; ICTY *Kunarac* Judgment, para. 41; ICTY *Nikolic* Judgment, para. 96; ECtHR, *Hadjianastassiou v. Greece*, para. 32; IACtHR, *J. v. Peru* , para. 224; IACtHR, *Lopez Mendoza v. Venezuela*, para. 141; IACtHR, *Chichilla Sandoval et al. v. Guatemala*, para. 248.

47. The Defence argues that the right to have fair proceedings requires a trial chamber to issue reasoned decisions and applies "whenever the legal status and interests of the parties are affected".[37] The Defence refers to the Appeals Chamber's finding in *Lubanga* that, in the context of reparations, this right "is understood to be the right to fair and impartial reparations proceedings", bearing in mind that the interpretation of the applicable provisions is required to be "consistent with internationally recognised human rights".[38]

48. According to the Defence, given that a reparations order establishes the liability of a convicted person *vis-à-vis* the victims, setting an amount to repair their harm, and defines the form and scope of the reparations process, it "greatly impacts" the interests of the convicted person.[39] The Defence submits that the right to appeal a reparations order under article 82(4) of the Statute reflects the importance of the findings made in such an order.[40] According to the Defence, the right to have fair proceedings contains guarantees such as the right to a reasoned decision and the right to be heard, and such rights are "standalone guarantees but are tightly interlinked".[41] The Defence refers to the judgment of the Appeals Chamber in the *Lubanga* OA5 appeal, in which, according to the Defence, the Appeals Chamber "endorsed the finding of the ICTY Appeals Chamber that 'the right to a reasoned decision is an element of the right to a fair trial and that only on the basis of a reasoned decision will proper appellate review be possible'".[42] The Defence goes on to submit that "[t]he ICTY explained that a reasoned opinion is key to the exercise of the right of appeal",[43] quoting the following excerpt from the jurisprudence of the ICTY Appeals Chamber:

> This element, *inter alia*, enables a useful exercise of the right of appeal available to the person convicted. Additionally, only a reasoned opinion allows the Appeals Chamber to understand and review the findings of the Trial Chamber as well as its evaluation of evidence.[44]

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[37] Defence Appeal Brief, para. 63.
[38] Defence Appeal Brief, para. 64, *referring to* 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 248.
[39] Defence Appeal Brief, para. 65.
[40] Defence Appeal Brief, para. 65.
[41] Defence Appeal Brief, para. 66.
[42] Defence Appeal Brief, para. 66, *referring to* *Lubanga* OA5 Appeals Chamber Judgment, para. 20.
[43] Defence Appeal Brief, para. 66.
[44] Defence Appeal Brief, para. 66, *referring to* ICTY *Kunarac* Judgment, para. 41; ICTY *Nikolic* Judgment, para. 96.

49. The Defence adds that, according to the ECtHR, "courts must indicate with sufficient clarity the grounds on which they based their decision", and that this "makes it possible for the accused to exercise usefully the rights of appeal available to him".[45] The Defence further submits that the IACtHR "has confirmed that 'the obligation to provide the reasoning for decisions is a guarantee related to the conscientious administration of justice that guarantees the individual the right to be tried for the reasons established by law' and that '[the reasoning] should show that the arguments of the parties have been duly taken into account and that all the evidence has been analyzed'".[46] The Defence argues that this is "well settled in the jurisprudence of the IACtHR", referring to additional judgments of that court.[47] Furthermore, according to the Defence, this right is closely related to the right to be heard – "*audi alteram partem*" – as reflected by the requirement of article 75(3) of the Statute to take the representations of the convicted person into account.[48]

50. According to the Defence, the Trial Chamber erred in law by issuing a reparations order without providing a reasoned opinion.[49] It submits that it agrees with some of the arguments of Victims Group 2 in that the Trial Chamber failed to provide a reasoned opinion in respect of many of its findings.[50] It further argues that the Trial Chamber violated Mr Ntaganda's right to be heard by failing to consider many of the Defence's submissions.[51] This, according to the Defence, is evidenced by the fact that the Trial Chamber referred to the Defence's submissions only 13 times over 649 footnotes, excluding the section on Procedural History.[52]

51. In addition, the Defence argues that the Trial Chamber erred in failing to explain the legal basis for its finding that there was no need to rule on the merits of individual

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[45] Defence Appeal Brief, para. 67, *referring to* *Hadjianastassiou v. Greece*, para. 32.
[46] Defence Appeal Brief, para. 68, *referring to* *J. v. Peru*, para. 224.
[47] Defence Appeal Brief, para. 68, *referring to* *López Mendoza. v. Venezuela*, para. 141; *Chinchilla Sandoval et al. v. Guatemala*, para. 248; *J. v. Peru*, para. 224.
[48] Defence Appeal Brief, para. 69, *referring to* Dissent to *Katanga* OA10 Appeals Chamber Judgment, para. 56; *Perez v. France*, para. 80.
[49] Defence Appeal Brief, paras 70-72, 82-84.
[50] Defence Appeal Brief, paras 71-72. *See also* paras 79, 85.
[51] Defence Appeal Brief, para. 72.
[52] Defence Appeal Brief, para. 72.

applications for reparations[53] and that it failed to address the Defence's submissions on its access to dossiers of participating victims.[54]

52. Further, the Defence argues that the Trial Chamber set a very wide range of numbers relating to potentially eligible beneficiaries that was based, on its own admission, on unreliable figures, and that it failed to explain its approach.[55] In addition, the Defence submits that the Trial Chamber committed further errors when pronouncing on other concepts and principles relevant to reparations.[56] In particular, the Defence argues that the Trial Chamber's errors in this regard include its pronouncements on: "(i) children born out of rape as direct victims whereas none of the parties or participants made representations to that effect; (ii) creation of a new category of indirect victims including persons who did not have a close personal relationship with the victim, who was nevertheless a person of significant importance in their lives; (iii) resort to presumptions of fact to establish certain types of harm suffered by categories of victims; and (iv) lowering the applicable standard of evidentiary proof for certain categories of victims".[57]

B. Victims Group 1's submissions before the Appeals Chamber

53. Victims Group 1 argue that the Defence's submissions are disorganised and unsubstantiated.[58] In particular, as for the Defence's argument that the Trial Chamber failed to provide the necessary reasoning in the Impugned Decision, Victims Group 1 submit that this argument is incorrect and unsubstantiated.[59] They submit that the Trial Chamber was justified in its approach not to consider individual requests[60] and that the Defence merely expresses disagreement with the Trial Chamber's previous decisions regarding the Defence's access to the application forms collected by the Registry.[61] Victims Group 1 further submit that they reiterate their arguments in response to the

[53] Defence Appeal Brief, paras 73-74.
[54] Defence Appeal Brief, paras 75-76.
[55] Defence Appeal Brief, para. 78.
[56] Defence Appeal Brief, para. 86.
[57] Defence Appeal Brief, para. 87.
[58] Victims Group 1's Response, para. 35.
[59] Victims Group 1's Response, para. 36.
[60] Victims Group 1's Response, paras 36-37, *referring to* Impugned Decision, paras 16-17, 21.
[61] Victims Group 1's Response, para. 38.

Defence's first ground of appeal that the Trial Chamber did not have to make a determination on the exact number of beneficiaries.[62]

54. Victims Group 1 argue that the Defence's submissions are unsubstantiated.[63] They further challenge the Defence's submission that the Trial Chamber's failure to provide sufficient reasoning materially affects the fairness of the Impugned Decision as, in their view, this allegation seems to be disproven by "the very fact that the Defence found itself in a position to file its Appeal Brief, formulating no less than 15 grounds of appeals [*sic*]".[64]

C. Victims Group 2's submissions before the Appeals Chamber

55. Victims Group 2 partly concur with the Defence's second ground of appeal, but submit that the Defence's contentions should be "approached with caution, as they do misrepresent the type of the reparations ordered",[65] especially those regarding individual components of collective reparations, which, Victims Group 2 submit, do not transform a collective award into individual awards.[66] Furthermore, Victims Group 2 submit that the Trial Chamber was not required to give a reasoned opinion regarding the Defence's access to the dossiers of the victims participating in the trial and the Defence's involvement in the assessment of requests.[67] In any event, according to Victims Group 2, the Defence failed "to demonstrate that the Impugned Decision would substantially differ from the one rendered had the alleged error not been committed".[68]

56. Victims Group 2 concur with the Defence's arguments that the Trial Chamber erred by failing to give a reasoned opinion on the determination of the number of potentially eligible victims,[69] and on the financial liability of the convicted person.[70] As for the Defence's remaining submissions under the second ground, Victims Group 2

[62] Victims Group 1's Response, para. 39.
[63] Victims Group 1's Response, para. 40.
[64] Victims Group 1's Response, para. 46.
[65] Victims Group 2's Response, paras 57-60.
[66] Victims Group 2's Response, paras 58-60.
[67] Victims Group 2's Response, para. 61.
[68] Victims Group 2's Response, para. 61.
[69] Victims Group 2's Response, para. 64.
[70] Victims Group 2's Response, para. 65.

argue that the Defence failed to demonstrate any error and/or the material impact of the alleged error on the Impugned Decision.[71]

D. Determination by the Appeals Chamber

57. The Appeals Chamber notes that the Defence, under its second ground of appeal, argues that trial chambers are required to provide sufficient reasons in their orders for reparations, and that the Trial Chamber failed to provide such reasons to reach determinations on elements that were essential to the Impugned Decision and other matters contained within it. According to the Defence, the Trial Chamber referred to its submissions only 13 times within its determination of the merits of the Impugned Decision.[72]

58. In this regard, the Appeals Chamber recalls that, in the context of appeals filed under rules 154 and 155 of the Rules, where a chamber has not expressly addressed an argument, the Appeals Chamber has noted that, "[w]hile the provision of sufficient reasoning is important", "this does not mean that failure to address in the reasoning of a decision one of the arguments of a party automatically results in an error".[73] It has circumscribed the requirement of a reasoned opinion to the circumstances of each case, as follows:

> The extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the Pre-Trial Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion.[74]

59. In the context of appeals against decisions on the criminal liability of an accused, the Appeals Chamber found that these considerations apply in principle.[75] In that context, it found that "[t]o fulfil its obligation to provide a reasoned opinion, a trial chamber is not required to address all the arguments raised by the parties, or every item

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[71] Victims Group 2's Response, para. 67.
[72] Defence Appeal Brief, para. 72. The Defence further lists the submissions that, in its view, were not addressed by the Trial Chamber (*see* Defence Appeal Brief, paras 75-76, 79, 85).
[73] *Bemba et al.* OA4 Appeals Chamber Judgment, para. 116.
[74] *Lubanga* OA5 Appeals Chamber Judgment, para. 20.
[75] *Bemba* A Appeals Chamber Judgment, para. 52.

of evidence relevant to a particular factual finding, provided that it indicates with sufficient clarity the basis for its decision".[76] It further stated:

> The Appeals Chamber notes that a trial chamber thus has a degree of discretion as to what to address and what not to address in its reasoning. Not every actual or perceived shortcoming in the reasoning will amount to a breach of article 74 (5) of the Statute.[77]

60. In light of the foregoing, the Appeals Chamber finds merit in the Defence's argument that these considerations equally apply in the context of reparations proceedings. In this regard, it notes that it found a lack of reasoning on an issue in the case of *Katanga*. It found that the Trial Chamber had "erred in failing to properly reason its decision in relation to the causal nexus between the attack on Bogoro and the harm suffered by [five applicants for reparations]".[78] It found that this made "it impossible for the Appeals Chamber to assess the reasonableness of the Trial Chamber's finding that the causal nexus had not been established to a balance of probabilities".[79]

61. In the present case, the Defence submits that the Trial Chamber failed to provide a reasoned opinion in relation to the following findings:

- The Trial Chamber's decision not to rule on the merits of individual applications for reparations,[80] allegedly ignoring (i) the Defence's requests to have access to the dossiers of the participating victims and potential beneficiaries, including the sample prepared by the Registry,[81] and (ii) the Defence's opposition to the Registry's proposed system to determine the eligibility of potential beneficiaries;[82]

- The Trial Chamber's reference to a very wide range of numbers of potentially eligible beneficiaries,[83] allegedly ignoring (i) the Defence's opposition to the figures submitted by Victims Group 2; (ii) its argument that the number of victims had to be established to set the final amount of the award; (iii) its

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[76] *Bemba* A Appeals Chamber Judgment, para. 53 (footnote omitted).
[77] *Bemba* A Appeals Chamber Judgment, para. 54.
[78] *Katanga* Appeals Chamber Judgment on Reparations, para. 239.
[79] *See* *Katanga* Appeals Chamber Judgment on Reparations, para. 239.
[80] Defence Appeal Brief, paras 73-74.
[81] Defence Appeal Brief, para. 75.
[82] Defence Appeal Brief, para. 76.
[83] Defence Appeal Brief, para. 78.

submissions on the unlikelihood that the total number of victims for the purpose of reparations would vary significantly from the number of participating victims; (iv) its submissions on the importance of an accurate number of potential beneficiaries, as well as (v) its request that the Trial Chamber order the Registry to disclose its estimates;[84]

- The Trial Chamber's determination of the final amount of the cost of reparations imposed on Mr Ntaganda,[85] listing certain figures and estimates from the TFV and the appointed experts, allegedly failing to (i) explain its calculations;[86] (ii) earmark specific amounts for participating victims, for new potential beneficiaries yet to be identified, or for "former child soldiers" as opposed to victims of attacks;[87] (iii) provide a breakdown of how the final sum is expected to be employed;[88] and (iv) consider the Defence's submissions on these matters;[89] and

- The Trial Chamber's findings on other matters, namely: (i) its rulings on various concepts, including transgenerational harm;[90] (ii) that children born out of rape and sexual slavery are direct victims; (iii) that persons to whom a direct victim is of significant importance are indirect victims; (iv) that certain types of harm suffered by some categories of victims can be presumed; and (v) that the applicable standard of proof could be lowered for certain categories of victims.[91]

62. The Appeals Chamber considers that, in order to determine whether the Trial Chamber failed to give a reasoned opinion on any of the above issues, it is necessary to address each of those issues separately. Furthermore, to determine properly the question of whether or not the Trial Chamber in fact provided sufficient reasons to support the findings it made in relation to the above issues, the Appeals Chamber finds it appropriate to address that question together with the additional arguments that both

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[84] Defence Appeal Brief, para. 79.
[85] Defence Appeal Brief, para. 83.
[86] Defence Appeal Brief, paras 82-83.
[87] Defence Appeal Brief, para. 84.
[88] Defence Appeal Brief, para. 84.
[89] Defence Appeal Brief, para. 85.
[90] Defence Appeal Brief, para. 86, fn. 125, *referring to*, *inter alia*, the fourth ground of the Defence's appeal, which includes transgenerational harm.
[91] Defence Appeal Brief, para. 87.

the Defence and Victims Group 2 submit in the grounds of appeal in which they both impugn and challenge such findings as erroneous. Therefore, (a) the issue regarding the Trial Chamber's lack of reasoning in relation to its determinations not to rule on individual applications and the Defence's role in that process is addressed below under the tenth, eleven and twelfth grounds of the Defence's appeal;[92] (b) the issue concerning the Trial Chamber's lack of reasoning in relation to the number of beneficiaries of the award is addressed under the fourteenth ground of the Defence's appeal and the first, third and fourth grounds of Victims Group 2's appeal;[93] while (c) the issue regarding the Trial Chamber's lack of reasoning concerning the amount of the reparations award is addressed below pursuant to the fifteenth ground of the Defence's appeal and the second, fourth and fifth grounds of Victims Group 2's appeal.[94] Finally, (d) the issue regarding the Trial Chamber's lack of reasoning concerning its findings in relation to additional categories of victims and further evidentiary matters is addressed below under the fourth to ninth grounds of the Defence's appeal.[95]

63. As indicated in the Introduction, the Appeals Chamber will first address the fourteenth ground of the Defence's appeal and the first, third and fourth grounds of Victims Group 2's appeal, namely, the number of potentially eligible beneficiaries of the reparations award. Then it will address those grounds of appeal challenging the amount of the award for reparations. Subsequently, it will turn to the issues of the applications for reparations, the eligibility assessment and the delegation of functions to the TFV, prior to addressing the evidentiary issues that have been raised on appeal.

VI. GROUNDS OF APPEAL RELATING TO THE NUMBER OF POTENTIALLY ELIGIBLE BENEFICIARIES OF THE AWARD FOR REPARATIONS

64. The Appeals Chamber notes that the issues raised by the Defence under the fourteenth ground of its appeal, which relate to alleged errors in the manner in which the Trial Chamber determined the number of potentially eligible beneficiaries of reparations, address the same part of the Impugned Decision against which Victims

[92] *See infra* paras 319-349, 358-369.
[93] *See infra* paras 141-174.
[94] *See infra* paras 236-274.
[95] *See infra* paras 470-497, 608-640, 641-661, 681-717.

Group 2 also appeal under the first,[96] third[97] and fourth[98] grounds of their appeal. For that reason, the Appeals Chamber will address the issues arising out of those grounds of appeal together in this section. In order to do so, the Appeals Chamber will first set out the relevant parts of the Impugned Decision addressing the number of potential beneficiaries of the reparations award, which relate to all of these grounds of appeal. It will then set out the arguments of the parties and, where relevant, the TFV, in separate sections on each of the above four grounds of appeal, prior to determining, as a whole, the issues raised by those four grounds. Where other parts of the parties' appeal briefs touch upon the issues considered in this section, they will also be summarised and addressed below.

A. Relevant parts of the Impugned Decision

65. At the beginning of the Impugned Decision, the Trial Chamber set out an "Overview", during the course of which it outlined the type of reparations that it had decided to award and the reasons therefor in the following terms:

> 7. After detailed consideration of the submissions of the parties and other participants in the proceedings, reports from the Registry and the Appointed Experts, the TFV, relevant case records, and the applicable legal framework, the Chamber has concluded that awarding collective reparations with individualised components is the most appropriate course of action in the present proceedings.
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> 8. The Chamber reached the above conclusion in light of (i) the scope of the case; (ii) the potentially large number of unidentified eligible victims; (iii) the extent of the harm the victims suffered; and (iv) the scope, types, and modalities of reparations the Chamber considers appropriate to address such harm, in the circumstances of the case. In effect, the Chamber notes that the potential number of victims of all crimes for which Mr Ntaganda was convicted may be significantly higher than the number of victims currently known. The exact number may never be determined given the passage of time, the widespread and

[96] Ground 1 of Victims Group 2's appeal is headed: "The Trial Chamber committed a combination of errors of law, fact and/or procedure in setting the overall cost to repair by failing to inquire into and to obtain an accurate estimate of the number of potential beneficiaries for reparations, and by failing to give a reasoned opinion on the estimates provided by the parties and participants". *See* Victims Group 2's Appeal Brief, p. 13.
[97] Ground 3 of Victims Group 2's appeal is headed: "The Trial Chamber committed a combination of errors of law, fact and procedure by failing to obtain estimates that are as accurate as possible on the number of victims likely to come forward for reparations, and by failing to give a reasoned opinion on its conclusions on the matter". *See* Victims Group 2's Appeal Brief, p. 39.
[98] Ground 4 of Victims Group 2's appeal is headed: "The Trial Chamber committed an error of law and/or fact by failing to give a reasoned opinion in relation to the way it purportedly 'resolved uncertainties in favour of the convicted person'". *See* Victims Group 2's Appeal Brief, p. 42.

> systematic nature of the crimes committed, and the specific context of the Democratic Republic of the Congo (the 'DRC'), and particularly Ituri.
>
> 9. The Chamber stresses that in reaching this decision it particularly took into account the victims' wish not to be granted any form of memorialisation or other forms of symbolic reparations unless they serve practical purposes, and their wish to receive awards aiming at supporting sustainable and long-term livelihood and well-being, rather than simply addressing their needs on a short-term basis. The Chamber has thus concluded that collective reparations with individualised components are the most appropriate way of addressing the harms caused by the crimes for which Mr Ntaganda was convicted and the long-term needs of the victims.[99]

66. In the context of addressing the types and modalities of reparations to be awarded, the Trial Chamber made the following observations in relation to the type of reparations to be awarded and the number of victims who would be eligible to receive them:

> 189. The Chamber further recalls that collective reparations may address the harm that victims suffered on an individual and collective basis. Despite their collective nature, due to their individualised components, the collective reparations in this case will also focus on the individual members of the group and include individual benefits that respond to the specific needs and current situation of individual victims within the group.
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> 190. The Chamber notes that the number of victims is an important factor for determining the type of reparations that is appropriate. However, victims eligible to receive reparations in this case are not limited to the individuals who may have requested reparations or those allowed to participate in the trial proceedings. Instead, it rather encompasses a much greater number of potential victims, in light of the findings in the Judgement and the Sentencing Judgment as to the scope and particularly the widespread and systematic nature of the crimes committed. In particular, the Chamber recalls its finding in the Sentencing Judgment that the crimes committed in the context of the attacks, in several instances, were committed on a large scale, and against a large number of victims. Regarding child soldiers, the Chamber recalls its Sentencing Judgment where it noted that the number of victims on which the Chamber made specific findings does not reflect the full extent of the UPC/FPLC's recruitment and use of child soldiers. Similarly, the Chamber recalls its findings in the Sentencing Judgment, indicating that rape and sexual violence was a common practice within the UPC/FPLC.[100]

67. The Trial Chamber subsequently introduced the section of the Impugned Decision entitled "Amount of Mr Ntaganda's financial liability" as follows:

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[99] Impugned Decision, paras 7-9 (footnotes omitted).
[100] Impugned Decision, paras 189-190 (footnotes omitted).

> The Chamber details below the elements it has taken into account in order to determine Mr Ntaganda's financial liability, which includes the applicable law, as interpreted by the Appeals Chamber, the estimated number of potentially eligible victims, and the cost to repair the harms they suffered.[101]

68. In considering the applicable law in relation to the number of potentially eligible beneficiaries for reparations in this case, the Trial Chamber stated as follows:

> 230. Despite the collective nature of the reparations ordered above, the number of potentially eligible beneficiaries is an important parameter for determining the scope of the convicted person's liability. This determination can be made based on a series of factors, including, the number of individual applicants, the number of victims at the time the crimes were committed, and the number of victims likely to come forward to benefit from the reparations programmes during the implementation stage. However, when the Chamber resorts to estimates as to the number of victims, it must endeavour to obtain an estimate that is as concrete as possible, based on a sufficiently strong evidential basis. Any uncertainties must be resolved in favour of the convicted person.
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> 231. Although relevant for determining the scope of liability, the number of potential beneficiaries is not a precondition to the issuance of the reparations order. In particular, the Chamber stresses that, as noted in the Court's jurisprudence, when there is uncertainty as to the number of victims, 'the Court should ensure that there is a collective approach that ensures reparations reach those victims who are currently unidentified'.[102]

69. The Trial Chamber then continued as follows under the heading "Victims potentially eligible for reparations":

> 232. The Chamber notes that, following a preliminary mapping exercise, conducted for the purposes of estimating the number of potentially eligible victims, the Registry has consistently indicated that it estimates that approximately 1,100 individuals may qualify as new potential victims of the attacks, and that it does not anticipate the final number to be exponentially higher. The Appointed Experts estimate that, at least, 3,500 direct victims are potentially eligible for reparations and note that the number of indirect victims could not be ascertained by them.
>
> 233. The CLR2 opposes the suggestion that the 'cost to repair' be solely based on the number of potential beneficiaries identified thus far by the Registry. The CLR2 argues that new beneficiaries will be numbering at least 100,000 people across all locations, reiterating that 'in the circumstances of the present case where thirteen villages throughout Ituri were found to be affected as a whole', the Registry's estimates appear too marginal compared to the size of the population. In particular, the CLR2 recalls that (i) publicly available records indicate that the population of Mongbwalu alone in 2002 was around 80,000 people; (ii) data on

[101] Impugned Decision, para. 226.
[102] Impugned Decision, paras 230-231 (footnotes omitted).

> the case-record provided by the Registry indicate that, just before the conflict, roughly 8,000 people lived in Kobu and 5,000 people lived in the Bambu area; and (iii) according to the UN, during the *shika na mukongo* operation, around 60,000 civilians were forced to flee to the bush surrounding the affected villages. The CLR1 also stresses that the Chamber should take into account that more child soldiers may be willing to participate in reparation programmes in this case as, unlike Mr Lubanga, Mr Ntaganda is not of Hema ethnicity.
>
> 234. The Chamber notes that 2,121 victims participated in the trial proceedings, including 1,837 victims of the attacks and 284 victims of crimes against child soldiers victims. As ordered by the Chamber, the Registry assessed the eligibility of participating victims. Although noting that it had taken a conservative approach, it estimated that approximately 1,460 participating victims of the attacks remain eligible to receive reparations. The CLR2 contests this assessment, reiterating that the victims considered as no longer fulfilling the eligibility criteria should be provided with an opportunity to clarify their account at a later stage, either through an individual assessment or screening.
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> 235. Regarding the former child soldiers, the Registry's assessment is that the 284 participating victims in the *Ntaganda* case have not been impacted by the scope of the conviction, and that all victims recognised to date as potential beneficiaries in the *Lubanga* case are also potentially eligible for reparations in the *Ntaganda* case. The Chamber notes that, although Trial Chamber II initially found that 425 victims in the sample it analysed qualified for reparations in the *Lubanga* case, it estimated that 'hundreds and possibly thousands more victims suffered harm as a consequence of the crimes for which Mr Lubanga was convicted'. However, although a cut-off date has been established for all new applicants to make themselves known in order to be considered for reparations in the *Lubanga* case, as of December 2020, Trial Chamber II had recognised 933 beneficiaries for reparations in the Lubanga case.[103]

70. The Trial Chamber proceeded to deal with the cost to repair the victims' harms.[104] This is set out in more detail below, in relation to those grounds of appeal brought by both the Defence and Victims Group 2 which challenge the amount of the award for reparations.[105]

71. Under the heading "Conclusion", the Trial Chamber found, in relevant part, as follows:

> 245. The Chamber recalls the large scope of the case in terms of the crimes for which Mr Ntaganda was convicted and the potentially large number of victims of such crimes eligible to receive reparations. The Chamber notes that it has carefully considered the information and evidence provided by the Registry, the TFV, the Appointed Experts, and the parties, all of whom have made substantial

[103] Impugned Decision, paras 232-235 (footnotes omitted).
[104] Impugned Decision, paras 236-244.
[105] *See infra* paras 183-184.

efforts in helping the Chamber to reach accurate estimates as to the number of potentially eligible victims and the cost to repair the harms they have suffered. The Chamber also notes that the figures and assessments made by Trial Chamber II in the *Lubanga* and *Katanga* cases, related to crimes committed in Ituri during the same time-frame, are highly relevant to the Chamber's assessment of the cost to repair the harm caused by the crimes for which Mr Ntaganda was convicted.

246. Based on the above, the Chamber has concluded that thousands of victims may be eligible for reparations in the present case. However, the Chamber is cognisant of the impossibility to predict in advance how many victims may ultimately come forward to benefit from collective reparations with individualised components during the implementation stage, particularly considering the widespread, systematic, and large-scale nature of the crimes for which Mr Ntaganda was convicted. The Chamber notes the estimation made by the Appointed Experts that at least 3,500 direct victims are potentially eligible for reparations, but that the number of indirect victims could not be ascertained by them. The Chamber notes that a total of 2,121 victims were admitted for participation at the trial stage, including 1,837 victims of the attacks and 284 former child soldier victims. The Registry has also reported that, in relation to the victims of the attacks, there may be at least 1,100 new potential applicants. As of December 2020, Trial Chamber II has recognised 933 beneficiaries for reparations in the *Lubanga* case, all eligible for reparations in the *Ntaganda* case. However, the numbers detailed above do not reflect the totality of the potential beneficiaries of reparations in the case. It is clear that there is still a significant number of as yet unidentified potentially eligible victims, for which no reliable figures are available. In effect, estimates vary greatly and range from 'at least approximately 1,100' to 'a minimum of 100,000 across all locations affected by Mr Ntaganda's crimes'.[106]

B. The fourteenth ground of the Defence appeal

1. Defence submissions before the Appeals Chamber

72. The Defence submits that the Trial Chamber "erred by determining that the number of potential new beneficiaries ranged between 1,100 and 100,000".[107] It argues that, although the Trial Chamber recognised the importance of setting a precise amount for the reparations award, which should be as accurate as possible, it did not do so.[108] The Defence argues that it is manifestly imprecise for the Trial Chamber to have determined the number of new potential beneficiaries to be between "at least

[106] Impugned Decision, paras 245-246 (footnotes omitted).
[107] Defence Appeal Brief, p. 78, Part III, heading V.
[108] Defence Appeal Brief, para. 226.

approximately 1,100" and "a minimum of 100,000", and that it is unreasonable to determine the amount of the award on that basis.[109] In the Defence's view, this determination simply takes the lowest and highest estimates submitted by the parties without any proper analysis.[110] In so doing, the Defence submits that the Trial Chamber set an "unhelpful precedent", as parties might under-estimate or over-estimate the number of victims, knowing that those estimates would make up the range of victims; and that such could not be a meaningful basis upon which to formulate a reparations award.[111]

73. The Defence argues that the Trial Chamber had "more accurate and specific" estimates from the VPRS (*i.e.*, 1,100 new potential beneficiaries), which it could have added to the number of participating victims and any eligible victims from the *Lubanga* case; and, alternatively, from the experts participating in this case (*i.e.*, about 3,500 direct victims, when taking into account the number of participating victims, former child soldiers in *Lubanga* that had applied for reparations in this case and the potential new beneficiaries suggested by the VPRS).[112] The Defence acknowledges that not all victims were direct victims, but that this would have been a reasonable basis for the Trial Chamber to commence its calculation of the amount of the award.[113] According to the Defence, "[t]o disregard these estimates and make reference instead to the outlying figure of 'at a minimum of 100,000 victims', was manifestly unreasonable, and undermines the resulting order".[114]

74. The Defence submits that, in estimating the number of potential beneficiaries, the Trial Chamber failed appropriately to consider the precedent set by the *Lubanga* case.[115] It avers that, in *Lubanga*, in 2017, Trial Chamber II, having considered the TFV's estimate of 3,000 victims, found the number of potential beneficiaries to be between 2,451 and 5,938 victims; however, as of December 2020, the number of eligible victims was 933, which was one third of the estimate of the TFV.[116] It submits

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[109] Defence Appeal Brief, para. 227.
[110] Defence Appeal Brief, para. 227.
[111] Defence Appeal Brief, para. 229.
[112] Defence Appeal Brief, paras 230-231.
[113] Defence Appeal Brief, para. 231.
[114] Defence Appeal Brief, para. 231.
[115] Defence Appeal Brief, paras 232-235.
[116] Defence Appeal Brief, para. 233.

that, although victims could submit applications until an extended cut-off date of 1 October 2021, in that case, as of May 2021, only 161 additional victims had been found eligible for reparations.[117] The Defence argues that, considering the significant overlap of victims between the *Lubanga* and *Ntaganda* cases, it was unreasonable, in the present case, for Victims Group 1 to provide an estimate of 3,000 victims of the crimes of conscripting and enlisting children under the age of 15 years into an armed group and using them to participate actively in hostilities.[118] It argues that Victims Group 1's contention that more victims will apply for reparations in this case because Mr Ntaganda is not of Hema ethnicity is without merit and that the Trial Chamber should not have considered that factor.[119] The Defence further argues that the Trial Chamber should not have suggested that the reason that the number of victims in the *Lubanga* case was lower than anticipated was the cut-off date of 1 October 2021, because that was seven years after the conviction decision in that case had been rendered, meaning that potential victims had had sufficient time to seek reparations; as a result, the Trial Chamber's reliance on there being possibly thousands of such victims in the present case was unreasonable.[120]

75. The Defence further submits that the Trial Chamber erred in according weight to Victims Group 2's "manifestly unreasonable" estimate of 100,000 victims, which, it avers, was not supported by any evidence on the record.[121] The Defence argues that, on 18 December 2020, the Trial Chamber had already rejected Victims Group 2's request that the Registry be ordered to collect data regarding the number of individuals residing "in and around" the affected locations; and that the Trial Chamber did so because the wording "in or around" in the Conviction Judgment refers only to houses burned down in two specific locations relevant for counts 10 and 18 for which Mr Ntaganda was convicted.[122] The Defence avers that this finding of the Trial Chamber undermined Victims Group 2's estimate of 100,000 victims.[123]

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[117] Defence Appeal Brief, para. 233.
[118] Defence Appeal Brief, para. 234.
[119] Defence Appeal Brief, para. 234, *referring to* Impugned Decision, para. 233.
[120] Defence Appeal Brief, para. 235, *referring to* Impugned Decision, para. 235.
[121] Defence Appeal Brief, paras 236-238.
[122] Defence Appeal Brief, para. 237.
[123] Defence Appeal Brief, para. 237.

76. In its introduction and within the first ground of its appeal, the Defence raises arguments that are relevant in the context of the fourteenth ground of its appeal. In particular, the Defence submits that the order for reparations was issued prematurely, *inter alia*, because "the evidence required to determine the number of potential beneficiaries with any degree of certainty was simply not yet available to [the Trial Chamber]";[124] that the Trial Chamber relied upon "inaccurate estimates and information" in ruling on this issue;[125] that the Impugned Decision was issued without the Trial Chamber having established the potential number of beneficiaries "with a sufficient degree of precision";[126] that the Trial Chamber could neither determine an accurate estimate, nor the number of potential beneficiaries with any degree of certainty given the paucity of available information;[127] and that the Trial Chamber failed appropriately to conclude that the COVID-19 pandemic prevented the VPRS from collecting sufficient information in the DRC to enable an order for reparations to be issued at the time that the Impugned Decision was rendered.[128]

77. The Defence further contends, in arguments raised within the second ground of its appeal, that the Trial Chamber's errors in determining the number of potential beneficiaries were "compounded by its failure to provide a reasoned opinion and to take into account submissions on behalf of [Mr Ntaganda]".[129]

78. The Defence submits that the Trial Chamber accepted that no reliable figures were available for the number of potentially eligible victims and yet nevertheless proceeded to set a very wide range of potential beneficiaries without explaining why it was doing so, particularly given its recognition that estimates as to the number of victims must be as concrete as possible and based upon a sufficiently strong evidential analysis.[130]

79. The Defence also argues that the Trial Chamber erred in failing to address Defence submissions in relation to the number of potential beneficiaries, including

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[124] Defence Appeal Brief, para. 5.
[125] Defence Appeal Brief, para. 11.
[126] Defence Appeal Brief, para. 43.
[127] Defence Appeal Brief, para. 54.
[128] Defence Appeal Brief, para. 55.
[129] Defence Appeal Brief, para. 77.
[130] Defence Appeal Brief, para. 78, *referring to* Impugned Decision, paras 5, 230, 246.

submissions: opposing figures provided by Victims Group 2; arguing that it was necessary to establish the number of victims in order to determine the final amount of Mr Ntaganda's liability for reparations; contending that it was unlikely that the number of victims for reparations would significantly differ from the number of victims who were participating in the trial proceedings; and averring that it was important to set an accurate number of potential beneficiaries.[131]

2. Victims Group 1's submissions before the Appeals Chamber

80. In response to the Defence's fourteenth ground of appeal, Victims Group 1 argue that the Trial Chamber did assess all the distinct estimates provided by the parties regarding the number of possible victims in the present case, determining that "thousands of victims" may qualify.[132] They contend that the Trial Chamber did not endorse the number of 100,000 victims, but only referred to it as the highest estimate that had been provided, but that this was not the figure upon which the Trial Chamber based its decision.[133] They submit that this approach was consistent with the jurisprudence of the Trial and Appeals Chambers in the *Lubanga* case, while accepting that a different approach was taken in the *Katanga* case as a result of its own circumstances.[134]

81. Victims Group 1 also re-iterate that the number of potential new beneficiaries who are former child soldiers and/or their dependants is most likely to increase as many of them did not come forward at an earlier stage of the proceedings.[135] They refer, in this context, to submissions that they had made before the Trial Chamber that a greater number of these potential new beneficiaries would claim reparations than had occurred in the *Lubanga* case because Mr Ntaganda was not of Hema ethnicity, which means that Hema victims are now more likely to come forward.[136] They further submit that

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[131] Defence Appeal Brief, para. 79, *referring to* various submissions made by the Defence during the course of the reparations proceedings.
[132] Victims Group 1's Response, para. 99.
[133] Victims Group 1's Response, para. 99, which, in turn, refers to Victims Group 1's Response, para. 84, in which Victims Group 1 argue, by reference to paragraph 246 of the Impugned Decision, that the figure of 100,000 was not part of the conclusion of the Trial Chamber. They argue that that figure was instead mentioned in the context of a sentence demonstrating that the estimates of potentially eligible victims varied greatly and that "no reliable figures are available" as to their actual number.
[134] Victims Group 1's Response, para. 99.
[135] Victims Group 1's Response, para. 100.
[136] Victims Group 1's Response, para. 100, fn. 184.

children born out of rape or sexual violence and other dependants would claim reparations.[137]

82. In their response to the Defence's first ground of appeal, Victims Group 1 submit that it is normal that, at this stage of the proceedings, the Trial Chamber was not yet in a position to identify the exact number of beneficiaries.[138] They argue that, according to jurisprudence of the Appeals Chamber on reparations, a trial chamber does not err by making a determination of the liability of the convicted person before knowing the exact number of beneficiaries.[139] They thus consider that the Defence's argument in this regard is unsupported.[140]

83. Victims Group 1 submit that the Defence fails to provide any facts or figures in support of its argument that delays resulting from the COVID-19 pandemic meant that the Impugned Decision was issued prematurely; that the Defence's arguments in this respect are both unsubstantiated and inconsistent; and that the Defence is merely disagreeing with the conclusion of the Trial Chamber on this issue.[141]

84. In response to the second ground of the Defence's appeal, Victims Group 1 reiterate their arguments in response to the first ground of that appeal in respect of the determination of the number of beneficiaries.[142] They submit that the Defence expresses frustration that some of its submissions, while duly considered, were not followed and merely disagrees with the rulings of the Trial Chamber.[143] Victims Group 1 refer to submissions made at the outset of their response in submitting that there was no obligation on the Trial Chamber to have addressed expressly each and every submission raised by the parties.[144] They further question the Defence's submission that the Trial Chamber's failure to provide sufficient reasoning materially affects the fairness of the

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[137] Victims Group 1's Response, para. 100.
[138] Victims Group 1's Response, para. 23, *referring to* 2019 *Lubanga* Appeals Chamber Judgment on Reparations, paras 90, 224.
[139] Victims Group 1's Response, para. 25, *referring to* 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 92. *See also* Victims Group 1's Response, para. 102, *referring to* 2019 *Lubanga* Appeals Chamber Judgment on Reparations, paras 89 *et seq.*, 92, 257.
[140] Victims Group 1's Response, para. 26.
[141] Victims Group 1's Response, para. 30.
[142] Victims Group 1's Response, para. 39.
[143] Victims Group 1's Response, para. 39.
[144] Victims Group 1's Response, para. 39, *referring also to* para. 18(b).

Impugned Decision, also pointing out that the Defence was able to formulate 15 grounds of appeal based upon the reasoning in that decision.[145]

3. Victims Group 2's submissions before the Appeals Chamber

85. In response to the Defence's fourteenth ground of appeal, Victims Group 2 concur that the Trial Chamber did not weigh the accuracy of the estimated number of potential beneficiaries against the goal of awarding reparations without delay, pointing out that this forms the basis for the first three grounds of their own appeal as "it constitutes one of the main and overarching errors […] that affect other key aspects of the Reparations Order".[146] They further concur with the submission of the Defence that setting a range of nearly 100,000 potential beneficiaries is unreasonable, "manifestly imprecise" and cannot be the basis for any meaningful reparations award.[147]

86. However, Victims Group 2 oppose the submissions of the Defence "that the Trial Chamber had sufficient information in the form of the Registry's and the Appointed Experts' estimates before it".[148] Victims Group 2 submit that it would have been unreasonable to accept the estimate of the Registry.[149] Instead, it is submitted, the Trial Chamber should have followed the jurisprudence in the *Lubanga* case by conducting further enquiries to determine "the most accurate possible estimates".[150] Victims Group 2 therefore submit that the Defence's fourteenth ground of appeal should be partly granted, in so far as it accords with their own submissions on appeal.[151]

87. In respect of the first ground of the Defence's appeal, Victims Group 2 submit that the Defence does not provide "cogent arguments that would clearly set out the alleged errors and the material impact thereof", thus failing to comply with the applicable standards of appellate review.[152]

88. Victims Group 2 argue that the Defence fails to substantiate its argument that the Trial Chamber had not adequately taken into account the effects of the COVID-19

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[145] Victims Group 1's Response, para. 46.
[146] Victims Group 2's Response, para. 166.
[147] Victims Group 2's Response, para. 166.
[148] Victims Group 2's Response, para. 167.
[149] Victims Group 2's Response, para. 167.
[150] Victims Group 2's Response, para. 167.
[151] Victims Group 2's Response, para. 168.
[152] Victims Group 2's Response, paras 45-46, 48.

pandemic and the security situation in Ituri, as the Defence left "unaddressed whether the Trial Chamber was meant to wait until the end of the pandemic and/or the end of the ongoing insecurity in Ituri, or what kind of information it expected to be further collected by the VPRS".[153] They further submit that the Defence contradicts its own subsequent submissions within the fourteenth ground of its appeal, in which it argues that the Trial Chamber had sufficient information to have made a reasonable assessment of potential beneficiaries.[154]

89. Victims Group 2 submit that the Defence's argument that the Trial Chamber had to establish the potential number of beneficiaries "with a sufficient degree of precision" before issuing the Impugned Decision is unsupported by the relevant jurisprudence, arguing that the Trial Chamber was merely required to arrive at an estimate that was "as accurate as possible".[155]

90. In respect of the relevant part of the second ground of the Defence's appeal, Victims Group 2 concur with the Defence that the Trial Chamber erred in failing to provide a reasoned opinion in respect of its determination of the number of potentially eligible victims and refer to ground one of their own appeal in this regard.[156] They point out that both parties agree that the Trial Chamber erred in its approach and decision on this issue, even though they disagree about what the correct number of beneficiaries should be.[157] They emphasise their agreement with the Defence both that (i) the Trial Chamber failed to justify or explain its approach in setting such a broad range of potential beneficiaries; and that (ii) it appears that the Trial Chamber failed to take the submissions of the Defence on this matter into account.[158] They aver that "the Trial Chamber reached a non-decision by merely considering that there were no reliable numbers and that the likely number of potential beneficiaries was in the thousands", rather than ordering the discovery of further directly relevant information having taken

[153] Victims Group 2's Response, para. 51, *referring to* Defence Appeal Brief, para. 43.
[154] Victims Group 2's Response, para. 51, *referring to* Defence Appeal Brief, para. 230.
[155] Victims Group 2's Response, para. 52, *referring to* Defence Appeal Brief, para. 43 and 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 108.
[156] Victims Group 2's Response, paras 63-64, 67.
[157] Victims Group 2's Response, para. 63.
[158] Victims Group 2's Response, para. 64.

into account all of the submissions before it, which was not in compliance with the 2019 *Lubanga* Appeals Chamber Judgment on Reparations.[159]

4. TFV's observations before the Appeals Chamber

91. In the context of its observations in response to a question from the Appeals Chamber about allocating reparations between former child soldiers and victims of the attacks, the TFV avers that its experience demonstrates that victims will continue to come forward once a specific programme of reparations commences and that it is essential that any such programme remains accessible to victims thereafter.[160] By reference to jurisprudence of the Appeals Chamber, the TFV submits that the final number of victims will not be known at the time that the amount of the award is determined in the order for reparations, particularly in the large-scale cases that come before the Court.[161] It further submits that therefore, to the extent that the number of potential beneficiaries is deemed important to determine the amount of the award, that number will need to be estimated.[162] In the present context, the TFV states that it cannot provide any additional information that would be of assistance in estimating the number of victims[163] and continues:

> Devising the reparation measures is a matter not so much of numbers of victims, but of the effect of the measures on the victims and their communities. In that regard, the Trust Fund seeks to put in place effective reparation measures that can reach a wide array of persons.[164]

92. In the context of its response to a question from the Appeals Chamber about the significance of Mr Ntaganda not being of Hema ethnicity in terms of the number of former child soldiers that might come forward, the TFV makes the following observations:

> By way of background, the Trust Fund's experience working with victims and reparation programmes has shown that there are various stages when potential beneficiaries come forward. One such stage is during an outreach campaign of identifying potential beneficiaries, which in the present proceedings is still to be conducted. Another stage is when beneficiaries actually start receiving reparations and are enrolled in reparation programmes. This may have a

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[159] Victims Group 2's Response, para. 64.
[160] TFV's Observations on the Defence Appeal Brief, para. 27.
[161] TFV's Observations on the Defence Appeal Brief, para. 27.
[162] TFV's Observations on the Defence Appeal Brief, para. 27.
[163] TFV's Observations on the Defence Appeal Brief, para. 28.
[164] TFV's Observations on the Defence Appeal Brief, para. 29.

> tremendous effect on victims and the wider victim community. As soon as some victims receive reparations, others may realise that the programmes are operational and also come forward. This prospect makes it difficult to speak in advance of a specific number of victims and reinforces the need for all stakeholders to work on the basis of estimates in relation to reparation awards and reparation programmes, in particular when collective reparations were awarded.[165]

93. In relation to the specific question about the impact of Mr Ntaganda's ethnicity on the number of potential beneficiaries, the TFV avers that it cannot report on any direct contact with potential further former child soldier beneficiaries during its consultations in May and June 2021 and also "cannot refer the Appeals Chamber to sources that it could make available to it in the matter".[166] Yet the TFV "nevertheless gives credit to the idea that Mr Ntaganda's ethnicity and his level of influence within the Hema community should not prevent victims from coming forward to benefit from reparations", pointing out that it had been challenging to convince victims to be involved in the *Lubanga* case.[167]

5. *Defence Response to the TFV's Observations*

94. The Defence submits that the observation of the TFV that Mr Ntaganda's ethnicity and level of influence within the Hema community should not prevent victims coming forward is unsupported and subjective; and that it also does not support the argument of Victims Group 1 that more former child soldiers will come forward in this case than in *Lubanga* because Mr Ntaganda is not of Hema ethnicity.[168] The Defence argues that there is no objective reason to believe that more former child soldiers will claim reparations in this case because of Mr Ntaganda's ethnicity.[169]

95. The Defence also reiterates its previous submissions that the Trial Chamber erred by relying upon unreasonable and imprecise estimates in its determination of the number of potential beneficiaries.[170]

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[165] TFV's Observations on the Defence Appeal Brief, para. 32.
[166] TFV's Observations on the Defence Appeal Brief, para. 33.
[167] TFV's Observations on the Defence Appeal Brief, para. 33.
[168] Defence Response to the TFV's Observations, para. 20.
[169] Defence Response to the TFV's Observations, para. 20.
[170] Defence Response to the TFV's Observations, paras 64-65.

6. *Victims Group 2's Response to the TFV's Observations*

96. Victims Group 2 submit that the TFV's Observations do not have any impact on their appeal, arguing that the deficiencies in the Impugned Decision cannot be remedied by TFV proposals about how it interprets its own role in the implementation process.[171] They also submit that the regulations of the TFV "only regulate the general operation of this administrative body; they do not regulate the implementation of fair and meaningful reparations in this case".[172] They contend that the Trial Chamber should have established a proper framework in the Impugned Decision, after which the TFV should only be concerned with implementing that framework;[173] and that the TFV's Observations cannot cure any defects in the Impugned Decision but "may be of some assistance in designing a new or amended Reparations Order".[174]

97. Victims Group 2 disagree with the TFV's submission that devising "reparation measures is a matter not so much of numbers of victims, but of the effect of the measures on the victims and their communities", submitting instead that "it matters tremendously for how many people reparation measures are being devised in order to achieve their aim of benefiting victims and their communities" and emphasising that the number of eligible beneficiaries is "one of the paramount parameters" that should have been set out in the Impugned Decision.[175] Victims Group 2 submit that the TFV's approach is "highly problematic" because it proposes "an entirely flexible concept" whereas the Trial Chamber should have set out "a properly grounded estimated number" of beneficiaries.[176]

98. Victims Group 2 do not have any observations to make in relation to the question concerning Mr Ntaganda not being of Hema ethnicity.[177]

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[171] Victims Group 2's Response to the TFV's Observations, paras 2-3.
[172] Victims Group 2's Response to the TFV's Observations, para. 5.
[173] Victims Group 2's Response to the TFV's Observations, para. 6.
[174] Victims Group 2's Response to the TFV's Observations, para. 7.
[175] Victims Group 2's Response to the TFV's Observations, para. 25.
[176] Victims Group 2's Response to the TFV's Observations, para. 26.
[177] Victims Group 2's Response to the TFV's Observations, para. 29.

C. The first ground of Victims Group 2's appeal

1. Victims Group 2's submissions before the Appeals Chamber

99. Victims Group 2's first ground of appeal is that the Trial Chamber erred in law, fact and/or procedure in setting the overall cost to repair without enquiring into and obtaining an accurate estimate of the number of potential beneficiaries; as well as failing to provide a reasoned opinion on the estimates submitted by the parties and participants.[178]

100. First, Victims Group 2 argue that the Trial Chamber misinterpreted the applicable law.[179] They argue that while the Trial Chamber stated that, under the jurisprudence of the Court, the number of potentially eligible beneficiaries is an important parameter for determining the scope of a convicted person's liability and any estimates thereof must be as concrete as possible and based upon a sufficiently strong evidential basis, it failed to apply these legal standards.[180]

101. Victims Group 2 submit that the Trial Chamber "failed to properly address and adjudicate the different estimates of the number of potential beneficiaries of reparations produced before it by the parties and participants".[181] They contend that the Trial Chamber referenced the very differing estimates of potential beneficiaries before it but failed to address the weight to be given to those estimates.[182] By reference to the paragraphs of the Impugned Decision in which the estimates of the parties and participants are set out, Victims Group 2 submit that the Trial Chamber made various errors in its approach to those figures.[183]

102. In respect of the figure of approximately 1,100 potentially eligible victims produced by the Registry, Victims Group 2 submit that this was based on a preliminary mapping exercise that was limited by the circumstances of the COVID-19 pandemic

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[178] Victims Group 2's Appeal Brief, p. 13.
[179] Victims Group 2's Appeal Brief, p. 13.
[180] Victims Group 2's Appeal Brief, paras 46-49, *referring to* Impugned Decision, paras 230-231 and 2019 *Lubanga* Appeals Chamber Judgment on Reparations, paras 3, 89, 223-224.
[181] Victims Group 2's Appeal Brief, para. 50.
[182] Victims Group 2's Appeal Brief, para. 51.
[183] Victims Group 2's Appeal Brief, paras 51-58, *referring to*, *inter alia*, Impugned Decision, paras 232-235.

and would have been expanded once conditions in the field permitted this to be done.[184] They submit that any such preliminary exercise "could not reasonably have been foreseen to generate the ostensibly decisive estimate the Trial Chamber ultimately relied upon".[185]

103. In respect of the figure of at least 3,500 direct victims and an unknown number of indirect victims produced by the appointed experts, Victims Group 2 argue that there are "two fundamental flaws" relating to this figure, namely that it was derived from the Registry's estimate and had therefore not been independently verified; and that the number of indirect victims could not be ascertained by the appointed experts.[186]

104. Victims Group 2 further submit that the Trial Chamber failed to address the weight to be given to the estimates provided by the parties; did not indicate which of the estimates before it were deemed most accurate and why; did not mention the Defence's submissions on this issue; and neither made any determination nor obtained calculations that were as accurate as possible in light of the estimates provided by the parties and participants.[187] They argue that the Trial Chamber "left it entirely unclear" whether it relied upon the "rather low estimate" provided by the Registry, an even lower figure suggested by the Defence, or "the rather high estimates" provided by Victims Group 2 which, if not accepted as accurate, should have been explained.[188] They submit that the "striking and significant difference between these figures could not simply be ignored by the Trial Chamber", and that it erred in not addressing the submissions of the parties and not making any determination.[189]

105. Furthermore, Victims Group 2 argue that the Trial Chamber erred by failing, at the very least, to determine the range of potential beneficiaries.[190] They submit that the Trial Chamber simply stated that there were "thousands" of potentially eligible victims, but that this "was neither based on any finding it actually reached, nor was it sufficiently

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[184] Victims Group 2's Appeal Brief, paras 51-52.
[185] Victims Group 2's Appeal Brief, para. 52.
[186] Victims Group 2's Appeal Brief, paras 51, 53-54.
[187] Victims Group 2's Appeal Brief, paras 55, 57.
[188] Victims Group 2's Appeal Brief, para. 58.
[189] Victims Group 2's Appeal Brief, para. 58.
[190] Victims Group 2's Appeal Brief, para. 59.

precise […] [as] thousands could mean 2,000 or 60,000".[191] Victims Group 2 argue that this left the matter "entirely unresolved" and led to the Trial Chamber committing a further material error by determining the overall liability for reparations "without foundation, or at least a discernible foundation".[192]

106. Moreover, Victims Group 2 argue that the Trial Chamber failed to obtain an estimate that was as concrete as possible so as to establish a sufficiently strong evidential basis, notwithstanding their repeated submissions that the Trial Chamber should obtain more accurate estimates of the local population at the time that the crimes were committed in order to ascertain the extent of Mr Ntaganda's liability.[193]

107. They submit that the errors alleged materially affected the Impugned Decision, as the cost of repair could have been more accurately calculated had the Trial Chamber established an accurate estimate of potential beneficiaries "or at least an accurate range of potentially eligible victims".[194] They allege that the Trial Chamber "set an award in a vacuum".[195] They submit that if tens of thousands of victims were to present themselves as eligible, the set amount would not be sufficient to provide adequate and fair reparation.[196] This, in their view, would negatively impact the well-being of the victims and thus contravene the "do no harm" principle set out by the Trial Chamber in the Impugned Decision, as well as not permitting appropriate reparations to be awarded for the harm suffered.[197]

108. Second, Victims Group 2 argue that the Trial Chamber "erred in fact by failing to take into account relevant information, facts and evidence and/or by misappreciating the relevant facts".[198] They recall their submissions that the number of potential beneficiaries of reparations was extremely high as entire villages were affected by the crimes in question.[199] They point to their references to publicly available figures about the number of inhabitants at the time of the events in certain villages, such as

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[191] Victims Group 2's Appeal Brief, para. 59.
[192] Victims Group 2's Appeal Brief, para. 59.
[193] Victims Group 2's Appeal Brief, para. 60.
[194] Victims Group 2's Appeal Brief, para. 61.
[195] Victims Group 2's Appeal Brief, para. 62.
[196] Victims Group 2's Appeal Brief, para. 62.
[197] Victims Group 2's Appeal Brief, para. 63.
[198] Victims Group 2's Appeal Brief, p. 21.
[199] Victims Group 2's Appeal Brief, para. 64.

Mongbwalu, and UN estimates of the number of victims affected by the *shika na mukono* operation, as well as figures provided by the Registry about the number of inhabitants in other affected villages, such as Kobu and Bambu.[200] They submit that the available figures could have resulted in a determination that there were tens of thousands of direct victims in those three locations alone.[201] They further recall their submissions that the number of indirect victims would also be likely to be very high as it may be triple the number of direct victims, given that the traditional family composition in the DRC includes both close and remote relatives.[202] Furthermore, they aver that they had submitted that it was probable that there would also be a very high number of additional potentially eligible direct victims originating from other locations who had suffered harm "in the forest or bush surrounding the affected locations".[203] They submit that the Trial Chamber committed a factual error by not paying sufficient heed to the aforementioned evidence, which it was required to do to determine the number of beneficiaries and the overall cost to repair.[204]

109. In the alternative, Victims Group 2 submit that the Trial Chamber misappreciated the relevant facts and evidence, which showed that the number of potential beneficiaries was much higher than the estimate provided by the Registry and might be at least several tens of thousands.[205] They argue that the Trial Chamber erred in the exercise of its discretion when it disregarded their repeated submissions that, in order to estimate the number of potential beneficiaries, it was necessary to obtain figures relating to the size of the population in the affected villages at the time that the crimes were committed.[206] They further aver that this should have been an important step in the mapping exercise of the Registry, which required the administrative structures of the affected communities to be established and the local authorities to be contacted.[207]

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[200] Victims Group 2's Appeal Brief, para. 64.
[201] Victims Group 2's Appeal Brief, para. 64.
[202] Victims Group 2's Appeal Brief, para. 65.
[203] Victims Group 2's Appeal Brief, para. 66, *referring to* Decision on the First Report, para. 19 (f) and Impugned Decision, para. 107.
[204] Victims Group 2's Appeal Brief, para. 67.
[205] Victims Group 2's Appeal Brief, para. 68.
[206] Victims Group 2's Appeal Brief, paras 69-70.
[207] Victims Group 2's Appeal Brief, para. 71.

110. In that connection, Victims Group 2 recall that they requested the Trial Chamber to order the Registry to obtain information about the official census of persons residing in the affected areas.[208] However, they assert that the request was rejected on the basis that the information sought was "not necessary at this stage of the proceedings" for the Trial Chamber "to decide on the types and modalities of reparations to be awarded".[209] Victims Group 2 submit that this suggested that there would be another stage of the proceedings, subsequent to the determination of the types and modalities of reparations, at which this issue could be raised again, and that they therefore did not seek leave to appeal this decision "since the matter seemed to have been postponed by the Trial Chamber, rather than rejected as meritless as such".[210] However, they submit that this matter was not addressed further before the Impugned Decision was issued, which was inconsistent with the need for judicial proceedings to be coherent and predictable and thus constituted an error in the exercise of judicial discretion.[211] They argue that establishing the number of victims at the time that the crimes were committed was "the crucial component" required to determine the liability of Mr Ntaganda for reparations, but that the Trial Chamber declined to ascertain that information.[212]

111. Victims Group 2 submit that relying on the size of the population in the affected villages at the time that the crimes were committed was the easiest way of estimating the number of potential beneficiaries, since Mr Ntaganda was, *inter alia*, convicted for mass crimes affecting entire communities, in particular intentionally directing attacks against civilians, persecution, forcible transfer of population and displacement of civilians in a number of locations.[213] They contend that the Trial Chamber also failed to consider that the crimes were committed in the context of a widespread and systematic campaign of violence with a predetermined aim of driving out and preventing the return of all of the Lendu from the localities targeted, in which, for the most part, they constituted the majority of the inhabitants.[214] Thus, they argue that the

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[208] Victims Group 2's Appeal Brief, para. 73, *referring to* CLR2's Request for Information, para. 1.
[209] Victims Group 2's Appeal Brief, para. 74, *referring to* Decision on the CLR2's Request for Information, paras 17-18.
[210] Victims Group 2's Appeal Brief, para. 74.
[211] Victims Group 2's Appeal Brief, para. 75.
[212] Victims Group 2's Appeal Brief, para. 76, *referring to* Impugned Decision, paras 98, 224.
[213] Victims Group 2's Appeal Brief, para. 77, *referring to* Conviction Judgment, pp. 535-538.
[214] Victims Group 2's Appeal Brief, para. 77, *referring to* Conviction Judgment, paras 470, 549, 803, 1177.

Trial Chamber was aware of the extent of the victimisation, which affected entire village communities, yet it failed to ascertain the number of victims at the time that the crimes were committed, which was an essential starting point to estimate the number of potential beneficiaries for reparations.[215] They submit that this error materially affected the Impugned Decision because, had this figure been ascertained, the amount of the reparations award would have been based upon a properly estimated number of potential beneficiaries.[216]

112. Third, Victims Group 2 submit that the Trial Chamber erred in fact and/or procedure by failing to give a reasoned opinion in relation to the estimated number of potentially eligible victims,[217] erring in the exercise of its discretion by failing to explain which estimates it had accepted or rejected in determining Mr Ntaganda's liability, particularly in light of the highly differing figures provided by the parties, the Registry and the appointed experts.[218] More specifically, they also aver that the Trial Chamber failed to explain why it relied upon a preliminary mapping exercise rather than obtaining more comprehensive data.[219] They submit that it appears that their submissions were "entirely disregarded", and that it is impossible to assess the adequacy of the reparations award and to how many victims it is intended to apply, there thereby being "a great risk that ultimately only a fraction of victims will be able to actually benefit from reparations in the present case".[220]

2. Defence submissions before the Appeals Chamber

113. The Defence agrees with Victims Group 2 that the Trial Chamber erred in law by failing to obtain an accurate estimate of the number of potential beneficiaries for reparations.[221] It avers that it was not sufficient for the Trial Chamber to conclude that "thousands" of victims may be eligible without analysing the submissions before it and determining the number, or a sufficiently precise range, of potential beneficiaries so as to be able to set the amount of Mr Ntaganda's liability.[222] The Defence further submits

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[215] Victims Group 2's Appeal Brief, para. 78.
[216] Victims Group 2's Appeal Brief, para. 78.
[217] Victims Group 2's Appeal Brief, p. 27.
[218] Victims Group 2's Appeal Brief, paras 79, 81-82.
[219] Victims Group 2's Appeal Brief, para. 80.
[220] Victims Group 2's Appeal Brief, para. 83.
[221] Defence Response to Victims Group 2's Appeal Brief, paras 7, 16.
[222] Defence Response to Victims Group 2's Appeal Brief, paras 7, 17.

that the Trial Chamber should have assessed and rejected Victims Group 2's submission that potential beneficiaries would number at least 100,000 victims across all locations, which could not be reconciled with the other estimates before it.[223] The Defence avers that, had the Trial Chamber done so, it would have been possible to obtain an accurate estimate or range of potential beneficiaries, based upon the other submissions before it.[224]

114. The Defence argues that, even when collective reparations are awarded, the number of potential beneficiaries is an important parameter for determining the convicted person's liability.[225] It further submits that the collective reparations with individualised components that were ordered in this case are akin to individual reparations and require both the determination of the number of potential beneficiaries and an evaluation of the cost per victim in order to establish the liability of the convicted person.[226] The Defence argues that this could not be based solely upon estimates of the cost of reparations projects to be implemented in the present case, in which there are different groups of victims, various types of harm and individualised components to the collective award.[227] It submits that estimating the total number of potential beneficiaries was "the single most important determination" that the Trial Chamber was required to make to assess Mr Ntaganda's liability for reparations;[228] yet neither the Trial Chamber's conclusion that "thousands of victims" might be eligible, nor the range of potential beneficiaries to which it referred, could form a sound basis for establishing Mr Ntaganda's liability.[229]

115. The Defence submits that in the absence of the number of potential beneficiaries, it was not possible to justify how the amount of 30 million USD was calculated; and that the Trial Chamber could have sought more information from the parties and participants to establish more accurate estimates had that been necessary.[230] The Defence argues, however, that the Trial Chamber had sufficient information before

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[223] Defence Response to Victims Group 2's Appeal Brief, paras 8, 17, 34.
[224] Defence Response to Victims Group 2's Appeal Brief, para. 8.
[225] Defence Response to Victims Group 2's Appeal Brief, para. 18.
[226] Defence Response to Victims Group 2's Appeal Brief, para. 18.
[227] Defence Response to Victims Group 2's Appeal Brief, para. 19.
[228] Defence Response to Victims Group 2's Appeal Brief, para. 20.
[229] Defence Response to Victims Group 2's Appeal Brief, para. 21.
[230] Defence Response to Victims Group 2's Appeal Brief, para. 22.

it to determine the number of potential beneficiaries, averring that the number of participating victims, adjusted in light of the Conviction Judgment, was known, as was the number of former child soldier victims, for which Mr Lubanga and Mr Ntaganda had been convicted; and that only the number of new potential beneficiaries remained to be determined.[231]

116. The Defence submits that the Trial Chamber erred by failing to engage with the submissions of the parties and participants and determine the matter, given the vast difference in the estimates that they provided.[232] The Defence avers that, had it done so, the Trial Chamber would have dismissed Victims Group 2's submissions, which "cannot be reconciled with any of the other estimates provided, or with the realities on the ground in Ituri during the relevant period".[233]

117. The Defence challenges the position of Victims Group 2 that the Trial Chamber should have taken into account publicly available figures on the number of inhabitants at the time of the events in locations such as Mongbwalu, Bambu and Kobu.[234] It argues that there is no official information available and that there was a significant movement of the population in Ituri between 2001 and 2003; and that therefore any public figure or census purported to represent the population of Mongbwalu in 2002 should be considered unreliable.[235] The Defence further contends that there is a difference between the population of a town or village and the number of victims when the crimes were committed – and that the former cannot establish the latter.[236] The Defence argues that potential beneficiaries need to satisfy both material and temporal requirements such as, in relation to the unlawful attack on civilians in Mongbwalu, proof that they were, *inter alia*, (i) a civilian; (ii) present during the unlawful attack in Mongbwalu; (iii) had not taken an active part in the hostilities at the time the crime was committed; and (iv) had suffered harm during the attack.[237] In its view, the information sought by Victims Group 2 would not be capable of establishing whether those criteria were fulfilled in relation to the inhabitants of Mongbwalu, Bambu and Kobu and that

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[231] Defence Response to Victims Group 2's Appeal Brief, para. 23.
[232] Defence Response to Victims Group 2's Appeal Brief, para. 24.
[233] Defence Response to Victims Group 2's Appeal Brief, para. 24.
[234] Defence Response to Victims Group 2's Appeal Brief, paras 25-26, 29.
[235] Defence Response to Victims Group 2's Appeal Brief, para. 26.
[236] Defence Response to Victims Group 2's Appeal Brief, para. 27.
[237] Defence Response to Victims Group 2's Appeal Brief, para. 27.

therefore no weight can be given to their submission that the population of Mongbwalu was 80,000 for the purposes of determining the number of potential beneficiaries.[238]

118. The Defence also opposes Victims Group 2's argument that the Trial Chamber erred by failing to take into account estimates of the United Nations that 60,000 victims were displaced by the *shika na mukono* operation, averring that this operation cannot form part of the crimes for which reparations can be ordered because it is not mentioned in the Conviction Judgment, nor was this part of the report of the United Nations on the record of the case.[239] The Defence further argues that no weight can be given to these estimates considering the length of time between the events and the compilation of the report in 2004.[240]

119. The Defence challenges Victims Group 2's submission that the Trial Chamber erred by failing to take into account a large number of potentially eligible direct victims who had suffered harm in the forest or bush surrounding the affected locations and which it had allegedly acknowledged in its Decision on the First Report.[241] The Defence argues that the Trial Chamber neither acknowledged nor endorsed an additional category of potential victims, but solely clarified that, in respect of Sangi and Kobu, people living within five kilometres of those two locations may be eligible for reparations; and that this would not impact the number of potential beneficiaries in any meaningful way.[242]

120. The Defence submits that, in light of its above arguments, for the purposes of determining the number of potential beneficiaries, no weight can be given to reports, census or other official documents regarding the size of the population of certain villages at the time relevant to the charges brought against Mr Ntaganda.[243] For that reason, the Defence argues that the Trial Chamber was correct to reject the request by Victims Group 2 for the Registry to be ordered to obtain information about the

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[238] Defence Response to Victims Group 2's Appeal Brief, paras 28-29.
[239] Defence Response to Victims Group 2's Appeal Brief, para. 30, *referring to* Victims Group 2's Appeal Brief, paras 64, 81.
[240] Defence Response to Victims Group 2's Appeal Brief, para. 30.
[241] Defence Response to Victims Group 2's Appeal Brief, para. 31, *referring to* Victims Group 2's Appeal Brief, para. 66, which referred in this regard to Decision on the First Report, para. 19(f) and Impugned Decision, para. 107.
[242] Defence Response to Victims Group 2's Appeal Brief, para. 31.
[243] Defence Response to Victims Group 2's Appeal Brief, para. 32.

population size of the affected areas at the time of the events in question because that information was not relevant to the determination of the number of potential beneficiaries.[244] The Defence submits that the Trial Chamber should therefore have rejected the assertion of Victims Group 2 that the number of potential beneficiaries was a minimum of 100,000 across all locations affected by the crimes – and that it erred in not doing so.[245]

121. The Defence argues that, instead of relying on information concerning population size, determining the number of eligible victims in this case "is a fact intensive enquiry that requires field work and the conduct of interviews with potential beneficiaries by an independent and impartial agency, namely the VPRS".[246] The Defence contends that the Trial Chamber, having rejected the figures provided by Victims Group 2, should have focused instead upon the other estimates that had been provided, in particular, those submitted by the VPRS, which indicated that approximately 1,100 individuals may qualify as new potential victims of the attacks – a figure that was not challenged by the experts appointed in this case.[247] The Defence submits that relying on these figures, and possibly obtaining additional information, might well have made it possible for the Trial Chamber to determine a sufficiently precise range of potential beneficiaries.[248] However, the Defence argues that by adopting the "manifestly exaggerated and unsupported figure of 'a minimum of 100,000' potential beneficiaries", the Trial Chamber's determination of Mr Ntaganda's liability at 30 million USD is "nothing more than arbitrary".[249]

3. Victims Group 1's submissions before the Appeals Chamber

122. Victims Group 1 submit that the arguments of Victims Group 2 "appear to amount to mere disagreements with the methodology and conclusions" of the Trial Chamber, which had explained in a previous decision why it had rejected Victims

[244] Defence Response to Victims Group 2's Appeal Brief, para. 33.
[245] Defence Response to Victims Group 2's Appeal Brief, para. 34.
[246] Defence Response to Victims Group 2's Appeal Brief, para. 32.
[247] Defence Response to Victims Group 2's Appeal Brief, para. 35.
[248] Defence Response to Victims Group 2's Appeal Brief, para. 36.
[249] Defence Response to Victims Group 2's Appeal Brief, para. 36.

Group 2's request to obtain further information about the population size of the affected locations; and Victims Group 2 had not appealed that previous decision.[250]

123. Victims Group 1 further argue that the jurisprudence of the Appeals Chamber to which they refer in opposing ground one of the Defence's appeal also applies in response to the submissions of Victims Group 2;[251] and submit that the first ground of their appeal should also be dismissed.[252]

D. Victims Group 2's third ground of appeal

1. Victims Group 2's submissions before the Appeals Chamber

124. Victims Group 2's third ground of appeal is that the Trial Chamber erred in law, fact and procedure in failing to obtain estimates of the number of victims likely to come forward for reparations that were as accurate as possible, and in failing to give a reasoned opinion about its conclusions on this matter.[253] Victims Group 2 submit that this ground, which relates to *actual* beneficiaries, namely victims likely to come forward for reparations, is different from the first ground of their appeal, which relates to all *potential* beneficiaries of reparations.[254] They aver that the errors covered by this ground of appeal relating to actual beneficiaries result from the Trial Chamber's failure to obtain an accurate estimate of the number of potentially eligible beneficiaries, as argued under their first ground of appeal.[255]

125. Victims Group 2 submit that the Trial Chamber erred in law by failing to obtain estimates that were as accurate as possible about the number of victims likely to claim reparations, taking into account the possibility that not all eligible victims would come forward.[256] They argue that the Trial Chamber's failure to estimate the number of all potentially eligible victims meant that it could not ascertain an estimate of persons likely to come forward.[257] They further submit that the Trial Chamber failed to provide

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[250] Victims Group 1's Response, para. 33, *referring to* Decision on the CLR2's Request for Information, paras 17-18.
[251] Victims Group 1's Response, para. 33, *referring to* Victims Group 1's Response, para. 23 and fns 28, 31.
[252] Victims Group 1's Response, paras 33-34.
[253] Victims Group 2's Appeal Brief, p. 39.
[254] Victims Group 2's Appeal Brief, para. 102.
[255] Victims Group 2's Appeal Brief, para. 102.
[256] Victims Group 2's Appeal Brief, para. 103.
[257] Victims Group 2's Appeal Brief, para. 104.

a reasoned opinion in relation to its conclusion that not all victims would come forward to benefit from reparations in this case, and why it was impossible to predict that number in advance.[258]

126. Victims Group 2 submit that the Trial Chamber did not discuss any concrete projected numbers or percentages of persons who would be unlikely to come forward.[259] They argue that the Trial Chamber merely raised this matter in determining the modalities of reparations, but that its discussion in that context could not be directly applied to the distinct question of the number of victims likely to come forward for reparations.[260]

127. Victims Group 2 submit that the Trial Chamber erred in not examining and providing reasons about which potentially eligible victims would fail to claim reparations.[261] They argue that it was unlikely that any potentially eligible victim would not make such a claim, given that: victims had not received any support since the crimes were committed; there was prevailing poverty in the region; the Court had an outreach campaign to make potentially eligible victims aware of their entitlements; reparations programmes could be designed in a manner that took into account any security concerns; and if an eligible victim died before receiving reparations, his or her successors would be entitled to claim those reparations.[262] Victims Group 2 contend that, "[b]y simply concluding that not all eligible victims would come forward for reparations, the Trial Chamber failed to consider any of the above relevant factors" and it therefore erred in fact and/or procedure, "because it cannot be discerned how said conclusion has reasonably been reached from the facts and evidence" before it.[263] They aver that these errors materially affected the Impugned Decision because, had the Trial Chamber ascertained the number of victims likely to come forward, "it would have rendered a decision reflecting a properly estimated number of potentially eligible victims".[264]

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[258] Victims Group 2's Appeal Brief, paras 105-106, *referring to* Impugned Decision, paras 230, 246.
[259] Victims Group 2's Appeal Brief, para. 107.
[260] Victims Group 2's Appeal Brief, para. 107.
[261] Victims Group 2's Appeal Brief, para. 108.
[262] Victims Group 2's Appeal Brief, para. 108.
[263] Victims Group 2's Appeal Brief, para. 108.
[264] Victims Group 2's Appeal Brief, para. 109.

2. Defence submissions before the Appeals Chamber

128. The Defence submits that the third ground of Victims Group 2's appeal is ill conceived.[265] It argues that victims likely to come forward for reparations are already included within all potential beneficiaries of reparations – and the Trial Chamber's errors in failing to establish an accurate estimate or sufficiently precise range of the latter has already been addressed under the first ground of Victims Group 2's appeal.[266]

129. The Defence argues that, for various reasons, some potential beneficiaries might not claim reparations; and that Appeals Chamber jurisprudence to which Victims Group 2 refer does not impose a duty upon a trial chamber to determine, or to provide a reasoned opinion in relation to, which potentially eligible victims may not come forward.[267] The Defence further submits that the Trial Chamber did not conclude that not all victims would seek reparations in the present case.[268]

130. The Defence challenges Victims Group 2's assertion that it seems doubtful that any potentially eligible victim would voluntarily opt not to claim reparations.[269] The Defence highlights the fact that reparations are voluntary and that there are many reasons why victims may choose not to request them, "*inter alia*, the time elapsed between the reparations proceedings and the crimes, the fear of marginalisation, a lack of interest, considerations relating to an ethnic group, geographical considerations and, more importantly, the will to move on with one's life".[270] The Defence submits that in other cases potential beneficiaries have chosen not to seek reparations, which renders it likely that the same would occur in the present case.[271]

3. Victims Group 1's submissions before the Appeals Chamber

131. While arguing that it should be dismissed,[272] Victims Group 1 do not raise any specific additional submissions in response to the third ground of Victims Group 2's appeal that they have not already made in response to the first ground of that appeal

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[265] Defence Response to Victims Group 2's Appeal Brief, para. 48.
[266] Defence Response to Victims Group 2's Appeal Brief, paras 48-49, 53.
[267] Defence Response to Victims Group 2's Appeal Brief, paras 50-52.
[268] Defence Response to Victims Group 2's Appeal Brief, para. 53.
[269] Defence Response to Victims Group 2's Appeal Brief, paras 54-55.
[270] Defence Response to Victims Group 2's Appeal Brief, paras 56-57.
[271] Defence Response to Victims Group 2's Appeal Brief, paras 57-58.
[272] Victims Group 1's Response, paras 34, 101.

and the fourteenth ground of the Defence's appeal. The submissions of Victims Group 1 in response to those latter two grounds have been summarised above.[273]

E. Victims Group 2's fourth ground of appeal

1. Victims Group 2's submissions before the Appeals Chamber

132. Victims Group 2's fourth ground of appeal is that the Trial Chamber erred in law and/or fact in failing to provide reasons for how it resolved uncertainties in favour of the convicted person.[274] This ground is not limited exclusively to the determination of the number of potentially eligible beneficiaries, yet as that matter is expressly addressed within this ground of appeal, the relevant arguments of the parties are summarised here. However, it is noted that the arguments raised within the fourth ground of Victims Group 2's appeal are also relevant to other grounds – notably, those relating to the manner in which the amount of the award for reparations was set, including because the Trial Chamber in fact made its statement about how uncertainties had been resolved in favour of the convicted person when addressing the amount of the award at paragraph 247 of the Impugned Decision.

133. Victims Group 2 point out that the Trial Chamber stated that it had resolved uncertainties in favour of the convicted person, but argue that it failed to give a reasoned opinion as to how it had done so.[275] They submit that the Trial Chamber failed to specify to which "uncertainties" it was referring and how any such uncertainties had been resolved; and that it also failed to explain what it meant by uncertainties having been resolved "in favour of the convicted person", thereby leaving it unclear whether the Trial Chamber had used a restrictive approach in respect of the number of potential beneficiaries or in awarding reparations by limiting Mr Ntaganda's liability to a minimum amount.[276] They further submit that the Trial Chamber failed in its duty to weigh the rights of the convicted person against other competing interests, including the interests of the victims and the need to redress the harm that they had suffered.[277]

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[273] *See supra* paras 80-84, 122-123.
[274] Victims Group 2's Appeal Brief, p. 42.
[275] Victims Group 2's Appeal Brief, paras 110-111.
[276] Victims Group 2's Appeal Brief, paras 112-113.
[277] Victims Group 2's Appeal Brief, para. 114.

134. Victims Group 2 argue that those combined factors constituted an error in the exercise of the Trial Chamber's discretion which materially affected the Impugned Decision because it is not apparent how the various competing interests were weighed.[278] This, it is averred, has left the victims "wondering and speculating that Mr Ntaganda might have ultimately been 'favoured' by excessively limiting his liability", which has negatively affected their well-being.[279]

2. Defence submissions before the Appeals Chamber

135. The Defence agrees with Victims Group 2 that the Trial Chamber did not indicate what, if any, uncertainties were resolved, "let alone how they were resolved in favour of Mr Ntaganda" and that it thereby failed to provide a reasoned opinion and erred in the exercise of its discretion.[280] However, the Defence disagrees with Victims Group 2 that there could be any presumption that anything was resolved in favour of Mr Ntaganda, instead arguing that the reparations award of 30 million USD was "set arbitrarily", with the Trial Chamber having failed to disregard the "outrageous figure" of 100,000 potential new beneficiaries put forward by Victims Group 2 and making calculations on that basis.[281] The Defence argues that the Trial Chamber therefore erred both by failing to provide a reasoned opinion about how it had resolved uncertainties in favour of Mr Ntaganda and by failing "to implement the principle itself".[282]

3. Victims Group 1's submissions before the Appeals Chamber

136. Victims Group 1 submit that the fourth ground of Victims Group 2's appeal should be dismissed for the reasons that they provide for dismissing the Defence's fifteenth ground of appeal[283] (for which, see further below[284]).

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[278] Victims Group 2's Appeal Brief, para. 115.
[279] Victims Group 2's Appeal Brief, para. 115.
[280] Defence Response to Victims Group 2's Appeal Brief, para. 59.
[281] Defence Response to Victims Group 2's Appeal Brief, paras 60-61.
[282] Defence Response to Victims Group 2's Appeal Brief, para. 61.
[283] Victims Group 1's Response, para. 108.
[284] *See infra* paras 195-196.

F. Victims Group 2's seventh ground of appeal and conclusion

1. Victims Group 2's submissions before the Appeals Chamber

137. The Appeals Chamber notes that the seventh ground of Victims Group 2's appeal is addressed separately below.[285] However, for present purposes, it is noted that certain arguments within that ground relate specifically to how the Trial Chamber addressed the determination of potentially eligible beneficiaries. It is therefore briefly recalled, in the current context, that Victims Group 2 submit within the seventh ground of their appeal, that, at the time that the Impugned Decision was issued, "the information before the Trial Chamber was far from being complete".[286] They argue that this is demonstrated by the mapping exercise of the Registry being both "preliminary" and affected by COVID-19 restrictions; and that the Trial Chamber acted on incomplete information, having rejected Victims Group 2's request to collect more concrete information about the population size of the affected locations.[287] They further submit that, at the time that it was issued, the order for reparations left many of its "fundamental parameters" undefined;[288] and that the Trial Chamber left the question of, *inter alia*, the number of potential beneficiaries "unresolved and conferred undue discretion upon the TFV" in this regard.[289]

138. In the conclusion to their appeal brief, Victims Group 2 submit that, by failing, *inter alia*, to obtain "the most accurate estimate possible as regards the number of potential beneficiaries", the Trial Chamber has created uncertainty as to whether and to what extent the reparations awarded will be sufficient to address the harm suffered by the victims of the attacks because "this will entirely depend on an unforeseen number of potentially eligible victims who will ultimately come forward".[290]

2. Defence submissions before the Appeals Chamber

139. The Defence submits that the Trial Chamber did not determine the number of potential beneficiaries with any degree of certainty, "the knock-on effect of which was

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[285] *See infra* paras 718 *et seq*.
[286] Victims Group 2's Appeal Brief, para. 138.
[287] Victims Group 2's Appeal Brief, para. 138.
[288] Victims Group 2's Appeal Brief, para. 139.
[289] Victims Group 2's Appeal Brief, para. 148.
[290] Victims Group 2's Appeal Brief, para. 151.

that setting the total reparations award at USD 30,000,000 was then arbitrary, premature, and unfair to the convicted person".[291]

3. Victims Group 1's submissions before the Appeals Chamber

140. Victims Group 1 do not expressly address the seventh ground of Victims Group 2's appeal.

G. Determination by the Appeals Chamber

141. The Appeals Chamber is required to determine whether the Trial Chamber erred in respect of its findings about the number of potentially eligible victims for reparations in this case. In their appeal briefs, the Defence and Victims Group 2 both submit that the Impugned Decision should be reversed for errors allegedly made by the Trial Chamber in its determination of this issue, although they disagree in relation to various matters in coming to that overall conclusion. In essence, both the Defence and Victims Group 2 agree that the Trial Chamber erred in failing: (i) to determine appropriately the number, or a sufficiently accurate estimated range, of potentially eligible victims for reparations; (ii) to provide a reasoned decision; and (iii) to explain how it had resolved uncertainties in favour of the convicted person in this regard. They also submit that the Trial Chamber erred in fact in various respects. Victims Group 1, in responding to the two appeals, argue that the various grounds of appeal raised by the Defence and Victims Group 2 on this issue should be dismissed.

142. The Appeals Chamber has had careful regard to all of the submissions that have been made by the parties and the TFV in relation to the manner in which the Trial Chamber addressed the number of potentially eligible beneficiaries of the reparations award. Those submissions span not only the fourteenth ground of the Defence appeal and the first and third grounds of Victims Group 2's appeal, which are expressly stated, in their titles, to relate to this matter; but relevant submissions are also made in the context of other grounds of appeal that relate to this issue (namely the first and second grounds of the Defence appeal and the fourth and seventh grounds of Victims Group 2's appeal), as well as submissions made in, and further to, the observations of the TFV. Having closely analysed all of those submissions, and in order to make its determination

[291] Defence Response to Victims Group 2's Appeal Brief, para. 79.

both clear and comprehensive, the Appeals Chamber deems it appropriate to resolve the issues raised in those grounds by addressing together the key arguments that have been put forward by the parties under the headings that follow. In this regard, it will first explain its understanding of the finding of the Trial Chamber, followed by setting out relevant prior jurisprudence, with finally, an assessment of the Trial Chamber's application of the legal principles to the facts of the case.

1. The finding of the Trial Chamber

143. Many of the submissions of the Defence and Victims Group 2 refer to the statement of the Trial Chamber that estimates of as yet unidentified potentially eligible victims ranged from "at least approximately 1,100" to "a minimum of 100,000".[292] They submit that such a range is a manifestly imprecise and unreasonable basis upon which to issue an order for reparations. Victims Group 1 contest these submissions and, in their response, contend that the Trial Chamber determined that "thousands of victims" may qualify but did not specifically endorse an estimate of 100,000 victims nor base its decision upon that figure, instead referring to it in the context of a sentence in the Impugned Decision demonstrating that estimates of potentially eligible victims varied greatly.

144. The Trial Chamber set out its conclusion about the number of potential victims in this case in one paragraph of the Impugned Decision.[293] At the start of that paragraph the Trial Chamber stated, "that thousands of victims may be eligible for reparations in the present case".[294] In the remainder of the paragraph, the Trial Chamber proceeded to state that it was impossible "to predict in advance how many victims may ultimately come forward to benefit from collective reparations with individualised components during the implementation stage".[295] It noted the various estimates that had been provided to it, stating that estimates varied greatly and ranged from at least approximately 1,100 to a minimum of 100,000.[296] The penultimate sentence of the paragraph reflects the overall situation in which the Trial Chamber perceived itself to

[292] Impugned Decision, para. 246.
[293] Impugned Decision, para. 246.
[294] Impugned Decision, para. 246.
[295] Impugned Decision, para. 246.
[296] Impugned Decision, para. 246.

be, namely that it was clear that there was "still a significant number of as yet unidentified potentially eligible victims, for which no reliable figures are available".[297]

145. The conclusion of the Trial Chamber was therefore that "thousands of victims" may be eligible. The Trial Chamber did not elaborate further upon whether that figure would be single thousands, tens of thousands or even potentially hundreds of thousands. It mentioned that it had estimates before it that ranged from "at least approximately 1,100" to "a minimum of 100,000", but it did not expressly state which of the figures within that range, if any, it endorsed. What is clear is that the Trial Chamber proceeded to issue an order for reparations in circumstances in which, according to the Trial Chamber, no reliable figures were available, estimates before it ranged from at least 1,100 to more than 100,000 victims, and it did not make any express determination as to how many "thousands of victims" may ultimately be entitled to reparations. The question that arises is whether the Trial Chamber erred in proceeding in that way.

2. Relevant statutory provisions and previous jurisprudence[298]

146. The Appeals Chamber recalls that article 75 of the Statute provides for reparations to victims and states, in relevant part:

> 1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.
>
> 2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.
>
> Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

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[297] Impugned Decision, para. 246.

[298] The Appeals Chamber has taken note of the Judgment of the International Court of Justice in the case of "Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v. Uganda*)" of 9 February 2022, which sets out the approach of that court to the questions of reparations that were before it in relation to crimes committed within the same country as in the present case. However, the present judgment, rendered in the context of criminal proceedings against an individual, is necessarily based upon the specific statutory regime and jurisprudence that applies to this Court, as set out in the following paragraphs and within each section of this judgment below, as well as to the specific facts and circumstances that have arisen in these appeals.

> 3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.

147. By reference to that article, the Appeals Chamber has previously held that,

> article 75 (1) of the Statute requires a trial chamber to "determine the scope and extent of any damage, loss and injury to, or in respect of victims". The Appeals Chamber considers that, in doing so, a trial chamber should, generally speaking, establish the types or categories of harm caused by the crimes for which the convicted person was convicted, based on all relevant information before it, including the decision on conviction, sentencing decision, submissions by the parties or *amici curiae*, expert reports and the applications by the victims for reparations.[299]

148. In respect of the specific issue that arises under these grounds of appeal, the Appeals Chamber recalls that it has addressed the question of the extent to which an order for reparations is required to set out the number of potentially eligible beneficiaries in the *Lubanga* case.

149. In that case, which gave rise to the Court's first appeal concerning reparations, the trial chamber had not identified eligible victims itself but had instead set out certain characteristics of groups of eligible victims to enable their identification by the TFV.[300] On appeal, the Appeals Chamber considered the relevant provisions of the Court's legal texts and found, *inter alia*, that

> an order for reparations under article 75 of the Statute must contain, at a minimum, five essential elements:
>
> […]
>
> 5) it must identify the victims eligible to benefit from the awards for reparations or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted.[301]

150. In the same case, in a subsequent appeal, the Appeals Chamber specifically recalled that the following finding of the trial chamber had not been overturned in the

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[299] *Katanga* Appeals Chamber Judgment on Reparations, para. 70. *See also* 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 78.
[300] *See* 2015 *Lubanga* Appeals Chamber Judgment on Reparations, para. 205.
[301] 2015 *Lubanga* Appeals Chamber Judgment on Reparations, paras 1, 32. *See also* para. 205.

initial appeal that had been brought against the order that the first instance chamber had made:

> In the present case, Trial Chamber I found that, '[g]iven the uncertainty as to the number of victims of the crimes in this case – save that a considerable number of people were affected – and the limited number of individuals who have applied for reparations, the Court should ensure there is a collective approach that ensures reparations reach those victims who are currently unidentified'. This finding was not overturned by the Appeals Chamber.[302]

151. As a result, a trial chamber therefore does not have to set out the precise number of beneficiaries in the order for reparations. It is permissible for the order for reparations instead to set out eligibility criteria from which victims can be identified.[303]

152. Nevertheless, establishing the number of beneficiaries to be repaired by the award will often be a fundamental parameter in the determination of both what reparations are appropriate and the amount of the award. Indeed, in *Lubanga*, the Appeals Chamber held:

> This is not to say that, if collective reparations are ordered, the number of victims is not relevant to the determination of the scope of a convicted person's liability for reparations; *to the contrary, the number of victims will be an important parameter for determining what reparations are appropriate*. Clearly, it makes a difference whether the crimes for which the conviction was entered resulted in the victimisation of one hundred, one thousand or one hundred thousand individuals. Nevertheless, it would be incorrect to assume that the number of victims may only be established based on individual requests for reparations received by the Court. It would be undesirable for the trial chamber to be restrained in that determination simply because not all victims had presented themselves to the Court by making a request under rule 94 of the Rules. In making

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[302] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 92 (footnote omitted), *referring, inter alia, to* *Lubanga* Reparations Decision, para. 219.

[303] Such victims would then be identified during the implementation stage of the reparations proceedings, in respect of which it is recalled that: (i) the order for reparations, such as the one issued in this case, is the first of potentially several decisions of a trial chamber in the process of awarding reparations (*see, e.g.*, *Al Mahdi* Reparations Order, para. 136. *See also* *Al Mahdi* Appeals Chamber Judgment on Reparations, paras 44, 68); (ii) following the issuance of the order for reparations, a draft implementation plan is drawn up by the TFV pursuant to the criteria contained within the order (*see, e.g.*, *Al Mahdi* Reparations Order, para. 136. *See also* *Al Mahdi* Appeals Chamber Judgment on Reparations, paras 44, 68); and (iii) thereafter, it remains for the relevant trial chamber to approve, reject or amend the draft implementation plan that is submitted to it by the TFV, with the trial chamber supervising the work of the TFV during the implementation stage of the proceedings (*see, e.g.*, *Al Mahdi* Reparations Order, para. 136. *See also* *Al Mahdi* Appeals Chamber Judgment on Reparations, paras 44, 68). Thereafter, the trial chamber may make further decisions during the course of the implementation process until its completion (*see, e.g.*, *Al Mahdi* Reparations Order, para. 136. *See also* *Al Mahdi* Appeals Chamber Judgment on Reparations, paras 44, 68).

> that determination, the trial chamber should consider the scope of damage as it is in the current reality, based on the crimes for which the convicted person was found culpable. The number of victims at the time of the crimes may be a starting point for this consideration. However, other parameters for determining what reparations are appropriate include considerations of what reparations measures are envisaged and how many victims are likely to come forward and benefit from them – a number that is likely to be smaller in the current reality than the overall number of victims of the crimes at the time they were committed. These determinations can be made based on, *inter alia*, submissions received from the parties and reports of experts.[304]

153. The Appeals Chamber underscored that:

> […] [i]f the trial chamber resorts to estimates as to the number of victims, such estimates must be based on a sufficiently strong evidential basis; any uncertainties must be resolved in favour of the convicted person (for instance, by assuming a lower number of victims, or by discounting the amount of liability). […][305]

154. Later in the same judgment, the Appeals Chamber addressed Mr Lubanga's argument that the trial chamber in that case had erred in relation to its findings about the existence of "hundreds and possibly thousands more victims" who had not been identified.[306] The Appeals Chamber held, in relevant part, as follows:

> 223. The Appeals Chamber acknowledges that the Trial Chamber set out only to determine an estimate of the approximate number of victims who had not already come forward during the proceedings before the Trial Chamber. It is also acknowledged that the Trial Chamber did so in an attempt to fix the amount of Mr Lubanga's liability for collective reparations, as directed by the Appeals Chamber. However, the Appeals Chamber recalls its finding above that, if a trial chamber resorts to estimates as to numbers of victims, such estimates must be based on a sufficiently strong evidential basis.
>
> 224. 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*.[307]

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[304] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 89 (emphasis added, footnote omitted).
[305] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 90.
[306] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 222.
[307] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, paras 223-224 (emphasis added, footnotes omitted), *referring to* its findings at paragraphs 89-90 of the same judgment, which are set out above.

3. The Trial Chamber's application of the legal principles to the facts of the present case

155. The Appeals Chamber notes that the Trial Chamber correctly identified the relevant legal principles when addressing the applicable law that applies to the number of potentially eligible beneficiaries in the circumstances of the present case. Specifically, the Trial Chamber expressly stated that the number of potentially eligible beneficiaries was "an important parameter for determining the scope of the convicted person's liability"; that "when the chamber resorts to estimates as to the number of victims, it must endeavour to obtain an estimate that is as concrete as possible, based on a sufficiently strong evidential basis"; and that "[a]ny uncertainties must be resolved in favour of the convicted person", referring, in those respects, to the relevant paragraphs of the 2019 *Lubanga* Appeals Chamber Judgment on Reparations.[308] The question for the Appeals Chamber to determine is therefore whether the Trial Chamber correctly applied those legal principles to the facts of the present case.

156. In respect of the above legal principles, it is noted that Judge Ibáñez Carranza disagrees with the finding that any uncertainties must automatically be resolved in favour of the convicted person. In her view, this approach contradicts the fundamental rights of victims during the reparation process.[309]

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[308] Impugned Decision, para. 230, *referring to* 2019 *Lubanga* Appeals Chamber Judgment on Reparations, paras 89, 90, 223-224.

[309] This footnote sets out the opinion of Judge Ibáñez Carranza on this point. In her view, the *in dubio pro reo* principle operates as a guarantee during criminal proceedings against the accused person. Nevertheless, and fundamentally due to the fact that reparation processes for the crimes under the jurisdiction of the Court, which always entail grave and manifest violations of human rights or international humanitarian law, this procedure is a separate one, whose nature is not solely criminal because the Prosecutor or public accuser is no longer a party in the procedure, and because it involves fundamental rights of victims to be repaired. Thus, the nature of the procedure is different and the guarantees here are rather in favour of the person or victim whose core human rights have been violated and affected by the crimes. Therefore uncertainties cannot automatically be resolved in favour of the accused, because his or her fair trial rights in purely criminal proceedings are not superior to the fundamental nature of the human rights of the victims of these kinds of violations in reparations proceedings. For these objective reasons, during the reparation process, uncertainties cannot be automatically resolved in favour of the convicted person; the *pro persona* principle (or the favourability principle) ought to be applied, weighing all the rights at stake and on a case-by-case basis, taking into account different factors benefiting the victims whose rights have been violated. According to previous Appeals Chamber precedent, "when setting the amount of the convicted person's liability, the trial chamber must bear in mind the overall purpose of reparations, which is to repair the harm caused and to achieve, to the extent possible, *restitutio in integrum*" (2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 107). Any uncertainty resolved in favour of the victims, or purported to make the reparation process more effective and comprehensive, is very unlikely to have a negative impact on the rights of the convicted person; instead, it would rather serve the core purpose of the reparation process

157. For the reasons that follow, the Appeals Chamber finds that, in the circumstances of the present case, one of the most fundamental parameters for setting the amount of the reparations award is the number of victims that it is intended to compensate.

158. The collective award for reparations that was made had "individualised components". This was therefore not a "classic" case of collective reparations, in the sense of community-based reparations in relation to which the potential number of beneficiaries might, depending upon the circumstances, not be of as much significance to the setting of the amount of the award.[310] The Trial Chamber itself defined what it termed "two forms of collective reparations" in the following manner:

> The first category of collective reparations ('community reparations') is intended to benefit the community as a whole and does not specifically address individual members thereof. The second category ('collective reparations with individualised components') focuses on the individual members of the group. Although they are collective in nature, they result in individual benefits, to respond to the needs and current situation of the individual victims in the group.[311]

159. In the present case, the Trial Chamber awarded the second category – collective reparations with individualised components – and the part of the Impugned Decision that dealt with the "Cost to repair the victims' harms"[312] contains many instances of the cost of reparations being priced *per victim*.

160. By way of example, the Trial Chamber refers to preliminary estimates of the TFV stating the cost to repair severe physical injury at 3,000 USD per victim; the cost to treat infections and chronic disease at 450 USD per victim; severe mental trauma at 2,000 USD per victim; and individual socio-economic reintegration at 3,000 USD per

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in the Rome Statute system, (also bearing in mind the fact that it is often the TFV that funds the reparations). Furthermore, as explained in paragraph 306 of the Separate Opinion of Judge Ibáñez to the 2019 *Lubanga* Appeals Chamber Judgment on Reparations: "[…] [T]his Opinion recalls that the determination of the victims and the harm suffered must be based on an integral approach whereby the burden of proof ought to be shared together with the victims and the system established in the Rome Statute and be guided by the principles and standards of international human rights law, especially the *pro homine* principle, according to which, in weighing the different rights at stake, the result may favour the person whose human rights have been violated".

[310] For the view of Judge Ibáñez Carranza on collective reparations being community-based, *see* Separate Opinion of Judge Ibáñez to the 2019 *Lubanga* Appeals Chamber Judgment on Reparations, paras 223-224.

[311] Impugned Decision, para. 81 (footnotes omitted).

[312] Impugned Decision, paras 236-244.

person.[313] Furthermore, the Trial Chamber refers to the appointed experts noting specific per victim costs in relation to customary justice in Ituri, where compensation is said to be quantified by a specific number of cows per loss of life or per loss of property, with a cow being valued at between 500 USD and 600 USD;[314] and it also refers to the appointed experts noting that Congolese military courts had variously quantified compensation for rape and sexual violence at amounts ranging from 55 USD to 50,000 USD, as well as referring to "an emerging standard of USD 5,000 being awarded for each rape in nine cases involving multiple child victims".[315] Moreover, the Trial Chamber referred to the *Katanga* case, setting out "the monetary value *per unit of head of harm*" that was used in that case;[316] and to the *Lubanga* case, where the harm was determined to be 8,000 USD per victim – a finding that might be of particular relevance in this case as the Trial Chamber found that all victims in *Lubanga* are potentially eligible for reparations in the present case.[317] Indeed, the Trial Chamber expressly referred to the figures and assessments made in the *Lubanga* and *Katanga* cases as being "highly relevant" to its assessment of the cost to repair the harm caused by the crimes which were committed in the present case.[318]

161. More generally, even where a cost per victim is not particularised for a certain type of harm, there is an obvious link between the number of victims and the cost to repair the harm suffered. Furthermore, it is apparent that the needs of individual victims are of significance. By way of example, the Trial Chamber cites the appointed experts as having referred to a general amount of almost 28 million USD having been awarded to victims in cases in the DRC courts. While there is no breakdown of the per victim cost of that amount, it is still linked to the number of victims, in that it is stated to have been awarded to "more than 3,300 victims".[319] Furthermore, the Trial Chamber refers to the difficulties expressed by the appointed experts in quantifying the cost of collective reparations and that, as a result, the TFV "provided some indicative figures for reparation projects that, while collective, *are 'highly individual in nature, tailored*

[313] Impugned Decision, para 236.
[314] Impugned Decision, para. 237.
[315] Impugned Decision, para. 238, *referring to* Second Expert Report, para. 77.
[316] Impugned Decision, para. 243 (emphasis added).
[317] Impugned Decision, para. 244.
[318] Impugned Decision, para. 245.
[319] Impugned Decision, para. 237.

to the need of each victim (victim-centred), and to the realities in Ituri'".[320] The Trial Chamber also noted that, according to the TFV, while provided under its assistance mandate, such figures "are comparable to a collective reparation programme with individualised components".[321] The Trial Chamber proceeds to set out examples of figures provided by the TFV in this respect, each of which refers to a specific number of victims that those figures were intended to repair (for example, an amount of 741,000 USD was said to be intended to reach 17,245 victims for the first year,[322] with further indicative figures being provided for other projects, each of which includes a specific amount and the precise number of beneficiaries that the amount is intended to reach in its first year, as well as, for some of them, average amounts for subsequent years and the overall targeted number of beneficiaries).[323]

162. There are certain exceptions to the per victim costs referenced above, notably the cost of repairing the health centre in Sayo, in relation to which estimates are cited as to the cost of building a new health care facility and reinstating the level of healthcare provision, including by repairing damage to the centre, and the cost of large equipment, transport, maintenance for five years, essential medications and the costs of one doctor and two nurses for five years.[324] However, the majority of the figures given for the cost to repair the harm in the Impugned Decision are linked to a "per victim" cost or, at least to some degree, to a total cost to be distributed among a specific number of victims.

163. The above forms a part of the background against which the Appeals Chamber needs to consider whether the Trial Chamber erred in its assessment of the number of potentially eligible victims entitled to be awarded reparations in the present case. It demonstrates to the Appeals Chamber that the number of victims is linked to the amount that will need to be awarded to repair their harm. It is emphasised that this is a case in which the Trial Chamber awarded "collective reparations with individualised components". It is therefore not a case in which collective reparations alone were ordered. Indeed, in many instances, the Trial Chamber itemised the costs to repair by reference to what amount would be necessary to repair the specific harms of individual

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[320] Impugned Decision, para. 241, *referring to* TFV Final Submissions, para. 44 (emphasis added).
[321] Impugned Decision, para. 241, *referring to* TFV Final Submissions, para. 59.
[322] Impugned Decision, para. 241.
[323] Impugned Decision, para. 241(i)-(v), *referring to* TFV Final Submissions, paras 60-63.
[324] Impugned Decision, para. 242.

victims. Therefore, without establishing even a concretely estimated number of victims, it is difficult to know how the Trial Chamber was in a position to proceed to determine the overall amount of the award to be made.

164. Furthermore, and more generally, it is clear that establishing the actual, or a concrete estimate of the, number of victims in this case was a matter of fundamental importance to the present order for reparations. Indeed, the matter appears to have been recognised by the Trial Chamber to be of importance during the course of the reparations proceedings as it issued orders and decisions which are relevant to establishing this number prior to it rendering the Impugned Decision.[325] Thereafter, in the Impugned Decision, the Trial Chamber stated that, in order to determine the amount of Mr Ntaganda's financial liability, it had taken into account, *inter alia*, "the estimated number of potentially eligible victims".[326] As the Trial Chamber proceeded to determine the amount of the award in the Impugned Decision, it is clear that if it under-estimated the number of potentially eligible victims, the amount of the award would be likely to be insufficient to meet their needs; yet, if it over-estimated the number of potentially eligible victims, the amount awarded would be likely to be unfair to the convicted person.

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[325] *See* Order for Preliminary Information, para. 4; December 2019 Order, para. 9, in which the Trial Chamber, *inter alia*, instructed the Registry, in consultation with the legal representatives of the victims and/or the TFV, as appropriate to: "(i) continue to carry out its preliminary mapping of potential new beneficiaries of reparations; (ii) carry out an assessment of how many of the victims participating in the *Ntaganda* case may potentially be eligible for reparations given the scope of the Judgment; and (iii) carry out an assessment of how many of the victims eligible for reparations as direct victim beneficiaries in the case of *The Prosecutor v. Thomas Lubanga Dyilo* ('*Lubanga case*') are also potentially eligible for reparations in the *Ntaganda case*"; First Decision on Reparations Process, para. 26, in which the Trial Chamber stated that: "For the purpose of enhancing the efficiency and effectiveness of the reparations proceedings taken as a whole, the Chamber considers it desirable for the identification of the victims potentially eligible for reparations to advance as much as possible before the issuance of the reparations order", and p. 19, in which the Trial Chamber instructed the Registry to finalise, as soon as practicable, the assessment of how many of the participating victims may potentially be eligible for reparations in light of the scope of the Conviction Judgment in consultation with the legal representatives of victims and the TFV, the assessment of how many victims eligible for reparations in the *Lubanga* case are also potentially eligible for reparations in the *Ntaganda* case, and the mapping of potential new beneficiaries, on which the Trial Chamber had given specific instructions in relation to how that should be done at paras 34-35 of the decision; Decision on the First Report, paras 64-65, p. 27, in which the Trial Chamber instructed the Registry to conclude its assessment of how many victims authorised to participate in the proceedings, and how many victims potentially eligible for reparations in the *Lubanga* case, may potentially be eligible for reparations, by 15 January 2021.

[326] Impugned Decision, para. 226.

165. The previous jurisprudence of the Appeals Chamber has endeavoured to strike an appropriate balance between the need for precise figures, the practical realities of attempting to establish the number of victims of mass crimes in what might often be war-torn territories and granting reparations as expeditiously as possible. In the 2019 *Lubanga* Appeals Chamber Judgment on Reparations, the Appeals Chamber did so by confirming that a trial chamber may resort to estimates of the number of potentially eligible victims, rather than being required to come up with a precise figure. However, the Appeals Chamber emphasized that when a trial chamber resorts to such estimates, they are required to be as concrete as possible and to ensure that those estimates are based upon a sufficiently strong evidential basis.[327] Importantly, it further found that, in cases of collective reparations, the number of potentially eligible victims remains relevant to the determination of the liability of the convicted person for reparations, with that number being "an important parameter for determining what reparations are appropriate" and stated:

> Clearly, it makes a difference whether the crimes for which the conviction was entered resulted in the victimisation of one hundred, one thousand or one hundred thousand individuals.[328]

166. That difference, in the circumstances of the present case, was clearly of significance. However, the Trial Chamber merely stated that "thousands of victims may be eligible for reparations".[329] The Trial Chamber did not give any indication as to whether, in expressing itself that way, it had in mind single thousands, tens of thousands or even, potentially, hundreds of thousands of victims.

167. Indeed, the Trial Chamber referred to there being "a significant number of as yet unidentified potentially eligible victims, for which no reliable figures are available".[330] It then proceeded to refer to estimates varying greatly and ranging from "at least approximately 1,100" to "a minimum of 100,000".[331] It is unclear whether the Trial Chamber specifically endorsed that range or was merely relaying the lower and upper ends of the figures it had before it. Indeed, it did not analyse in any way the reliability or basis for these estimates – simply setting them out as submitted. For

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[327] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, paras 89-90, 223-224.
[328] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 89.
[329] Impugned Decision, para. 246.
[330] Impugned Decision, para. 246.
[331] Impugned Decision, para. 246.

present purposes, what matters is that the Trial Chamber not only failed further to particularise how many "thousands of victims" there may be, but it also at least gave the impression that the relevant figure might be anywhere between "at least" 1,100 to a "minimum of" 100,000. Without expressly refining the figures further in its reasoning, it is impossible to tell, from the face of the Impugned Decision, whether the Trial Chamber was more inclined to find that a few thousand victims had been affected or whether it in fact thought that the figure would be even a considerable multiple of any such number. The Appeals Chamber cannot see that as forming a proper basis upon which to fix the monetary award for reparations in this case.

168. Accordingly, the Appeals Chamber finds that in the course of determining Mr Ntaganda's liability for reparations, the Trial Chamber failed in its duty to establish an actual, or estimated, number of victims of the award that was as concrete as possible and based upon a sufficiently strong evidential basis. The Trial Chamber clearly set out the various estimates that each of the parties and the appointed experts had provided to it, alongside the number of victims participating in the trial proceedings and the number of former child soldier victims that had been recognised in the *Lubanga* case, who are also potentially eligible for reparations in this case.[332] However, at no point did the Trial Chamber expressly rule upon which of the varying estimates and numbers it found more persuasive; nor did it provide any analysis of the submissions received or the relative weight to be given to them. This includes not expressly considering factors underpinning various arguments that the Defence and Victims Group 2 have made in the present appeal, which reflect the overall position that each of those parties raised before the Trial Chamber,[333] putting forward various arguments as to why their figures (which potentially vary in number by at least 100,000 victims) should be preferred. There is simply no determination of this issue in the Impugned Decision. The Appeals Chamber considers that the role of the trial chamber in circumstances such as these is

[332] Impugned Decision, paras 232-235, 246.
[333] *See e.g.*, Defence February 2020 Submissions, paras 99, 104; Defence Final Submissions, para. 116; CLR2 February 2020 Submissions, para. 72; CLR2 Final Submissions, paras 91, 94-97, 107-110, 112-115.

to analyse and rule upon the various submissions before it. In this case, however, the Trial Chamber merely summarised those submissions without ruling upon them.[334]

169. The failure of the Trial Chamber to weigh and rule upon the various submissions before it is what appears, on the face of the Impugned Decision, to have led the Trial Chamber to have been unable to state whether the number of victims was in the lower thousands, as put forward by the Registry, or over 100,000, as submitted by Victims Group 2; or to provide a sufficiently concrete potential range of the relevant number. The Appeals Chamber finds that what was required in those circumstances was a determination of the issue by the Trial Chamber on the basis of all of the facts and information that it had before it and/or deemed necessary to obtain.[335] The Trial Chamber did not provide one. Accordingly, the Trial Chamber committed an error in this regard.

170. The Appeals Chamber further notes that the Trial Chamber did not rule, or provide any reasoning in relation to, the issue raised by the third ground of Victims Group 2's appeal, namely whether and how the Trial Chamber considered that the number of actual victims likely to come forward to claim reparations would be the same, or less than, those potentially eligible to do so – and the effect that would have

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[334] The broad range provided by the Trial Chamber in the Impugned Decision of "'at least approximately 1,100' to 'a minimum of 100,000 across all locations affected by Mr Ntaganda's crimes'" related to the number of presently unknown potentially eligible victims. Yet, in addition to not ruling more definitively on an estimated number of those victims, it is unclear to the Appeals Chamber why the Trial Chamber did not rule more definitively in relation to the victims participating in the trial proceedings and in respect of the former child soldier victims. The Trial Chamber referred to the assessment of the Registry that, of the 1,837 victims of the attacks participating at trial, approximately 1,460 remained eligible to receive reparations – and that Victims Group 2 contested that assessment (*see* Impugned Decision, paras 234, 246). It also referred to the assessment of the Registry that the 284 participating former child soldier victims had not been impacted by the scope of the conviction (*see* Impugned Decision, paras 235, 246); and that all potential former child soldier beneficiaries in the *Lubanga* case were also potentially eligible for reparations in the present case, referring both to the 933 beneficiaries that had been recognised for reparations in *Lubanga* as of December 2020 (*see* Impugned Decision, paras 235, 246); and to the submission of Victims Group 1 that more former child soldier victims may be willing to participate in reparation programmes in the present case as a result of Mr Ntaganda not being of Hema ethnicity (*see* Impugned Decision, para. 233). Yet, having referred to those assessments and submissions, the Trial Chamber did not set out its analysis of them nor draw a conclusion as to the number, or a concrete estimate, of participating victims and former child soldier victims who would be likely to come forward to claim reparations.

[335] In relation to further information that the Trial Chamber might have potentially obtained, *see*, by way of example, *infra* fn. 732.

on any estimates upon which it relied. The Trial Chamber should have done so. Thus, it committed an error.

171. The Appeals Chamber further recalls that there is an additional requirement upon a trial chamber that resorts to estimates as to the number of victims, namely that "any uncertainties must be resolved in favour of the convicted person (for instance, by assuming a lower number of victims, or by discounting the amount of liability)".[336] In the present case, in the paragraph of the Impugned Decision directly following that which set out the conclusion on the number of potentially eligible victims, the Trial Chamber stated that it had resolved "uncertainties in favour of the convicted person" in setting the total amount of the reparations award.[337] However, the Trial Chamber did not explain to which "uncertainties" it was referring; nor did it provide any reasoning in relation to how any such uncertainties had been resolved "in favour of the convicted person". In particular, in this context, the Trial Chamber did not provide any reasoning as to whether it had followed the example given by the Appeals Chamber in its previous jurisprudence that to resolve uncertainties in favour of the convicted person a trial chamber might assume a lower number of victims. Indeed, it is not clear to the Appeals Chamber how it would have been able to do so in light of its conclusion that no reliable figures were available in relation to the significant number of unidentified potentially eligible victims. Nor does the Trial Chamber offer any other explanation about what it meant by its statement, which has led to the differing arguments of the Defence and Victims Group 2 in relation to this issue on appeal, as neither party is aware of how this factor affected the award for reparations.

172. The Appeals Chamber therefore finds that the Trial Chamber erred in failing: (i) to make any appropriate determination in relation to the number of potentially eligible or actual victims of the award; and/or (ii) to provide a reasoned decision in relation to its conclusion about that number; and (iii) to provide any reasoning in relation to the uncertainties that it stated it had resolved in favour of the convicted person.

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[336] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 90 (footnote omitted).
[337] Impugned Decision, para. 247.

173. The Appeals Chamber considers that the above errors had a material effect upon the Impugned Decision: the basis of one of its fundamental parameters, namely the number of victims who would benefit from the award for reparations, was either not appropriately determined in line with previous Appeals Chamber jurisprudence in relation to estimates of numbers of victims or was insufficiently reasoned. Those factors call into question the very foundation of the award that was made in the circumstances of the present case. An award of 30 million USD has been made in circumstances in which the number of potential beneficiaries is either unknown or unreasoned. Having failed to determine the number, or an appropriately concrete estimate or estimated range, of victims who would benefit from the award, it was not possible for the Trial Chamber to set the amount of the award by reference to the number of victims whose harm it was intended to repair.

174. In light of the above, the Appeals Chamber deems it appropriate to reverse the findings of the Trial Chamber on those matters and to remand to it the issue of how many victims are likely to come forward to benefit from reparations in the present case.

VII. GROUNDS OF APPEAL CHALLENGING THE AMOUNT OF THE AWARD FOR REPARATIONS

175. In this section, the Appeals Chamber will address the Defence's fifteenth ground of appeal, as well as the second, fourth and fifth grounds of Victims Group 2's appeal, which all raise issues in respect of the manner in which the Trial Chamber calculated the amount of the reparations award. Where other parts of the parties' appeal briefs touch upon the issues considered in this section, they will also be summarised and addressed below. Under its fifteenth ground of appeal, the Defence raises two main issues: (i) whether the Trial Chamber "erred and abused its discretion in assessing Mr Ntaganda's liability at US$ 30,000,000",[338] and (ii) whether it "erred by failing to indicate and/or to take into account the joint liability between Mr Ntaganda and Mr Lubanga".[339] In turn, under the second, fourth and fifth grounds of Victims Group 2's appeal, they argue that the Trial Chamber "committed a combination of errors of law, fact and procedure in determining the cost to repair by failing to establish a proper

[338] Defence Appeal Brief, p. 83. *See also* fn. 366.
[339] Defence Appeal Brief, p. 88. *See also* fn. 390.

basis for its approach, and by failing to give a reasoned opinion on the principles it relied upon",[340] and that it "erred in procedure in setting the overall cost to repair jointly for both groups of victims by failing to give due regard to the overlap with the *Lubanga* reparations proceedings".[341]

176. Considering the overlapping nature of the arguments, the Appeals Chamber will address and determine them together.

A. Relevant parts of the Impugned Decision

177. The Trial Chamber stated as follows in respect of joint and several liability:

> The goal of reparations is not to punish the convicted person but to repair the harm caused to others. Where the Court considers the application of joint and several liability or responsibility *in solidum*, victims shall not be over-compensated for the harm they have suffered.[342]

178. With respect to modes of liability, the Trial Chamber found

> Mr Ntaganda liable to repair the full extent of the harm caused to the direct and indirect victims of all crimes for which he was convicted, regardless of the different modes of liability relied on in the conviction and regardless of whether others may have also contributed to the harm.[343]

179. The Trial Chamber addressed the issue of shared liability as follows:

> As to the shared liability of Mr Ntaganda and his co-perpetrators in the crimes for which he was convicted, including Mr Thomas Lubanga, the Chamber notes that they are all jointly liable *in solidum* to repair the full extent of the harm caused to the victims. Responsibility *in solidum* […] entails the corresponding right for any of the co-perpetrators who may have repaired, in full or in part, the harms caused to the direct and indirect victims, to seek to recover from the co-perpetrators their proportionate share.[344]

180. The Trial Chamber considered submissions in relation to the ongoing implementation of reparation programmes in the *Lubanga* case and held that

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[340] Victims Group 2's Appeal Brief, p. 29. *See also* p. 42 which introduces the fourth ground of Victims Group 2's appeal under the following heading: "The Trial Chamber committed an error of law and/or fact by failing to give a reasoned opinion in relation to the way it purportedly 'resolved uncertainties in favour of the convicted person'".
[341] Victims Group 2's Appeal Brief, p. 44.
[342] Impugned Decision, para. 100 (footnotes omitted).
[343] Impugned Decision, para. 218 (footnotes omitted).
[344] Impugned Decision, para. 219.

> [it would] thus adopt, for the purposes of reparations in this case, the reparation programmes ordered by Trial Chamber II in the *Lubanga* case, in relation to the overlapping victims and harms of both cases. Accordingly, the reparation programmes implemented in the *Lubanga* case, which comprehensively repair the harm caused to the overlapping direct and indirect victims of both cases, should be understood to repair the victims' harm on behalf of both, Mr Lubanga and Mr Ntaganda.[345]

181. The Trial Chamber, however, stressed that

> this, under no circumstances, diminishes Mr Ntaganda's liability to repair in full the harm caused to all victims of the crimes for which he was convicted. To the contrary, Mr Lubanga and Mr Ntaganda are jointly and severally liable to repair in full the harm suffered by the overlapping victims and both remain liable to reimburse the funds that the TFV may eventually use to complement the reparation awards for their shared victims.[346]

182. Within the section entitled "Amount of Mr Ntaganda's financial liability", the Trial Chamber included the sub-section "Applicable Law", in which it stated as follows:

> 227. Pursuant to article 75(2) of the Statute, the Court may make an order directly against the convicted person, through the TFV, 'specifying appropriate reparations to, or in respect of, victims'. […]
>
> 228. When determining the extent of harm, 'rather than attempting to determine the "sum-total" of the monetary value of the harm caused', the Chamber should seek to define the harms and the appropriate modalities for repairing them, 'with a view to, ultimately, assessing the costs of the identified remedy'. It is indeed appropriate for the Chamber to focus on the cost to repair, depending on the circumstances of the case and bearing in mind the overall purpose of reparations. The Chamber should determine the cost to repair, ultimately, with the goal of setting an amount that is fair and properly reflects the rights of the victims, bearing in mind the rights of the convicted person. If the available information does not allow the Chamber to set the amount with precision it may, with caution, rely on estimates, after making every effort to obtain calculations that are as accurate as possible, weighing the need for accuracy of estimates against the goal of awarding reparations without delay.[347]

183. In the sub-section entitled "Cost to repair the victims' harms", the Trial Chamber summarised the estimates provided by the TFV with respect to the following:

> (i) *physical rehabilitation*, referring to the costs of medical treatment for severe physical injury at 3,000 USD per victim and the costs to treat infections and

[345] Impugned Decision, para. 220 (footnote omitted).
[346] Impugned Decision, para. 221 (footnote omitted).
[347] Impugned Decision, paras 227-228 (footnotes omitted).

> chronic diseases at 450 USD per victim, including medical costs, transport, cost for stay, and food while at hospital;
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> (ii) *psychological rehabilitation*, referring to rehabilitation for severe mental trauma, including behavioural disorders, isolation, suicidal tendencies, and loss of childhood at 2,000 USD per victim per year;
>
> (iii) *individual socio-economic reintegration*, referring to a total of 3,000 USD per person, which includes 2,000 USD for a reinsertion kit, 500 USD for vocational training, and 500 USD for one year of coaching per person. It also refers to programmes such as microcredit schemes with individual coaching at 500 USD per person, per year, suggesting two to three years to yield expected results, and the costs of recovering important documents lost or destroyed during the conflict at 300 USD in fees;
>
> (iv) *programmes to address the loss of physical infrastructure*, referring to building a school or health centre at 50,000 USD, building a market at USD 100,000 and establishing a source of drinking water at 6,000 USD; and
>
> (v) *programme support costs*, referring to indirect administrative and management costs incurred by a partner organisation in support of project implementation at approximately 15% of the direct project costs and to the costs of monitoring, evaluation, and reporting by partner organisations at approximately 3% of the direct costs.[348]

184. The Trial Chamber referred to reports of experts on (i) damages awarded by DRC courts and customary justice in cases of war crimes and crimes against humanity, including compensation for rape and sexual violence,[349] (ii) collective reparations,[350] and (iii) the cost of repairing the health centre in Sayo.[351] The Trial Chamber also quoted indicative figures provided by the TFV in relation to reparation projects in Ituri.[352] The Trial Chamber referred to the monetary value per unit of head of harm assigned by the trial chamber in the *Katanga* case[353] and to the *ex aequo et bono* calculation of the harm suffered by each victim in the *Lubanga* case.[354]

185. The Trial Chamber concluded as follows:

> 245. The Chamber recalls the large scope of the case in terms of the crimes for which Mr Ntaganda was convicted and the potentially large number of victims of such crimes eligible to receive reparations. The Chamber notes that it has

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[348] Impugned Decision, para. 236 (footnotes omitted).
[349] Impugned Decision, paras 237-238.
[350] Impugned Decision, para. 240.
[351] Impugned Decision, para. 242.
[352] Impugned Decision, para. 241.
[353] Impugned Decision, para. 243.
[354] Impugned Decision, para. 244.

carefully considered the information and evidence provided by the Registry, the TFV, the Appointed Experts, and the parties, all of whom have made substantial efforts in helping the Chamber to reach accurate estimates as to the number of potentially eligible victims and the cost to repair the harms they have suffered. The Chamber also notes that the figures and assessments made by Trial Chamber II in the *Lubanga* and *Katanga* cases, related to crimes committed in Ituri during the same time-frame, are highly relevant to the Chamber's assessment of the cost to repair the harm caused by the crimes for which Mr Ntaganda was convicted.

[…]

247. As to the costs to repair the harm, as detailed above, the Chamber has also relied on the conservative estimates made by the TFV and the Appointed Experts. The Chamber has equally considered the figures and assessments made by Trial Chamber II in the context of the *Katanga* and *Lubanga* cases, in light of their similarities with the present case, as they relate to crimes committed in Ituri during the same time-frame, and the types and modalities of reparations envisaged by the Chamber. Nevertheless, the Chamber notes that the victims of the case suffered different kinds of harm and, in the context of collective reparations with individualised components, the cost to repair the harm for each victim may substantially differ from one to another. Having considered the Appeals Chamber's jurisprudence, the Chamber sets an amount that it considers fair and appropriate, in light of the circumstances of the case and bearing in mind the rights of the convicted person. The Chamber has reached its conclusion on the basis of all the information before it, at this point in time, on the basis of conservative estimates, and weighing the need for accuracy of estimates against the goal of awarding reparations without delay. Taking all the above considerations into account, resolving uncertainties in favour of the convicted person and taking a conservative approach, the Chamber sets the total reparations award for which Mr Ntaganda is liable at USD 30,000,000 (thirty million dollars).[355]

B. The fifteenth ground of the Defence appeal

1. Defence submissions before the Appeals Chamber

186. The Defence argues that the Trial Chamber made three errors, which undermine its reparations award.[356] Although the Defence concedes that the Trial Chamber correctly stated that it would need to have regard to the applicable law, the Defence argues that it incorrectly applied it, failing to take into account the estimated number of eligible victims and failing to set a cost to repair the victims' harm.[357] In its view, the

[355] Impugned Decision, paras 245, 247 (footnotes omitted).
[356] Defence Appeal Brief, para. 239.
[357] Defence Appeal Brief, para. 240.

Trial Chamber set *ex aequo et bono* "an amount which is untethered to the considerations it was required to take into account, and incompatible with the practice of the Court".[358] To develop these arguments, the Defence presents three sub-sections entitled "Trial Chamber VI erred in ruling that 'the number of potential beneficiaries is not a precondition to the issuance of the reparations order' and thereby failing to establish an estimate of potential beneficiaries for the purpose of setting the amount of liability",[359] "Trial Chamber VI erred by failing to provide objective calculations justifying the amount of US$ 30,000,000",[360] and "Trial Chamber VI erred by adopting a baseless *ex aequo et bono* approach".[361]

187. As for the first error, the Defence argues that the Trial Chamber erred in considering that "the number of potential beneficiaries is not a precondition to the issuance of the reparations order".[362] The Defence argues that, while the Trial Chamber relied on previous jurisprudence stating that a collective approach ensures that reparations reach unidentified victims, that jurisprudence does not relieve a trial chamber from determining the number of victims before setting the reparations award, nor does it allow it to base the award on a range as wide as nearly 100,000 victims.[363] According to the Defence, the number of potential beneficiaries is essential to entertain the extent of the harm and the damage caused by the crimes of the convicted person, and it "should be the natural and logical antecedent to the reparations award".[364] It argues that, without knowing the number of beneficiaries, setting the award "becomes a completely arbitrary exercise, in violation of the rights of the Convicted Person".[365] Referring to the *Lubanga* case, the Defence avers that the Trial Chamber "should have determined the eligibility of as many victims as possible and set a reasonable estimate of the number of potential victims before setting an amount".[366] In its view, "[b]y relieving itself of the obstacle of estimating the number of potential beneficiaries, the

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[358] Defence Appeal Brief, para. 240.
[359] Defence Appeal Brief, p. 83.
[360] Defence Appeal Brief, p. 85.
[361] Defence Appeal Brief, p. 87.
[362] Defence Appeal Brief, para. 241, *referring to* Impugned Decision, para. 231.
[363] Defence Appeal Brief, paras 241-242, *referring to* 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 107.
[364] Defence Appeal Brief, para. 243, *referring to* Separate Opinion of Judge Eboe-Osuji to the 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 12.
[365] Defence Appeal Brief, para. 243.
[366] Defence Appeal Brief, para. 244.

Trial Chamber erred in law, and its resulting finding of financial liability has no basis and must be quashed".[367]

188. Secondly, the Defence refers to the Appeals Chamber's jurisprudence arguing that it "authorised the use of 'estimates', with caution if the information and evidence on which a Trial Chamber relies does not allow it to set the amount of liability with precision".[368] The Defence argues that this jurisprudence "was not an invitation to rely on 'estimates'".[369] It avers that the Trial Chamber's finding that it had no information to set the amount with precision, and that it could rely on estimates, "makes no reference to these estimates being in relation to the cost of the reparations programs themselves, rather than the Convicted Person's liability".[370] According to the Defence, the Trial Chamber, "[h]aving freed itself from the burden of assessments and calculations", apparently felt able to set Mr Ntaganda's liability for 30 million USD with "no basis in any kind of objective calculation on its part".[371] The Defence argues that the figures submitted by the experts in this case are not estimates but "extrinsic figures" as the experts submitted that they were "not in a position to assess themselves the costs of the collective reparations".[372] It further challenges the figures submitted by the TFV in relation to ten projects it implemented in Ituri under its assistance mandate in *Lubanga* as, in the Defence's view, they are not estimates but also "extrinsic figures" of programmes with humanitarian purposes.[373]

189. According to the Defence, having already identified categories of victims and the harms they suffered, the Trial Chamber should have required estimates of the number of victims in each category and the cost of repairing their harms.[374] The Defence submits that the accuracy of such estimates should also have been demonstrated, so that it could have "submit[ted] its views, or appeal[ed] the Impugned

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[367] Defence Appeal Brief, para. 244.
[368] Defence Appeal Brief, para. 245, *referring to* 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 108 ("In this regard, depending on the type of reparations contemplated, and the information it has managed to obtain, the trial chamber may have to rely on estimates as to the cost of reparations programmes. In doing so, it should, however, make every effort to obtain estimates that are as accurate as possible in the circumstances of the case").
[369] Defence Appeal Brief, para. 246.
[370] Defence Appeal Brief, para. 246.
[371] Defence Appeal Brief, para. 246.
[372] Defence Appeal Brief, para. 247, *referring to* Impugned Decision, paras 237-240.
[373] Defence Appeal Brief, para. 247.
[374] Defence Appeal Brief, para. 248.

Decision in any meaningful way".[375] In the Defence's view, the Trial Chamber's approach of simply citing the figures submitted by the experts and the TFV is "meaningless" as it did not explain how those figures were relevant for its overall assessment of financial liability, especially because the estimated damages provided by the experts did not correspond with the findings of the Sentencing Judgment.[376] The Defence argues that, having failed to make findings about the number of potential beneficiaries and having relied solely on estimates to assess financial harm, the Trial Chamber failed to set an amount that represents Mr Ntaganda's financial liability.[377] It submits that the Trial Chamber's errors materially impacted the validity of the Impugned Decision, warranting its reversal.[378]

190. Thirdly, the Defence argues that, having failed to make any "meaningful calculations or assessment", the Trial Chamber erred in setting an amount of 30 million USD *ex aequo et bono*.[379] The Defence avers that, although the Trial Chamber's lack of reasoning in reaching this amount is unclear, it apparently considered "figures submitted by the participants, without discriminating between them in accordance with their relevance", and relied "on its discretion, rather than calculations, to establish what seemed like a 'fair' amount of liability".[380] The Defence contends that this is against the jurisprudence of this Court.[381] It submits that, in *Lubanga*, Trial Chamber II estimated the amount per victim to repair psychological, physical and material harm of a single category of victim, then exercised its discretion to set the amount of 8,000 USD per victim, and then, "[b]ased on this first determination and on the number of eligible and potentially eligible victims," set the total amount of liability *ex aequo et bono*.[382] It submits that, in this regard, the Appeals Chamber held that "it would have been preferable for the Trial Chamber to set out clearly how the factors on which it relied impacted on its conclusion".[383] The Defence further submits that, in *Katanga*, Trial

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[375] Defence Appeal Brief, para. 248.
[376] Defence Appeal Brief, para. 249.
[377] Defence Appeal Brief, para. 250.
[378] Defence Appeal Brief, para. 250.
[379] Defence Appeal Brief, para. 251.
[380] Defence Appeal Brief, para. 251.
[381] Defence Appeal Brief, para. 252.
[382] Defence Appeal Brief, para. 252.
[383] Defence Appeal Brief, para. 252, *referring to* 2015 *Lubanga* Appeals Chamber Judgment on Reparations, para. 118.

Chamber II similarly set *ex aequo et bono* the cost of repair per victim for an identified harm, "in a situation where the parties had not provided an estimate for it and/or for harm that was difficult to quantify".[384] It argues that, in that case, the final amount of liability was assessed through calculations considering the number of victims and their harm, through a transparent and clear method that provided certainty to both the victims and the convicted person.[385]

191. In the Defence's view, "the Trial Chamber's approach of resorting to an *ex aequo et bono* approach to the entire amount of Mr Ntaganda's financial liability is unprecedented, incompatible with due process, and with the principle of proportionality".[386] It considers that "[a] failure to ground the figure in fulfilling a *restitutio in integrum* purpose means that it is, in fact, nothing more than a discretionary amount set by the Trial Chamber and therefore a punitive measure against Mr Ntaganda, rather than a reparations award linked to the conviction".[387] It concludes that the Trial Chamber's error materially impacted the validity of the Impugned Decision, warranting its reversal.[388]

192. Related to the amount of Mr Ntaganda's liability for reparations, under its second ground of appeal, the Defence argues that the Trial Chamber did not explain how it calculated the final amount of the cost of reparations imposed on Mr Ntaganda.[389] Rather, the Defence argues, the Trial Chamber merely listed certain figures and estimates from the TFV and the Appointed Experts that, for the most part, do not relate to the case at hand, and "without setting out the relevance of these figures or explaining how it calculated the final amount imposed on the Convicted Person".[390] The Defence further submits that it is still unknown how much of the sum of 30 million USD has been earmarked for participating victims, for new potential beneficiaries yet to be identified, or for former child soldiers as opposed to the victims

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[384] Defence Appeal Brief, para. 253, *referring to* *Katanga* Reparations Order, para. 191.
[385] Defence Appeal Brief, para. 253, *referring to* *Katanga* Reparations Order, paras 237-239.
[386] Defence Appeal Brief, para. 254.
[387] Defence Appeal Brief, para. 254.
[388] Defence Appeal Brief, para. 254. *See also* Defence Appeal Brief, paras 12, 56, in which the Defence argues generally, in its introduction and within the first ground of its appeal, that the amount of the award of 30 million USD was determined arbitrarily, without sufficient justification and in a manner that was premature and unfair.
[389] Defence Appeal Brief, para. 83.
[390] Defence Appeal Brief, paras 82-83.

of the attacks.[391] According to the Defence, the Trial Chamber did not provide a breakdown of how the final sum is expected to be employed.[392]

193. Furthermore, the Defence argues that the Trial Chamber failed to consider the Defence's submissions regarding Mr Ntaganda's financial liability, namely its opposition to the numbers put forward by the appointed experts, its argument that financial liability could not be evaluated in the absence of a clear number of potential beneficiaries, its submission that the costs to repair should take into account the degree of participation, as well as its submission that the liability of Mr Ntaganda must be shared with Mr Lubanga.[393]

194. Finally, the Defence argues that the Trial Chamber found that Mr Ntaganda, together with Mr Lubanga, was jointly and severally liable to repair the harm of victims overlapping in both the *Lubanga* and *Ntaganda* cases, but that it failed to indicate how that affects the amount of financial liability.[394] According to the Defence, the Trial Chamber failed to "provide any guidance as to how [its] ruling affects the final amount for which Mr Ntaganda is now liable".[395] In the Defence's view, "[t]his absence of reasoning materially affects the total amount of liability provided by the Trial Chamber".[396] The Defence argues that this further justifies "quashing" the Impugned Decision.[397]

2. Victims Group 1's submissions before the Appeals Chamber

195. In response to the Defence's fifteenth ground of appeal, Victims Group 1 argue that, contrary to the Defence's submissions, the Trial Chamber did not adopt an *ex aequo et bono* approach to determine Mr Ntaganda's liability.[398] Rather, they argue that the Trial Chamber indeed referred to the estimated number of potentially eligible victims, the harm caused to the victims and the cost to repair that harm.[399] They submit

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[391] Defence Appeal Brief, para. 84.
[392] Defence Appeal Brief, para. 84.
[393] Defence Appeal Brief, para. 85.
[394] Defence Appeal Brief, paras 255-256.
[395] Defence Appeal Brief, para. 256.
[396] Defence Appeal Brief, para. 256.
[397] Defence Appeal Brief, para. 256.
[398] Victims Group 1's Response, para. 102.
[399] Victims Group 1's Response, para. 102.

that under the jurisprudence of the Appeals Chamber, determining the exact number of beneficiaries is not a pre-condition to issuing a reparations order and to determining the financial liability of the convicted person.[400] Victims Group 1 further submit that, contrary to the Defence's submissions, the Trial Chamber did in fact provide its reasoning for setting Mr Ntaganda's liability at 30 million USD, rendering the Defence's claim that "the Chamber freed itself from the burden of assessments and calculations" unsubstantiated.[401]

196. Victims Group 1 further argue that while the Trial Chamber has not provided guidelines about how the TFV should take into consideration the joint liability of Mr Lubanga and Mr Ntaganda in the design and implementation of the reparations programmes, it did already underline the key aspect, namely that victims may not be over-compensated for the harm they suffered.[402] Victims Group 1 submit that the concept of joint liability has no impact on the determination of Mr Ntaganda's own liability, as the Trial Chamber noted that Mr Ntaganda and his co-perpetrators are jointly liable *in solidum* to repair the full extent of the harm.[403] Further, Victims Group 1 submit that since both convicted persons concerned have been found indigent and will most likely never be in a position to reimburse the TFV for the funds advanced in both reparations proceedings, the Defence's ground of appeal is moot in this respect.[404]

3. Victims Group 2's submissions before the Appeals Chamber

197. In response to the Defence's fifteenth ground of appeal, Victims Group 2 concur that "the Trial Chamber erred in relying on estimates without proper basis in relation to the cost of reparations programmes, that the 'estimates' provided by the Appointed Experts and the TFV have no relation to the overall amount the Trial Chamber arrived at, and that merely citing numbers presented to it was meaningless in the absence of an explanation as to how these figures related to the overall amount set".[405] Victims Group 2 submit, however, that the Defence failed to demonstrate "that only if the Trial

[400] Victims Group 1's Response, paras 102-103.
[401] Victims Group 1's Response, para. 104.
[402] Victims Group 1's Response, para. 105, *referring to* Impugned Decision, paras 99-100, 220.
[403] Victims Group 1's Response, para. 106, *referring to* Impugned Decision, para. 219.
[404] Victims Group 1's Response, para. 107.
[405] Victims Group 2's Response, para. 172.

Chamber had estimated the cost of repairing the harm of the potential victims, the Defence could have meaningfully appealed the decision".[406] They further submit that they do not contest that this error had a material effect as the Defence argues under its second ground of appeal.[407]

198. Furthermore, Victims Group 2 submit that, while they oppose the Defence's "unsubstantiated submissions" demonstrating "its disagreement" with the joint liability of Mr Lubanga and Mr Ntaganda, they argue that the Trial Chamber "erred by failing to set out how the overall amount of Mr Ntaganda would be divided and how it related to the victims of the attacks on the one hand and the former child soldiers on the other".[408] Victims Group 2 argue that by failing to rule on this question, the Trial Chamber effectively delegated this decision to the TFV, which amounts to an error materially affecting the Impugned Decision and "laying the groundwork for unequal treatment of victims in the present case".[409]

199. Finally, regarding the related arguments raised under the Defence's second ground of appeal, Victims Group 2 concur with the Defence that the Trial Chamber erred by failing to give a reasoned opinion on the determination of the number of potentially eligible victims,[410] and on the financial liability of the convicted person.[411] As for the Defence's remaining submissions under its second ground, Victims Group 2 argue that the Defence fails to demonstrate any error and/or the material impact of the alleged error on the Impugned Decision.[412]

4. TFV's observations before the Appeals Chamber

200. The TFV submits that "reparation measures will need to be implemented by a phased approach" and that "the estimates of costs and their division within the amount

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[406] Victims Group 2's Response, para. 173.
[407] Victims Group 2's Response, para. 173.
[408] Victims Group 2's Response, para. 175.
[409] Victims Group 2's Response, para. 175.
[410] Victims Group 2's Response, para. 64.
[411] Victims Group 2's Response, para. 65.
[412] Victims Group 2's Response, para. 67.

of liability relevant to the two groups – child soldiers and victims of the attacks – may also change over time and adapt to the realities in the field".[413]

201. The TFV also submits that the Trial Chamber directed that the *Lubanga* reparations programmes be adopted for the purposes of the present proceedings.[414] According to the TFV, if either or both of the convicted persons in the two cases cease to be indigent, the Trial Chamber's imposition of liability *in solidum* means that any of the co-perpetrators who has repaired the harms will have the right to seek to recover from the co-perpetrators their proportionate share.[415]

5. Defence Response to the TFV's Observations

202. The Defence submits that the TFV's answer to the fourth question from the Appeals Chamber comprises two relevant submissions: "(i) estimates of costs and their division within the amount of liability relevant to the two groups – child soldier[s] and victims of the attacks – may also change over time and adapt to the realities in the field; and (ii) it is likely that there will be more victims of attacks than child soldiers".[416] In the Defence's view, "the TFV is not able to allocate / divide the reparations awards between the child soldiers and the victims of the attacks" on the basis of the Impugned Decision.[417] According to the Defence, this is illustrative of the Trial Chamber's error in setting a 30 million USD award "in the absence of a determination regarding the number of potential beneficiaries and/or reliable estimates", as argued in its appeal.[418]

203. As for the TFV's answer to the seventh question from the Appeals Chamber, the Defence submits that the TFV neither addresses nor explains the practical consequences of the Trial Chamber's finding that Mr Ntaganda and Mr Lubanga are jointly liable to repair the full extent of the harm caused to the victims.[419] The Defence

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[413] TFV's Observations on the Defence Appeal Brief, para. 29.
[414] TFV's Observations on the Defence Appeal Brief, para. 34.
[415] TFV's Observations on the Defence Appeal Brief, para. 35.
[416] Defence Response to the TFV's Observations, para. 15.
[417] Defence Response to the TFV's Observations, para. 16. *See also* paras 63, 66.
[418] Defence Response to the TFV's Observations, para. 17.
[419] Defence Response to the TFV's Observations, para. 22.

submits that this information is not provided in the Impugned Decision, "which further evinces the arbitrary nature of the amount set by [the] Trial Chamber".[420]

6. Victims Group 2's Response to the TFV's Observations

204. Victims Group 2 submit that the TFV's proposed allocation of funds between the victims of the attacks and the former child soldiers highlights "the material impact" of the Trial Chamber's failure to set out clear guidelines in relation to this issue.[421] Victims Group 2 take issue with the "fluid and adaptable process", which, in its view, "can be changed and modified as time progresses", proposed by the TFV, and underline that "precisely such practice is prone to resulting in unequal treatment in practical terms", as they argue under their fifth ground of appeal.[422]

205. Regarding the TFV's answer to the seventh question, Victims Group 2 submit that "the TFV does not answer the question posed in any substantial or satisfactory manner".[423] They argue that it "remains entirely vague on how exactly the TFV intends to deal with the issue of liability in practical terms",[424] and that this is "concerning" considering the "unlimited discretion" that the Trial Chamber has conferred upon the TFV.[425] In their view, had the Impugned Decision "set at least minimum guidelines", it would have ensured that the TFV would follow and meet them.[426]

C. The second and fourth grounds of Victims Group 2's appeal

1. Victims Group 2's submissions before the Appeals Chamber

206. Victims Group 2 argue that the Trial Chamber made a combination of errors of law, fact and procedure in determining the cost of repairing the harm in this case, by failing to establish a proper basis for its approach and to give a reasoned opinion.[427] They divide this ground of appeal into two sub-grounds. First, they argue that "[t]he

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[420] Defence Response to the TFV's Observations, para. 22.
[421] Victims Group 2's Response to the TFV's Observations, para. 27.
[422] Victims Group 2's Response to the TFV's Observations, para. 27.
[423] Victims Group 2's Response to the TFV's Observations, para. 30.
[424] Victims Group 2's Response to the TFV's Observations, para. 30.
[425] Victims Group 2's Response to the TFV's Observations, para. 30.
[426] Victims Group 2's Response to the TFV's Observations, para. 30.
[427] Victims Group 2's Appeal Brief, p. 29.

Trial Chamber erred in law and/or fact by failing to establish a proper basis for its approach".[428] Second, they argue that "[t]he Trial Chamber erred in fact and/or procedure by failing to give a reasoned opinion on what constituted the 'fairness', 'appropriateness', and the 'conservative approach' it purportedly relied upon for the purpose of its determination of the cost to repair".[429]

207. According to the first sub-ground, by opting not to make an individual assessment of harm, despite having acknowledged similarities between this case and both the *Lubanga* and *Katanga* cases, in which Trial Chamber II conducted an individual assessment, the Trial Chamber misinterpreted the law and thus failed to establish a proper basis for its approach.[430] Victims Group 2 submit that the Trial Chamber erred in the exercise of its discretion.[431] They argue that while the Trial Chamber mentioned different estimates of the number of potential beneficiaries before it, it made no determination in this regard.[432] Victims Group 2 submit that the Trial Chamber discussed estimates provided in the expert reports, including compensation awards set by the Congolese courts, as well as the figures submitted by the TFV regarding projects in Ituri, reparations awarded in the *Lubanga* and *Katanga* cases, and the submissions of Victims Group 1 and the TFV.[433] However, Victims Group 2 argue that, although the Trial Chamber noted that it had carefully considered such information and deemed the assessment of the *Lubanga* and *Katanga* cases to be highly relevant to the assessment of the cost to repair the harm in this case, the Trial Chamber "failed to calculate or determine either compensation amounts for specific heads of harm or an average *per capita* cost to repair", as done in those other cases.[434] They submit that the Trial Chamber "simply stated that it had concluded that there were 'thousands' of victims that may be eligible for reparations in the present case", but such "conclusion was neither based on any finding it actually reached, nor was it sufficiently precise".[435] In their view, "[w]ithout knowing approximately how many victims would ultimately benefit from reparations in the present case, the determination of a cost was by

[428] Victims Group 2's Appeal Brief, p. 29.
[429] Victims Group 2's Appeal Brief, p. 34.
[430] Victims Group 2's Appeal Brief, para. 84.
[431] Victims Group 2's Appeal Brief, para. 84.
[432] Victims Group 2's Appeal Brief, para. 85.
[433] Victims Group 2's Appeal Brief, para. 85.
[434] Victims Group 2's Appeal Brief, para. 86.
[435] Victims Group 2's Appeal Brief, para. 86.

definition impossible", and the Trial Chamber further "ignored the jurisprudence of the Court".[436]

208. Victims Group 2 argue that it is "irrelevant that the Trial Chamber considered at length the cost breakdown for different heads of harm provided by the TFV and the Appointed Experts", as such figures were not reflected in the Trial Chamber's conclusion and it was unclear whether, and to what extent, they were taken into account.[437] Victims Group 2 submit that, "[i]n the present case, where the number of potentially eligible victims might be in the tens of thousands, the individual assessment of harm is impractical", and "putting a specific monetary value on different types of multi-dimensional harm suffered by the victims in the present case is unnecessary, given the collective nature of the reparations as awarded".[438] They argue that the Trial Chamber, having purportedly conducted an assessment, set an overall amount for reparations in the abstract, not knowing the number of persons who would benefit from the award, thereby casting doubt on its decision making process.[439] They argue that the Trial Chamber failed to establish an approximate number of potentially eligible victims and the cost to repair their harm, and that this "demonstrates that the decision was issued without taking relevant facts into account".[440]

209. According to Victims Group 2, this materially affected the Impugned Decision in that the award was arbitrary, with no discernible basis for the specific amount of 30 million USD.[441] In their view, "since the overall amount of Mr Ntganda's liability is set in the abstract and since it will entirely depend on the number of actual beneficiaries coming forward and ultimately being eligible, it cannot be discerned whether the overall award will be adequate and fair in the circumstances of the present case".[442]

210. According to the second sub-ground under Victims Group 2's second ground of appeal, the Trial Chamber referred to the principles of fairness and appropriateness, and

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[436] Victims Group 2's Appeal Brief, para. 87.
[437] Victims Group 2's Appeal Brief, para. 88.
[438] Victims Group 2's Appeal Brief, para. 88.
[439] Victims Group 2's Appeal Brief, para. 88.
[440] Victims Group 2's Appeal Brief, para. 88.
[441] Victims Group 2's Appeal Brief, para. 89.
[442] Victims Group 2's Appeal Brief, para. 89.

claimed to have applied a conservative approach, but did not give a reasoned opinion as to what exactly these principles entailed in its determination of the cost to repair, and how they influenced the Trial Chamber's determination, "bearing in mind the rights of the victims and the overall goal of reparations".[443] Having indicated the parts of the Impugned Decision in which the Trial Chamber referred to the above-mentioned principles,[444] Victims Group 2 argue that the Trial Chamber did not establish what was fair in the concrete circumstances of the present case nor how its final determination was guided by any of its findings regarding fairness.[445] In their view, "the fact that the Trial Chamber failed to provide a proper basis for its determination of the cost to repair and further failed to estimate the number of potential beneficiaries of reparations, makes it entirely impossible to compare and ascertain whether the sum total set by the Trial Chamber is indeed fair in particular when compared to the awards set in the *Lubanga* and *Katanga* cases".[446] Victims Group 2 submit that, considering that those cases are about crimes committed in the same region and time-frame as the present case, and that some victims in the *Lubanga* case are also eligible in this case, a direct comparison would have been required with the approaches taken in *Lubanga* and *Katanga* in order to meaningfully address the question of fairness.[447] Similarly, Victims Group 2 argue that while the Trial Chamber determined that collective reparations with individualised components were the most appropriate in the present case, it did not make an assessment as to whether the award it set was appropriate.[448] In their view, "[s]uch assessment would have involved in particular a consideration of what could be achieved with the money to ultimately repair and address the harm of all potentially eligible victims".[449]

211. Victims Group 2 submit that the Trial Chamber did not conduct any analysis to determine the scope and extent of any damage, loss and injury to, or in respect of, the victims.[450] They argue that, "[h]aving failed to establish an approximate number of potentially eligible victims, the Trial Chamber had deprived itself of the most basic

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[443] Victims Group 2's Appeal Brief, para. 91.
[444] Victims Group 2's Appeal Brief, para. 92.
[445] Victims Group 2's Appeal Brief, para. 93.
[446] Victims Group 2's Appeal Brief, para. 93.
[447] Victims Group 2's Appeal Brief, para. 93.
[448] Victims Group 2's Appeal Brief, para. 94.
[449] Victims Group 2's Appeal Brief, para. 94.
[450] Victims Group 2's Appeal Brief, para. 95.

parameter for conducting an analysis of what was appropriate in terms of overall cost to repair", thereby conducting "its purported assessment of what was 'appropriate' in the present case without any basis" and determining a figure in the abstract.[451] Victims Group 2 submit that, "[b]y concluding that the award of 30 million USD was appropriate, the Trial Chamber erred in the exercise of its discretion".[452]

212. Victims Group 2 further argue that, although the Trial Chamber referred to the application of a conservative approach, it did not define or explain this concept.[453] It argues that "it remains unclear whether the Trial Chamber's approach relates to the undefined number of potential beneficiaries or the unspecified individual cost to repair, as the Trial Chamber only mentions the 'conservative estimates' provided by the TFV and the Appointed Experts in relation to cost to repair in its conclusion".[454] Victims Group 2 argue that it is not discernible "[w]hether the Trial Chamber also relied on the rather low number of potential beneficiaries estimated in the Registry's respective submissions and/or the Experts' Reports", and that, even if that were the case, it would have been erroneous, as per the Appeals Chamber's jurisprudence, not to consider the relevant estimates submitted by the parties.[455]

213. Victims Group 2 contend that, contrary to the Appeals Chamber's jurisprudence, the conclusion of the Impugned Decision "as regards the overall amount of Mr Ntaganda's liability is not discernible, and neither is what it termed the 'conservative approach'".[456] They argue that, even under the plain reading of the word "conservative", the Trial Chamber failed to explain on which estimates it was relying.[457] According to Victims Group 2, "it would further appear that the Trial Chamber took the lowest estimated number of the potentially eligible beneficiaries and multiplied it with the lowest estimated cost to repair", but this approach "would equally be erroneous as it would disregard and be irreconcilable with the principles of 'fairness' and 'appropriateness' of the award, thus rendering the entire reasoning unsound".[458]

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[451] Victims Group 2's Appeal Brief, para. 95.
[452] Victims Group 2's Appeal Brief, para. 95.
[453] Victims Group 2's Appeal Brief, para. 96.
[454] Victims Group 2's Appeal Brief, para. 96.
[455] Victims Group 2's Appeal Brief, para. 96.
[456] Victims Group 2's Appeal Brief, para. 98.
[457] Victims Group 2's Appeal Brief, para. 98.
[458] Victims Group 2's Appeal Brief, para. 98.

This is because "a cost to repair cannot be appropriate if it corresponds to the lowest possible figure", as this would very likely reduce "the overall resources for the actual number of beneficiaries".[459]

214. In Victims Group 2's view, it is impossible to discern whether the Trial Chamber's final award was indeed fair or appropriate.[460] They submit that the Trial Chamber's failure to reason its approach materially affects the overall reparations award because it creates uncertainty in relation to the adequacy of the monetary award.[461] They argue that a fair and appropriate award that properly reflects the rights of the victims, in keeping with the principles of reparations that the Trial Chamber identified, would have been "commensurate with the extent of the victimisation in terms of the number of victims and the harm they suffered".[462]

215. Under their fourth ground of appeal, Victims Group 2 argue that the Trial Chamber also erred in law and/or fact by "failing to give a reasoned opinion in relation to the way it purportedly 'resolved uncertainties in favour of the convicted person'".[463] Their arguments in this respect – and the responses thereto – have been summarised above within the grounds of appeal relating to the number of potentially eligible beneficiaries of the reparations award. As mentioned therein, those arguments are also relevant to the grounds of appeal relating to the manner in which the award for reparations was set and have therefore also been taken into account for the determination of the issues under consideration in this part of the judgment.

2. Victims Group 1's submissions before the Appeals Chamber

216. As for the contentions that the Trial Chamber failed to establish a proper basis to approach the cost to repair and give reasons for the principles on which it relied, Victims Group 1 refer to their submissions in response to the same grounds raised by the Defence.[464]

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[459] Victims Group 2's Appeal Brief, para. 99.
[460] Victims Group 2's Appeal Brief, para. 100.
[461] Victims Group 2's Appeal Brief, para. 101.
[462] Victims Group 2's Appeal Brief, para. 101.
[463] Victims Group 2's Appeal Brief, p. 42, paras 110-115.
[464] Victims Group 1's Response, para. 47.

3. Defence submissions before the Appeals Chamber

217. The Defence points out that it agrees with Victims Group 2 "that the Trial Chamber had no discernible basis to set Mr Ntaganda's liability at USD 30,000,000" and that it conducted only a purported assessment, but set an overall sum in the abstract.[465] Similarly, the Defence agrees that the range of potential beneficiaries relied upon by the Trial Chamber was too large and that this made a determination of the cost to repair impossible.[466] The Defence avers that the parties disagree about "whether a meaningful process of estimation was possible, and where it would have arrived".[467]

218. In this regard, the Defence rejects Victim Group 2's own estimated figure of "tens of thousands" of potential beneficiaries as baseless.[468] According to the Defence, this figure ignores the more accurate and specific figures put forward by the VPRS – namely that the number of new potential beneficiaries would be 1,100 – and the experts – namely that the direct victims are likely comprised of about 3,500 victims.[469]

219. The Defence agrees with Victims Group 2 "that the Trial Chamber's purported reliance on 'fairness' in reaching the reparations amount was entirely unsound".[470] However, it disagrees with Victims Group 2's arguments that the Trial Chamber's supposedly conservative approach means that the Trial Chamber purposefully took low estimates into account.[471] Rather, the Defence submits that there is "no suggestion, either explicit or implicit, in the 8 March Reparations Order that the 'lowest possible figure' was used as a basis for anything".[472] In sum, the Defence contends that "Mr Ntaganda's liability is tethered to nothing more than a stab in the dark".[473]

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[465] Defence Response to Victims Group 2's Appeal Brief, paras 37-38.
[466] Defence Response to Victims Group 2's Appeal Brief, para. 39.
[467] Defence Response to Victims Group 2's Appeal Brief, para. 40.
[468] Defence Response to Victims Group 2's Appeal Brief, para. 41.
[469] Defence Response to Victims Group 2's Appeal Brief, paras 41-42.
[470] Defence Response to Victims Group 2's Appeal Brief, paras 43-44.
[471] Defence Response to Victims Group 2's Appeal Brief, para. 45.
[472] Defence Response to Victims Group 2's Appeal Brief, para. 46.
[473] Defence Response to Victims Group 2's Appeal Brief, para. 47.

D. The fifth ground of Victims Group 2's appeal

1. Victims Group 2's submissions before the Appeals Chamber

220. Victims Group 2 argue that the Trial Chamber erred in setting the overall cost to repair jointly for both groups of victims and with no due regard to risks of potential unequal treatment between the two groups.[474] They submit that the Trial Chamber "failed to consider the distinct nature of the harm occasioned to each group of victims", which required different approaches to addressing that harm.[475] Victims Group 2 further aver that the Trial Chamber erred by failing to indicate how the overlap with the *Lubanga* reparations proceedings should be dealt with by the TFV.[476]

221. Victims Group 2 submit that, in accordance with the principles set out by the Trial Chamber, the two groups of victims in this case "must be treated fairly and equally *vis-à-vis* each other".[477] Victims Group 2 point out that the Trial Chamber decided to adopt the reparation programmes ordered in the *Lubanga* case in relation to the overlapping former child soldier victims in the present case.[478] They argue that, in *Lubanga*, it was determined that an average *per capita* cost of 8,000 USD should be awarded to repair the harm; and that the implication is that the former child soldiers in the present case should receive the same *per capita* amount – and that some of those victims would receive further reparations for the harm suffered as a result of sexual and gender-based crimes.[479]

222. Victims Group 2 argue that the Trial Chamber failed to establish an average *per capita* cost to repair the harm suffered by the victims of the attacks and to indicate how that cost should relate to the cost to repair the harm suffered by the former child soldiers in the *Lubanga* case.[480] They submit that the failure to do so contradicted the requirement to treat all victims in the present case fairly and equally and to ensure certainty and predictability in relation to the reparations regime as a whole.[481] As a

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[474] Victims Group 2's Appeal Brief, para. 116.
[475] Victims Group 2's Appeal Brief, para. 116.
[476] Victims Group 2's Appeal Brief, para. 116.
[477] Victims Group 2's Appeal Brief, paras 117-118.
[478] Victims Group 2's Appeal Brief, para. 119.
[479] Victims Group 2's Appeal Brief, paras 119-120.
[480] Victims Group 2's Appeal Brief, para. 121.
[481] Victims Group 2's Appeal Brief, para. 120.

consequence, they argue, the *per capita* cost to repair the harm suffered by the victims of the attacks will depend upon (i) the amount out of the total award of 30 million USD to be dedicated to victims of the attacks, and (ii) the presently unknown number of eligible victims likely to come forward.[482]

223. Victims Group 2 submit that, as a result of the Trial Chamber's failure to indicate how the total figure awarded in reparations was to be distributed between the two groups of victims, the TFV will be granted "an unreasonable amount of discretion" in the allocation of funds.[483] They further argue that, as the number of potentially eligible victims of the attacks may be high, the overall amount awarded by the Trial Chamber may be inadequate to treat the victims of the attacks equally with the former child soldier victims whose harm has been assessed to be an average 8,000 USD *per capita*.[484] Victims Group 2 submit that the Trial Chamber erred in the exercise of its discretion by allowing former child soldier victims to be over-compensated when compared with the victims of the attacks.[485]

224. Victims Group 2 submit that the Trial Chamber further erred by "placing all victims in the present case under the same umbrella", rather than recognising that the two groups of victims have different needs and interests.[486] In this context, they emphasise that former child soldiers are closely associated with the perpetrators of the crimes that caused harm to the victims of the attacks; and that they therefore cannot be awarded the same type of reparations.[487] Victims Group 2 argue that the Trial Chamber neither considered the different needs and therefore different costs that were involved; nor resolved the financial implications of the overlap of victims in this case and the *Lubanga* case.[488] They submit that the Trial Chamber exacerbated the unequal treatment between the two groups of victims by putting all former child soldiers and

[482] Victims Group 2's Appeal Brief, para. 121.
[483] Victims Group 2's Appeal Brief, paras 122, 127.
[484] Victims Group 2's Appeal Brief, para. 123.
[485] Victims Group 2's Appeal Brief, paras 123-124.
[486] Victims Group 2's Appeal Brief, para. 125.
[487] Victims Group 2's Appeal Brief, para. 125.
[488] Victims Group 2's Appeal Brief, para. 125.

only a number of victims of the attacks into a category of victims who would be awarded reparations as a matter of priority.[489]

225. Victims Group 2 submit that the Trial Chamber's procedural error materially affects the way in which the victims will receive reparations and that a more equitable distribution of the reparations award between the two groups of victims would have occurred if the Trial Chamber had not committed this error.[490]

226. In the seventh ground of their appeal, which is addressed separately below, Victims Group 2 reiterate that the Impugned Decision "leaves a number of key matters unresolved", including the basis for the cost to repair and the allocation of the award between the different groups of victims and among the priority victims.[491]

2. Defence submissions before the Appeals Chamber

227. The Defence agrees with Victims Group 2 that "the Trial Chamber failed to properly articulate the consequences of the overlap between the victims in the *Lubanga* and the *Ntaganda* proceedings, including its impact on Mr Ntaganda's liability for reparations, and how it would be divided between the beneficiaries in both groups of victims".[492] The Defence argues that despite its submissions made in the course of the reparations proceedings that Mr Ntaganda should not be held accountable for an amount additional to the financial liability of Mr Lubanga, the Trial Chamber erred by merely stating that Mr Lubanga and Mr Ntaganda are liable for the cost to repair the harm caused to former child soldiers *in solidum*.[493]

228. The Defence rejects Victims Group 2's submission that the proportion of Mr Ntaganda's liability to repair the harm of child soldier victims is such that the remaining funds would be insufficient to repair the harm caused to the victims of the attacks.[494] Further, it disagrees with Victims Group 2's submission that the average *per*

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[489] Victims Group 2's Appeal Brief, para. 126.
[490] Victims Group 2's Appeal Brief, para. 128.
[491] Victims Group 2's Appeal Brief, para. 148. *See also* Victims Group 2's Appeal Brief, paras 136, 138.
[492] Defence Response to Victims Group 2's Appeal Brief, paras 62-63, 71. *See also* Defence Response to Victims Group 2's Appeal Brief, para. 79, in which, in responding to the seventh ground of Victims Group 2's appeal, the Defence reiterates more generally its argument that the amount of 30 million USD that was awarded was "arbitrary, premature, and unfair to the convicted person".
[493] Defence Response to Victims Group 2's Appeal Brief, paras 64-65.
[494] Defence Response to Victims Group 2's Appeal Brief, para. 66.

capita cost to repair established in *Lubanga* could potentially be earmarked in this case for former child soldier victims.[495] It argues that Mr Lubanga's liability for reparations of 10 million USD was calculated taking into consideration not only the victims identified at the time, but also an estimation of the number of new potential beneficiaries, yet to be identified.[496] The Defence submits that since Mr Ntaganda was convicted of the same crimes as Mr Lubanga, the cost to repair the harm suffered by victims of those crimes is 10 million USD for which Mr Lubanga and Mr Ntaganda are jointly and severally liable.[497]

229. The Defence argues that no amount taken from Mr Ntaganda's total liability is meant to be used to repair the harm to overlapping direct and indirect victims in *Lubanga* and *Ntaganda*, but that Mr Lubanga and Mr Ntaganda are jointly liable in full to repair the harm suffered by the overlapping victims.[498] It submits that as of December 2020, 933 victims were certified in *Lubanga*, which, the Defence argues, leaves "ample resources to repair the harm caused to overlapping child soldier related victims, yet to be identified in *Ntaganda*".[499] It therefore contends that the joint amount for both groups is unlikely to prejudice the victims of the attacks *vis-à-vis* the former child soldiers.[500]

3. Victims Group 1's submissions before the Appeals Chamber

230. Victims Group 1 argue that the fifth ground of Victims Group 2's appeal "is without merit" and refer to a recent decision in which the Trial Chamber observed, *inter alia*, that victims should "be treated fairly and equally during the reparation process".[501] They note that in that decision the Trial Chamber instructed the TFV to amend its initial draft implementation plan and rejected two of its proposals which "d[id] not appear to fully guarantee equal treatment among the different groups of victims who experience

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[495] Defence Response to Victims Group 2's Appeal Brief, para. 66.
[496] Defence Response to Victims Group 2's Appeal Brief, para. 67.
[497] Defence Response to Victims Group 2's Appeal Brief, para. 68.
[498] Defence Response to Victims Group 2's Appeal Brief, para. 69.
[499] Defence Response to Victims Group 2's Appeal Brief, para. 70.
[500] Defence Response to Victims Group 2's Appeal Brief, para. 71.
[501] Victims Group 1's Response, para. 55, *referring to* Decision on the TFV's Initial Draft Implementation Plan, paras 19 *et seq*.

similar urgent needs".[502] According to Victims Group 1, this shows that this ground of appeal "constitutes a misinterpretation and possibly a mischaracterisation of the [Impugned Decision]".[503]

E. Determination by the Appeals Chamber

231. The Appeals Chamber notes that both the Defence (in its second and fifteenth grounds of appeal) and Victims Group 2 (in their second, fourth and fifth grounds of appeal) challenge the manner in which the Trial Chamber determined the amount of the reparations award.

232. The Defence argues that the Trial Chamber made three errors, which undermine its assessment of the amount of the reparations award.[504] In particular, the Defence argues that the Trial Chamber (i) "erred in ruling that 'the number of potential beneficiaries is not a precondition to the issuance of the reparations order' and thereby failing to establish an estimate of potential beneficiaries for the purpose of setting the amount of liability";[505] (ii) "erred by failing to provide objective calculations justifying the amount of US$ 30,000,000";[506] and (iii) "erred by adopting a baseless *ex aequo et bono* approach".[507] The Defence further avers that the Trial Chamber failed to indicate how the amount of the award was affected by the joint liability of Mr Ntaganda and Mr Lubanga.[508]

233. Victims Group 2 also challenge the manner in which the Trial Chamber calculated the amount of the reparations award.[509] First, they argue that "[t]he Trial Chamber erred in law and/or fact by failing to establish a proper basis for its approach".[510] Second, they contend that "[t]he Trial Chamber erred in fact and/or procedure by failing to give a reasoned opinion on what constituted the 'fairness',

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[502] Victims Group 1's Response, para. 56, *referring to* Decision on the TFV's Initial Draft Implementation Plan, para. 20.
[503] Victims Group 1's Response, para. 56. It is noted that Victims Group 1 do not expressly address Victims Group 2's arguments about the amount of the award that are made within their seventh ground of appeal.
[504] Defence Appeal Brief, para. 239.
[505] Defence Appeal Brief, p. 83.
[506] Defence Appeal Brief, p. 85.
[507] Defence Appeal Brief, p. 87.
[508] Defence Appeal Brief, paras 255-256.
[509] Victims Group 2's Appeal Brief, p. 29.
[510] Victims Group 2's Appeal Brief, p. 29.

'appropriateness' and the 'conservative approach' it purportedly relied upon for the purpose of its determination of the cost to repair".[511] Third, they submit that the Trial Chamber erred in law and/or fact "by failing to give a reasoned opinion in relation to the way it purportedly 'resolved uncertainties in favour of the convicted person'".[512] Victims Group 2 also argue that the Trial Chamber committed a procedural error "in setting the overall cost to repair jointly for both groups of victims by failing to give due regard to the overlap with the *Lubanga* reparations proceedings".[513]

234. The Appeals Chamber has closely analysed all of the submissions raised under, and by way of response to, the above grounds of appeal. It deems it appropriate to resolve these grounds of appeal by addressing together the key arguments that have been raised under the headings that follow.

1. Failing to determine an estimate of the number of victims that was as concrete as possible prior to setting the amount of the award

235. The Appeals Chamber recalls that it has established above that the Trial Chamber erred by not providing at least an estimate of the number of victims that was as concrete as possible and based upon a sufficiently strong evidential basis. In light of the fact that the number of victims is, in the circumstances of the present case, one of its fundamental parameters, it follows that setting the amount of the award without reference to any concrete estimate of the number of victims whose harm it was intended to repair constitutes an error. That error materially affected the Impugned Decision. Indeed, setting the amount of the award without even an appropriately estimated number of victims makes it impossible to know whether it will be both adequate to repair the harm of the victims affected by the crimes and fair for Mr Ntaganda in respect of his total liability.

[511] Victims Group 2's Appeal Brief, p. 34.
[512] Victims Group 2's Appeal Brief, p. 42.
[513] Victims Group 2's Appeal Brief, p. 44.

2. Failing to give a reasoned opinion about the amount of the reparations award

236. The Appeals Chamber notes that both the Defence and Victims Group 2 raise the issue of lack of reasoning regarding the amount of the award for which the Trial Chamber held Mr Ntaganda liable.

237. The Defence argues that the Trial Chamber did not explain how it calculated the final amount of reparations,[514] and that it is still unknown how much of the sum of 30 million USD has been earmarked for the different victims in this case.[515] It also submits that the Trial Chamber failed to consider various submissions that it made.[516]

238. Victims Group 2 argue that the Trial Chamber did not give a reasoned opinion as to what exactly the principles of fairness and appropriateness entailed in its determination of the cost of repair.[517] In their view, the Trial Chamber did not explain how it purportedly applied a conservative approach,[518] nor is it discernible whether it relied upon the low estimates as to the number of potential beneficiaries submitted by the Registry and the experts, which would in any event be erroneous as the Trial Chamber was obliged to consider the relevant estimates submitted by the parties.[519] They further argue that the Trial Chamber did not explain how it had resolved uncertainties in favour of Mr Ntaganda.[520] According to their submissions, the Trial Chamber's failure to reason its approach materially affects the overall reparations award because it creates uncertainty in relation to the adequacy of the monetary award.[521]

(a) Previous jurisprudence on lack of reasoning

239. The Appeals Chamber has set out above its jurisprudence and approach when addressing an argument that a chamber has erred in failing to reason its findings

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[514] Defence Appeal Brief, paras 82-83.
[515] Defence Appeal Brief, para. 84.
[516] Defence Appeal Brief, para. 85.
[517] Victims Group 2's Appeal Brief, para. 91.
[518] Victims Group 2's Appeal Brief, paras 96, 98.
[519] Victims Group 2's Appeal Brief, para. 96.
[520] Victims Group 2's Appeal Brief, paras 110-115.
[521] Victims Group 2's Appeal Brief, paras 101, 115.

adequately.[522] In this regard, it is recalled that a trial chamber, in setting out its reasoning, is not required to refer to every aspect of a party's submissions on the issue on which it is deciding, "but it is essential that it indicates with sufficient clarity the basis of the decision".[523]

(b) Failing to consider Defence submissions

240. The Defence argues that the Trial Chamber failed to consider its submissions in relation to the need to have a clear number of potential beneficiaries, the costs put forward by the appointed experts, the degree of Mr Ntaganda's participation in the crimes and his shared responsibility with Mr Lubanga.[524]

241. These submissions relate to issues of significance to the calculation of the award in respect of which the Appeals Chamber finds, both above and below, *inter alia*, a lack of reasoning within the Impugned Decision. With the sole exception of certain submissions made by the Defence which are addressed further below,[525] the Appeals Chamber finds that, given how these aspects of the case were determined in the Impugned Decision, the issues arising out of the submissions on these matters should have been further addressed and that the Trial Chamber erred in failing to do so.

(c) Failing to explain the basis for the award of 30 million USD

242. More generally, the Appeals Chamber recalls that the Trial Chamber concluded as follows in relation to the amount of the award:

> As to the costs to repair the harm, as detailed above, the Chamber has also relied on the conservative estimates made by the TFV and the Appointed Experts. The Chamber has equally considered the figures and assessments made by Trial Chamber II in the context of the *Katanga* and *Lubanga* cases, in light of their similarities with the present case, as they relate to crimes committed in Ituri during the same time-frame, and the types and modalities of reparations envisaged by the Chamber. Nevertheless, the Chamber notes that the victims of the case suffered different kinds of harm and, in the context of collective reparations with individualised components, the cost to repair the harm for each victim may substantially differ from one to another. Having considered the Appeals Chamber's jurisprudence, the Chamber sets an amount that it considers fair and appropriate, in light of the circumstances of the case and bearing in mind the rights of the convicted person. The Chamber has reached its conclusion on

[522] *See supra* paras 58-60.
[523] *Lubanga* OA5 Appeals Chamber Judgment, para. 20.
[524] Defence Appeal Brief, para. 85.
[525] *See infra* para. 273.

> the basis of all the information before it, at this point in time, on the basis of conservative estimates, and weighing the need for accuracy of estimates against the goal of awarding reparations without delay. Taking all the above considerations into account, resolving uncertainties in favour of the convicted person and taking a conservative approach, the Chamber sets the total reparations award for which Mr Ntaganda is liable at USD 30,000,000 (thirty million dollars).[526]

243. The Appeals Chamber notes that the Trial Chamber did not provide any specific information, calculation or other reasoning as to how it reached the amount of 30 million USD. In this regard, the Appeals Chamber finds merit in the parties' arguments that the Trial Chamber's reasoning to set the reparations award was not clear. In addressing this issue, the Appeals Chamber recalls both the statutory regime and its previous jurisprudence in relation to certain of the principles that apply to setting the amount of an award for reparations.

(i) Statutory provisions and relevant jurisprudence

244. As mentioned above, article 75(1) of the Statute provides that the Court may "determine the scope and extent of any damage, loss and injury to, or in respect of, victims". Article 75(2) of the Statute stipulates that "[t]he Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation".

245. In the *Katanga* Appeals Chamber Judgment on Reparations, the Appeals Chamber noted that

> rather than attempting to determine the "sum-total" of the monetary value of the harm caused, trial chambers should seek 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 to repair is appropriate, in light of the overall purpose of reparations, which is indeed to repair.[527]

246. In relation to this finding, the 2019 *Lubanga* Appeals Chamber Judgment on Reparations pointed out:

> 107. […] that this ruling only indicates that it is *appropriate* for the trial chamber to *focus* on the cost to repair. How much the trial chamber is able to focus on the

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[526] Impugned Decision, para. 247 (footnotes omitted).
[527] *Katanga* Appeals Chamber Judgment on Reparations, para. 72 (footnote omitted).

> cost of repair will depend on the circumstances of a given case. Importantly, a trial chamber's failure to do so does not necessarily constitute an error. The Appeals Chamber is of the view that, when setting the amount of the convicted person's liability, the trial chamber must bear in mind the overall purpose of reparations, which is to repair the harm caused and to achieve, to the extent possible, *restitutio in integrum*.
>
> 108. The amount of the convicted person's liability should be fixed taking into account the cost of reparations considered to be appropriate and that are intended to be put in place (which can include reparations programmes) and the different harms suffered by the different victims, both individual victims (direct and indirect) in addition to, in particular circumstances, the collective of victims. In setting the amount, the trial chamber must also ensure that it takes into account the convicted person's rights and interests. The goal is to set an amount that is fair and properly reflects the rights of the victims, bearing in mind the rights of the convicted person. If the information and evidence upon which the trial chamber relies does not enable it to set the amount of liability with precision, for example, because it cannot obtain precise information as to the costing of specific reparations programmes, then it may, with caution, consider whether to rely on estimates. In this regard, depending on the type of reparations contemplated, and the information it has managed to obtain, the trial chamber may have to rely on estimates as to the cost of reparations programmes. In doing so, it should, however, make every effort to obtain estimates that are as accurate as possible in the circumstances of the case. It is also important, and in the interests of both the victims and the convicted person, that the trial chamber conducts the reparations proceedings as expeditiously as possible. It may, therefore, need to weigh the need for accuracy of estimates against the goal of awarding reparations without delay.[528]

247. The Appeals Chamber notes that it envisaged the possibility that a trial chamber might consider, with caution, whether to rely on estimates. However, in doing so, it should make every effort to obtain "estimates that are as accurate as possible in the circumstances of the case".[529]

(ii) The figures set out by the Trial Chamber and the apportionment of the award

248. In the present case, the Appeals Chamber notes that the Trial Chamber set out various costs to repair the harms of the victims at paragraphs 236 to 244 of the Impugned Decision. However, when it set the amount of the award at paragraph 247 of the Impugned Decision, it did not make any concrete reference to the figures that it had earlier set out, nor did it provide any breakdown or other explanation of, or calculation

[528] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, paras 107-108 (footnote omitted).
[529] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 108.

for, the figure of 30 million USD. Notably, there is no explanation as to the link between the figures set out at paragraphs 236 to 244 and the final figure determined to be appropriate at paragraph 247 of the Impugned Decision.

249. The Appeals Chamber also notes that, within the above paragraphs of the Impugned Decision, the Trial Chamber referred to the costs provided by the TFV being "preliminary estimates"[530] and "indicative figures",[531] and that the appointed experts were not in a position themselves to assess the cost of the collective reparations.[532] The Trial Chamber subsequently referred to the "conservative estimates" made by the TFV and the appointed experts.[533] The Trial Chamber, however, did not explain how it relied upon those estimates to come to its overall figure; nor did it demonstrate that it had applied the Court's previous jurisprudence on the use of estimates, namely by, "with caution", considering whether to rely on estimates and making "every effort to obtain estimates that are as accurate as possible in the circumstances of the case".[534] The Appeals Chamber finds that the Trial Chamber needed to state more concretely whether it was appropriate to rely upon the estimates as to the cost to repair that it had received and the extent to which it had done so in arriving at its figure of 30 million USD.

250. Moreover, the Appeals Chamber observes that, in its concluding paragraph in which it set the amount of the award,[535] the Trial Chamber stated that it had considered the figures and assessments made by Trial Chamber II in the *Katanga* and *Lubanga* cases, given their similarity to the present case, noting however that the victims in this case suffered different types of harm and that the cost to repair for each victim may substantially differ between victims in the context of collective reparations with individualised components.[536] Yet, notwithstanding the fact that the Trial Chamber referred to the figures and assessments in those other cases, its approach in the present case appears to have differed markedly, without sufficiently explaining why that was the case.

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[530] Impugned Decision, para. 236.
[531] Impugned Decision, para. 241.
[532] Impugned Decision, para. 240.
[533] Impugned Decision, para. 247.
[534] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 108.
[535] Impugned Decision, para. 247.
[536] Impugned Decision, para. 247.

251. The Appeals Chamber observes that, unlike in *Lubanga* and *Katanga*, the Trial Chamber did not set out its assessment of the cost to repair the harm of any of the victims in the present case. In this context, the Appeals Chamber further recalls its findings in the *Lubanga* case, in which Trial Chamber II had established an *ex aequo et bono* per victim award of 8,000 USD, to which the sum of 3,400,000 USD directly related, as it was awarded to repair the harm of the 425 individuals who had established themselves to be victims on the basis of the sample that was taken in that case.[537] In that case, the Appeals Chamber also referred to the sum of 6,600,000 USD in respect of any other victims who may be identified as reflecting a cautious approach and conservative estimate, which appeared to take into account a number of victims that was significantly lower than Trial Chamber II's estimated range of 2,451 to 5,938.[538] The Appeals Chamber, in considering the manner in which the award had been calculated, referred to an *ex aequo et bono* per victim cost of 8,000 USD having been established on the basis of a sample of victims, the submissions of the parties, decisions of Congolese military tribunals and the findings in the *Katanga* case;[539] and that the amount of 8,000 USD remained within the range of the estimates and amounts provided by, *inter alia*, the parties, which were referred to by Trial Chamber II in setting the award.[540] Yet, notwithstanding the considerably greater precision in the figures used to calculate the amount in the *Lubanga* case, the Appeals Chamber found that Trial Chamber II in that case should have more clearly set out the basis on which it determined the award,[541] specifically finding that "the Trial Chamber's calculation of the amount is not entirely clear".[542] Ultimately, the Appeals Chamber did not find an error in that case because the considerations upon which Trial Chamber II appeared to have relied were relevant and efforts had been made to obtain estimates as to the costs of repair that were as accurate as possible.[543]

252. In the present case, however, it is not discernible how the Trial Chamber arrived at the amount of 30 million USD that it awarded. No calculations or explanations are

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[537] *See*, *inter alia*, 2019 *Lubanga* Appeals Chamber Judgment on Reparations, paras 109-110, 120.
[538] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, paras 109-110, 119-120.
[539] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, paras 109-110.
[540] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, paras 113-118.
[541] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, paras 118-121.
[542] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 121.
[543] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, paras 121-122.

provided, whether by reference to applications received or a sample of victims,[544] a per victim cost, the overall cost of reparations programmes, submissions of the parties or any other basis.

253. Furthermore, it is not clear how the amount awarded was apportioned between the two groups of victims in this case. The Trial Chamber adopted the reparation programmes implemented in the *Lubanga* case in relation to the overlapping former child soldier victims of that case and the present one.[545] The Trial Chamber further found that additional reparation measures would need to be implemented for former child soldier victims for whom Mr Ntaganda bore sole responsibility (because they fell outside the temporal scope of the *Lubanga* case or suffered additional harm);[546] and it cited the submission of Victims Group 1, albeit without ruling thereon, that it should take into account that more former child soldier victims may be willing to come forward in this case than in *Lubanga* because Mr Ntaganda is not of Hema ethnicity.[547]

254. However, it is notable that, in *Lubanga*, as referred to above, the award was calculated based upon a per victim cost of 8,000 USD for former child soldier victims. While not expressly made clear, it could therefore be understood that the same 8,000 USD figure might form the basis for the amount awarded in the present case per former child soldier victim, noting that there were victims who suffered the same harm in the two cases. Furthermore, it may be necessary to provide for a greater number of such former child soldier victims in the present case than in *Lubanga* (for example, if former child soldier victims come forward who have suffered the same harm but fall outside the temporal scope of the *Lubanga* case; or if the submission of Victims Group 1 were to be accepted that a greater number of such victims may come forward in this case than was contemplated in *Lubanga* because Mr Ntaganda is not of Hema ethnicity).

255. If it was intended to use the above per victim cost in respect of such former child soldier victims, it is then not possible to know what proportion of the award was intended to address their harms without knowing how many such victims the award

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[544] The Appeals Chamber considers at paras 321-346 below whether the Trial Chamber ought to have examined applications for reparations in the present case.
[545] Impugned Decision, para. 220.
[546] Impugned Decision, para. 222.
[547] Impugned Decision, para. 233.

envisaged repairing. Nor is it possible to know what amount was set aside to cover the cost to repair former child soldier victims who had suffered harms in addition to that accounted for in *Lubanga* (with Mr Ntaganda bearing sole responsibility for former child soldiers who were victims of rape and sexual slavery within the UPC/FPLC).[548] Nor is it possible to know what proportion of the award was intended to repair the harm suffered by the other group of victims in this case, namely the victims of the attacks. Indeed, the basis upon which it was intended to repair their harm is unknown. No per victim cost is given for their harms; nor, if that was not felt appropriate, is it made clear on any other basis what proportion of the award would apply to them.

256. In sum, it is neither discernible how the Trial Chamber arrived at the amount of 30 million USD that it awarded nor how it was intended to apportion that amount between the different groups of victims.

(iii) Other factors relied upon by the Trial Chamber

257. The Appeals Chamber further observes that the Trial Chamber stated that, in establishing the total reparations award at 30 million USD, it had set "an amount that it considers fair and appropriate […] resolving uncertainties in favour of the convicted person and taking a conservative approach".[549] Victims Group 2 argue under their second and fourth grounds of appeal that the Trial Chamber did not explain what it meant by any of those concepts.[550]

258. The Appeals Chamber finds that the Trial Chamber was required to elaborate upon why it considered the award of 30 million USD to be "fair" and in what way it was "appropriate" and took "a conservative approach". Having failed to do so, the victims cannot know whether the amount awarded is sufficient to repair the harm that they have suffered, nor can the Defence know whether the amount of the award in fact represents a sum for which the convicted person should be held liable.

259. Similarly, the Trial Chamber merely stated that it had resolved uncertainties in favour of the convicted person without explaining what those "uncertainties" were, nor

[548] Impugned Decision, para. 222.
[549] Impugned Decision, para. 247.
[550] Victims Group 2's Appeal Brief, paras 96, 98.

how they had been resolved, nor how that resolution had been in favour of Mr Ntaganda. The Trial Chamber should have done so. The Appeals Chamber observes that, in the 2019 *Lubanga* Appeals Chamber Judgment on Reparations, it had given examples of the manner in which uncertainties could be resolved in favour of the convicted person in the following terms:

> If the trial chamber resorts to estimates as to the number of victims, such estimates must be based on a sufficiently strong evidential basis; any uncertainties must be resolved in favour of the convicted person (for instance, by assuming a lower number of victims, or by discounting the amount of liability).[551]

260. If, in the present case, the Trial Chamber discounted the amount of Mr Ntaganda's liability, it should have explained the manner in which it did so.

(iv) Awarding reparations ex aequo et bono

261. The Appeals Chamber notes that, in addition to its argument that the Trial Chamber failed to provide any meaningful calculations in determining the reparations award, the Defence argues that the Trial Chamber erred in apparently setting an amount *ex aequo et bono*.[552]

262. More specifically, the Defence argues that, while its reasoning is unclear, in reaching the amount of the award, the Trial Chamber relied "on its discretion, rather than calculations, to establish what seemed like a 'fair' amount of liability",[553] and that there was no basis for such an approach in the Court's jurisprudence.[554]

263. The Appeals Chamber recalls that article 21(1)(a) of the Statute requires the Court to apply, in the first place, its own Statute, Rules and Elements of Crimes. It further recalls that, as it has found in the context of considering the application of the *non ultra petita* principle in reparations proceedings, article 75(1) and (3) of the Statute, read together with rule 97(1) of the Rules, "illustrate that a trial chamber, in making an

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[551] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 90.
[552] Defence Appeal Brief, paras 251-254.
[553] Defence Appeal Brief, para. 251.
[554] Defence Appeal Brief, paras 252-254, *referring to* 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 118; *Katanga* Reparations Order, paras 191, 237-239.

award for reparations, has the discretion to depart from an applicant's claim for reparations, if it considers it to be appropriate".[555]

264. Furthermore, the Appeals Chamber recalls that, in *Lubanga*, Trial Chamber II reckoned *ex aequo et bono* Mr Lubanga's liability at 3,400,000 USD in relation to the 425 victims found to qualify for reparations, and 6,600,000 USD in respect of other victims who may be identified.[556] However, Trial Chamber II made it discernible for the parties how it reached the per capita amount as well as the total amount of the award *ex aequo et bono*, while in the case at hand, the Trial Chamber did not. In light of the absence of reasoning in relation to the amount of the award, it is not clear whether the Trial Chamber intended to set the award on an *ex aequo et bono* basis, whether in whole or in part, nor the reasons therefor. The Appeals Chamber therefore cannot further consider whether that might have been appropriate. Yet what is clear is that purporting to set an award for reparations *ex aequo et bono* – or on any other basis – does not relieve a trial chamber from the requirement to provide the parties with clear reasons for reaching its decision, which means, in reparations proceedings, to provide an intelligible calculation or explanation of the award based upon the available body of facts and information before it.[557] As noted above, the Trial Chamber did not provide any specific information, explanation or calculation allowing the parties, or the public for that matter, to understand how it reached the figure of 30 million USD. The Appeals Chamber considers that the Trial Chamber erred by proceeding in this manner.

265. The cumulative errors identified above materially affected the Impugned Decision. As set out above, the award was made without having any concrete estimate as to one of its fundamental parameters in the circumstances of this case, namely the number of victims whose harm it was intended to repair. Nor is it discernible from the award how the amount was arrived at and, therefore, whether it is capable of appropriately repairing the harms suffered by the victims or fairly establishing the liability of Mr Ntaganda. The part of the Impugned Decision setting the amount of the award is therefore reversed and remanded to the Trial Chamber to assess and explain

[555] *Katanga* Appeals Chamber Judgment on Reparations, para. 147.
[556] *Lubanga* Second Reparations Order, paras 279-280. *See also* paras 245-259.
[557] *See infra* para. 335.

fully what the appropriate award for reparations should be in the present case, taking into account all known circumstances at the date of that assessment.

3. Joint liability between Mr Ntaganda and Mr Lubanga

266. Under the second and fifteenth grounds of appeal, the Defence argues in general that, despite the Defence's submissions on this matter,[558] the Trial Chamber failed to indicate how Mr Lubanga's and Mr Ntaganda's joint liability for reparations affects the amount of financial liability.[559]

267. The Appeals Chamber recalls that:

> A convicted person's liability for reparations must be proportionate to the harm caused and, *inter alia*, his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case.[560]

268. The Appeals Chamber further held that the above finding "does not mean, however, that the amount of reparations for which a convicted person is held liable must reflect his or her relative responsibility for the harm in question *vis-à-vis* others who may also have contributed to that harm".[561] The Appeals Chamber clarified 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.[562]

269. In the present case, the award for reparations relates in part to liability to repair the harm caused to victims who are already the subject of the reparations order in the *Lubanga* case. The Trial Chamber was aware of this overlap. However, it pointed out that Mr Ntaganda is liable to repair the full extent of the harm "regardless of whether others may have also contributed to the harm".[563]

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[558] Defence Appeal Brief, para. 85.
[559] Defence Appeal Brief, paras 255-256.
[560] 2015 *Lubanga* Appeals Chamber Judgment on Reparations, para. 118.
[561] *Katanga* Appeals Chamber Judgment on Reparations, para. 175.
[562] *Katanga* Appeals Chamber Judgment on Reparations, para. 178.
[563] Impugned Decision, para. 218.

270. The Trial Chamber found Mr Ntaganda and his co-perpetrators, including Mr Lubanga, "jointly liable *in solidum* to repair the full extent of the harm caused to the victims".[564] The Trial Chamber clarified that such responsibility *in solidum* "entails the corresponding right for any of the co-perpetrators who may have repaired, in full or in part, the harms caused to the direct and indirect victims, to seek to recover from the co-perpetrators their proportionate share".[565] Consequently, the Trial Chamber adopted the reparations programmes ordered in the *Lubanga* case and indicated that those programmes "should be understood to repair the victims' harm on behalf of both, Mr Lubanga and Mr Ntaganda".[566]

271. The Appeals Chamber finds that the Trial Chamber correctly imposed joint and several liability. In particular, it correctly proceeded on the understanding that other persons' contribution to the harm resulting from the crimes for which the person has been convicted is irrelevant to that person's liability.[567] It was therefore not an error for the Trial Chamber "to hold [Mr Ntaganda] liable for the full amount necessary to repair the harm" caused by the crimes of which he was convicted,[568] irrespective of the ongoing implementation of a reparations order with respect to the same harm in the *Lubanga* case.

272. Furthermore, the Trial Chamber correctly found that in relation to the type of liability which it imposed on Mr Ntaganda, both he and Mr Lubanga "remain liable to reimburse the funds that the TFV may eventually use to complement the reparation awards for their shared victims".[569]

273. Consequently, the Appeals Chamber finds that the Trial Chamber did not err in failing to address the Defence's relevant submissions on these matters. Indeed, the Trial Chamber specifically addressed the question of joint and several liability to repair the harm caused to overlapping victims.

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[564] Impugned Decision, para. 219.
[565] Impugned Decision, para. 219.
[566] Impugned Decision, para. 220.
[567] *Katanga* Appeals Chamber Judgment on Reparations, para. 178.
[568] *Katanga* Appeals Chamber Judgment on Reparations, para. 178.
[569] Impugned Decision, para. 221.

274. Turning to the Defence's argument that the Trial Chamber failed to indicate how finding Mr Ntaganda to be jointly liable with Mr Lubanga affects the amount of financial liability,[570] the Appeals Chamber has already found above that the Trial Chamber erred in its failure to specify the manner in which the award was arrived at and how it was to be apportioned. As such, the Trial Chamber should specifically set out the manner in which the imposition of joint liability impacts the overall amount and apportionment of the award as a part of its reconsideration of these issues.

VIII. GROUNDS OF APPEAL RELATING TO APPLICATIONS FOR REPARATIONS, THE ELIGIBILITY ASSESSMENT AND DELEGATION OF FUNCTIONS TO THE TFV

275. Under the first, second, tenth, eleventh and twelfth grounds of appeal, the Defence challenges (i) the Trial Chamber's failure to examine applications for reparations, and (ii) the Trial Chamber's failure to enable the Defence meaningfully to challenge such applications. Both the Defence, under the above-mentioned grounds of appeal, and Victims Group 2, under the sixth ground of their appeal, also challenge the Trial Chamber's delegation of powers to the TFV.

A. Background and relevant parts of the Impugned Decision

276. On 25 July 2019, the Trial Chamber directed the Registry to submit information about, and a proposed methodology for, *inter alia*, the identification of victims who had not yet participated in the proceedings.[571]

277. In its observations made pursuant to the Order for Preliminary Information, dated 5 September 2019, the Registry submitted that the total number of victims authorised to participate at trial was 2,129, comprising 283 former child soldiers and 1,849 victims of the attacks.[572] The Registry noted that the application forms used for participation "only asked victims whether they 'intend to apply for reparations' and therefore [did] not constitute a formal request for reparations".[573] The Registry proposed that the Trial Chamber adopt "a uniform system for the identification of

[570] Defence Appeal Brief, paras 255-256.
[571] Order for Preliminary Information, para. 4.
[572] Registry's Preliminary Observations, para. 5.
[573] Registry's Preliminary Observations, para. 7.

potential new reparations beneficiaries", involving the use of "an individualised reparations form".[574] It submitted that the reparations forms received would be processed by the VPRS in accordance with the identification criteria and standard of proof set by the Trial Chamber.[575] The Registry suggested that, similar to the procedure adopted for victims' participation in the proceedings, it would transmit the processed applications to the Trial Chamber, dividing them into three groups: (i) applicants "clearly identified as beneficiaries", (ii) applicants "clearly identified as not qualifying" and (iii) applicants for whom the Registry could not make a clear determination.[576] The Registry proposed that the applications from the third group "would be transmitted to the parties systematically for the litigation of unclear issues and decided upon by the Chamber".[577] The Registry considered such participation of the Defence in the process to be "an effective way to preserve fairness", given the "security context where victims are likely to oppose the disclosure of their identities to Mr Ntaganda".[578]

278. On 3 October 2019, in response to the above observations of the Registry, the Defence argued that it was imperative that it be involved in the assessment of all applications for reparations.[579] The Defence therefore submitted that the procedure used for victims' participation was "inapplicable for the purpose of assessing and determining certified beneficiaries, who [would] be awarded reparations *via* the reparations order".[580] The Defence averred that disclosing all applications to it and involving it in the assessment of eligibility would not impact on the time necessary to finalise the process.[581]

279. In its December 2019 Order, the Trial Chamber set time limits for submissions of the parties, the Registry, the TFV, the Prosecutor, the DRC authorities and interested organisations on various aspects of the reparations proceedings.[582] The Trial Chamber directed the Registry, in consultation with the LRVs and/or the TFV, to:

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[574] Registry's Preliminary Observations, para. 10.
[575] Registry's Preliminary Observations, para. 13.
[576] Registry's Preliminary Observations, para. 13.
[577] Registry's Preliminary Observations, para. 14. *See also* para. 26.
[578] Registry's Preliminary Observations, para. 27.
[579] Defence Response to Registry's Preliminary Observations, para. 25.
[580] Defence Response to Registry's Preliminary Observations, para. 26.
[581] Defence Response to Registry's Preliminary Observations, para. 26.
[582] December 2019 Order, para. 9(c)-(e).

> (i) continue to carry out its preliminary mapping of potential new beneficiaries of reparations; (ii) carry out an assessment of how many of the victims participating in the *Ntaganda* case may potentially be eligible for reparations given the scope of the Judgment; and (iii) carry out an assessment of how many of the victims eligible for reparations as direct victim beneficiaries in the case of *The Prosecutor v. Thomas Lubanga Dyilo* […] are also potentially eligible for reparations in the *Ntaganda* case.[583]

280. The Trial Chamber also directed the Registry to identify experts with expertise in the following areas:

> (i) the scope of liability of the convicted person; (ii) 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; (iii) appropriate modalities of reparations; (iv) sexual violence, in particular sexual slavery, and the consequences thereof on direct and indirect victims; and (v) any other matter deemed relevant after the aforesaid consultation.[584]

281. In response to the December 2019 Order,[585] Victims Group 1 presented their views, on 28 February 2020, on, among other matters, the types of harm suffered by direct victims in relation to the crimes of conscription, enlistment and use of children under the age of 15 to participate actively in hostilities,[586] the damage to a life plan/the project of life suffered by child soldiers,[587] transgenerational harm,[588] the impact of sexual violence crimes on victims and their families,[589] the calculation of the cost of repairing the harm,[590] as well as the victims' preference for individual reparations and preparedness to accept collective reparations with an individual component.[591]

282. Victims Group 2 also presented their views on the same date, on a number of issues, such as the presumption of harm in relation to the death of a relative,[592] types of

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[583] December 2019 Order, para. 9(a).
[584] December 2019 Order, para. 9(b).
[585] December 2019 Order.
[586] CLR1 February 2020 Submissions, para. 40.
[587] CLR1 February 2020 Submissions, paras 43-45.
[588] CLR1 February 2020 Submissions, paras 47-48.
[589] CLR1 February 2020 Submissions, paras 49-51.
[590] CLR1 February 2020 Submissions, paras 58-64.
[591] CLR1 February 2020 Submissions, para. 69.
[592] CLR2 February 2020 Submissions, para. 37.

harm suffered as a result of various crimes[593] and the number of potential beneficiaries.[594]

283. Also on 28 February 2020, the TFV submitted its observations on the criteria and methodology to be applied in the assessment of (i) eligibility of victims, (ii) types and scope of harm, (iii) modalities of reparations, and (iv) the scope of liability of a convicted person.[595] The TFV presented cost estimates for various reparations programmes.[596]

284. In that same round of submissions, and also on 28 February 2020, the Defence proposed a two-phase process, comprising "the pre-reparations order phase and the post-reparations order implementation phase".[597] The Defence argued that in the pre-reparations order phase the Registry would be ordered to transmit to the Defence redacted versions of the dossiers of all participating victims and the Defence would make observations on their eligibility for reparations.[598] The Defence submitted that in the post-reparations order implementation phase, the VPRS would be ordered to collect applications for reparations from potential new beneficiaries.[599] The Defence argued that redacted versions of the applications for reparations should then be transmitted to the parties for observations on eligibility.[600] The Defence submitted that the TFV should be ordered to submit "a draft implementation plan comprising, *inter alia*, the list of beneficiaries certified by the Chamber – including both participating victims and new beneficiaries – and the anticipated monetary amount that it consider[ed] necessary to remedy the harms caused by the crimes for which Mr. Ntaganda was convicted".[601]

285. In the First Decision on Reparations Process, on 26 June 2020, the Trial Chamber stated that it considered it desirable for the identification of eligible victims "to advance as much as possible before the issuance of the reparations order".[602]

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[593] CLR2 February 2020 Submissions, paras 40-46.
[594] CLR2 February 2020 Submissions, para. 72.
[595] TFV February 2020 Submissions.
[596] TFV February 2020 Submissions, paras 131-136.
[597] Defence February 2020 Submissions, para. 8.
[598] Defence February 2020 Submissions, para. 8. *See also* paras 81-99.
[599] Defence February 2020 Submissions, para. 9. *See also* paras 100-108.
[600] Defence February 2020 Submissions, para. 9. *See also* paras 100-108.
[601] Defence February 2020 Submissions, para. 9. *See also* paras 100-108.
[602] First Decision on Reparations Process, para. 26.

However, the Trial Chamber recognised that it might not be feasible for all potential victims to come forward at that stage of the proceedings and that some victims might choose to come forward "only once the types and modalities of reparations [were] established".[603]

286. The Trial Chamber directed the Registry to finalise, in consultation with the LRVs and the TFV, "the assessment of how many of the participating victims may potentially be eligible for reparations".[604] The Trial Chamber further stated:

> Considering the fact that the Chamber has not yet decided the types and modalities of reparations, a further assessment as to the eligibility of the participating victims falling within the scope of the Judgment is not required at this stage. The participating victims are also not required to file a new application form in order to be considered as potential reparations beneficiaries.[605]

287. Regarding those participating victims who had not expressed views on whether they wished to receive reparations, the Trial Chamber found that they would, "in principle, be presumed willing to be considered as potential beneficiaries of reparations" and that their consent would "more appropriately [be] sought at the implementation stage".[606]

288. The Trial Chamber noted that the period prior to the issuance of the reparations order could be used to identify potential beneficiaries, but due to the limitations to such identification caused by the COVID-19 pandemic, it requested the Registry "to focus mainly on its mapping exercise".[607] The Trial Chamber invited the Registry to consult with the parties and the TFV on its proposed draft application form.[608] However, as the types and modalities of reparations had not been determined, the Trial Chamber decided that "any application forms collected by the Registry [would] not be the subject of an individual assessment by the Chamber at [that] point in time".[609]

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[603] First Decision on Reparations Process, para. 26 (footnote omitted).
[604] First Decision on Reparations Process, para. 29.
[605] First Decision on Reparations Process, para. 29 (footnote omitted).
[606] First Decision on Reparations Process, para. 30.
[607] First Decision on Reparations Process, para. 33.
[608] First Decision on Reparations Process, para. 35.
[609] First Decision on Reparations Process, para. 36.

289. The Trial Chamber instructed the Registry to prepare, in consultation with the parties and the TFV, a sample of potential beneficiaries, the aim of which was "to collect updated information on the harm experienced by victims and their current needs, so as to inform the reparations order".[610] The Trial Chamber encouraged cooperation between "the relevant actors" and stated that "[t]he Defence, where appropriate, [was] also invited to share its views with the Registry".[611]

290. In the course of the Registry's implementation of the Trial Chamber's instruction to prepare the above-mentioned sample of potential beneficiaries, the Defence, on 11 September 2020, sought clarifications on the process, emphasising the need for it "to be provided with the complete application forms of the three categories of victims to be included in the sample".[612]

291. In the Registry's First Report, dated 30 September 2020, the Registry raised questions to the Trial Chamber as to its assessment of eligibility of participating victims. It also informed the Trial Chamber about its activities aimed at identifying a sample of victims belonging to three categories: "[v]ictims who participated in the trial proceedings and fall within the scope of the Judgment", "[v]ictims who are also eligible for reparations in the *Lubanga* case" and "[v]ictims who are new potential beneficiaries of reparations".[613] The Registry estimated that the total number of potential beneficiaries from these three categories in the sampling exercise would be approximately 80-100.[614] The Registry informed the Trial Chamber that the VPRS had designed a consultation form for the purpose of identifying potential new beneficiaries (third category) and a short version of that form for the potential beneficiaries belonging to the first and second categories, who had previously completed forms in the course of their respective proceedings.[615]

292. In its observations on the Registry's First Report, of 30 October 2020, the Defence argued that "the preparation of the sample should be an exercise of

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[610] First Decision on Reparations Process, para. 37.
[611] First Decision on Reparations Process, para. 42.
[612] Defence Request for Clarification, paras 11, 15-23.
[613] Registry's First Report, para. 20.
[614] Registry's First Report, para. 27.
[615] Registry's First Report, para. 38.

representativeness and should be carried out with neutrality".[616] It also requested access to application forms and emphasised the importance of enabling it to make observations on them, in view of the fact that "the files included in the Sample [would] be the basis for the Chamber to set out eligibility criteria and inform its decision on Mr Ntaganda's liability for reparations".[617]

293. In its Decision on the First Report, of 15 December 2020, the Trial Chamber provided some clarification about issues raised by the Registry with regard to the eligibility assessment of potential beneficiaries: territorial scope, temporal scope and subject-matter jurisdiction.[618] The Trial Chamber instructed the Registry "to conclude [by 15 January 2021] the assessment of how many of the victims authorised to participate in the proceedings may potentially be eligible for reparations given the scope of the Judgment".[619] Having noted that "an initial review of the Judgments in both cases appear[ed] to show that not all victims eligible for reparations in the *Lubanga* case may also be eligible for reparations in the *Ntaganda* case", the Trial Chamber directed the Registry to conclude by 15 January 2021 the assessment of how many victims potentially eligible for reparations in the *Lubanga* case might also potentially be eligible for reparations in the *Ntaganda* case.[620]

294. In its final submissions before the Trial Chamber, of 18 December 2020, the Defence reiterated its request for access to application forms and supporting documents.[621] It also argued that it should be allowed to challenge any decisions by the TFV on the eligibility of victims.[622]

295. In Victims Group 1's final submissions before the Trial Chamber, of the same date, they provided their views on a number of issues, for instance on children born out of rape,[623] the concept of "loss of life plan",[624] the material harm which former child

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[616] Defence Observations on the Registry's First Report, para. 76.
[617] Defence Observations on the Registry's First Report, paras 73, 77.
[618] Decision on the First Report, paras 10-63.
[619] Decision on the First Report, para. 64.
[620] Decision on the First Report, para. 65.
[621] Defence Final Submissions, para. 144.
[622] Defence Final Submissions, para. 150.
[623] CLR1 Final Submissions, para. 44.
[624] CLR1 Final Submissions, para. 47.

soldiers suffered,[625] the harm suffered by male victims of rape and sexual slavery,[626] the victims' preference for individual reparations and preparedness to accept collective reparations with an individual component,[627] as well as the victims' expectation for meaningful, as opposed to symbolic, reparations.[628]

296. In Victims Group 2's final submissions before the Trial Chamber, also of the same date, they presented their views on a number of matters, including on whether children born out of rape should qualify as indirect victims,[629] transgenerational harm,[630] the victims' preference for appropriate and adequate reparations,[631] as well as presumptions of harm in respect of victims of crimes committed during attacks.[632]

297. In its Second Report, of 15 January 2021, the Registry provided updated numbers of victims who participated at trial who remained, in the Registry's view, eligible for reparations, and updated figures as to sampling. Regarding the former, it stated that there were 284 former child soldiers and 1,837 victims of the attacks, who participated at trial, of whom the Registry estimated 661 not to be eligible for reparations; for a total of 1,460 victims.[633] The Registry submitted that with a view to preparing the sample, as directed by the Trial Chamber, it consulted with potential beneficiaries belonging to each of the three categories identified by the Trial Chamber;[634] it consulted 28 in the category of victims who participated at trial, 53 in the category of victims eligible in the *Lubanga* case, and 25 potential newly identified beneficiaries. Regarding the latter it stated that this was still a rather limited pool, and "not yet representative of the pool of at least 1100 potential new beneficiaries".[635] It referred to COVID-19 related constraints and the complex situation on the ground, but stated that "the Registry is confident that this number will increase significantly during the next reporting period in light of its current activities of registering potential new

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[625] CLR1 Final Submissions, para. 49.
[626] CLR1 Final Submissions, para. 42.
[627] CLR1 Final Submissions, para. 32.
[628] CLR1 Final Submissions, para. 15.
[629] CLR2 Final Submissions, paras 31-33.
[630] CLR2 Final Submissions, paras 44-45.
[631] CLR2 Final Submissions, paras 57, 73.
[632] CLR2 Final Submissions, para. 108.
[633] Registry's Second Report, para. 9.
[634] Registry's Second Report, paras 16-19, 31-37, 39-53.
[635] Registry's Second Report, para. 39.

beneficiaries following the mapping exercise".[636] It concluded its report by observing that the task of producing relevant information about potential beneficiaries in the sample was challenging, due to "COVID-19, the security situation in the field and mobility difficulties for victims and other stakeholders", and that, as a result, the sample for two of the three categories remained small.[637] It stated that it would "continue the consultation of potential new beneficiaries identified in the course of the mapping exercise, in order to best inform the Chamber of victims' experience of harm, specific needs and desired reparations measures".[638]

298. In its observations on the Registry's Second Report, of 28 January 2021, the Defence argued that the sampling exercise was carried out "in the absence of a ruling by the Chamber on the system to be implemented to determine the eligibility of victims and without granting the Defence access to the application forms, allowing [it] to challenge the eligibility of potential beneficiaries".[639]

299. Victims Group 2, on the same date, took issue with the Registry's estimates of the number of new potential beneficiaries[640] and its assessment of eligibility.[641]

300. In the Impugned Decision, the Trial Chamber held that "awarding collective reparations with individualised components is the most appropriate course of action in the present proceedings".[642] It reached this conclusion, *inter alia*, in light of the potentially large number of unidentified eligible victims.[643] The Trial Chamber considered "the submissions of the parties and other participants in the proceedings, reports from the Registry and the appointed experts, the TFV, relevant case records, and the applicable legal framework".[644] The Trial Chamber noted that

> the number of victims is an important factor for determining the type of reparations that is appropriate. However, victims eligible to receive reparations in this case are not limited to the individuals who may have requested reparations or those allowed to participate in the trial proceedings. Instead, it rather

[636] Registry's Second Report, para. 39.
[637] Registry's Second Report, para. 58.
[638] Registry's Second Report, para. 58.
[639] Defence Observations on the Registry's Second Report, paras 3, 25-26, 29-32.
[640] CLR2 Observations on the Second Report, para. 27.
[641] CLR2 Observations on the Second Report, paras 15-25.
[642] Impugned Decision, para. 7. *See also* paras 186, 194.
[643] Impugned Decision, para. 8.
[644] Impugned Decision, para. 7.

> encompasses a much greater number of potential victims, in light of the findings in the Judgement and the Sentencing Judgment as to the scope and particularly the widespread and systematic nature of the crimes committed.[645]

301. The Trial Chamber explained that "collective reparations with individualised components" focus on the individual members of the group and that, "[a]lthough they are collective in nature, they result in individual benefits, to respond to the needs and current situation of the individual victims in the group".[646] In this respect, the Trial Chamber took into account the victims' "wish not to be granted any form of memorialisation or other forms of symbolic reparations unless they serve practical purposes" and "their wish to receive awards aiming at supporting sustainable and long-term livelihood and well-being, rather than simply addressing their needs on a short-term basis".[647]

302. In light of the type of reparations awarded, the Trial Chamber saw "no need to rule on the merits of individual applications for reparations, pursuant to rule 94 of the Rules".[648] The Trial Chamber held:

> In light of the type of reparations to be awarded, the Chamber finds it appropriate to establish the eligibility criteria for reparations rather than identifying the victims eligible itself. Accordingly, the Chamber hereafter indicates the characteristics of the categories of eligible victims, in order to enable their identification by the TFV.[649]

303. The following section of the Impugned Decision contains a number of eligibility criteria related to identification of victims by the TFV.[650] In particular, the Trial Chamber indicated, with reference to the Conviction Judgment, the territorial, temporal and subject-matter scope of the crimes of which Mr Ntaganda was convicted.[651] Based on its findings in the Conviction Decision, it listed the characteristics of direct victims, including victims of the attacks, child soldiers and children born out of rape and sexual slavery, as well as indirect victims.[652]

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[645] Impugned Decision, para. 190 (footnotes omitted).
[646] Impugned Decision, para. 81.
[647] Impugned Decision, para. 9.
[648] Impugned Decision, para. 196.
[649] Impugned Decision, para. 105 (footnote omitted).
[650] Impugned Decision, paras 106-128.
[651] Impugned Decision, para. 106.
[652] Impugned Decision, paras 108-128

304. The Trial Chamber instructed the TFV

> to include in its draft implementation plan a detailed proposal as to the way in which it expects to conduct the administrative eligibility assessment, based on the eligibility requirements established by the Chamber in the present order. The TFV shall ensure that its proposals ensure a fair, efficient, and expeditious process, taking into consideration the Registry's capacity to assist.[653]

305. Regarding the modalities of reparations, the Trial Chamber held that they "may include measures of restitution, compensation, rehabilitation, and satisfaction, which may incorporate, when appropriate, a symbolic, preventative, or transformative value".[654] It found that "in principle" the listed modalities "appear appropriate to address the harms" caused to the victims.[655] The Trial Chamber directed the TFV "to design an implementation plan on the basis of all the identified modalities of reparations, in consultation with the victims".[656]

306. When determining the number of victims potentially eligible for reparations, the Trial Chamber noted, *inter alia*, that 2,121 victims, including 1,837 victims of the attacks, participated in the trial proceedings and that, in the Registry's assessment, approximately 1,460 victims of the attacks were eligible to receive reparations.[657] It also noted that the 284 former child soldiers participating in the proceedings had not been impacted by the scope of the conviction.[658]

307. The Trial Chamber referred to estimates of the cost for various programmes made by the TFV,[659] including the costs of medical treatment, psychological rehabilitation, vocational training, and building a school or health centre.[660] The Trial Chamber also set out the views of the appointed experts when dealing with the costs.[661]

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[653] Impugned Decision, para. 253.
[654] Impugned Decision, para. 199; *see also* Impugned Decision, paras 82-88.
[655] Impugned Decision, para. 200.
[656] Impugned Decision, para. 212.
[657] Impugned Decision, para. 234.
[658] Impugned Decision, para. 235.
[659] Impugned Decision, para. 213, *referring to* TFV February 2020 Submissions, paras 131-136.
[660] Impugned Decision, para. 236.
[661] Impugned Decision, paras 237-244.

308. Regarding the victims' consent, the Trial Chamber found that "the informed consent of the recipient is necessary prior to any award of reparations, including participation in any reparations programme".[662]

309. In its instructions regarding the draft implementation plan, the Trial Chamber discussed the modalities of reparations:

> pursuant to rule 98(3) of the Rules and regulations 54 and 69 of the Regulations of the TFV, the Chamber hereby orders the TFV to prepare a draft implementation plan and submit it for the Chamber's approval within six months. The draft implementation plan shall clearly specify the objectives, outcomes, and activities identified as necessary in order to give effect to the present order. In particular, the TFV shall describe the reparation projects it intends to develop, indicating the details of the proposed collective awards, each of the collective projects with individualised components, and the modalities of reparations identified in this Order considered appropriate to address each of the harms. The TFV should also clearly indicate the methods of implementation, steps to be taken, direct and indirect costs, the expected amount that the TFV will use to complement the awards, and the expected timeline necessary for the projects' development and implementation. The TFV should, to the extent possible, resort to pre-existing structures, programmes, and partners to optimise the costs of implementation of reparations.[663]

B. The twelfth ground of the Defence appeal: Whether the Trial Chamber ought to have examined applications for reparations

1. Defence submissions before the Appeals Chamber

310. The Defence submits that the Trial Chamber did not assess any victims' applications for reparations and then delegated the entire assessment process to the TFV without any guidelines or judicial supervision.[664] The Defence argues that this made the applications "utterly irrelevant" and prevented it from being able meaningfully to challenge the inclusion of potential beneficiaries in the reparations award.[665] The Defence avers that the Trial Chamber made pronouncements as to the amount of Mr Ntaganda's liability without any knowledge of the number of eligible victims and the basis for their eligibility.[666]

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[662] Impugned Decision, para. 49.
[663] Impugned Decision, para. 249.
[664] Defence Appeal Brief, paras 176-177.
[665] Defence Appeal Brief, para. 177.
[666] Defence Appeal Brief, para. 177.

311. The Defence contends that the application forms used in the present case were not "dual purpose" in that they only enabled victims to provide information relevant to their participation in the proceedings, rather than also providing information relevant to reparations, including the victims' consent thereto.[667] The Defence submits that the Trial Chamber did not require the victims participating in the proceedings to file new forms in order to be considered as potential beneficiaries of reparations, and directed that those victims' consent be sought "once the types and modalities of reparations were known".[668] The Defence argues that victims' consent must be sought and obtained, and that the Court cannot presume that all victims desire to receive reparations.[669] The Defence avers that, as of 21 February 2021, the VPRS had only been able to consult about 25 new potential beneficiaries.[670] The Defence argues that the Trial Chamber failed to collect information relevant to reparations from potential beneficiaries and imposed reparations on entire communities without their involvement or consent, and that it thereby committed an error of law that vitiates the Impugned Decision.[671]

312. The Defence contends that the Appeals Chamber's ruling that there is no need for a trial chamber to rule on individual applications applies to reparations programmes where only collective reparations are awarded and thus not to the present case, where the Trial Chamber awarded collective reparations "with individualised components".[672] The Defence argues that individual awards can only be made when applications for reparations have been assessed and that, therefore, the Trial Chamber's "adoption of the *Lubanga* exception for collective reparations" was a legal error.[673]

313. In its reply regarding the distinction between individual and collective reparations, the Defence submits that various views were expressed about the nature of reparations awarded in the *Lubanga* case and that it is unsure whether the "collective approach" to which Trial Chamber I referred meant that it awarded reparations only on

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[667] Defence Appeal Brief, paras 180-182.
[668] Defence Appeal Brief, para. 179.
[669] Defence Appeal Brief, paras 171-173, 182.
[670] Defence Appeal Brief, para. 178.
[671] Defence Appeal Brief, para. 184
[672] Defence Appeal Brief, paras 185-186, 196, *quoting* 2015 *Lubanga* Appeals Chamber Judgment on Reparations, para. 152.
[673] Defence Appeal Brief, para. 188.

a collective basis, as stipulated in the subsequent judgment of the Appeals Chamber.[674] The Defence argues that, regardless of the type of reparations awarded, the reparations scheme is to remain a judicial process and the decision to award collective reparations "should not be a vehicle to minimize a convicted person's due process rights".[675]

314. The Defence submits that, even if a trial chamber is not required to rule on each application, the victims' applications "remain essential to an informed decision about the quantum of the award".[676] The Defence argues that a review of applications also enables a trial chamber to determine the percentage of persons who are not eligible to benefit from reparations.[677] It concludes that the Trial Chamber's failure to rule on the eligibility of victims made the Trial Chamber unable to determine the amount of Mr Ntaganda's liability.[678]

315. In addition to the above, the Defence argues, under the second ground of its appeal, that the above alleged errors are "compounded by Trial Chamber VI's failure to justify such a marked departure from the practice before other trial chambers".[679] In particular, the Defence contends that the Trial Chamber failed to explain how "collective reparations with individual components" could equate to "collective reparations only" and on what basis it could decide not to rule on the merits of any applications for reparations.[680] The Defence submits that the Trial Chamber "systematically refrained from addressing and/or ruling on the Defence submissions" on these matters.[681]

2. Victims Group 2's submissions before the Appeals Chamber

316. In response to the Defence's twelfth ground of appeal, Victims Group 2 submit that the Defence fails to identify or illustrate how the Trial Chamber erred in the exercise of its discretion, and that "the Defence submissions do not rise beyond a mere disagreement with the decision on the modalities of collective reparations".[682] Victims

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[674] Defence Reply to Victims' Responses, paras 31-33.
[675] Defence Reply to Victims' Responses, paras 37-43.
[676] Defence Appeal Brief, paras 197-198.
[677] Defence Appeal Brief, para. 199.
[678] Defence Appeal Brief, para. 200.
[679] Defence Appeal Brief, para. 73.
[680] Defence Appeal Brief, para. 74.
[681] Defence Appeal Brief, para. 76. *See also* para. 53.
[682] Victims Group 2's Response, para. 156.

Group 2 argue that in cases in which collective reparations are awarded, administrative screening is the most efficient method of assessing eligibility.[683] They contend that the Defence's argument that victims have not consented to reparations is without merit, as eligible victims will present themselves personally to the screening body and by doing so will show that they wish to receive reparations.[684] Victims Group 2 argue that their views were adequately reflected in submissions made on their behalf.[685] They submit that the Defence has failed to show that the Trial Chamber reached a decision which no reasonable trial chamber could have reached.[686]

3. Victims Group 1's submissions before the Appeals Chamber

317. Victims Group 1 argue that the specificity of this case calls for a different sampling arrangement from that used in other cases before the Court.[687] They observe that the Trial Chamber already had several thousands of files of victims identified in the pre-trial and trial stages of the proceedings, as well as many victims identified in the *Lubanga* case who were already deemed eligible to benefit from reparations.[688] Victims Group 1 submit that before issuing the Impugned Decision, the Trial Chamber directed the Registry to proceed with additional sampling.[689] They argue that the forms provided by the Registry to be used during the eligibility assessment will allow for the collection of all necessary information from individuals who wish to benefit from reparations.[690]

318. Victims Group 1 argue that the Defence misunderstands the meaning of collective reparations with individual components, as opposed to individual reparations.[691] They highlight that the former, which is the modality endorsed by the Trial Chamber in the present case, allows for specific services to each victim in accordance with their respective needs.[692] Victims Group 1 submit that "the collective reparations of access to services have an inherent individual component, in as much as

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[683] Victims Group 2's Response, para. 156.
[684] Victims Group 2's Response, para. 159.
[685] Victims Group 2's Response, para. 159.
[686] Victims Group 2's Response, para. 159.
[687] Victims Group 1's Response, para. 83.
[688] Victims Group 1's Response, para. 83.
[689] Victims Group 1's Response, para. 83.
[690] Victims Group 1's Response, para. 86.
[691] Victims Group 1's Response, para. 97.
[692] Victims Group 1's Response, para. 97.

the reparations for each beneficiary will necessarily vary from [one] person to another".[693] For this reason, they argue that the chosen modality is the most appropriate in the circumstances of this case.[694]

4. Determination by the Appeals Chamber

319. The Appeals Chamber notes that the Defence raises two main issues: (i) the permissibility of proceeding without having ruled on applications for reparations in a case in which the collective reparations have an individualised component; and (ii) the lack of consent of victims for participation in the reparations proceedings.

320. The Appeals Chamber will examine these issues in turn.

(a) Whether the Trial Chamber erred in proceeding without having ruled on applications for reparations despite the individualised component of the award

321. The Defence argues that the Appeals Chamber's ruling that a trial chamber need not rule on individual applications only applies where collective reparations are awarded and not to collective reparations "with individualised components".[695] The Defence further submits that applications for reparations are relevant to the trial chamber's determination of the percentage of persons who are not eligible to benefit from reparations and are "essential" to the amount of the award, as they enable a determination of the scope and extent of the harm suffered, and the resulting cost to repair.[696]

322. The Appeals Chamber notes that, in the instant case, the Trial Chamber did not rule on any applications for reparations.[697] The Trial Chamber noted that the figures and assessments made by Trial Chamber II in the *Lubanga* and *Katanga* cases, which related to crimes committed in Ituri during the same time-frame, were highly relevant to the assessment of the cost to repair in the present case.[698] However, in not ruling on any applications, the Trial Chamber followed a markedly different practice from what

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[693] Victims Group 1's Response, para. 97.
[694] Victims Group 1's Response, para. 97.
[695] Defence Appeal Brief, paras 185-186, 196, *quoting* 2015 *Lubanga* Appeals Chamber Judgment on Reparations, para. 152.
[696] Defence Appeal Brief, paras 197-200.
[697] *See* Impugned Decision, para. 196.
[698] Impugned Decision, para. 245.

was done in those cases. In *Katanga*, Trial Chamber II examined all applications for reparations that had been submitted in relation to the crimes for which Mr Katanga had been convicted.[699] In *Lubanga*, the same trial chamber examined all applications that had been submitted by the time that the reparations order was issued.[700] It proceeded to explain that the applications which it had received constituted only a sample of the total number of victims, in the sense that the number of victims of Mr Lubanga's crimes was higher than those who had submitted applications, because there were additional victims, that were as yet unknown to the trial chamber at the time that the order for reparations was issued, who would only be identified during the implementation process.[701]

323. The Appeals Chamber must therefore determine whether the relevance of applications for reparations to the award which the Trial Chamber made was such that, in the circumstances of this case, its failure to rule on any applications amounted to an error. The Appeals Chamber notes in this respect that it has not yet had an opportunity to examine an appeal in which an award for reparations was challenged on the basis of a trial chamber's alleged failure to rule on any applications. For the reasons that follow, the Appeals Chamber considers that in certain cases it is indeed erroneous for a trial chamber to make an award for reparations without having ruled on any applications for reparations.

(i) Relevant statutory provisions and previous jurisprudence

324. The Appeals Chamber observes that, in its first judgment on an appeal in relation to reparations in the *Lubanga* case, it found that when only collective reparations are awarded, a trial chamber is not required to rule on individual applications for reparations; and that the determination that it is more appropriate to award collective reparations "operates as a decision denying, as a category, individual reparation awards".[702] The Appeals Chamber left open the question of whether a ruling on each request would be required if reparations were awarded on an individual basis

[699] *Katanga* Reparations Order, paras 168-180.
[700] *Lubanga* Second Reparations Order, paras 30-194.
[701] *Lubanga* Second Reparations Order, para. 248.
[702] 2015 *Lubanga* Appeals Chamber Judgment on Reparations, para. 152.

or on both an individual and collective basis.[703] In any event, the Appeals Chamber underscored in its subsequent jurisprudence that a trial chamber is not precluded from ruling on applications in cases in which there are more than a very small number of victims or where collective reparations are awarded.[704] Indeed, in an ensuing appeal in the *Lubanga* case itself, which involved collective reparations, the Appeals Chamber upheld the decision of Trial Chamber II to assess the applications that it had received as a proper exercise of its discretion in conducting the reparations proceedings and setting the size of the award.[705] In the circumstances of the present case, the question arises as to whether the Trial Chamber should have examined at least some applications for reparations. The Appeals Chamber therefore deems it to be appropriate to consider further below the circumstances in which a trial chamber should consider assessing applications for reparations.

325. In the *Katanga* Appeals Chamber Judgment on Reparations, the Appeals Chamber held that chambers have "ample margin to determine how to best […] deal with the matter before them", but noted that the reparations proceedings "must be as expeditious and cost effective as possible", as well as "avoid unnecessarily protracted, complex and expensive litigation".[706]

326. Regarding the evidential basis for an order for reparations, the Appeals Chamber held that in determining the scope and extent of any damage, loss and injury to, or in respect of victims:

> [A] trial chamber should, generally speaking, establish the types or categories of harm caused by the crimes for which the convicted person was convicted, based on all relevant information before it, including the decision on conviction, sentencing decision, submissions by the parties or *amici curiae*, expert reports and the applications by the victims for reparations.[707]

327. As regards the question of whether a trial chamber is required to rule on applications, the Appeals Chamber noted that

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[703] 2015 *Lubanga* Appeals Chamber Judgment on Reparations, para. 152.
[704] *Katanga* Appeals Chamber Judgment on Reparations, para. 71; 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 138.
[705] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 142.
[706] *Katanga* Appeals Chamber Judgment on Reparations, para. 64.
[707] *Katanga* Appeals Chamber Judgment on Reparations, para. 70.

> there may be circumstances where a trial chamber finds it necessary to individually set out findings in respect of all applications in order to identify the harms in question (for example, if there is a very small number of victims to whom the chamber intends to award individual and personalised reparations). However, when there are more than a very small number of victims, this is neither necessary nor desirable. This is not to say that trial chambers should not consider those applications – indeed the information therein may be crucial to assess the types of harm alleged and it can assist a chamber in making findings as to that harm. However, setting out an analysis for each individual, in particular in circumstances where a subsequent individual award bears no relation to that detailed analysis, appears to be contrary to the need for fair and expeditious proceedings.[708]

328. In the 2019 *Lubanga* Appeals Chamber Judgment on Reparations, the Appeals Chamber further held that the reparations order may be "based on information *other than that contained in requests for reparations* filed before the [trial c]hamber"[709] and that "it would be incorrect to assume that the number of victims may only be established based on individual requests for reparations received by the Court".[710]

329. However, in that judgment, the Appeals Chamber also acknowledged the significance of "[t]he central provision regulating reparations before the Court", which is article 75 of the Statute.[711] The Appeals Chamber held that the words "upon request" in the second sentence of article 75(1), which reads in relevant part: "in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims", mean that applications for reparations *trigger* reparations proceedings.[712]

330. The Appeals Chamber also takes note of the detailed requirements of an application for reparations, set out in rule 94(1) of the Rules. In particular, this provision stipulates:

> A victim's request for reparations under article 75 shall be made in writing and filed with the Registrar. It shall contain the following particulars:
>
> (a) The identity and address of the claimant;
>
> (b) A description of the injury, loss or harm;

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[708] *Katanga* Appeals Chamber Judgment on Reparations, para. 71 (footnotes omitted).
[709] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 80 (emphasis added).
[710] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 89.
[711] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 77.
[712] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 73; *see also* para. 84.

(c) The location and date of the incident and, to the extent possible, the identity of the person or persons the victim believes to be responsible for the injury, loss or harm;

(d) Where restitution of assets, property or other tangible items is sought, a description of them;

(e) Claims for compensation;

(f) Claims for rehabilitation and other forms of remedy;

(g) To the extent possible, any relevant supporting documentation, including names and addresses of witnesses.

331. The Appeals Chamber is therefore of the view that the Statute and the Rules attach significant weight to applications for reparations.

332. Furthermore, although the Appeals Chamber was not persuaded by the approach chosen by the *Katanga* trial chamber, which consisted of an individual assessment of each application by the trial chamber, it nonetheless noted that "the information [in applications] may be crucial to assess the types of harm alleged and it can assist a chamber in making findings as to that harm".[713]

333. The Appeals Chamber further notes that, while it held in the *Katanga* case that ruling on *all* applications for reparations is not necessary in cases involving a large number of such applications, its holding must be seen in light of the award for reparations made in that case and the fact that that award had a limited correlation with the *Katanga* trial chamber's findings on the individual applications. The Appeals Chamber is, however, of the view that there will be other cases in which the circumstances may well be different in that a trial chamber's findings on individual applications may have a greater bearing on the award. In such cases, it will be desirable for a trial chamber to rule on the information contained in the applications.

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[713] *Katanga* Appeals Chamber Judgment on Reparations, para. 71. The Appeals Chamber observed that "the monetary value of the harm that the Trial Chamber assessed in relation to each type of harm, totalling USD 3 752 620, was not used as a basis for determining what each of the identified victims should receive", but "merely a reference point to determine the amount of money for which Mr Katanga was liable" (para. 68). The Appeals Chamber was concerned that "[the *Katanga* trial chamber's] approach required it to analyse all individual applications in detail, only to then put a monetary value to the harm which did not reflect the reparations eventually awarded to the victims" (para. 69).

334. The applications for reparations thus not only trigger the reparations proceedings, but they are also an important source of information for the trial chamber's determination of the award. In particular, information contained in applications for reparations "may be crucial to assess the types of harm alleged",[714] which, in turn, is relevant to a determination of "the appropriate modalities for repairing the harm caused with a view to, ultimately, assessing the costs of the identified remedy".[715] Nevertheless, the importance of applications for reparations as a source of information relevant to these determinations will depend on the circumstances of a given case.

335. Reparations proceedings are judicial proceedings, resulting in a judicial order fixing a monetary award for which the convicted person is held liable.[716] The Appeals Chamber therefore underscores that, irrespective of whether a trial chamber makes individual findings on applications for reparations or not, the paramount consideration is that its determination of the award for reparations must be based on a sufficiently strong evidential basis.[717] In other words, the available body of facts and information, which may include, *inter alia*, the decision on conviction, sentencing decision, submissions by the parties or *amici curiae*, expert reports and the applications for reparations,[718] must be sufficiently robust in order for a trial chamber to make the required findings as to the fundamental parameters of the award. This relates in particular, where applicable, to the actual or an appropriately estimated number of victims,[719] and, in any event, to the precise scope of the convicted person's liability. The trial chamber must also issue a reasoned decision which appropriately explains the basis for the award.[720]

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[714] *Katanga* Appeals Chamber Judgment on Reparations, para. 71.
[715] *Katanga* Appeals Chamber Judgment on Reparations, para. 72.
[716] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 237. *See also* Separate Opinion of Judge Ibáñez to the 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 25.
[717] The Appeals Chamber recalls in this respect that it has previously held that when a trial chamber resorts to estimates as to the number of victims, "such estimates must be based on a sufficiently strong evidential basis": *See* 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 90. However, having a sufficiently strong evidential basis is not limited solely to estimates as to the number of victims, but applies generally to the fundamental parameters of the order for reparations.
[718] *Katanga* Appeals Chamber Judgment on Reparations, para. 70.
[719] The present case is one in which establishing the actual or an appropriately estimated number of victims was required, for the reasons explained above: *see supra*, paras 164-168. On the requirement to establish an appropriately estimated number of victims, *see supra*, paras 146-154.
[720] In the present case, as has been found above, the Trial Chamber failed to establish an actual, or estimated, number of victims of the award that was as concrete as possible and based upon a sufficiently strong evidential basis (*see supra*, para. 168); nor is it possible to discern how the amount of 30 million

336. The Appeals Chamber notes in this context the Defence argument that, unlike in cases where only collective reparations are awarded, a trial chamber is required to rule on applications for reparations in cases in which collective reparations with an individualised component are awarded.[721] The Appeals Chamber recalls its ruling that cases in which collective reparations are awarded are indeed an example of when a trial chamber may follow a procedure whereby it does not rule on the merits of the individual applications for reparations.[722] Therefore, while not, in and of itself, determinative of whether a trial chamber is required to rule on applications for reparations, the type of the award – collective, individual or both – is, along with other factors, a relevant consideration to be taken into account in the exercise of a trial chamber's discretion as to whether to rule on individual applications and the extent of its reliance on such applications.

337. In view of the foregoing considerations, the Appeals Chamber reaffirms that a trial chamber conducting reparations proceedings has "ample margin to determine how to best deal with the matter before [it]".[723] A myriad of circumstances may arise in future cases which are currently unknown and a trial chamber therefore needs considerable discretion to decide how it should best approach the differing eventualities that might come before it.

338. In sum, while there may be instances where it is appropriate to proceed without ruling on any applications, there may be cases in which the evidential basis other than that contained in applications for reparations will be insufficient. In those latter circumstances, a trial chamber is *required* to rule upon applications for reparations to determine whether relevant alleged facts have been established to the applicable standard.

339. Indeed, in the view of the Appeals Chamber, the information gleaned from those applications may represent the strongest and most direct available evidence on which to base, in particular, a monetary award. In this sense, ruling on applications ensures

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USD that was awarded was arrived at and therefore whether it is capable of appropriately repairing the harms suffered by the victims or fairly establishing the liability of Mr Ntaganda (*see supra*, para. 265).

[721] Defence Appeal Brief, paras 185-186, 196, *quoting* 2015 *Lubanga* Appeals Chamber Judgment on Reparations, para. 152.

[722] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 87 (footnotes omitted).

[723] *Katanga* Appeals Chamber Judgment on Reparations, para. 64.

that any monetary award for reparations against a convicted person will be grounded on tangible, concrete evidence, from applicants who have in fact come forward seeking that their harm be repaired. The Appeals Chamber considers that, in the absence of a sufficiently strong evidential basis coming from sources other than applications, ruling upon applications is the fairest and most transparent manner in which to make an order for reparations. In particular, this approach allows for the identification of the types of harm at issue (based on specific claims of such harm) and, equally importantly, may provide potentially crucial information in relation to the number of victims who wish to receive reparations, thus forming a sound basis for the calculation of the award.

340. In order to ensure that applications for reparations are received, the VPRS and the legal representatives of victims may assist a trial chamber in gathering such applications. It also seems advisable, as suggested by Trial Chamber VI in a recent decision in the *Said* case, for trial chambers, already to seek and identify victim applicants, and collect their applications, from the early stages of proceedings;[724] in fact, rule 94(2) of the Rules and regulation 56 of the Regulations of the Court suggest this approach and aim to advance reparations proceedings with all expedition.

341. The Appeals Chamber recalls that there may be cases in which there is, or there appears to be, a high number of potential beneficiaries and it is thus not "desirable" to "set out findings in respect of all applications".[725] The Appeals Chamber also notes that there may be circumstances in which, despite concrete efforts, it will not be possible to receive applications from all potential beneficiaries within a given period of time, but that they are likely to come forward in the future. In such circumstances, considering that judicial proceedings must come to an end within a reasonable period of time, a trial chamber may elect instead to rule only on a sample of applications for reparations and then proceed to estimate how many more potential beneficiaries will come forward in the future.[726] In such cases, the information contained in the sample of applications for reparations may be essential to a determination of the types of harm and the cost to repair the harm with respect to all beneficiaries, including those who come forward

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[724] *Said* Decision on Victims Participation, para 88. *See also* *Abd-Al-Rahman* Reparations Notification, paras 6-15. The Appeals Chamber also recalls its finding in the *Abd-Al-Rahman* case that even a pre-trial chamber may hear submissions and issue interim orders in relation to reparations: *Abd-Al-Rahman* OA4 Appeals Chamber Judgment, paras 14-16.
[725] *Katanga* Appeals Chamber Judgment on Reparations, para. 71.
[726] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, paras 89-90.

only at the implementation stage of the proceedings. Ruling on applications from a sample, which must be a representative one, may allow a trial chamber to extrapolate the makeup of the entire group of beneficiaries, according to the types of harm suffered by victims from each sub-group. This, in turn, is relevant to the ultimate determination of the amount of the award. In this context, the Appeals Chamber notes that the meaning of the term "sample" is twofold: it may mean a representative part from a larger group of applications already in possession of a trial chamber during the reparations proceedings. However, it may also mean all of the applications that a trial chamber has received at the reparations stage, but where it is determined that there is a strong evidential basis to conclude that those applications do not represent the total number of potential beneficiaries and that there are therefore further potential beneficiaries, who will come forward by a set date during the implementation stage and who should benefit from the award.

(ii) The Trial Chamber's application of the legal principles to the facts of the present case

342. Turning to the present case, the Appeals Chamber recalls that it has analysed above the manner in which the Trial Chamber determined the number of potentially eligible victims for reparations and the amount of 30 million USD that it awarded; and that it has found errors in respect thereof. The Appeals Chamber is of the view that, in the instant case, the Trial Chamber ought to have examined at least a sample of applications from victims prior to arriving at its determinations of those matters, so as to have been able to base the award on a stronger evidential basis.

343. In terms of numbers of victims, it appears that the Trial Chamber could have determined more concretely how many of the victims who had participated in the trial qualified as beneficiaries by reference to applications, in particular given that it did not resolve this matter on the basis of other evidence that it had before it or by any other means.[727] More generally, and as mentioned above, ruling on a sample of applications

[727] The Appeals Chamber notes that the Trial Chamber did not rule on how many of the 1,837 victims of the attacks who participated at the trial stage were eligible to claim reparations. The Trial Chamber stated that the Registry had estimated that approximately 1,460 of those victims of the attacks remained eligible to receive reparations, whereas Victims Group 2 had submitted that any such victims who the Registry

may provide potentially crucial information in relation to the number of victims who wish to receive reparations, which, in turn, may form a sound basis for the calculation of the award. Moreover, as stated above and in the previous jurisprudence of the Appeals Chamber, information contained in applications can assist a trial chamber in making findings as to harm caused and the cost of repairing it.[728] This would have been particularly relevant in the present case, given that the Trial Chamber defined the type of reparations that it was awarding ("collective reparations with individualised components") as focusing "on the individual members of the group. Although they are collective in nature, they result in individual benefits, to respond to the needs and current situation of the individual victims in the group".[729] Indeed, had the Trial Chamber ruled on a sample of applications, it would have obtained specific information about the types of harm which actual victims claiming reparations had suffered, which would also have been relevant to the costs to repair those harms and thus to the amount of the award. In sum, in an order in which key parameters are either undetermined or insufficiently explained, an analysis of the applications would have produced a sounder evidential basis for the conclusions that were necessary.

344. What is notable in the present case is that the Trial Chamber had the opportunity to examine a sample of applications. However, it appears to have elected not to do so. This is notwithstanding the Trial Chamber itself having instructed the Registry to prepare a sample of a limited but representative pool of potential beneficiaries, the aim of which was "to collect updated information on the harm experienced by victims and their current needs, so as to inform the reparations order".[730] Yet it ultimately proceeded to issue the order without looking at information that it had itself previously deemed relevant. Furthermore, although the initial sample of potentially new beneficiaries was limited, the Registry had expressed confidence that it would be able to consult significantly more than the 25 potential new beneficiaries with whom it had been in contact at that stage during the next reporting period.[731] Yet rather than awaiting the Registry consulting more potential beneficiaries in that reporting period, the Trial

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considered ineligible to receive reparations should be able to clarify their account through an individual assessment or screening (*see* Impugned Decision, para. 234).

[728] *Katanga* Appeals Chamber Judgment on Reparations, paras 71-72.

[729] Impugned Decision, para. 81 (footnote omitted).

[730] First Decision on Reparations Process, para. 37.

[731] Registry's Second Report, para. 39.

Chamber proceeded to issue the order for reparations, thereby not affording itself the opportunity to obtain further evidence that it had apparently considered important.

345. On the facts of the present case, it is not clear why the Trial Chamber did not examine evidence that was available to it or that could have been obtained – and this is not addressed in the Impugned Decision. As explained above, applications are a source of direct evidence from the victims themselves who are seeking the repair of the harm that they have suffered. The Appeals Chamber therefore concludes that the Trial Chamber erred by failing to rule on at least a sample of applications and that this error necessarily materially affected the Impugned Decision.

346. In considering the matter of the number of beneficiaries and the amount of the award anew, the Trial Chamber should therefore take at least a sample of applications into account. Its focus needs to be upon ensuring that there is a sufficiently strong evidential basis for the order. Adding an examination of at least a sample of applications to other evidence that the Trial Chamber already has, or can subsequently obtain, would strengthen the basis for the award.[732] Indeed, in the present case, it appears that an examination of applications would have assisted, when combined with other information, evidence and submissions, at least in establishing an actual number of

[732] As emphasised above, it is within the discretion of the Trial Chamber to determine by what means it establishes a sufficiently strong evidential basis for its order. For present purposes, and by way of example, the Appeals Chamber therefore merely recalls that, in *Lubanga*, Trial Chamber II used a variety of means to establish as concrete an estimate as possible of the number of beneficiaries and used that estimate, in combination with its assessment of the costs to repair the harm suffered, to arrive at the total figure that was awarded. In addition to its findings on the submissions before it (*see* *Lubanga* Second Reparations Order, paras 200-212), the trial chamber in that case used a sample of potentially eligible victims based upon the dossiers that it had received, from which it drew certain conclusions regarding the overall number of victims (*Lubanga* Second Reparations Order, paras 190-191, 231; 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 142); relied upon documents from official sources and/or in the public domain (*Lubanga* Second Reparations Order, paras 195-199, 213-221); and used statistical information to arrive at an estimated range/number of victims (*Lubanga* Second Reparations Order, paras 222-231. *See also* 2019 *Lubanga* Appeals Chamber Judgment on Reparations, paras 194-195). More generally, and depending upon the circumstances of an individual case, other sources of information might include assistance from local authorities, central Government or intergovernmental or international organisations; and the Appeals Chamber also notes the effect that appropriate outreach can potentially have in identifying victims (*See, e.g.*, TFV's Observations on the Defence Appeal Brief, para. 32: "By way of background, the Trust Fund's experience working with victims and reparation programmes has shown that there are various stages when potential beneficiaries come forward. One such stage is during an outreach campaign of identifying potential beneficiaries, which in the present proceedings is still to be conducted"). While the TFV appears to refer to outreach in the implementation phase, whether outreach prior to issuing the order for reparations might be helpful in identifying victims, and can be conducted in a manner that would not risk their re-traumatisation, is also something that could be considered.

eligible victims based upon those individuals who are already known to the Trial Chamber (including the victims who participated at trial and overlapping victims with those in the *Lubanga* case); in establishing the types of harms suffered and their cost to repair; and it might have assisted in more concretely estimating a further number of currently unknown beneficiaries.

(b) Whether the Trial Chamber erred in making an award for reparations in the absence of the consent of the victims

347. The Defence argues that victims' consent must be sought and obtained,[733] and that the Trial Chamber imposed reparations on entire communities without their involvement or consent.[734]

348. The Appeals Chamber finds the Defence's argument speculative. While underscoring that the requirement of victims' consent to benefit from reparations relates to the principle that reparations are voluntary,[735] the Appeals Chamber notes that, to the extent that the present argument of the Defence relates to victims whose eligibility to benefit from reparations will be determined as part of the implementation process, the Trial Chamber was indeed aware of the need to seek "the informed consent of the recipient" of reparations.[736] As observed by Victims Group 2,[737] victims will give their consent by presenting themselves personally to the screening body at the implementation stage.

349. The Defence's argument is thus rejected.

[733] Defence Appeal Brief, paras 171-173, 182.
[734] Defence Appeal Brief, para. 184.
[735] 2015 *Lubanga* Appeals Chamber Judgment on Reparations, para. 160. *See also* Separate Opinion of Judge Ibáñez to the 2019 *Lubanga* Appeals Chamber Judgment on Reparations, paras 198, 218, 227-231, 236.
[736] Impugned Decision, para. 49.
[737] Victims Group 2's Response, para. 159.

C. The tenth ground of the Defence appeal: Whether the Impugned Decision impedes the Defence's ability to challenge the eligibility of potential beneficiaries

1. Defence submissions before the Appeals Chamber

350. Under its tenth ground of appeal, the Defence submits that the Trial Chamber erred by failing to give any role to the Defence in the process of assessing the eligibility of victims.[738] The Defence argues that "basic principles of fairness dictate that [Mr Ntaganda] should be afforded an ability to make submissions on the eligibility of the victims he is being ordered to pay".[739]

351. The Defence raises related arguments elsewhere in its appeal brief. Under its first ground of appeal, the Defence contends that the Trial Chamber overlooked the Defence's submissions on its involvement in the assessment of applications for reparations[740] and rejected its request for guidance regarding, *inter alia*, its access to application forms.[741] Under its second ground of appeal, the Defence submits that the Trial Chamber failed to provide a reasoned opinion by systematically refraining from addressing the Defence's applications for access to the application forms of potential new beneficiaries[742] and its submissions regarding its involvement in the eligibility assessment.[743]

352. In its reply, the Defence contends that the due process rights of Mr Ntaganda were not fully enforced in that the Defence was not given an opportunity to challenge the Trial Chamber's guidance to the Registry.[744]

2. Victims Group 1's submissions before the Appeals Chamber

353. Victims Group 1 argue that the Defence had the opportunity to make observations on the victims' applications for participation in the trial proceedings[745]

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[738] Defence Appeal Brief, paras 189-195; Defence Response to the TFV's Observations, paras 46-53.
[739] Defence Appeal Brief, para. 190.
[740] Defence Appeal Brief, paras 45-46.
[741] Defence Appeal Brief, paras 49-50, 53.
[742] Defence Appeal Brief, para. 75.
[743] Defence Appeal Brief, para. 76.
[744] Defence Reply to Victims' Responses, paras 18-30.
[745] Victims Group 1's Response, paras 43, 89.

and on the Registry's information about victims included in the sample.[746] Victims Group 1 further argue that once the Trial Chamber determined the convicted person's liability, the Defence's interest in accessing information about victims is limited.[747]

354. In relation to the Defence's argument under its second ground of appeal that the Trial Chamber failed to provide the necessary reasoning, Victims Group 1 argue that this argument is unsubstantiated and amounts to repeating a disagreement with the Trial Chamber's previous decisions on the Defence's access to the application forms collected by the Registry.[748]

3. Victims Group 2's submissions before the Appeals Chamber

355. Victims Group 2 argue that when collective reparations are awarded, the Defence's involvement in the screening of victims' eligibility "is neither foreseen nor warranted".[749] Victims Group 2 submit that the rights of the convicted person are sufficiently safeguarded by his or her ability to challenge the eligibility criteria.[750]

356. Regarding the Defence's submissions under its second ground of appeal on the alleged lack of sufficient reasoning, Victims Group 2 argue that in view of the collective nature of the reparations in the present case, the Trial Chamber was not required to give a reasoned opinion regarding the Defence's involvement in the assessment of applications.[751]

4. TFV's observations before the Appeals Chamber

357. The TFV submits that in cases in which collective reparations are awarded the convicted person can challenge the eligibility criteria, but the jurisprudence does not establish a role for that person in the eligibility verification at the implementation

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[746] Victims Group 1's Response, para. 83.
[747] Victims Group 1's Response, paras 87-89.
[748] Victims Group 1's Response, paras 36, 38.
[749] Victims Group 2's Response, paras 50, 165; Victims Group 2's Response to the TFV's Observations, para. 22.
[750] Victims Group 2's Response, para. 50.
[751] Victims Group 2's Response, paras 61-62.

stage.[752] It argues that the Defence had the opportunity to challenge the eligibility criteria and will be able to submit observations on the draft implementation plan.[753]

5. Determination by the Appeals Chamber

358. The Defence submits that the Trial Chamber erred by failing to give a meaningful role to the Defence in the process of assessing the eligibility of victims.[754]

(a) Defence involvement in the eligibility assessment conducted in the proceedings before the Trial Chamber

359. The Appeals Chamber takes note of the following provisions of the Court's legal texts and of the jurisprudence. Article 75(3) of the Statute provides in its relevant part:

> Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person […].

360. The Appeals Chamber also notes the related requirement of rule 94(2) of the Rules to notify, *inter alios*, the convicted person of applications for reparations:

> At commencement of the trial and subject to any protective measures, the Court shall ask the Registrar to provide notification of the request to the person or persons named in the request or identified in the charges and, to the extent possible, to any interested persons or any interested States. Those notified shall file with the Registry any representation made under article 75, paragraph 3.

361. Furthermore, the Appeals Chamber recalls that "[t]he convicted person must be given a sufficient opportunity to make submissions" and that

> [the trial chamber] must ensure that the convicted person is adequately on notice as to the information on which it will rely in making its order, so that he or she has a meaningful opportunity to make representations thereon, and it must give notice as to the manner in which it intends to assess that information.[755]

362. The Appeals Chamber further recalls that "the guiding principle for trial chambers must be to ensure that the convicted person, as a party to the litigation, has a

[752] TFV's Observations on the Defence Appeal Brief, para. 18.
[753] TFV's Observations on the Defence Appeal Brief, para. 19.
[754] Defence Appeal Brief, paras 189-195. *See also* paras 45-46, 50.
[755] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 90.

meaningful opportunity to challenge the information on the basis of which a chamber will make an award against him or her".[756]

363. The Appeals Chamber recalls its above finding that the Trial Chamber erred in failing to rule on at least a sample of applications for reparations.[757] As a result of this error, the Defence was unable to participate in the assessment of the eligibility of victims to benefit from reparations, which the Trial Chamber ought to have carried out as part of its review of the above-mentioned sample. The Appeals Chamber finds that, since the amount of the award for reparations in this case should be based on information contained in, among other sources, at least a sample of applications for reparations, the Defence must be able to challenge this information by means of reviewing the applications and making representations thereon.[758] The Defence must also be on notice as to the manner in which the Trial Chamber intends to assess the information.

364. The Appeals Chamber finds that the Trial Chamber erred in this respect. In the circumstances of the present case, the Appeals Chamber considers that the finding of an error in relation to the Defence's involvement in the eligibility assessment also addresses the Defence's argument that the Trial Chamber failed to address the Defence's submissions on its involvement in the assessment of applications for reparations[759] and to provide a reasoned opinion in that regard.[760]

(b) Defence involvement in the eligibility assessment to be conducted at the implementation stage

365. The Appeals Chamber notes that, in light of its finding of an error in the Trial Chamber's failure to rule on a sample of applications and in the Trial Chamber's failure to enable the Defence to participate in the eligibility assessment, there is in principle no need to examine the Defence arguments concerning its involvement in the eligibility assessment at the implementation stage.[761] Indeed, as a result of the Trial Chamber's decision not to rule on any applications, it was intended that the eligibility assessment

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[756] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 256.
[757] *See supra* paras 345-346.
[758] *See also* rule 94(2) of the Rules.
[759] Defence Appeal Brief, paras 45-46, 49-50.
[760] Defence Appeal Brief, paras 75-76.
[761] Defence Appeal Brief, para. 195. *See also* para. 207.

of all potential beneficiaries would be carried out at the implementation stage. By contrast, in the proceedings following this judgment, the Trial Chamber is required to rule itself on the eligibility of a number of potential beneficiaries, rather than deferring such assessment to the implementation stage. However, the Appeals Chamber notes that when the Trial Chamber rules on only a sample of applications, further potential beneficiaries may remain unidentified at the time of the issuance of the new order for reparations. Consequently, further eligibility assessments may be needed at the implementation stage. The Appeals Chamber will therefore consider the Defence's present arguments on the basis that they concern its possible involvement in the eligibility assessment to be carried out at the implementation stage.

366. Turning to those arguments, the Defence seems to challenge what was intended to be the future procedure for the assessment of eligibility of victims by the TFV at the implementation stage. It argues that the Impugned Decision "sets out a regime that fails to respect [Mr Ntaganda's] […] right to a meaningful opportunity to challenge the reparation claims".[762] The Appeals Chamber notes that, according to the Impugned Decision and without prejudice to the foregoing considerations, the eligibility assessment was to be conducted at the implementation stage. To this end, the Trial Chamber instructed the TFV "to include in its draft implementation plan a detailed proposal as to the way in which it expects to conduct the administrative eligibility assessment".[763] It follows that, to the extent that the Defence can be understood to challenge the Trial Chamber's pronouncements as to its role in the eligibility assessment to be conducted at the implementation stage, the Defence's appeal is premature. The modalities of that assessment are not part of the Impugned Decision.

367. In any event, the Appeals Chamber takes note of the argument of the victims and the TFV that the Defence need not be involved in the eligibility assessment at the implementation stage.[764] It also recalls that in the *Al Mahdi* case it found that Trial Chamber VIII "accorded too much weight to the role of Mr Al Mahdi in the screening process".[765] The Appeals Chamber clarified that "Mr Al Mahdi's interests at [that] stage

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[762] Defence Appeal Brief, para. 195. *See also* para. 207.
[763] Impugned Decision, para. 253.
[764] Victims Group 1's Response, paras 87-89; Victims Group 2's Response, paras 50, 165; TFV's Observations on the Defence Appeal Brief, para. 18.
[765] *Al Mahdi* Appeals Chamber Judgment on Reparations, para. 92.

of the proceedings [we]re limited", as "the Trial Chamber ha[d] already set Mr Al Mahdi's monetary liability and […] the results of the screening process [would] have no impact on this".[766] Similarly, in the *Lubanga* case, Trial Chamber II held, with respect to the involvement of the Defence in the assessment of eligibility to be conducted at the implementation stage, that

> the process for locating new applicants and determining their eligibility for reparations will […] have no bearing on Mr Lubanga's liability for reparations or on the size of the award that the Chamber set in its [*Lubanga* Second Reparations Order]. Accordingly, the Chamber determines that the decision on the eligibility of new applicants is delegated to the Trust Fund […], and shall be taken without the Defence's involvement.[767]

368. In addition, the Appeals Chamber recalls that, to the extent that a trial chamber sets out eligibility criteria with respect to those potential beneficiaries upon whose applications it has not ruled and whose eligibility is to be assessed subsequently at the implementation stage, the rights of the convicted person are safeguarded by his or her ability to challenge those criteria in an appeal against the reparations order.[768] The Appeals Chamber has found that in this case the Trial Chamber ought to have ruled on at least a sample of applications. Had the Trial Chamber ruled on a sample, it would have had to set the eligibility criteria for victims to be identified at the implementation stage. To the extent that the Defence's present argument relates to such victims, the Appeals Chamber notes that the Defence does challenge a number of eligibility criteria in the present appeal.

369. The Appeals Chamber finds that the Defence has not demonstrated an error in the Trial Chamber's approach to the Defence's involvement in the assessment of the eligibility of victims, which was intended to be conducted at the implementation stage and which, following this judgment, may still need to be conducted, albeit with respect to a lower number of potential beneficiaries. The Defence's arguments on this point are thus rejected.

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[766] *Al Mahdi* Appeals Chamber Judgment on Reparations, para. 93. *See also* 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 252.
[767] *Lubanga* Decision of 7 February 2019, para. 27.
[768] 2015 *Lubanga* Appeals Chamber Judgment on Reparations, para. 166.

D. The tenth and eleventh grounds of the Defence appeal and the sixth ground of Victims Group 2's appeal: Whether the Trial Chamber erred by delegating judicial functions to the TFV

1. Defence submissions under its tenth and eleventh grounds of appeal

370. The Defence argues that the Trial Chamber erred by delegating judicial functions to the TFV.[769] It submits that "the extent of the abdication of judicial functions to the TFV in the *Ntaganda* case is entirely unprecedented", as the Trial Chamber "left the TFV to its own devices" regarding the way in which to conduct the administrative eligibility assessment.[770] The Defence submits that the Trial Chamber did not lay out a procedure with respect to the timeframes, the distinction between prior and new applicants, or the limits on information which should form part of the assessment.[771] It argues that the Trial Chamber erred by listing harms suffered by indirect victims without linking them to the crimes that form part of the conviction, and thereby failing "to engage with the scope of the conviction".[772]

371. The Defence further argues that the Trial Chamber erred by failing to identify adequately the modalities of reparations considered appropriate, which impeded the right of Mr Ntaganda to challenge the Impugned Decision on appeal.[773] It emphasises the distinction between the identification of modalities of reparations, which relates to a judicial procedure, and the designing of awards for reparations, which relates to the practicalities.[774]

372. The Defence avers that the Trial Chamber erred by failing to put in place a monitoring system over the TFV's decisions, other than retaining the ability to approve the TFV's design and determinations as to the size and nature of the awards.[775] It submits that the Trial Chamber failed to provide for the monitoring of the identification

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[769] Defence Appeal Brief, paras 201-214.
[770] Defence Appeal Brief, para. 205; Defence Response to the TFV's Observations, paras 25-26, 31-32, 35.
[771] Defence Appeal Brief, paras 207-208; Defence Response to the TFV's Observations, paras 27-28.
[772] Defence Appeal Brief, para. 209.
[773] Defence Appeal Brief, paras 210-214.
[774] Defence Response to the TFV's Observations, paras 55-62.
[775] Defence Appeal Brief, paras 215-216.

of new potential beneficiaries and the determination of eligibility by the TFV,[776] thereby failing properly to consider the TFV's limitations.[777]

2. Victims Group 2's submissions in response to the tenth and eleventh grounds of the Defence appeal

373. Victims Group 2 concur with the Defence's argument that the delegation to the TFV of the administrative eligibility screening without guidelines was erroneous.[778] They argue that the absence of criteria and guidelines makes it impossible to challenge future decisions of the TFV.[779] Victims Group 2 submit, however, that "the Defence mistakenly avers that the convicted person enjoys a procedural right to challenge decisions on the eligibility of individual victims".[780] As a result, Victims Group 2 submit that the present ground of appeal should be granted in part, "namely that the Appeals Chamber find that the Trial Chamber erred in failing to set criteria and guidelines for the TFV's eligibility assessment, insofar as it is providing the TFV with unfettered discretion in the matter".[781] Victims Group 2 contend that the remainder of this ground should be rejected as the Defence failed to demonstrate that it was prejudiced by this error.[782]

374. Victims Group 2 also concur with the Defence's argument that "the Trial Chamber erred in the way in which it delegated certain decision-making functions to the TFV", but oppose the Defence's contention that the delegation of the eligibility screening was erroneous in and of itself.[783] Victims Group 2 argue that the eligibility assessment is "the only matter that can and should be delegated to the TFV", but that the Trial Chamber failed to set out eligibility criteria for the administrative screening.[784] Furthermore, Victims Group 2 argue that the Defence did not demonstrate "how the rights of the convicted person were materially affected by the Trial Chamber's error",

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[776] Defence Appeal Brief, paras 217-220; Defence Response to the TFV's Observations, paras 38-44.
[777] Defence Appeal Brief, paras 222-225.
[778] Victims Group 2's Response, para. 146.
[779] Victims Group 2's Response, para. 146.
[780] Victims Group 2's Response, paras 146-147.
[781] Victims Group 2's Response, para. 148.
[782] Victims Group 2's Response, para. 148.
[783] Victims Group 2's Response, paras 149, 154.
[784] Victims Group 2's Response, para. 150.

given that the convicted person has no role in the administrative assessment of eligibility when the award is of a collective nature.[785]

3. *Victims Group 2's submissions under their sixth ground of appeal*

375. Under the sixth ground of their appeal, Victims Group 2 submit that the Trial Chamber erred in fact and/or procedure in making conflicting findings, as a result of which the TFV was "given unfettered discretion as to the allocation of resources between the different groups of victims".[786] They argue that the delegation of authority to the TFV went beyond the administrative screening of potential beneficiaries and extends to "the *de facto* determination of the size of the reparation award to different groups of eligible victims".[787] Victims Group 2 submit, in particular, that the Trial Chamber "failed to provide guidance […] on how to determine the amount of money to be dedicated to the reparation programmes for priority victims, how to determine the amount of money to be expended on programmes for the remainder of eligible beneficiaries and how to ensure that during the entire process of the design and implementation of the reparations all victims are treated fairly and equally".[788] Victims Group 2 argue that in the system created by the Trial Chamber "victims will […] be treated unequally because of the staggering of [the] implementation phase", in contravention of the "do no harm" principle.[789]

376. Victims Group 2 contend that, as a result of the Trial Chamber's failure to set out parameters such as the number of potential beneficiaries or the individual cost to repair, the TFV can design an implementation plan "as it sees fit or practicable" and it will be nearly impossible for the parties to challenge it.[790] They submit that the requirements of the TFV's consultation with the Trial Chamber, under regulation 57 of

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[785] Victims Group 2's Response, para. 153.
[786] Victims Group 2's Appeal Brief, paras 129-135; Victims Group 2's Response to the TFV's Observations, paras 31-33.
[787] Victims Group 2's Appeal Brief, para. 130.
[788] Victims Group 2's Appeal Brief, paras 133-135.
[789] Victims Group 2's Appeal Brief, para. 133.
[790] Victims Group 2's Appeal Brief, paras 130, 132.

the Regulations of the TFV, or of the approval of the implementation plan, are insufficient guarantees.[791]

4. *Defence submissions in response to the sixth ground of Victims Group 2's appeal*

377. In response to Victims Group 2's sixth ground of appeal, the Defence states that it agrees with their argument that the delegation of tasks to the TFV without any guidance "was neither considered nor careful".[792] It further highlights that the TFV's unfettered discretion with respect to the allocation of resources would make it nearly impossible for the convicted person or victims to challenge any proposal.[793] It argues that the "unprecedented level of delegation of duties to the TFV" is accompanied by "an unprecedented lack of supervision" from the Trial Chamber.[794]

5. *Victims Group 1's submissions before the Appeals Chamber*

378. Victims Group 1 submit that, contrary to the Defence's argument, the applicable law and jurisprudence enable a trial chamber to delegate aspects of the assessment of individual applications for reparations to the TFV, based on the eligibility criteria set out by that chamber.[795] They argue that in this case the Trial Chamber has provided the TFV with the necessary guidance and criteria and that it will carry out judicial oversight over the process.[796] Victims Group 1 contend that the Trial Chamber sufficiently determined the framework in which reparations programmes should be developed by the TFV and that it will exercise judicial control by approving or rejecting the TFV's proposals.[797]

379. Victims Group 1 reject the Defence's claim that the Trial Chamber delegated the eligibility assessment to the TFV without a monitoring or oversight system.[798] They submit that the Trial Chamber established criteria of eligibility of victims and directed

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[791] Victims Group 2's Appeal Brief, paras 131-132; Victims Group 2's Response to the TFV's Observations, paras 18-19.
[792] Defence Response to Victims Group 2's Appeal Brief, paras 73-75.
[793] Defence Response to Victims Group 2's Appeal Brief, paras 11, 76.
[794] Defence Response to Victims Group 2's Appeal Brief, para. 76.
[795] Victims Group 1's Response, paras 91-93.
[796] Victims Group 1's Response, para. 93.
[797] Victims Group 1's Response, para. 94.
[798] Victims Group 1's Response, para. 79.

the TFV to include in the draft implementation plan a proposal for the procedure for the eligibility assessment, to be approved by that chamber.[799]

380. Victims Group 1 submit that the sixth ground of Victims Group 2's appeal should be dismissed and refer to their arguments against the Defence's twelfth ground of appeal.[800]

6. TFV's observations before the Appeals Chamber

381. The TFV submits that the Impugned Decision provides "a firm basis" for its eligibility assessment, as it clearly sets out categories of eligible victims, the burden of proof and the standard of proof.[801] The TFV argues that the Trial Chamber directed it to submit a proposal for a procedure for the eligibility assessment, to be approved by the Trial Chamber upon receiving the views of the parties and participants.[802] The TFV submits that the entire process of the eligibility assessment will be overseen by the Trial Chamber, including by means of the TFV's regular reports on implementation.[803]

382. Regarding the modalities of reparations, the TFV submits that the Impugned Decision contains the essential elements and that the Regulations of the TFV confirm that it should "have a say in how the reparations are designed and implementation-related methods devised", subject to the oversight and monitoring of the Trial Chamber.[804]

7. Determination by the Appeals Chamber

383. The Appeals Chamber notes that the Defence and Victims Group 2 raise three main issues: (i) the delegation to the TFV of authority to identify beneficiaries and verify their eligibility, and the adequacy of the Trial Chamber's guidelines to the TFV in this respect; (ii) the clarity of the guidelines to the TFV in relation to the modalities of reparations and the costs of implementation; and (iii) the extent of judicial oversight of the activities of the TFV. In essence, the overall argument is that the level of delegation by the Trial Chamber to the TFV is excessive, and that the Trial Chamber

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[799] Victims Group 1's Response, paras 80-81.
[800] Victims Group 1's Response, para. 98.
[801] TFV's Observations on the Defence Appeal Brief, paras 6-7, 30.
[802] TFV's Observations on the Defence Appeal Brief, paras 10-11.
[803] TFV's Observations on the Defence Appeal Brief, paras 12-17, 30-31.
[804] TFV's Observations on the Defence Appeal Brief, paras 21-25.

has abdicated its responsibilities. The Appeals Chamber will examine these issues in turn.

(a) Whether the Trial Chamber gave clear instructions to the TFV on verification of eligibility

384. The Defence challenges the extent of the delegation of what it perceives to be judicial functions to the TFV in relation to the eligibility assessment of beneficiaries.[805] The Defence focuses on two aspects of the process. First, it argues that the Trial Chamber failed to lay out a procedure, timeframes and the manner in which the TFV should process information.[806] Victims Group 2 also argue that the Trial Chamber failed to set out eligibility criteria for the administrative screening.[807] Second, the Defence submits that the Trial Chamber failed to link harms suffered by indirect victims to the crimes that form part of the conviction.[808]

385. The Appeals Chamber recalls that, in certain cases, the TFV, rather than the Trial Chamber, may identify victims and verify their eligibility. Regulation 62 of the Regulations of the TFV expressly provides for such identification and assessment by the TFV.[809] Therefore, the delegation of authority in this respect to the TFV does not, on its own, constitute an error.

386. The Appeals Chamber recalls its above finding that the Trial Chamber erred in failing to rule on a sample of applications. As a result, and as set out above,[810] the eligibility assessment to be conducted in the implementation of the future reparations order may thus differ from what was originally intended. However, as some considerations with respect to the present arguments of the Defence and Victims Group 2 remain valid for such a future implementation stage, the Appeals Chamber will examine these arguments despite its above-mentioned finding of an error. It notes that in the present case, after having decided not to examine individual applications for

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[805] Defence Appeal Brief, para. 205.
[806] Defence Appeal Brief, para. 207.
[807] Victims Group 2's Response, para. 150.
[808] Defence Appeal Brief, para. 209.
[809] Regulation 62 of the Regulations of the TFV reads: "The Secretariat shall verify that any persons who identify themselves to the Trust Fund are in fact members of the beneficiary group, in accordance with any principles set out in the order of the Court".
[810] *See supra* para. 365.

reparations, the Trial Chamber found it appropriate to establish the eligibility criteria and indicate "the characteristics of the categories of eligible victims, in order to enable their identification by the TFV".[811] It is not an error *per se* for a trial chamber to delegate the identification of (some of) the beneficiaries and the verification of their eligibility to the TFV. The issue under this ground of appeal is the manner in which this delegation was carried out, and whether the Trial Chamber set out adequate eligibility criteria.

387. The first group of arguments raised by the Defence concern the absence of a procedure for the TFV to carry out the eligibility assessment. The Trial Chamber did not lay out such a procedure. It directed the TFV to include in the draft implementation plan "a detailed proposal as to the way in which it expects to conduct the administrative eligibility assessment".[812] The draft implementation plan must be submitted to the Trial Chamber for approval.[813] Therefore, although the Trial Chamber did not lay out a procedure for verification of eligibility in the Impugned Decision, it will adopt one at a later stage, based on the proposal submitted by the TFV. Nevertheless, the Appeals Chamber finds that the Trial Chamber ought already to have set out at least the most fundamental parameters of this procedure in the Impugned Decision. While an administrative screening of eligibility can be carried out by the TFV, the outcome of any such screening must be judicially approved by the Trial Chamber. Those who the TFV finds not to be eligible should be able to challenge the TFV's findings before the Trial Chamber. The Trial Chamber's failure to indicate these parameters of the future procedure for the eligibility assessment amounts to an error. If the Trial Chamber had not committed this error, the Impugned Decision would have been different in that it would have set out these important parameters. The Appeals Chamber therefore finds that this error materially affects the Impugned Decision and that it must be reversed in this respect. In the future order for reparations, the Trial Chamber is instructed to provide for specific judicial approval of administrative screenings that find beneficiaries eligible to benefit from reparations; and for the possibility for those who are found not to be eligible to challenge the TFV's findings before the Trial Chamber.

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[811] Impugned Decision, para. 105.
[812] Impugned Decision, para. 253.
[813] Impugned Decision, para. 249.

388. The Defence also argues, in the context of the delegation of authority to the TFV, that the Trial Chamber merely listed harms suffered by indirect victims, of which four were copied from the *Lubanga* Amended Reparations Order, without linking them to the crimes that form part of the conviction.[814] The Defence seems to argue that this alleged lack of clarity in the definition of harms suffered by indirect victims will increase "the extent of the abdication of judicial functions to the TFV".[815]

389. The Appeals Chamber notes that the Trial Chamber defined the harms suffered by indirect victims as a result of the crimes committed by Mr Ntaganda as follows:

> i. Material deprivation that accompanies the loss of the family member's contributions;
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> ii. Loss, injury or damage suffered by person intervening to attempt to prevent the direct victims from being further harmed as a result of the relevant crime;
>
> iii. Psychological harm experienced as a result from the sudden loss of a family member, including behavioural disorders, such as trauma, depression, suicidal tendencies and feelings of hatred;
>
> iv. Psychological harm and trauma as a result of what they witnessed during or after the attacks;
>
> v. Psychological, psychosocial, and material harm resulting from aggressive behaviour by former child soldiers reunited with their families and communities; and
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> vi. Transgenerational harm of children of direct victims.[816]

390. In the *Lubanga* Amended Reparations Order, the Appeals Chamber defined the harms suffered by indirect victims as a result of the crimes committed by Mr Lubanga as follows:

> i. Psychological suffering experienced as a result of the sudden loss of a family member;
>
> ii. Material deprivation that accompanies the loss of the family members' contributions;

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[814] Defence Appeal Brief, para. 209.
[815] Defence Appeal Brief, paras 205, 209.
[816] Impugned Decision, para. 183(d).

iii. Loss, injury or damage suffered by the intervening person from attempting to prevent the child from being further harmed as a result of a relevant crime; and

iv. Psychological and/or material sufferings as a result of aggressiveness on the part of former child soldiers relocated to their families and communities.[817]

391. The Appeals Chamber notes that, while it is true that some types of harm identified by the Trial Chamber are almost identical to those identified in the *Lubanga* case, others are different. In particular, (i) behavioural disorders, (ii) psychological harm and trauma as a result of what victims witnessed during or after the attacks, as well as (iii) transgenerational harm of children of direct victims, are listed in the present case in addition to the types of harm listed in the *Lubanga* case. It is thus clear that the Trial Chamber did not merely copy the list of harms from the *Lubanga* Amended Reparations Order. A certain overlap is understandable, given that both Mr Lubanga and Mr Ntaganda were convicted of the war crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities. However, the Trial Chamber appears to have had due regard to the different scope of the conviction in the present case, as it also defined additional types of harm.

392. The Appeals Chamber further notes that the Trial Chamber held, for both direct and indirect victims, that "a causal link must always exist between the crimes for which the person was convicted and the harm alleged".[818] The Trial Chamber also emphasised that indirect victims "suffer harm as a result of the harm suffered by the direct victims" and that the latter harm was "brought about by the commission of the crimes for which the defendant was convicted".[819] Therefore, although the Trial Chamber did not link the harms suffered by indirect victims to specific crimes of which Mr Ntaganda was convicted, it made it clear that such a link must be established with regard to direct victims. Regarding the latter victims, the Impugned Decision sets out a number of eligibility criteria which correspond to the findings which the Trial Chamber made in the Conviction Judgment in relation to the crimes of which Mr Ntaganda was convicted.[820] The Appeals Chamber is thus not persuaded that the Trial Chamber failed

[817] *Lubanga* Amended Reparations Order, para. 58(b).
[818] Impugned Decision, para. 33; *see also* para. 38.
[819] Impugned Decision, para. 35.
[820] Impugned Decision, para. 106.

to link the harm suffered by indirect victims to the crimes that form part of the conviction.[821]

393. The Appeals Chamber also takes note of the TFV's view that the Impugned Decision clearly sets out categories of eligible victims, including indirect victims, "by reference to each of the crimes" of which Mr Ntaganda was convicted, and the assurance of the TFV that it is in a position to apply these criteria.[822] While not on its own dispositive of the present issue, this is a relevant consideration in determining whether the TFV received sufficiently clear guidelines with respect to the harm suffered by indirect victims. This is without prejudice to the Appeals Chamber's conclusion, under the fourth ground of the Defence's appeal, on the issue of transgenerational harm.[823]

(b) Whether the Trial Chamber gave clear guidelines to the TFV on the modalities of reparations

394. The Defence argues that the Trial Chamber merely listed available modalities of reparations, leaving the choice of options to the TFV, and thus erred by failing to identify adequately the modalities of reparations considered appropriate.[824]

395. The Appeals Chamber recalls that an order for reparations must identify the appropriate modalities of reparations.[825] Article 75(2) of the Statute reads in its relevant part:

> The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

396. The Appeals Chamber has held that

> a modality of reparations is not an award for reparations, as meant by the Regulations of the Trust Fund. Rather, awards for reparations are designed based on the modalities of reparations identified by the Trial Chamber. Thus, in the view of the Appeals Chamber, if a Trial Chamber does not specify the nature and size of an award for reparations in the order itself, it must identify the modalities

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[821] Defence Appeal Brief, para. 209.
[822] TFV's Observations on the Defence Appeal Brief, paras 6-7, 30.
[823] *See infra* paras 470-497.
[824] Defence Appeal Brief, paras 210-214.
[825] 2015 *Lubanga* Appeals Chamber Judgment on Reparations, para. 32.

> of reparations that are appropriate for the circumstances of that case, based upon which the Trust Fund then designs the award for reparations. Accordingly, the Appeals Chamber holds that, in the order for reparations, at a minimum, the Trial Chamber must identify those modalities of reparations which it considers appropriate based on the circumstances of the specific case before it.[826]

397. The Appeals Chamber notes that in the present case the Trial Chamber identified the modalities of reparations which it considered appropriate and described them in considerable detail. The Trial Chamber held that "the modalities of reparations may include measures of restitution, compensation, rehabilitation, and satisfaction, which may incorporate, when appropriate, a symbolic, preventative, or transformative value".[827] It found that "in principle" the listed modalities "appear appropriate to address the harms" caused to the victims.[828] The Trial Chamber noted that full restitution "will often be unachievable for victims of the crimes in this case".[829] Regarding compensation, the Trial Chamber directed the TFV "to include in its draft implementation plan a recommendation as to compensation, including the amount of compensation, if any" and decided that it would "then determine whether compensation for any harm may be appropriate in this case".[830]

398. The Trial Chamber also described the goals of rehabilitation and listed possible measures of rehabilitation:

> providing preventative, curative, and rehabilitative medical services (including psychiatric and psychological care); assistance as regards general rehabilitation and housing; psychosocial rehabilitative services, including a component of treatment for those who suffer from any addiction; re-integrative and social services; community and family-oriented assistance and services, including mediation; vocational training and education, along with micro-credits, income generating opportunities or sustainable work that promote a meaningful role in society.[831]

399. The Trial Chamber directed that rehabilitation measures include "the means of addressing the shame that victims, particularly former child soldiers and victims of rape

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[826] 2015 *Lubanga* Appeals Chamber Judgment on Reparations, para. 200. *See also* regulations 55 and 69 of the Regulations of the TFV.
[827] Impugned Decision, para. 199; *see also* Impugned Decision, paras 82-88.
[828] Impugned Decision, para. 200.
[829] Impugned Decision, para. 201.
[830] Impugned Decision, para. 202.
[831] Impugned Decision, para. 203 (footnotes omitted).

and sexual slavery may feel".[832] Furthermore, the Trial Chamber listed, among others, the following satisfaction measures: issuing certificates acknowledging the harm experienced by the victims, outreach and promotional programmes, and educational campaigns.[833] The Trial Chamber also considered symbolic reparations, including the construction of a community centre to be named after *Abbé* Bwanalonga.[834]

400. In the *Lubanga* case, the Appeals Chamber held that:

> The Trust Fund shall design awards for reparations on the basis of all or some of those modalities [which the Trial Chamber considers appropriate] and should link the relevant modalities to the award for reparations in its draft implementation plan, in order for the Chamber to review the determinations made in this respect.[835]

401. In the present case, the Trial Chamber directed the TFV "to design an implementation plan on the basis of all the identified modalities of reparations, in consultation with the victims".[836] The Appeals Chamber finds no error in the Trial Chamber's approach in this regard.

402. Regarding the Defence's argument that the Impugned Decision only contains a list of available options of modalities and leaves the choice to the TFV,[837] the Appeals Chamber recalls that "it is possible that not all the modalities will ultimately be reflected in the awards for reparations".[838] Indeed, the Appeals Chamber previously held that the TFV should design awards for reparations "on the basis of all *or some* of those modalities" which the trial chamber considers appropriate.[839]

403. In the present case, the Trial Chamber noted:

> It is possible that not all the modalities outlined above may ultimately be included in such a [draft implementation] plan. In this respect, should the TFV consider that any of the above modalities of reparations is not appropriate, it is instructed

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[832] Impugned Decision, para. 206.
[833] Impugned Decision, para. 207.
[834] Impugned Decision, para. 208.
[835] 2015 *Lubanga* Appeals Chamber Judgment on Reparations, para. 200 (footnote omitted).
[836] Impugned Decision, para. 212.
[837] Defence Appeal Brief, para. 212.
[838] 2015 *Lubanga* Appeals Chamber Judgment on Reparations, para. 201.
[839] 2015 *Lubanga* Appeals Chamber Judgment on Reparations, para. 200 (emphasis added).

> to include in its draft implementation plan an explanation regarding the reasons.[840]

404. The Appeals Chamber is therefore satisfied that it was not an error for the Trial Chamber to allow the TFV to design the implementation of the award for reparations on the basis of some, rather than all, modalities which the Trial Chamber found to be appropriate. For the same reason, the Appeals Chamber is also not persuaded that the Trial Chamber's failure to direct the TFV to design programmes with respect to all modalities identified in the Impugned Decision impedes Mr Ntaganda's right to challenge those modalities on appeal.[841]

405. Turning to the issue of the cost of the programmes which the TFV is tasked to design, the Appeals Chamber notes Victims Group 2's argument that the Trial Chamber failed to provide guidance on the cost to repair the harm and on the allocation of resources between various groups of victims, leaving "unfettered discretion" to the TFV and leading to unequal treatment.[842]

406. The Appeals Chamber notes that the following considerations are without prejudice to its overall determination of the manner in which the award was calculated, as addressed under the fifteenth ground of the Defence appeal and the second, fourth and fifth grounds of Victims Group 2's appeal.[843] The present argument of Victims Group 2 is not concerned with whether the Trial Chamber's findings on the costs of repair are sufficiently clear to inform its determination of the amount of the award. Rather, Victims Group 2 raise the question of whether the Trial Chamber's guidance to the TFV on the cost to repair and the allocation of resources between various groups of victims is sufficiently clear and whether the activities of the TFV will be under judicial supervision. For the reasons that follow, the Appeals Chamber is not persuaded by Victims Group 2's argument.

407. The Appeals Chamber recalls that "trial chambers should seek to define the harms and to determine the appropriate modalities for repairing the harm caused with a

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[840] Impugned Decision, para. 212.
[841] Defence Appeal Brief, para. 214.
[842] Victims Group 2's Appeal Brief, paras 129-133, 135.
[843] *See supra* paras 231-274.

view to, ultimately, assessing the costs of the identified remedy".[844] The Appeals Chamber notes that the Trial Chamber referred to the cost estimates for various programmes made by the TFV and directed the TFV to keep the costs at a minimum.[845] In particular, the Trial Chamber noted the TFV's estimates as to the costs of, *inter alia*, medical treatment, psychological rehabilitation, vocational training, and building a school or health centre.[846] The Trial Chamber also considered the views of experts on standard compensation amounts,[847] examples of costs of reparations projects provided by the TFV,[848] the estimated cost of repairing the health centre in Sayo,[849] and the costs to repair the harm set by trial chambers in other cases.[850] The Trial Chamber then set the total award for reparations at 30 million USD.[851]

408. The Appeals Chamber is therefore satisfied that, although the Trial Chamber did not set the specific amounts with respect to each reparations programme, its guidelines for the TFV, based on various cost estimates, are sufficiently clear in the circumstances.

409. Furthermore, contrary to Victims Group 2's argument, the Impugned Decision does not vest the TFV with "unfettered discretion on how to divide or allocate resources".[852] The Trial Chamber directed the TFV to:

> describe the reparation projects it intends to develop, indicating the details of the proposed collective awards, each of the collective projects with individualised components, and the modalities of reparations identified in [the Impugned Decision] considered appropriate to address each of the harms. The TFV should also clearly indicate the methods of implementation, steps to be taken, direct and indirect costs, the expected amount that the TFV will use to complement the awards, and the expected timeline necessary for the projects' development and implementation.[853]

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[844] *Katanga* Appeals Chamber Judgment on Reparations, para. 72.
[845] Impugned Decision, para. 213, *referring to* TFV February 2020 Submissions, paras 131-136.
[846] Impugned Decision, para. 236.
[847] Impugned Decision, paras 237-240.
[848] Impugned Decision, para. 241.
[849] Impugned Decision, para. 242.
[850] Impugned Decision, paras 243-244.
[851] Impugned Decision, para. 247.
[852] Victims Group 2's Appeal Brief, para. 130.
[853] Impugned Decision, para. 249.

410. It is thus clear that all proposals of the TFV with respect to the methods of implementation of the Impugned Decision and their costs will need to be approved by the Trial Chamber. The Appeals Chamber is therefore not persuaded that the Trial Chamber erred in failing to duly constrain the TFV's discretion in this respect. Similarly, the Appeals Chamber finds no merit in Victims Group 2's argument that the Impugned Decision leaves "entirely unregulated" the amount of expenditure with respect to priority victims.[854] To the contrary, the Trial Chamber indicated that

> priority should be given to individuals who require immediate physical and/or psychological medical care, victims with disabilities and the elderly, victims of sexual or gender-based violence, victims who are homeless or experiencing financial hardship, as well as children born out of rape and sexual slavery and former child soldiers.[855]

411. Accordingly, the Trial Chamber directed the TFV:

> to submit in the shortest time possible and within three months of the issuance of the present order at the latest, an initial draft implementation plan focused exclusively on the options for addressing the most urgent needs of victims that require priority treatment […].[856]

412. Similarly to the "general" draft implementation plan,[857] the urgent plan for the priority victims will also be reviewed by the Trial Chamber. The Appeals Chamber therefore rejects Victims Group 2's argument that the Impugned Decision leaves too much discretion to the TFV in determining options for addressing the needs of the priority victims.

(c) Whether the Impugned Decision provides for sufficient judicial oversight of the activities of the TFV

413. The Defence argues that the Trial Chamber erred by failing to put in place a monitoring system over the TFV's decisions on victims' eligibility.[858] Victims Group 2 contend that, as a result of the Trial Chamber's failure to set out the basic parameters, it will be nearly impossible for the parties to challenge the TFV's proposals and that

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[854] Victims Group 2's Appeal Brief, paras 132, 135.
[855] Impugned Decision, para. 214.
[856] Impugned Decision, para. 252; p. 97.
[857] Impugned Decision, p. 97.
[858] Defence Appeal Brief, paras 215-225.

the requirement of the TFV's consultation with the Trial Chamber is an insufficient guarantee.[859]

414. As discussed above, the Appeals Chamber finds an error in the Trial Chamber's failure to set out the requirement of judicial approval of the TFV's eligibility assessments and the possibility to challenge those assessments before the Trial Chamber.[860] The following determination concerns other aspects of the implementation to be carried out by the TFV.

415. Regulation 57 of the Regulations of the TFV, applicable where "the activities and projects of the Trust Fund are triggered by a decision of the Court", provides:

> The Trust Fund shall submit to the relevant Chamber, via the Registrar, the draft implementation plan for approval and shall consult the relevant Chamber, as appropriate, on any questions that arise in connection with the implementation of the award.

416. Regulation 58 of the Regulations of the TFV reads:

> The Trust Fund shall provide updates to the relevant Chamber on progress in the implementation of the award, in accordance with the Chamber's order. At the end of the implementation period, the Trust Fund shall submit a final narrative and financial report to the relevant Chamber.

417. The Appeals Chamber further notes that the applicable regulations of the Regulations of the TFV require the TFV, in addition to submitting the draft implementation plan for the Trial Chamber's approval: (i) to consult the Trial Chamber "on any questions that arise in connection with the implementation of the award";[861] (ii) provide updates on progress;[862] and (iii) submit a final narrative and financial report.[863] The Appeals Chamber finds that these requirements provide for a sufficient oversight by the Trial Chamber of the implementation process, including the design of reparations programmes by the TFV and their implementation.

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[859] Victims Group 2's Appeal Brief, paras 130-132; Victims Group 2's Response to the TFV's Observations, paras 18-19.
[860] *See supra* para. 387.
[861] Regulation 57 of the Regulations of the TFV.
[862] Regulation 58 of the Regulations of the TFV.
[863] Regulation 58 of the Regulations of the TFV.

418. Finally, the Appeals Chamber is not persuaded that it will be "nearly impossible" for the victims to challenge aspects of the implementation by the TFV.[864] The Trial Chamber clearly indicated that the TFV must prepare the draft implementation plan in consultation with the victims.[865] There is thus nothing to suggest that the victims will not be able to challenge the TFV's proposals. In particular, in terms of allocation of resources to different groups of victims, and the concern expressed in this regard by Victims Group 2, they will be able to seise the Trial Chamber should they believe that the TFV's proposal in this respect is incorrect; and therefore the concern that the Trial Chamber has abdicated its responsibilities in requesting the TFV to produce a draft implementation plan, which will also cover such issues, is misplaced.

(d) Conclusion

419. For the foregoing reasons, the Appeals Chamber finds an error in the Trial Chamber's failure to set out the requirement for judicial approval of the TFV's findings on eligibility. It rejects the remainder of the arguments of the Defence and Victims Group 2 concerning the extent of the Trial Chamber's delegation of authority to the TFV.

IX. GROUNDS OF APPEAL ON EVIDENTIARY ISSUES

A. The third ground of the Defence appeal

420. The Defence's third ground of appeal alleges that the Trial Chamber "committed a mixed error of law and fact by adopting a new principle, *i.e. 'do no harm',* without taking into consideration the current security situation and the rising tensions among communities in Ituri".[866]

1. Relevant parts of the Impugned Decision

421. In setting out the principles applicable to reparations, the Trial Chamber observed:

> Principles on reparations, which are to be distinguished from the order for reparations, are general concepts that, while formulated in light of the circumstances of a specific case, can nonetheless be applied, adapted, expanded

[864] Victims Group 2's Appeal Brief, para. 130.
[865] Impugned Decision, para. 212.
[866] Defence Appeal Brief, p. 30.

> upon, or added to by future trial chambers. As such, the Chamber adopts the principles established by different chambers of the Court in previous cases, as it considers them to be of general application. It has also adapted and expanded them, identifying additional principles, and has rearranged them as necessary in light of the specific circumstances of the present case.[867]

422. In relation to the "do no harm" principle specifically, the Trial Chamber, in its overview at the start of the Impugned Decision, stated that, after the issuance of the decision, it was the Court's duty "as a whole, including the Registry as appropriate, and of all those who assist in its work, including the Legal Representatives of Victims […] and the [TFV], depending on their roles, to manage the victims' expectations through proper outreach and communication".[868] The Trial Chamber referred in a footnote to, *inter alia*, the "do no harm" principle as elaborated upon later in the decision.[869]

423. The Trial Chamber made the same cross-reference to the "do no harm" principle when it made the following findings: when stating that there would be an overlap between the principles it would set out, which "is due to their complementary nature, which requires that they are considered as a whole and not in isolation, in order to adequately assess and address the victims' harms in a holistic manner";[870] when dealing with stigmatisation, and stating that "[t]he Court should avoid further stigmatisation of the victims and reinforcing discrimination by their families and communities";[871] when stating that "reparations awards must avoid creating tensions, jealousy, or animosity among affected communities and between cohabiting groups";[872] when finding that individual reparations should be awarded in a way that avoids creating or adding tensions and divisions within the relevant communities;[873] and when stating that "[c]ertain measures of satisfaction require especial consultation with victims, particularly regarding victims of gender and sexual-based violence".[874]

424. What it then stated about the principle itself was the following:

> 50. The 'do no harm' principle stems from the field of international humanitarian assistance. It is an internationally recognised principle that complements the

[867] Impugned Decision, para. 29 (footnotes omitted).
[868] Impugned Decision, para. 6.
[869] Impugned Decision, fn. 17.
[870] Impugned Decision, para. 30, fn. 80.
[871] Impugned Decision, para. 44, fn. 110.
[872] Impugned Decision, para. 44, fn. 111.
[873] Impugned Decision, para. 79.
[874] Impugned Decision, para. 88, fn. 239.

> humanitarian principles of humanity, impartiality, neutrality, and independence. It requires humanitarian actors to anticipate, monitor, and address the potential or unintended negative effects of their actions. Considering the object and purpose of reparations, the 'do no harm' principle shall be applicable throughout the proceedings.
>
> 51. When deciding on the types and modalities of reparations, the Court shall ensure that reparation measures themselves do no harm. At a minimum, this includes taking all steps necessary to ensure that access to justice and reparations by victims and affected communities does not lead to further or secondary victimisation, that they do not create or exacerbate security concerns or tensions among communities, and that victims are not endangered or stigmatised as a result. The Court should ensure that particular attention is paid to victims belonging to groups that are more vulnerable.
>
> 52. This principle should have particular application (i) when conducting victim identification and eligibility screening; (ii) when developing reparations orders and plans; and (iii) when carrying out the approved reparations measures. In addition, the observance of the 'do no harm' principle should guide, to the extent possible, the application of the other relevant principles stated in the present order, as they interact with each other.[875]

425. Later in the Impugned Decision, when deciding on the types and modalities of reparations and, in particular, when explaining why it had "concluded that collective reparations with individualised components are the most appropriate in the present case",[876] the Trial Chamber stated:

> At the same time, this approach addresses the concerns that victims should receive equal reparations to avoid awards being a source of jealousy, animosity, or stigmatisation among the affected communities and between interethnic groups, especially given the unstable security situation on the ground. As such, this approach may avoid creating perceptions of hierarchy between victims and of placing a higher value on some harms, while ensuring that reparations respond to the victims' harms and needs.[877]

426. Finally, when dealing with the "[p]rocedure for the adoption of the implementation plan", the Trial Chamber stated that the TFV "shall ensure that consultations are conducted in compliance with the 'do no harm' principle, guarantee accessibility and meaningful participation of victims, respect for their diversity as to their particular needs and interests, including gender-specific considerations, and take

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[875] Impugned Decision, paras 50-52 (footnotes omitted).
[876] Impugned Decision, para. 194.
[877] Impugned Decision, para. 194.

into account any obstacles victims may face in coming forward and expressing their views".[878]

2. Defence submissions before the Appeals Chamber

427. According to the Defence, the Trial Chamber "committed a mixed error of law and fact by adopting a new principle, *i.e. 'do no harm'*, without taking into consideration the current security situation and the rising tensions among communities in Ituri".[879]

428. The Defence refers to the Trial Chamber's adoption of this principle and its finding that, "[w]hen deciding on the types and modalities of reparations, the Court shall ensure that reparation measures themselves do no harm" and "do not create or exacerbate security concerns or tensions among communities".[880] The Defence submits that, during the reparations proceedings, it requested the Trial Chamber "to take into consideration, when issuing its Reparation Order, the current security situation in Ituri, including in particular, '[…] the ongoing and continued intercommunal tensions between the Lendu and Hema communities, the creation of new community-affiliated armed groups and the ensuing violence'".[881] In the view of the Defence, the Trial Chamber's failure to take this situation into consideration was an error.[882]

429. The Defence recalls that the security situation it was referring to in Ituri was described by the Registry in its second report, and it recalls the Registry's submissions thereon.[883] The Defence recalls that it "underscored that for many years now, the region of Ituri has been torn apart by armed conflicts" and that "to this day, since the beginning of the ethnic conflict in 1996 that developed into protracted armed conflicts involving many armed groups, numerous Ituri inhabitants, from various ethnic groups including the Hema and the Lendu, were displaced on more than one occasion from several villages they lived in, including villages where crimes for which Mr Ntaganda was

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[878] Impugned Decision, para. 250.
[879] Defence Appeal Brief, p. 30.
[880] Defence Appeal Brief, paras 92-93, *referring to* Impugned Decision, paras 50-51.
[881] Defence Appeal Brief, para. 94, *referring to* Defence Observations on the Registry's First Report on Reparations, paras 52-55.
[882] Defence Appeal Brief, para. 95.
[883] Defence Appeal Brief, paras 96-97.

found guilty were committed".[884] It argues that, "attempting to establish in 2021, harm suffered by victims during the period from 6 August 2002 to 31 December 2003, that years later continues to affect the victims without interruption, is an almost impossible endeavour, which cannot take place in the abstract".[885] It argues that "[t]he ongoing movements of the population of Ituri as a result of the never-ending armed conflicts must be taken into consideration".[886]

430. In its view, "[t]he ICC reparations scheme is ill-designed to address this situation as it focusses on the harm suffered by victims who belong to one side of a protracted armed conflict, during which crimes were committed by members belonging to all sides; instead of addressing the harm suffered by all victims of this protracted armed conflict, belonging to all sides".[887] It submits that, "[t]aking into consideration that the harm suffered by more than half of the victims is ignored because, *inter alia*, the Prosecutor did not bring charges against members of the other sides, it certainly cannot be said that the ICC reparations scheme is driven by the humanitarian principles of humanity, impartiality, neutrality and independence".[888] The Defence argues that implementation of reparations that address harm of victims belonging to one side of the conflict only, "unless the circumstances of the protracted armed conflict that started as early as 1996 are fully taken into consideration", was "likely to exacerbate security concerns and tensions among communities, possibly leading to yet another full-blown community conflict".[889]

431. Recalling the TFV's aim when it proposed the "do no harm" principle,[890] the Defence submits that, one way the principle "can meaningfully inform the reparations process is to ensure that the identification of the extent of the harm suffered by victims

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[884] Defence Appeal Brief, para. 98.
[885] Defence Appeal Brief, para. 98.
[886] Defence Appeal Brief, para. 98.
[887] Defence Appeal Brief, para. 99.
[888] Defence Appeal Brief, para. 99.
[889] Defence Appeal Brief, para. 100.
[890] Defence Appeal Brief, para. 101: "When the TFV proposed the '*do no harm*' principle, its aim was '[…] to inform the choice of the types and modalities of reparations, as well as the advisability of their practical implementation throughout reparations proceedings'. The TFV also stated that '[a]t the development stage of reparations orders and implementation plans, the 'do no harm' principle would imply amending or discarding a reparation measure under consideration when there is a strong basis to believe that its execution would have a negative impact that would outweigh the positive outcome initially foreseen'".

in this case – and the determination of the cost to repair the same – take into consideration the circumstances of the ongoing protracted armed conflict in Ituri".[891] In its view, "[t]his will be most important when determining whether there was a break in the chain of causality that would end the Convicted Person's liability for harm suffered in the 2002-2003 period".[892]

432. The Defence further submits that the application of this principle "also militates in favour of engaging victims belonging to the other sides of the ongoing protracted armed conflict, and, more importantly, the implementation of programs by the TFV, pursuant to its assistance mandate, directed at all victims who suffered during the relevant period".[893]

433. According to the Defence, the Trial Chamber's error "impacted the Impugned Decision by failing to consider Defence submissions based on the *'do no harm'* principle", and the Appeals Chamber should issue "a *new or significantly amended* reparations order, taking into consideration the ongoing protracted armed conflict in Ituri and the current security situation".[894]

3. *Victims Group 1's submissions before the Appeals Chamber*

434. Victims Group 1 submit that, contrary to the submissions of the Defence, the Trial Chamber took into consideration the victims' security situation.[895] They further argue that the "do no harm" principle is not a new principle and that "the fact that the Chamber refers to it for the first time at this stage of the proceedings pleads for the opposite of the Defence argument".[896] They submit that the Trial Chamber's approach to take into consideration the needs of the victims is especially important "in the context of an interethnic conflict, where one community cannot be favoured over another", and that the principles of "dignity, non-discrimination, non-stigmatisation, and the *do no*

[891] Defence Appeal Brief, para. 102.
[892] Defence Appeal Brief, para. 102.
[893] Defence Appeal Brief, para. 103.
[894] Defence Appeal Brief, para. 104.
[895] Victims Group 1's Response, para. 49, *referring to* Impugned Decision, paras 51, 194.
[896] Victims Group 1's Response, para. 50, *referring to* Impugned Decision, paras 47, 50-52, 250.

harm principle" continue to be re-emphasised by the Trial Chamber during the implementation stage.[897]

435. They further submit that reparations are limited by the scope of the present case.[898] In their view, victims in this case, contrary to the submissions of the Defence, belong to several ethnicities, and the TFV, the LRVs and the Registry are thus expected to work and adapt their communications with the relevant communities in the field in accordance with the circumstances of this case.[899] They further submit that "the balance between the services provided to victims of the three cases having reached the reparations stages in the DRC situation and the support provided through the TFV assistance programs in DRC should indeed help in mitigating any detrimental impacts that could arise from assisting the victims of each specific case − which, incidentally, is the natural corollary to judicial proceedings".[900]

4. Victims Group 2's submissions before the Appeals Chamber

436. Victims Group 2 aver that the error alleged by the Defence under this ground of appeal is unclear.[901] They submit that the Defence argues, on the one hand, "that the Trial Chamber erred in not taking into account its submissions on the nature of the on-going conflict", while on the other hand it argues "that the 'do no harm' can '*meaningfully inform*' the reparations process by ensuring that the extent of the harm take into account the circumstances of the on-going conflict, stating that it would be '*most important when determining whether there was a break in the chain of causation*'".[902] In other words, according to Victims Group 2, the Defence seems to argue "that likely hardly any victims qualify for reparations in the present case because other conflicts are on-going in the region in which they reside".[903] Victim Group 2 submit that this is unacceptable, and it is unclear how it is relevant to the "do no harm" principle.[904] They argue that, in any event, "the fact that the victims in the present case

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[897] Victims Group 1's Response, para. 51, *referring to* Decision on the TFV's Initial Draft Implementation Plan, para. 19.
[898] Victims Group 1's Response, para. 52.
[899] Victims Group 1's Response, para. 53.
[900] Victims Group 1's Response, para. 53.
[901] Victims Group 2's Response, para. 70.
[902] Victims Group 2's Response, para. 70.
[903] Victims Group 2's Response, para. 70.
[904] Victims Group 2's Response, para. 70.

may have also been victims of other crimes and in different periods of time, does not negate their victim status as regards the crimes for which Mr Ntaganda has been convicted".[905]

437. Victims Group 2 further submit that the Defence appears to disagree with the reparations system under the Statute as a whole, without demonstrating how the Trial Chamber erred.[906] They state "that the Trial Chamber was neither entitled nor required to deal with possible deficiencies of the ICC reparations system as such" and that it was correct to adopt the "do no harm" principle.[907] They argue that "[t]his key principle must apply at all stages of the reparations process".[908] They submit that the "modalities of the application of this principle are case specific, and it is incumbent on the TFV to comply with this principle for the purpose of the implementation of the Reparations Order with due regard to specific circumstances of the present case, including the security situation in the affected locations".[909]

438. Victims Group 2 further submit that

> While the Defence might be right in stating that the 'do no harm' principle militates in favour of engaging victims belonging to other sides of the conflict parties and accordingly in favour of the implementation of assistance programmes directed at all victims who suffered during the conflict, the Trial Chamber was neither entitled nor required to order such a measure. The Legal Representative also repeatedly submitted that implementing the reparations in the present case along with putting in place relevant assistance programmes in locations where Lendu and Hema communities live side by side and/or where only a selected part of the inhabitants would benefit from reparations would be the most optimal way to mitigate risks of tensions, jealousy and animosity. Thus, the TFV should consider this option as part of its implementing strategy subject to the availability of resources and operational capacities.[910]

439. Victims Group 2 argue that the submissions of the Defence on the "do no harm" principle were not sufficiently substantiated, since the Defence did not "set out *what*

[905] Victims Group 2's Response, para. 70.
[906] Victims Group 2's Response, paras 71-72.
[907] Victims Group 2's Response, para. 72.
[908] Victims Group 2's Response, para. 72.
[909] Victims Group 2's Response, para. 72.
[910] Victims Group 2's Response, para. 73.

exactly the alleged error is and, more importantly, *how* it is alleged to materially affect the Impugned Decision and in what way".[911]

440. As such, Victims Group 2 submit that the third ground of appeal of the Defence should be dismissed.[912]

5. *Determination by the Appeals Chamber*

441. The Defence argues that, by adopting the "do no harm" principle, "without taking into consideration the current security situation and the rising tensions among communities in Ituri", the Trial Chamber "committed a mixed error of law and fact".[913]

442. While it is not clear to the Appeals Chamber whether the Defence is also challenging the legality of the "do no harm" principle as such, as described by the Trial Chamber, the Appeals Chamber understands the Defence argument to be, broadly, that the Trial Chamber erred in failing to take into account the Defence's submissions as to the ongoing armed conflict in relation to the "do no harm" principle. In its submissions before the Appeals Chamber,[914] the Defence refers, *inter alia*, to testimony presented during the trial and its trial closing brief,[915] and five reports.[916]

443. In relation to the trial testimony and trial closing brief, the Appeals Chamber recalls that, when dealing with reparations, a trial chamber is not required to "analyse all submissions made before the criminal trial chamber again unless raised by a party in the reparations proceedings, who clearly indicates their relevance to his liability for reparations".[917] In this regard, the Appeals Chamber notes that the Defence has not indicated whether these submissions were raised before the Trial Chamber at the time of the reparations proceedings. Accordingly, and to the extent that the Defence suggests that the Trial Chamber erred in not taking them into account, the argument is rejected. Similarly, regarding the five reports, it is not clear to the Appeals Chamber, and the Defence has not indicated, whether these reports had in fact been submitted to the Trial

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[911] Victims Group 2's Response, para. 74.
[912] Victims Group 2's Response, para. 75.
[913] Defence Appeal Brief, p. 30.
[914] Defence Appeal Brief, paras 94-95.
[915] Defence Appeal Brief, para. 98, fn. 146.
[916] Defence Appeal Brief, para. 97, fns 142-143, para. 98, fn. 146.
[917] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 312.

Chamber.[918] Since the Defence has not sought leave to submit them as additional evidence on appeal, pursuant to regulation 62(1) of the Regulations of the Court, they will not be considered further. This is, however, without prejudice to the question as to whether the Trial Chamber or the TFV may consider this information in the future.[919]

444. Furthermore, the Defence presents submissions on the security situation in Ituri, and argues that they were not taken into account by the Trial Chamber. In particular, the Defence states that, in submissions before the Trial Chamber, in response to the Registry Second Report, it had argued that, when issuing the Impugned Decision, the Trial Chamber should take into account "the current security situation in Ituri, including in particular, '[…] the ongoing and continued intercommunal tensions between the Lendu and Hema communities, the creation of new community-affiliated armed groups and the ensuing violence'".[920] The Defence argues that the Trial Chamber erred in failing to take these submissions into account.[921] It refers to the security situation as laid out by the Registry,[922] and refers in footnotes to two sets of submissions it made: the Defence Observations on the Registry's Second Report on Reparations, and the Defence Final Submissions.[923] In its observations, the Defence raised concerns as to inter-communal tensions, arguing that "the reparations process should be designed and implemented with a view to avoid exacerbating intercommunal tensions".[924] It pointed to the difficulties of establishing the casual link and quantum, given the situation of conflict in Ituri for many years.[925] It further argues that Mr Ntaganda should not be held liable for harm which was not attributed to him.[926]

445. The Appeals Chamber notes that indeed the Trial Chamber did not refer to the Defence's submissions as to the protracted armed conflict, nor did it refer to the Registry reports, which are also relied upon by the Defence. In dealing with the "do no harm" principle, the Trial Chamber's statements were largely general in nature, and

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[918] Defence Appeal Brief, para. 98, fn. 146.
[919] For a similar approach, *see* *Al Mahdi* Appeals Chamber Judgment on Reparations, paras 20-21.
[920] Defence Appeal Brief, para. 94.
[921] Defence Appeal Brief, paras 94-95.
[922] Defence Appeal Brief, paras 96-97, *referring to* the Registry Second Report and an annex thereto.
[923] Defence Appeal Brief, para. 94, fn. 139, para. 98, fn. 145.
[924] Defence Observations on the Registry's Second Report on Reparations, para. 55.
[925] Defence Observations on the Registry's Second Report on Reparations, paras 52-59.
[926] Defence Observations on the Registry's Second Report on Reparations, paras 52-59.

unrelated to the case. It did not expressly analyse the submissions presented on the security situation, nor reach developed conclusions as to what they meant.

446. The Trial Chamber did, however, refer in different footnotes to some submissions related to the concerns that victims should be treated equally during the reparations stage and the ongoing insecurity in Ituri.[927] It further referred to the "unstable security situation on the ground" when deciding on the modalities of reparations.[928] In this regard, when setting out the principle of "do no harm", it stated that, in deciding on the types and modalities of reparations, the Court should ensure that reparation measures "do no harm"; it stated that, "[a]t a minimum, this includes taking all steps necessary to ensure that access to justice and reparations by victims and affected communities […] do not create or exacerbate security concerns or tensions among communities, and that victims are not endangered or stigmatised as a result".[929] In making this finding, it referred in two footnotes to submissions by Victims Group 2 related to the "do no harm" principle, noting inter-ethnic tensions and the ongoing insecurity in Ituri.[930] It then found that the principle would have "particular application (i) when conducting victim identification and eligibility screening; (ii) when developing reparations orders and plans; and (iii) when carrying out the approved reparations measures".[931] Later, when deciding on the types and modalities of reparations and, in particular, when explaining why it had "concluded that collective reparations with individualised components are the most appropriate in the present case",[932] it stated:

> At the same time, this approach addresses the concerns that victims should receive equal reparations to avoid awards being a source of jealousy, animosity, or stigmatisation among the affected communities and between interethnic groups, especially given the unstable security situation on the ground. As such, this approach may avoid creating perceptions of hierarchy between victims and of placing a higher value on some harms, while ensuring that reparations respond to the victims' harms and needs.[933]

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[927] *See* Impugned Decision, para. 194, fns 534-536.
[928] Impugned Decision, para. 194.
[929] Impugned Decision, para. 51.
[930] *See* Impugned Decision, fns 133, 134.
[931] Impugned Decision, paras 50-52 (footnotes omitted).
[932] Impugned Decision, para. 194.
[933] Impugned Decision, para. 194.

447. Although not identified by the Trial Chamber as concerning the principle of "do no harm", the latter language reflects the principle as set out above,[934] and, when specifically referring to the "unstable security situation on the ground", the Trial Chamber referred in a footnote to submissions by Victims Group 1, Victims Group 2, and the First Experts Report as to the insecurity in the region.[935]

448. As a result, the Appeals Chamber finds that the Trial Chamber therefore clearly intended that the principle of "do no harm" required ongoing consideration by the Trial Chamber itself, and the TFV, during the implementation process, in the identification and assessment of victims' applications, and in the decision as to particular reparation projects. Furthermore, the Appeals Chamber notes that, although the Trial Chamber could have expressly referred to the Defence's submissions, the Defence has not indicated how the information it points to would have affected Mr Ntaganda's liability for reparations, how it would have affected the Impugned Decision in general, and what the result would have been if it had. In particular, the Defence has not shown concretely how the Trial Chamber's approach would harm other communities or victims of crimes for which Mr Ntaganda was not convicted. The Appeals Chamber therefore rejects these arguments.

449. The Defence also argues that "[t]he ICC reparations scheme is ill-designed to address" the situation in the DRC, as "it focuses on the harm suffered by victims who belong to one side of a protracted armed conflict during which crimes were committed by members belonging to all sides", as opposed to all victims.[936] The Defence submits that the harm of many victims is ignored because "the Prosecutor did not bring charges against members of the other sides", and that it "cannot be said that the ICC reparations scheme is driven by the humanitarian principles of humanity, impartiality, neutrality and independence".[937] The Defence argues that "[t]his is where the '*do no harm*' principle can find application".[938] In its view, implementing reparations to victims on one side only – "unless the circumstances of the protracted armed conflict that started

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[934] *See* Impugned Decision, para. 194, fn. 534 *referring, inter alia, to* CLR2 February 2020 Submissions, paras 16, 23; CLR2 Final Submissions, paras 54, 100; CLR1 Final Submissions, para. 78.
[935] Impugned Decision, para. 194, fn. 535.
[936] Defence Appeal Brief, para. 99.
[937] Defence Appeal Brief, para. 99.
[938] Defence Appeal Brief, para. 100.

as early as 1996 are fully taken into consideration – is likely to exacerbate security concerns and tensions among communities, possibly leading to another full-blown community conflict".[939]

450. To the extent that the Defence is suggesting that, without repairing harm to victims of all sides of the conflict, reparations should not be awarded, the Appeals Chamber finds this argument to be without merit. This case concerns victims of the crimes of Mr Ntaganda. Mr Ntaganda cannot be required to repair harm caused to persons who are not victims of crimes for which he has been convicted.[940] The Defence's argument on this point is thus rejected.

451. Furthermore, the Defence states:

> When the TFV proposed the 'do no harm' principle, its aim was "[…] to inform the choice of the types and modalities of reparations, as well as the advisability of their practical implementation throughout reparations proceedings". The TFV also stated that "[a]t the development stage of reparations orders and implementation plans, the 'do no harm' principle would imply amending or discarding a reparation measure under consideration when there is a strong basis to believe that its execution would have a negative impact that would outweigh the positive outcome initially foreseen".[941]

452. The Appeals Chamber recalls that the Trial Chamber stated that the "do no harm" principle should "be applicable throughout the proceedings".[942] It also recalls how it stated that the principle would have "particular application (i) when conducting victim identification and eligibility screening; (ii) when developing reparations orders and plans; and (iii) when carrying out the approved reparations measures".[943] The Appeals Chamber notes that, indeed, the Trial Chamber did not specifically state that the TFV should not implement a measure if it falls foul of the principle of "do no harm". However, given that the Trial Chamber stated that the principle should be applied throughout the proceedings, it clearly meant that any measure not complying with that principle should be discarded. In this regard, the Appeals Chamber also recalls that the Trial Chamber is responsible for approving the TFV's implementation plan and it is to

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[939] Defence Appeal Brief, para. 100.
[940] *See* rule 85(a) of the Rules.
[941] Defence Appeal Brief, para. 101, *referring to* TFV February 2020 Submissions, paras 30, 32.
[942] Impugned Decision, para. 50.
[943] Impugned Decision, paras 50-52 (footnotes omitted).

be expected that, based on what the Trial Chamber stated, compliance with the principle will be ensured, in this way, if necessary, as plans progress.

453. Moreover, the Defence submits that, "[o]ne of the ways in which the '*do no harm*' principle can meaningfully inform the reparations process is to ensure that the identification of the extent of the harm suffered by victims in this case – and the determination of the cost to repair the same – take into consideration the circumstances of the ongoing protracted armed conflict in Ituri"; it further submits that this is most important "when determining whether there was a break in the chain of causality" which would lead to Mr Ntaganda not being found liable for the harm in question.[944] The Appeals Chamber notes that the issue of breaks in the chain of causation, and the impact (if any) of the protracted armed conflict on the chain of causation, will be addressed under the ninth ground of the Defence appeal. Suffice it to say here that, if a break in the chain of causation is established in a particular case, liability for the harm could not be attributed to the convicted person in question.

454. Finally, the Defence argues that the application of the "do no harm" principle "militates in favour of engaging victims belonging to the *other sides* of the ongoing protracted armed conflict, and, more importantly, the implementation of programs by the TFV, pursuant to its assistance mandate, directed to all victims who suffered during the relevant period".[945] Victims Group 1 and Victims Group 2 also raise this point on appeal,[946] while Victims Group 2 had already raised it before the Trial Chamber.[947]

455. The Appeals Chamber observes that neither it, nor the Trial Chamber, can order the TFV to implement its assistance mandate under regulation 50(a) of the Regulations of the TFV in a particular way. Nevertheless, the Appeals Chamber, in *Lubanga*, encouraged the TFV to consider particular issues within its assistance mandate when they could not be included in the reparations order, given that Mr Lubanga could not be held liable in relation to them.[948] As in that case, the Appeals Chamber considers

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[944] Defence Appeal Brief, para. 102.
[945] Defence Appeal Brief, para. 103.
[946] *See* Victims Group 1's Response, para. 51, *referring to* Decision on the TFV's Initial Draft Implementation Plan, para. 19. *See also* Victims Group 2's Response, para. 73.
[947] *See* CLR2 February 2020 Submissions, para. 23
[948] 2015 *Lubanga* Appeals Chamber Judgment on Reparations, paras 199, 211-215.

that it is appropriate for the Board of Directors of the TFV to consider, in its discretion, the possibility of including victims belonging to other sides of the conflict, especially those who suffered harm caused by crimes of which Mr Ntaganda was not convicted, in the assistance activities undertaken according to its mandate under regulation 50(a) of the Regulations of the TFV.[949] The Appeals Chamber also expects that the TFV, pursuant to what it,[950] and the Trial Chamber, have stated as to how the TFV should implement reparations in this case, would take into account all relevant issues which could impact on the principle of "do no harm" when implementing its mandate.[951] Indeed, ensuring application of the "do no harm" principle is of the utmost importance in the implementation of reparations.

456. Since the Defence has not demonstrated any error in the Trial Chamber's approach to the "do no harm" principle, the Appeals Chamber rejects the Defence's third ground of appeal.

B. The second ground (in part) and fourth ground (in part) of the Defence appeal

457. The fourth ground of the Defence's appeal includes challenges to the Trial Chamber's findings related to the assessment of evidence. In this context, the Appeals Chamber will address the Defence's arguments related to the issue of transgenerational harm, followed by those related to how the Trial Chamber dealt with the issue of

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[949] In relation to the assistance mandate of the TFV, Judge Ibáñez recalls her observations in her separate opinion in the *Lubanga* case:

> 84. The TFV may use its resources for assistance and directly help victims and their families who have suffered harm separately from, and prior to, a conviction by the Court. In this respect, the TFV may provide 'assistance' that goes beyond the scope of the charges in any one particular case. Indeed, the TFV administers programmes in relation to grave crimes, without the need of judicial proceedings and regardless of whether or not a conviction decision has been entered, including situations where there have been acquittals.
>
> 85. In this regard, the TFV has administered programmes, as in the Uganda situation, benefitting *inter alia* survivors of sexual and gender-based violence, former (male and female) child soldiers, girls formerly associated with armed groups, disabled persons and amputees, disfigured and tortured persons, and other vulnerable children and young people, including orphans. In the *Bemba* case, the TFV announced the acceleration of its assistance programme in the wake of the accused's acquittal. The TFV said that it would consider all of the harms suffered by victims, regardless of the acquittal. In fact, such assistance will even reach victims who were not admitted to participate in the *Bemba* case, but who nonetheless suffered harm as a result of crimes under the jurisdiction of the Court in CAR during the relevant dates (*See* Separate Opinion of Judge Ibáñez to the 2019 *Lubanga* Appeals Chamber Judgment on Reparations, paras 84-85 (footnotes omitted)).

[950] TFV February 2020 Submissions, paras 30, 32.

[951] *See supra* paras 394-412.

documentary evidence that may or may not be presented together with future applications for reparations to the TFV (fourth ground of appeal). Finally, it will consider the arguments related to the health centre in Sayo (second and fourth grounds of appeal). The remainder of the arguments challenging the Trial Chamber's presumption of harm for victims of sexual violence will be considered in another section along with the eighth ground of the Defence's appeal.[952]

1. Transgenerational harm

(a) Relevant parts of the Impugned Decision

458. Under a heading dealing with "[c]oncept and types of harm", the Trial Chamber stated the following:

> 71. When assessing the extent of harm suffered by victims, the Court must take into account that various permutations and combinations of different layers of the aforementioned types of harm are possible, which can be manifested, *inter alia*, in damage to their life plan, transgenerational harm, or in harm suffered by persons as members of a family or community.
>
> […]
>
> 73. Transgenerational harm refers to a phenomenon, whereby social violence is passed on from ascendants to descendants with traumatic consequences for the latter. It is characterised by the existence of an intergenerational cycle of dysfunction that traumatised parents set in motion, handing-down trauma by acting as violent and neglectful caretakers deforming the psyche and impacting the next generation. Traumatised parents, who live in constant and unresolved fear, unconsciously adopt a frightening behaviour. This affects their children's emotional behaviour, attachment, and well-being, increasing the risk that they will suffer post-traumatic stress disorders, mood disorders, and anxiety issues. It is argued that the noxious effects of trauma may be transmitted from one generation to the next, with a potential impact on the structure and mental health of families across generations.
>
> 74. More often than not, the inherent features of the crimes under the jurisdiction of the Court also result in mass victimisation, affecting victims as members of families and entire communities. Members of families and communities may be affected by traumatic events suffered collectively by the individual members of the group, by reasons of the group's disintegration, breaking up, or scattering.
>
> 75. For the purposes of reparations, the harm manifested in the form of loss of life plan, transgenerational trauma, as well as that suffered collectively by individual members of a family or community, shall be personally suffered by the

[952] *See infra* paras 709-717.

> victim. Moreover, the causal nexus between the alleged harm and the crime for which the defendant was convicted needs to be established.[953]

459. Later, when addressing harm suffered by indirect victims, the Trial Chamber stated:

> 181. The Appointed Experts also indicate that the psychological harm experienced by the indirect victims may still seriously affect them and may have resulted in a range of long-lasting behavioural disorders, such as trauma, depression, suicidal tendencies, and feelings of hatred. Intense psychological trauma may also lead victims to develop medical conditions and alter their capabilities. The TFV notes in particular the impact these murders had on the development of victims who were children at the time, either because their parent died or because they witnessed atrocious murders. The Chamber also takes note of the DRC's submissions regarding orphans, who are perceived as a sign of bad luck within their communities and are thus socially rejected. Children whose parents were victims of murder may have suffered social rejection and its consequences, similarly to the case of 'snake children' mentioned above.
>
> 182. Regarding transgenerational harm, the Chamber considers that given the short and long-term consequences of certain crimes, as discussed above, children of the direct victims may have suffered transgenerational trauma regardless of the date when they were born, if they can show that their harm is a result of the crimes for which Mr Ntaganda was found guilty. In addition, the Chamber highlights that although children born out of rape are considered direct victims, they may have also suffered transgenerational harm as indirect victims.[954]

(b) Defence submissions before the Appeals Chamber

460. In the second ground of its appeal, arguing a lack of reasoning by the Trial Chamber, the Defence submits that "[f]urther errors committed by [the Trial Chamber] when pronouncing on various other concepts and principles relevant to reparations are also compounded by its failure to provide a reasoned opinion and to take into consideration submissions on behalf of the Convicted Person", referring generally in a footnote to the fourth to ninth grounds of the Defence appeal.[955]

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[953] Impugned Decision, paras 71, 73-75 (footnotes omitted).
[954] Impugned Decision, paras 181-182 (footnotes omitted).
[955] Defence Appeal Brief, para. 86.

461. In the fourth ground of its appeal, under the subtitle "Trial Chamber VI erred in law by erroneously interpreting the concepts of transgenerational harm",[956] the Defence argues that this type of harm "in the context of massive human rights violations is an evolving concept in scientific, medical and legal literature and scholarship" and, while it has been discussed in previous cases, it did not form part of previous reparations orders, thereby remaining "undefined and novel at the ICC".[957] It submits that the Trial Chamber's reference to the *Katanga* case "gives the impression that it is an established and uncontested concept within the ICC's reparations practice" and that, "[b]y failing to acknowledge its novelty, [the Trial Chamber] also failed to consider the limitations and shortcomings of this category of harm, which was an error".[958] The Defence alleges that the Trial Chamber failed to make reference to the "scientific uncertainty" and "ongoing debate" around the impact of transgenerational harm, and that it did not refer to "the different schools of scientific thought which have developed around the impact of transgenerational trauma, being epigenetic transmission and the social transmission".[959] According to the Defence, "[t]his scientific uncertainty as to how harm is transmitted between generations necessarily impacts the establishment of the causal nexus between the psychological harm and the crimes for which Mr Ntaganda was convicted".[960] Noting that the Trial Chamber relied on submissions, expert reports and IACtHR jurisprudence, it states that it "failed to even refer to the limits of the concepts cited therein", and that "[i]n these circumstances, the Trial Chamber's reliance on the concept of transgenerational harm is unsound, undermining its ultimate findings which incorporate this harm into the Reparations Order".[961]

462. The Defence further avers that the Trial Chamber erred in the evidentiary criteria it required for transgenerational harm.[962] It argues that, in its submissions before the Trial Chamber, it "underlined the need for strong guidelines on the burden of proof, in light of the Court's prior practice".[963] According to the Defence, victims in *Katanga*

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[956] Defence Appeal Brief, p. 39. The Defence argues that this error falls within ground 4. *See* Defence Appeal Brief, fn. 166.
[957] Defence Appeal Brief, para. 118.
[958] Defence Appeal Brief, para. 119.
[959] Defence Appeal Brief, para. 119.
[960] Defence Appeal Brief, para. 119.
[961] Defence Appeal Brief, para. 120.
[962] Defence Appeal Brief, p. 44.
[963] Defence Appeal Brief, para. 131.

"provided psychiatric expertise in support of their applications" and, while an expert in *Lubanga* observed that post-traumatic stress disorder can be transmitted to children, she stated that "PTSD must be demonstrated by way of medical examination";[964] an expert in *Bemba* gave similar input regarding PTSD and, in *Ongwen*, an expert stated that "a clinical diagnosis must be recent, given that this type of diagnosis is evolving, even in cases where the chronical outcome had been confirmed".[965] The Defence argues that, in the case at hand, the experts "did not directly examine victims from the conflict"; it states that, "[w]hile Dr Gilmore relies on medical and scientific literature, the Joint Experts relied in large part on the Dr Gilmore Report, non scientific documents and the Court record".[966] It submits that the Trial Chamber "erred in law by failing to specify certain element[s] of this harm that need to be established by the potential beneficiary, namely the date of birth of the child".[967] Referring to *Katanga*, the Defence notes that Trial Chamber II "underlined the importance of establishing the date of birth of a child born out of rape in assessing their eligibility and their harm".

463. In its reply, the Defence submits that

> [m]ajor studies done on the concept of transgenerational harm on various communities have been scientific and medical in nature. And despite much literature and scholarship, it remains contested and is still considered a "young" or novel science.[968]

464. The Defence further submits that, contrary to Victims Group 2's submissions, "the nature of the reparations, whether collective or individual, does not diminish the fact that this kind of assessment is fact-intensive".[969] Finally, it submits

> that the novelty of this field in science and at the Court requires a thorough study, without which the Chamber's reliance on it for purposes of reparations is unsound. For this reason, the Chamber committed an error when it recognized

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[964] Defence Appeal Brief, para. 131.
[965] Defence Appeal Brief, para. 131, *referring to* *Katanga* Decision on Transgenerational Harm, paras 28-29; *Katanga* Rapport d'Expertise; *Lubanga* Transcript, 7 April 2009, p. 80, line 12 to p. 81, line 5, p. 50, lines 1-8; *Ongwen* Transcript, 14 May 2018, p. 16, line 24 to p. 17, line 10 ; *Bemba* Transcript, 16 May 2016, p. 75, line 7 to p. 76, line 8; *Bemba* Transcript, 17 May 2016, p. 6, lines 8-13.
[966] Defence Appeal Brief, para. 132.
[967] Defence Appeal Brief, paras 132-133, *referring* to *Katanga* Decision on Transgenerational Harm, para. 29.
[968] Defence Reply to Victims' Responses, para. 49.
[969] Defence Reply to Victims' Responses, para. 50.

transgenerational harm without properly engaging with the novelty of the concept, its limitations and shortcomings.[970]

(c) Victims Group 1's submissions before the Appeals Chamber

465. Victims Group 1 argue that the fact that a presumption of transgenerational harm was not implemented in other cases at the Court does not mean that the topic is "undefined", as the Defence argues.[971] They further argue that, whether or not the Trial Chamber acknowledged that the concept has only been developed and referred to more recently at the ICC does not constitute an error of law or mean *per se* that the Trial Chamber failed to consider the limitations of the concept as argued by the Defence.[972] They note that the existence of two schools related to transgenerational trauma (epigenetic and psycho-social) "does not weaken the concept, nor does it make it '*uncertain*'".[973] In fact, according to Victims Group 1, "it reinforces its very existence and provides explanations for two distinct ways traumas are transmitted from one generation to another, both of which exist in parallel and therefore complement one another, therefore rendering the generational transmission more likely to happen – and not the contrary".[974]

466. As to the idea of medical expertise regarding each victim, Victims Group 1 argue that, "not only does it appear in total contradiction with the reasoning underpinning the use of a presumption, but it also appears in total contradiction with the evidentiary threshold at the reparations stage".[975] They state that the testimony referred to by the Defence was given at trial, and not during reparations proceedings, and "the fact that the experts mentioned the need to scientifically establish the presence of such trauma by way of a diagnosis, was not a statement made in relation to the possibility for the person concerned to benefit from reparations".[976] They note that the Trial Chamber has confirmed the use of presumptions in this case and that "scientifically establishing the presence of transgenerational trauma and post-traumatic stress disorder for each and every victim of the crimes referred to would be completely

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[970] Defence Reply to Victims' Responses, para. 51.
[971] Victims Group 1's Response, para. 65.
[972] Victims Group 1's Response, para. 66.
[973] Victims Group 1's Response, para. 67.
[974] Victims Group 1's Response, para. 67.
[975] Victims Group 1's Response, para. 68.
[976] Victims Group 1's Response, para. 68.

unrealistic and detrimental to the victims concerned", stating also that this trauma and harm "is more likely than not to have occurred", given the crimes in question in this case and as established in various reports in the case.[977] Victims Group 1 submit that recognising this type of harm would not prejudice the Defence, that the reparations proceedings aim to address the victims' needs, and as long as they stem from the crimes in the case, "the use of presumptions aims at identifying and providing explanations for the existence of said needs in relation to the harm the victims have been suffering from".[978] Finally, Victims Group 1 argue that, "as long as the harm suffered by the victims [is] related to Mr Ntaganda's crimes, whether or not said harm [is] transgenerational, physical, psychological, material or of a different nature, they ought to be, and will be, repaired in accordance with the legal framework of the Court".[979]

(d) Victims Group 2's submissions before the Appeals Chamber

467. Victims Group 2 argue "that the Defence fails to demonstrate that by endorsing the concept of transgenerational harm, the Trial Chamber committed an error which materially affects the Impugned Decision".[980] Referring to the Trial Chamber's findings, they submit "that by finding that persons who can provide proof that they are children of direct victims in the present case *may* have suffered transgenerational harm, the Trial Chamber did not commit any error, because it did not categorically find that specific persons *have* suffered harm".[981] The Trial Chamber required them to establish that they are children of direct victims and that the harm of the direct victim resulted from the crimes in question.[982] They state that, contrary to the Defence's submissions, the Trial Chamber relied not only on *Katanga* but on other sources too, and that nothing in the sources it discussed showed that the concept in *Katanga* needed to be revised or adapted.[983]

468. Victims Group 2 argue that the Trial Chamber was not required to discuss any uncertainty around the issue of transgenerational harm, or the different schools of

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[977] Victims Group 1's Response, para. 68.
[978] Victims Group 1's Response, para. 69.
[979] Victims Group 1's Response, para. 69.
[980] Victims Group 2's Response, para. 78.
[981] Victims Group 2's Response, para. 79.
[982] Victims Group 2's Response, para. 79.
[983] Victims Group 2's Response, para. 80.

thought.[984] In their view, the Trial Chamber, contrary to Trial Chamber II in the *Katanga* case, did not assess individual applications, or the causal nexus between the crimes and the psychological harm, and instead "ordered collective reparations which made the application-based procedure redundant".[985] They argue that the fact that victims in *Katanga* were not able to establish the nexus, in an application based procedure, "does not invalidate the general concept formulated by the Trial Chamber in that case".[986] Victims Group 2 further argue that, "[s]ince the concept as such also remained undisturbed by the *Katanga* Appeals Judgment, the Trial Chamber in the present case, within its discretionary power under article 75 of the Statute, was therefore entitled to rely on this concept".[987] According to Victims Group 2, whether the concept of transgenerational harm is new or not has no relevance, and "the Defence fails to show how the adoption and application of the notion of transgenerational harm impacts the outcome of the Impugned Decision".[988] They further argue that the submissions of the Defence are "a mere disagreement with the Trial Chamber's endorsement of the concept of transgenerational harm",[989] and that the Defence failed to demonstrate how the Trial Chamber's endorsement of transgenerational harm was an error of law.[990]

469. Regarding the evidentiary criteria for transgenerational harm, Victims Group 2 recall the Trial Chamber's findings that the harm had to be personally suffered and that there should be a causal nexus between the harm and the crime.[991] They state that the Appeals Chamber in *Katanga* referred to the same criteria and did not point to any specific elements that should be shown.[992] They note that the Trial Chamber in that case took the approach it did while assessing individual applications "and in light of *specific evidence and material brought before it*, including statements, supporting material and mental health certificates".[993] They state that, as collective reparations were ordered, not involving the individual assessment of applications, the Trial Chamber was not

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[984] Victims Group 2's Response, para. 81.
[985] Victims Group 2's Response, para. 81.
[986] Victims Group 2's Response, para. 82.
[987] Victims Group 2's Response, para. 82.
[988] Victims Group 2's Response, para. 82.
[989] Victims Group 2's Response, para. 83.
[990] Victims Group 2's Response, para. 83.
[991] Victims Group 2's Response, para. 86.
[992] Victims Group 2's Response, para. 87.
[993] Victims Group 2's Response, para. 88.

required to adopt specific criteria such as the date of birth for evidentiary purposes.[994] They argue that the decision is sufficiently clear, requiring kinship and for the harm to be the result of the crimes.[995] They note, in relation to the argument that the experts did not examine the victims concerned, that evidence can come from other sources, and in holding that children of direct victims *may* suffer from transgenerational harm, the Trial Chamber was not required to assess individual applications.[996] In their view, the Trial Chamber decided that collective measures were appropriate and that such children may have suffered from this harm, leaving it for the TFV to assess.[997] Finally, Victims Group 2 argue that the Defence has failed to show that the Trial Chamber committed a discernible error, "by relying on the submissions and evidence before it along with various other sources in finding that persons who have suffered transgenerational harm could potentially benefit from reparations in the present case if they establish that they are children of direct victims and affected by Mr Ntaganda's crimes".[998]

(e) Determination by the Appeals Chamber

470. The Defence raises two issues in relation to how the Trial Chamber approached reparations for transgenerational harm. First, it argues that the Trial Chamber erred in law by erroneously interpreting the concept of transgenerational harm,[999] and in failing to refer to the "scientific uncertainty" and "ongoing debate" around its impact.[1000] Second, it argues that the Trial Chamber erred in relation to what it said about the evidentiary criteria for transgenerational harm,[1001] and that it failed to "specify certain element[s] of this harm that need to be established by the potential beneficiar[ies]".[1002] Furthermore, under its second ground of appeal, the Defence states that the Trial Chamber failed to take into consideration and provide reasons regarding its submissions on various concepts, referring to, *inter alia*, its fourth ground of appeal, which includes the issue of transgenerational harm.[1003]

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[994] Victims Group 2's Response, para. 89.
[995] Victims Group 2's Response, para. 89.
[996] Victims Group 2's Response, para. 90.
[997] Victims Group 2's Response, para. 90.
[998] Victims Group 2's Response, para. 90.
[999] Defence Appeal Brief, p. 39.
[1000] Defence Appeal Brief, para. 119.
[1001] Defence Appeal Brief, p. 44.
[1002] Defence Appeal Brief, para. 132, *referring* in para. 133 to *Katanga* Decision on Transgenerational Harm, para. 29.
[1003] *See* Defence Appeal Brief, para. 86, fn. 125.

471. For the reasons that follow, the Appeals Chamber finds that the Trial Chamber failed to provide sufficient reasoning regarding (i) the concept of transgenerational and (ii) the evidentiary criteria to prove it.

472. In terms of how the Trial Chamber dealt in the Impugned Decision with the concept of transgenerational harm, the Appeals Chamber observes that, when providing the definition and characteristics of the concept of transgenerational harm (in paragraph 73 of the Impugned Decision), the Trial Chamber referred in footnotes to the *Katanga* Decision on Transgenerational Harm, the first and second expert reports produced in this case, and submissions of the parties and the TFV.[1004] It also referred to two cases of the IACtHR.[1005] As the Appeals Chamber finds below, the Trial Chamber did not provide sufficient reasoning on this concept.

473. In terms of evidentiary guidance, the Trial Chamber found, in general terms, that, in respect of transgenerational harm, the harm "shall be personally suffered by the victim" and "the causal nexus between the alleged harm and the crime for which the defendant was convicted needs to be established".[1006] However, the following examples illustrate some matters on which the Trial Chamber did not provide sufficient reasoning and should have provided further guidance.

474. First, as noted by the Defence, the Trial Chamber, in discussing the issue of transgenerational harm, did not refer to potential scientific uncertainties as to this concept, nor to the potential limitations to the concept of transgenerational harm.[1007] Rather, it simply set out, in more general terms, what it understands the phenomenon of transgenerational harm to be, and that a causal link must be established between the crimes for which the convicted person was found criminally liable and such harm.[1008] Furthermore, the Appeals Chamber also notes that, in making its findings on this issue,

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[1004] Impugned Decision, para. 73, fns 188-192, *referring to* TFV February 2020 Submissions, para. 111; *Katanga* Reparations Order, paras 132, 274-275; CLR2 Final Submissions, paras 44- 45; Defence Final Submissions, para. 157; CLR1 February 2020 Submissions, paras 47-48, 58-64; First Experts Report, paras 37, 47, 69, 80, 101, 111-114; Second Expert Report, paras 53-54; *Katanga* Decision on Transgenerational Harm, para. 10.
[1005] Impugned Decision, para. 73, *referring to* *Gómez Palomino v. Peru*, para. 146; *Rosendo Cantú et al. v. Mexico*, paras 138-139, 257.
[1006] Impugned Decision, para. 75.
[1007] Defence Appeal Brief, para. 119.
[1008] Impugned Decision, paras 72-75, 182.

the Trial Chamber referred only once to the Defence's submissions and, more importantly, the reference it makes is irrelevant to its finding.[1009]

475. In this context, the Appeals Chamber observes that, in its final submissions before the Trial Chamber, the Defence argued that, although in *Katanga*, Trial Chamber II recognised the existence of the concept of transgenerational harm, it found "no absolute scientific certainty with regard to this concept, with regard to the epigenetic change theory".[1010] The Defence submitted that the "*new* types of harm" suggested by the experts, such as damage to life plan and transgenerational harm, "have no proper foundation and […] should be rejected."[1011] It went on to develop arguments addressing evidentiary issues related to proving transgenerational harm, the casual nexus and the fact that in its view a presumption of such harm should not be drawn.[1012] In doing so, it challenged the reliability of the First Experts Report. It submitted that its authors were not medical experts, and that "[t]heir opinion concerning the transmission of harm is purely based on academic literature, and not personal knowledge or expertise".[1013]

476. Furthermore, the Defence made detailed submissions before the Trial Chamber on the issue of, in particular, proof of transgenerational harm, when addressing the issue in the context of its argument that children born out of rape should not be presumed to have suffered harm.[1014] It submitted that,

> the phenomena of transgenerational harm – more particularly the harm suffered by children born out of rape – must be carefully scrutinized, in particular with regard to the required standard in order to establish the causal link and the burden of proof. Even though these victims could be considered as indirect victims in

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[1009] Impugned Decision, para. 73, fn. 188, which is attached to the words "transgenerational harm", in the opening sentence: "Transgenerational harm refers to a phenomenon, whereby […]". The footnote refers to, *inter alia*, Defence Final Submissions, para. 157. However, paragraph 157 of the Defence Final Submissions appears to be irrelevant as it refers to the Defence's submissions challenging the harm to the family unit rather than its submissions challenging the concept of transgenerational harm: "Second, the Defence takes issue with the Joint Experts' suggestion to compensate 'harm to the family unit'. Harms underlying the 'harm to the family unit' include, inter alia, psychological harm, interruption of schooling, loss of valuables – all of which can individually be compensated. The concept of family unit is too immaterial to be compensated" (Defence Final Submissions, para. 157, *referring to* First Experts Report, para. 37. *Cfr.* Defence Final Submissions, paras 38, 88-96).
[1010] Defence Final Submissions, para. 87.
[1011] Defence Final Submissions, para. 156.
[1012] *See* Defence Final Submissions, paras 90-98, 156.
[1013] Defence Final Submissions, paras 97-98, *referring to* Confidential Registry List of Proposed Experts.
[1014] Defence Final Submissions, paras 86-107, addressing transgenerational and intergenerational harm in the context of children born out of rape.

> very specific circumstances, the harm they may have suffered should not be presumed.[1015]

477. The Defence further submitted, before the Trial Chamber, that, "in order to prove transgenerational harm, there must first be a diagnosis of psychological harm for the parents", and that, "considering that a psychiatric diagnosis fluctuates and evolves with time, it must be reassessed on a rolling basis".[1016] It referred to expert testimony in *Bemba* where it was stated that "a clinical diagnosis could not be based on information collected years ago" and that one dated ten years prior "had to be reassessed, even in the presence of indications that the mental trouble is a chronic one".[1017] It thus argued for the need for a precise psychological assessment "in order to establish a transgenerational harm due to the PTSD or stress disorder of one of the parents who suffered harm as a result of a crime for which the accused person was convicted of and that would have been transmitted to his/her offspring".[1018] It further submitted that, in *Katanga*, Trial Chamber II considered that a neuropsychiatrist, after examination of an applicant, had found that several causes for the condition could not be ruled out, and that the chamber, having noted that other events could have contributed to the applicants' suffering,[1019] found that the causal link had not been established between their suffering and that of the parents during the 2003 Bogoro attack.[1020] The Defence noted that Trial Chamber II had reiterated "that the burden to demonstrate the existence of a prejudice, and a causal nexus between the harm suffered and the crime lies on the claimant" and that "[t]his, in and of itself, excludes any possibility for the use of presumptions".[1021] The Defence further argued that the legal representative of victims in the *Katanga* case conceded that "following a neuropsychiatrist examination, the degree of probability of the existence of a nexus between the harm suffered by children born after an attack due to the trauma experienced by the parent in the *Katanga* case, differs depending on the child", also supporting the rejection of any presumption on the matter.[1022]

[1015] Defence Final Submissions, para. 38.
[1016] Defence Final Submissions, para. 89.
[1017] Defence Final Submissions, para. 89.
[1018] Defence Final Submissions, para. 90.
[1019] Defence Final Submissions, paras 92-93.
[1020] Defence Final Submissions, para. 94.
[1021] Defence Final Submissions, para. 95.
[1022] Defence Final Submissions, para. 96, *referring to* *Katanga* Rapport d'Expertise, para. 32.

478. As the Appeals Chamber has previously stated, "the right to a reasoned decision is an element of the right to a fair trial and that only on the basis of a reasoned decision will proper appellate review be possible".[1023] It notes that, while the issue of transgenerational harm was discussed in the *Katanga* case, Trial Chamber II ultimately rejected the requests for reparations based on transgenerational harm in that case. It is correct, as noted by the Defence, that the Trial Chamber's reference to the *Katanga* case "gives the impression that it is an established and uncontested concept within the ICC's reparations practice".[1024] This raises the question of whether the reasoning provided by the Trial Chamber in the Impugned Decision is sufficient to find that transgenerational harm can be awarded in this case.

479. Although the Defence made these substantial submissions before the Trial Chamber, they were not addressed in the Impugned Decision and the Trial Chamber gave no indication of any caution the TFV would need to exercise in assessing applications claiming reparations as a result of transgenerational harm.

480. The Defence had particularly argued in some depth about the evidence that should be put before a trial chamber to prove transgenerational harm, and the type of enquiry that the Chamber should be required to undertake should an application for reparations for transgenerational harm be submitted.[1025] It had also pointed, both on appeal, and before the Trial Chamber, to the enquiry that was carried out in the *Katanga* case, on the five applications before that trial chamber, and the issues considered by it.[1026] It argues that the Trial Chamber in Mr Ntaganda's case did not examine any applications, relied on unreliable expert reports, and did not specify that the date of birth of the child seeking reparations needs to be established.[1027]

481. The Appeals Chamber notes the contrast between the detailed assessment carried out in *Katanga*, and the lack of any guidance provided by the Trial Chamber in the instant case.[1028] The approach by the Trial Chamber, in this case, also lacks any substantial guidance to the TFV as to how it should assess an application for reparations

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[1023] *Lubanga* OA5 Appeals Chamber Judgment, para. 20. *See also* Defence Appeal Brief, para. 66.
[1024] Defence Appeal Brief, para. 119.
[1025] Defence Final Submissions, paras 89-90.
[1026] *See* Defence Appeal Brief, paras 131-132; Defence Final Submissions, paras 92-94.
[1027] Defence Appeal Brief, para. 132.
[1028] *See* *Katanga* Decision on Transgenerational Harm.

based on transgenerational harm. The Trial Chamber made a simple statement as to the need for the harm to be established, without elaborating further how this harm must be proven, and specifying the type of evidence that must be submitted or enquiry that should be carried out. Furthermore, as the Trial Chamber did not rule upon any application,[1029] it failed to address this issue on the basis of any applications that had been filed.

482. The Appeals Chamber recalls that, "in awarding reparations, a trial chamber must remain within the confines of the conviction and sentencing decisions".[1030] In this regard, the Appeals Chamber notes that the Sentencing Judgment made the following observation:

> In addition to this issue, the Chamber notes that the LRVs both raise the general issue of inter- or transgenerational harm resulting from sexual crimes (CLR1 Submission paras 16 and 43; and CLR2 Submission, para. 40). *Noting, however, the complex questions of causation involved in determining this type of harm to a beyond reasonable doubt standard and the very general nature in which this type of harm has been referred to by the LRVs, the Chamber does not consider this further issue here for the purposes of sentencing*[1031] [emphasis added].

483. The Sentencing Judgment made this observation immediately after having held that children born as a result of sexual violence and their mothers suffer rejection from their communities.[1032] Thus, in contrast to the express finding that these children and their mothers personally suffer harm – which may serve as a basis to grant reparations to children born out of rape and sexual slavery, as indicated below when addressing the Defence's sixth ground of appeal[1033] – the Trial Chamber's observation, quoted above,

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[1029] *See* Impugned Decision, para. 196.
[1030] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 311.
[1031] Sentencing Judgment, fn. 317. This finding of the Sentencing Judgment was made with regard to, *inter alia*, Victims Group 1's argument that child soldiers invariably suffered trauma and that the impact of the crimes extended to members of their families, including children born out of sexual violence (CLR1 Observations on Sentencing, paras 15-16), to which the Defence responded, during the sentencing stage, that "this phenomenon was not an invariable consequence of being a child soldier" and that "greater caution and concrete, individualized evidence is required in respect of 'inter-generational' harm" (Defence Response to Submissions on Sentence, para. 65, *referring, inter alia, to Katanga* Decision on Transgenerational Harm, paras 9-14, 141-142).
[1032] Sentencing Judgment, para. 113. This finding will be referred to under the Defence's sixth ground of appeal. *See infra* paras 641-661.
[1033] *See infra* paras 641-661.

shows that, at the sentencing stage, it refrained from making any further finding on transgenerational harm.

484. In this context, in order to find Mr Ntaganda liable for this type of harm, the Appeals Chamber would have expected the Trial Chamber to have fully considered the issue at the reparations stage, on the basis of clear submissions, having sought any necessary clarifications,[1034] expert evidence and, in particular, applications for reparations in respect of this type of harm by particular victims, or findings from the Conviction Judgment or Sentencing Judgment.

485. Regarding the two expert reports, the Appeals Chamber observes that at no point did the Trial Chamber assess their reliability, or the underlying basis for the submissions of the experts, nor did it address the Defence's arguments that were relevant to assessing the reliability of this evidence. The Trial Chamber's approach in this regard is insufficient, for several reasons. First, the parts of the First Experts Report on which the Trial Chamber relied, in turn, referred to the Second Expert Report,[1035] an expert report in the *Lubanga* case[1036] or submissions made by the TFV in that case.[1037] Furthermore, as the Defence argues,[1038] various observations of the Second Expert Report regarding transgenerational harm, including those to which the Trial Chamber

[1034] In contrast, the Trial Chamber sought submissions from the parties regarding the issues of "whether children born out of rape should be presumed as having suffered harm as a result of the commission of these two crimes" and "whether a lower burden of proof should be retained in cases of sexual violence", inviting the TFV and the parties to make submissions. *See* First Decision on Reparations Process, para. 46.
[1035] *See, e.g.*, fn. 188 of the Impugned Decision, *referring, inter alia, to* First Experts Report, paras 69, 101, which refer, *inter alia, to* Second Expert Report, in general.
[1036] *See, e.g.*, fn. 188, of the Impugned Decision, *referring, inter alia, to* First Experts Report, para. 111, which refers, *inter alia,* to *Lubanga* Expert Report.
[1037] First Experts Report, para. 101, *referring, inter alia, to Lubanga* Filing on Reparations and Draft Implementation Plan, paras 256, 277.
[1038] Defence Appeal Brief, paras 132-133, *referring to Katanga* Decision on Transgenerational Harm, para. 29.

referred,[1039] are based on a literature review[1040] or the expert report in *Lubanga*,[1041] rather than any examination of the victims of this case themselves.

486. More specifically, six of the ten lines of paragraph 73 of the Impugned Decision (see above) rely on a footnote in the First Experts Report.[1042] That footnote in turn relies on findings made by an expert in the *Lubanga* case,[1043] in addition to submissions by Victims Group 1 in this case.[1044] The latter submissions cite to the same expert in *Lubanga*,[1045] in addition to two decisions in *Katanga*,[1046] two scientific articles[1047] and a HRW report.[1048] Relying on this, the Trial Chamber states the following:

> [Transgenerational harm] is characterised by the existence of an intergenerational cycle of dysfunction that traumatised parents set in motion, handing-down trauma by acting as violent and neglectful caretakers deforming the psyche and impacting the next generation. Traumatised parents, who live in constant and unresolved fear, unconsciously adopt a frightening behaviour. This affects their children's emotional behaviour, attachment, and well-being, increasing the risk that they will suffer post-traumatic stress disorders, mood disorders, and anxiety issues.[1049]

487. The Trial Chamber also essentially relies on this expert report from *Lubanga*, when referring to other parts of the First Experts Report,[1050] including the following:

[1039] Impugned Decision, para. 73, *referring to* Second Expert Report, paras 53-54.
[1040] This includes studies on the Holocaust (*see* Second Expert Report, para. 53, *referring to* Fossion *et al.*; Wiseman/Barber), Ukraine (*see* Second Expert Report, para. 53, *referring to* Bezo/Maggi), Cambodia (*see* para. 53, *referring to* Field *at al.*), Northern Ireland (*see* Second Expert Report, para. 53, *referring to* WAVE Trauma Centre), Bosnia and Herzegovina (*see* Second Expert Report, para. 54, *referring to* Medica Mondiale, pp. 36-37), and Sierra Leone (*see* Second Expert Report, para. 54, *referring to* MacKenzie, p. 126), as well as more general studies (*see* Second Expert Report, para. 54, *referring to* Dowds; Mochmann, p. 338; Drumbl, p. 8).
[1041] For instance, *referring to* the *Lubanga* Expert Report, the expert observed that "[t]his can impact on the structure and mental health of families across generations". Second Expert Report, para. 53 *referring to Lubanga* Expert Report, p. 3, p. 25.
[1042] *See* fns 190-192 of the Impugned Decision, *referring to* fn. 148 of the First Experts Report.
[1043] *See* fn. 148 of the First Experts Report, *referring to* page 25 of *Lubanga* Expert Report.
[1044] *See* fn. 148 of the First Experts Report, *quoting* para. 48 of CLR1 February 2020 Submissions.
[1045] *See* para. 48 of CLR1 February 2020 Submissions, *referring to* pages 26-27 of *Lubanga* Expert Report.
[1046] *See* para. 48 of CLR1 February 2020 Submissions, *referring to* para. 10 of *Katanga* Decision on Transgenerational Harm and para. 132 of *Katanga* Reparations Order.
[1047] *See* para. 48 of CLR1 February 2020 Submissions, *referring to* Yehuda, pp. 121-135 *and* Bosquet, pp. 41-65.
[1048] *See* para. 48 of CLR1 February 2020 Submissions, *referring to* HRW Report on Reparations in Kenya, p. 61.
[1049] Impugned Decision, para 73, *referring* to First Experts Report, fn. 148.
[1050] *See, e.g.*, fn. 188 of the Impugned Decision, *referring, inter alia, to* First Experts Report, para. 111, which refers, *inter alia*, to *Lubanga* Expert Report, p. 25.

> The Experts submit that the transgenerational harm must be taken into account when assessing the harm in the case of former child soldiers. 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. *Dr Elisabeth Schauer clearly defined the cascading impact from each direct victim onto their relatives who became indirect victims of the events.* 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.[1051]

488. The Trial Chamber also relied on the *Lubanga* Expert Report when referring to part of the Second Expert Report.[1052] The Appeals Chamber notes that the Trial Chamber specifically stated, when appointing the experts in this case, that its reparations order "may draw on the expertise provided by relevant experts in other cases at the Court", referring in a footnote to several reports in other cases; it "therefore encourage[d] the Experts to consult this expertise should they consider it relevant and to reference it in their report if relied on" and required the Registry to "facilitate the Experts' access to these reports, in the version available to the public".[1053] This practice is questionable. This expert report, from the *Lubanga* case, on which the experts (and indeed the parties) rely, albeit existing in public version, has not been admitted in this case and its reliability has also not been analysed and tested.

489. Furthermore, the Trial Chamber also relied on assertions made in the First Experts Report which rely on submissions made by the TFV in the *Lubanga* case.[1054] Again, it is not clear how such submissions can be persuasive on issues arising in the case of *Ntaganda*, in particular without the parties having had the chance to challenge what is being said.

490. Finally, the Appeals Chamber also observes that it is not immediately apparent how some of the references in paragraph 73 of the Impugned Decision are relevant to the issue of transgenerational harm.[1055] The Trial Chamber also relied on a paragraph

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[1051] First Experts Report, para. 111, *referring, inter alia, to* *Lubanga* Expert Report, p. 25.
[1052] Impugned Decision, fn. 188, *referring to* Second Expert Report, para. 53, wherein it is stated, *inter alia*, that noxious effects of trauma creating depressive or anxiety disorders "can impact on the structure and mental health of families across generations", *referring to* *Lubanga* Expert Report, p. 3, p. 25.
[1053] Decision Appointing Experts on Reparations, para. 17.
[1054] Impugned Decision, fn. 188, *referring, inter alia, to* First Experts Report, para. 101 (this paragraph refers to *Lubanga* Filing on Reparations and Draft Implementation Plan, paras 256, 277).
[1055] Impugned Decision, fn. 188, *referring to*: TFV February 2020 Submissions, para. 111, *Katanga* Reparations Order, paras 274-275, and First Experts Report, para. 37. Concerning the latter, the Trial

of the First Experts Report, which refers to the Sentencing Judgment, and in doing so they allude to transgenerational harm.[1056] As seen above, the Trial Chamber, in that judgment, specifically stated that it would not engage for the purposes of sentencing in such an issue, considering "the complex questions of causation involved in determining this type of harm to a beyond reasonable doubt standard".[1057] However, the experts not only omit this consideration but their reference to the Sentencing Judgment in the report is simply to a paragraph setting out the analysis the Trial Chamber would carry out in that case in respect of gravity;[1058] it does not directly support the assertion being made by the expert. The Experts seem to give their own explanation of how the Sentencing Judgment and crimes for which Mr Ntaganda was convicted should be understood. How this paragraph of the First Experts Report could assist the Trial Chamber in deciding on the existence of transgenerational harm is unclear.[1059]

491. The Appeals Chamber finds that, in a case such as this, where the concept of transgenerational harm is indeed novel and evolving, it was incumbent upon the Trial Chamber to demonstrate that it had properly and fairly taken the parties' submissions into account. Specifically, in the absence of any further reference by the Trial Chamber to the relevant arguments of the Defence challenging, *e.g.*, the reliability of the experts' findings on transgenerational harm, and any substantial findings of the Trial Chamber on the evidential issues raised by the Defence, it is unclear whether and, if so, why and how, the Trial Chamber rejected the abovementioned submissions.

492. In the Appeals Chamber's view, the Trial Chamber's overall approach to the making of findings as to the existence and characteristics of transgenerational harm,

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Chamber referred to the experts' finding that, besides recognising the harm to each member of a family, "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".

[1056] Impugned Decision, fn. 188, *referring to* First Experts Report, para. 47.

[1057] Sentencing Judgment, fn. 317.

[1058] Impugned Decision, fn. 188, *referring to* First Experts Report, para. 47, which refers to the Sentencing Judgment, para. 16.

[1059] First Experts Report, para. 47, referred to in the Impugned Decision, fn. 188. The expert said: "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". To support this statement, the expert refers, in a footnote, to paragraph 16 of the Sentencing Judgment, in which the Trial Chamber dealt with gravity and did not make these findings. The expert went on to say: "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".

and how it should be understood in the context of the ICC, renders unclear the overall findings made by the Trial Chamber and amounts to an error. The Appeals Chamber finds that, by failing to properly assess the characteristics of this form of harm, and consider the Defence's submissions, the Trial Chamber failed to meet the requirement to provide a reasoned opinion on the matter. Furthermore, the examples given above illustrate that it was incumbent upon the Trial Chamber to provide reasons as to whether the expert reports were reliable and that indeed the Trial Chamber did not address some issues that may reasonably challenge the reliability of what it relied upon. The Trial Chamber's findings are inadequate, lack sufficient clarity and make it impossible for the Appeals Chamber to assess their accuracy.

493. In these circumstances, the Appeals Chamber considers it appropriate to reverse the Trial Chamber's findings in relation to transgenerational harm and to remand the matter to the Trial Chamber for it to assess and properly reason the matter based on submissions sought from the parties and having assessed the credibility and reliability of the expert evidence on the record and addressed the issue of evidentiary guidance on this issue.

494. In particular, the Trial Chamber is directed to consider the issue of scientific certainty as to the concept of transgenerational harm and whether it is appropriate to award reparations therefor at this Court and, if so, what the evidentiary requirements are for an applicant to establish that type of harm. Furthermore, if there is sufficient scientific certainty as to the concept of transgenerational harm, the Trial Chamber is directed to assess whether Mr Ntaganda is liable to repair such harm in the specific context of the crimes of which he has been convicted and taking into consideration the impact, if any, that the protracted armed conflict in the DRC may have as to the possibility of establishing that the trauma associated with transgenerational harm was caused by Mr Ntaganda.

495. In sum, the Appeals Chamber considers it appropriate for the Trial Chamber to consider whether it needs to address such issues as: the matter of the basis for the concept of transgenerational harm; the evidence needed to establish it; what the evidentiary requirements are for an applicant to prove this type of harm; the need, if any, for a psychological examination of applicants and parents; the need, if any, to exercise caution in assessing applications based on transgenerational harm; whether

Mr Ntaganda is liable to repair such harm in the specific context of the crimes of which he has been convicted and taking into consideration the impact, if any, that the protracted armed conflict in the DRC may have as to the possibility of establishing that the trauma associated with transgenerational harm was caused by Mr Ntaganda.

496. On this point, Judge Ibáñez Carranza observes that the Trial Chamber should also consider what was stated in her separate opinion in the *Lubanga* case, namely that, in respect of harm caused to child soldiers, it "transcends to impact the relatives of those children as well as the social fabric, cohesion and future of their communities".[1060] In her view, "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".[1061]

497. The Appeals Chamber also considers it appropriate for the Trial Chamber to request submissions from the parties and, *e.g.*, experts. It is also necessary to ensure that the process remains fair for both victims who will submit applications to be assessed by the Trial Chamber, and those who may be assessed later by the TFV. Every victim shall equally benefit from the detailed guidance that the Trial Chamber will issue. In this regard, since the Trial Chamber may benefit from assessing, *inter alia*, applications received, before issuing any decision on evidentiary criteria, it might wish to then allow victims to supplement their applications if necessary, based on guidance related to evidentiary criteria that it may provide, or allow any victims it may reject, to resubmit their applications to the TFV based on the Trial Chamber's guidance.[1062]

[1060] Separate Opinion of Judge Ibáñez to the 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 141.
[1061] Separate Opinion of Judge Ibáñez to the 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 141.
[1062] In the *Lubanga* case, in 2019, the Appeals Chamber noted that victims who came forward to the TFV after issuance of its judgment would have an advantage "in knowing in detail the factors which the Trial Chamber found relevant in its assessment and the Trial Chamber's reasons for concluding that some victims were ineligible for reparations". It stated that victims who had been rejected until then, could reapply to the TFV, so they were not disadvantaged *vis-à-vis* new victims who would come forward (*see* 2019 *Lubanga* Appeals Chamber Judgment on Reparations, paras 165, 170 171).

2. Documentary evidence

(a) Relevant parts of the Impugned Decision

498. Regarding the standard and burden of proof in reparations proceedings, the Trial Chamber stated:

> In reparation proceedings, the victims shall provide sufficient proof of the causal link between the crime and the harm suffered, based on the specific circumstances of the case. What the 'appropriate' standard of proof is and what is 'sufficient' for the purposes of a victim meeting the burden of proof, will depend upon the specific circumstances of the case, including any difficulties the victims may face in obtaining evidence.[1063]

499. When addressing harm and, in particular, evidentiary criteria, the Trial Chamber stated:

> 136. The Chamber notes that reparations proceedings require a less exacting standard of proof than trial proceedings. In line with the previous jurisprudence, the Chamber adopts the 'balance of probabilities' test as the appropriate standard of proof in reparations proceedings.
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> 137. Victims eligible for reparations must provide sufficient proof of identity, of the harm suffered, and of the causal link between the crime and the harm. Victims may use official or unofficial identification documents, or any other means of demonstrating their identities. In the absence of acceptable documentation, a statement signed by two credible witnesses establishing the identity of the victim and describing the relationship between the victim and any individual acting on their behalf is acceptable.
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> 138. The Chamber is aware of some of the difficulties the victims may face in producing the relevant information. For instance, the Chamber notes that one of the consequences of the crimes against property for which Mr Ntaganda was convicted is the loss of important documents, such as diplomas, identity cards, and land ownership titles. In addition, the Chamber notes that victims may often have difficulties obtaining or producing copies of official documents in the DRC.
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> 139. The Chamber also emphasises the need to adopt a gender-inclusive and sensitive approach when applying the 'balance of probabilities' standard to sexual crimes. In this regard, the Chamber recalls rule 63(4) of the Rules and stresses that this prohibition should be translated into taking into account the additional difficulties that these victims may face in obtaining or producing evidence to demonstrate that they were victims of rape and/or sexual slavery. Accordingly, the Chamber considers that the victim's coherent and credible account shall be accepted as sufficient evidence to establish their eligibility as victims on a balance of probabilities.

[1063] Impugned Decision, para. 77 (footnotes omitted).

> 140. Furthermore, the Chamber recalls that rule 94(1)(g) of the Rules, which is applicable to proceedings leading to individual reparations, requires victims to furnish supporting documentation to bolster their applications for reparations '[t]o the extent possible'. The rule makes allowance for the difficulties the victims may encounter in gathering evidence, including the passage of time since the crimes were committed. Although this rule is of less relevance in relation to collective reparations, the Chamber finds that the principle behind it is applicable to the eligibility screening to be carried out at the implementation stage.[1064]

(b) Defence submissions before the Appeals Chamber

500. The Defence argues that the Trial Chamber "failed to identify the type of documents that would be sufficient to meet the burden of proof", stating that it "simply" found that "[v]ictims eligible for reparations must provide sufficient proof of identity, of the harm suffered, and of the causal link between the crime and the harm" but that "[i]n the absence of acceptable documentation, a statement signed by two credible witnesses establishing the identity of the victim and describing the relationship between the victim and any individual acting on their behalf is acceptable".[1065]

501. The Defence argues that the Trial Chamber "should have provided guidance as to which documents could be provided, as has been done by other trial chambers",[1066] submitting that failing to do this, especially in light of the low burden of proof established by the Trial Chamber in this case, meant that "the Impugned Decision appears as a reparations order that renders optional the substantiation of an application for reparations".[1067]

502. The Defence refers to the *Lubanga* case, arguing that Trial Chamber II reviewed application forms and granted the Defence the opportunity to make observations.[1068] It states that, "[a]s such, there was a process in place to ensure that the burden of proof was met, and that the documents provided supported the alleged harm and corroborated the narrative put forward in the application itself".[1069] It argues that "the impossibility of providing documents should not have been presumed".[1070] Referring to the 2019

[1064] Impugned Decision, paras 136-140 (footnotes omitted).
[1065] Defence Appeal Brief, para. 124, *referring to* Impugned Decision, para. 77.
[1066] Defence Appeal Brief, para. 125.
[1067] Defence Appeal Brief, para. 125.
[1068] Defence Appeal Brief, para. 127, *referring to* *Lubanga* Order for TFV to supplement DIP, para. 14.
[1069] Defence Appeal Brief, para. 127, *referring, inter alia, to* *Lubanga* Order for TFV to supplement DIP, para. 14.
[1070] Defence Appeal Brief, para. 129.

Lubanga Appeal Chamber Judgment on Reparations, which noted that "it is in the interest of the person who is unable to supply any documentation to explain his or her reasons for this inability", the Defence argues that the Trial Chamber did not follow the same approach.[1071] According to the Defence, the Trial Chamber "only went as far as to find that potential victims may experience difficulties in providing relevant documents".[1072] The Defence states that the Trial Chamber "did not foresee any mechanism, or put in place any similar requirements, circumventing the need for the kind of substantiation of applications that was a minimum condition in other cases".[1073] The Defence argues that the Trial Chamber erred and this provides further justification for the submission that the Impugned Decision should be quashed.[1074]

(c) Victims Group 1's submissions before the Appeals Chamber

503. Victims Group 1 do not make submissions on the issue of documentary evidence.

(d) Victims Group 2's submissions before the Appeals Chamber

504. As for the requisite documents to be submitted in support of an application for reparations, Victims Group 2 argue that "the Defence fail[ed] to demonstrate that the Trial Chamber committed a discernible error in deciding not to rule on the merits of individual applications for reparations".[1075] They submit that, given the collective nature of the reparations order, "no application-based process pursuant to rule 94 of the Rules as such has been envisaged at any stage of the reparations process in the present case", meaning that the Trial Chamber "was not required to specify 'any relevant supporting documentation'".[1076] They further submit that, in light of such collective nature, the Trial Chamber had no obligation to provide a "detailed analysis of which specific documents would satisfy the burden of proof" and that it "addressed the matter to the necessary extent".[1077]

[1071] Defence Appeal Brief, paras 129-130, *referring* to 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 204.
[1072] Defence Appeal Brief, para. 130.
[1073] Defence Appeal Brief, para. 130.
[1074] Defence Appeal Brief, para. 130.
[1075] Victims Group 2's Response, para. 99.
[1076] Victims Group 2's Response, paras 98-99.
[1077] Victims Group 2's Response, para. 100.

505. Victims Group 2 also submit that the Defence misrepresents the case law to which it refers when arguing that the Trial Chamber should have provided guidance as to which documents could be provided, arguing that such did not happen in the *Katanga* case, where Trial Chamber II "simply noted which types of documents the victims had actually been able to present in support of their requests for reparations", nor did it happen in the *Lubanga* and *Al Mahdi* cases.[1078] Victims Group 2 further submit that, "contrary to the Defence's contention, the Trial Chamber did not presume the impossibility for victims to provide documents", but rather held that the "difficulties the victims *may* encounter in gathering evidence […] ought to be taken into consideration for the purpose of the eligibility screening to be carried out at the implementation stage".[1079] Victims Group 2 conclude that, because the Defence failed "to show that the Trial Chamber committed an error of law in relation to the burden of proof", "this part of the Defence's Ground of Appeal 4 should also be dismissed".[1080]

(e) Determination by the Appeals Chamber

506. The Defence's overarching argument appears to be that the Trial Chamber failed to require documentary evidence in support of the applications for reparations,[1081] and that such failure, coupled with the low burden of proof, "rendered optional the substantiation of an application for reparations".[1082] It argues that the application process in *Lubanga* ensured that there was a proper process in place to review the corroborating documentary evidence and that, in the absence of reasons as to an applicant's inability to provide such documentation, it is in his or her interest to explain the reasons for such inability.[1083] It argues that "the impossibility of providing documents should not have been presumed" in the present case.[1084]

507. As noted above, the Trial Chamber did not rule on any applications for reparations.[1085] Its findings as to the documentary evidence required for applications

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[1078] Victims Group 2's Response, para. 101.
[1079] Victims Group 2's Response, para. 102.
[1080] Victims Group 2's Response, para. 103.
[1081] Defence Appeal Brief, p. 42.
[1082] Defence Appeal Brief, paras 124-125.
[1083] Defence Appeal Brief, paras 129-130, *referring* to 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 204.
[1084] Defence Appeal Brief, para. 129.
[1085] *See* Impugned Decision, para. 196.

were general in nature; the Trial Chamber supported what it found primarily by reference to previous jurisprudence, while referring in footnotes to submissions by the TFV and the Registry, respectively, as to difficulties that exist in producing documentary evidence.[1086] The Trial Chamber intended its findings to be applied by the TFV in the future, when presented with applications for reparations.[1087] As found elsewhere in this judgment, this matter will be remanded to the Trial Chamber for it to assess applications for reparations that are received.[1088]

508. The Appeals Chamber emphasises that, as noted in its previous jurisprudence, when making a decision as to the eligibility of a victim for reparations, the enquiry is whether the relevant facts have been established to the applicable standard of proof.[1089] This standard of proof must be met, regardless of whether or not a victim has been in a position to provide supporting documentary evidence.

509. The Appeals Chamber notes that, in this case, the Trial Chamber required that victims "provide sufficient proof of the causal link between the crime and the harm suffered, based on the specific circumstances of the case".[1090] The Trial Chamber clarified that "what is 'sufficient' for the purposes of a victim meeting the burden of proof, will depend upon the specific circumstances of the case, including any difficulties the victims may face in obtaining evidence".[1091] It referred to the Appeals Chamber's findings in *Lubanga* in 2015 to make these statements.

510. The Appeals Chamber further notes that, later in the Impugned Decision, the Trial Chamber stated that it "adopt[ed] the 'balance of probabilities' test as the appropriate standard of proof in reparations proceedings".[1092] It found that victims "must provide sufficient proof of identity, of the harm suffered, and of the causal link between the crime and the harm".[1093] It made findings as to what can be provided in relation to proof of identity, and made reference to difficulties victims may have in

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[1086] *See* Impugned Decision, paras 136-138.
[1087] *See, e.g.*, Impugned Decision, para. 129.
[1088] *See supra* paras 345-346.
[1089] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 204, *referring to* *Lubanga* Amended Reparations Order, para. 22; *Al Mahdi* Appeals Chamber Judgment on Reparations, para. 42.
[1090] Impugned Decision, para. 135.
[1091] Impugned Decision, para. 140.
[1092] Impugned Decision, para. 136.
[1093] Impugned Decision, para. 137.

producing relevant information,[1094] referring to submissions by the TFV and the Registry as to the loss of important documents (*e.g.*, diplomas, identity cards, and land ownership titles) and difficulties in obtaining or producing copies of official documents in the DRC, respectively.[1095] It also referred to rule 94(1)(g) of the Rules, providing that an application shall contain, "[t]o the extent possible, any relevant supporting documentation". Finally, it noted that "this rule is of less relevance in relation to collective reparations" but that "the Chamber finds that the principle behind it is applicable to the eligibility screening to be carried out at the implementation stage".[1096]

511. The Appeals Chamber considers that what the Trial Chamber stated was, in general terms, in keeping with the Appeals Chamber's previous jurisprudence. However, the following aspects, not referred to by the Trial Chamber, require emphasis. The Appeals Chamber refers in particular to what it stated in the 2019 *Lubanga* Appeals Chamber Judgment on Reparations, parts of which have also been raised by the Defence. Regarding rule 94(1)(g) of the Rules, the Appeals Chamber stated the following:

> *The Appeals Chamber considers that the requirement to provide, to the extent possible, supporting documents and information under rule 94(1)(g) of the Rules, both serves to assist a trial chamber in its assessment of a claim while also providing the convicted person with an opportunity to challenge the requests submitted.* However, the rule also allows for the possibility that a request that is not supported by relevant documentation may nevertheless be filed. In this regard, and as correctly noted by the Trial Chamber, rule 94(1)(g) of the Rules acknowledges that victims are not always in a position to provide supporting documentation. Consequently, the Appeals Chamber considers that the fact that potential victims generally did not submit documents in support of their written allegations does not lead inexorably to the conclusion that the Trial Chamber was prevented from finding that their victimhood was established to a balance of probabilities.[1097]

512. The Appeals Chamber further stated that, "what is [...] 'sufficient' for purposes of an applicant meeting the burden of proof will depend upon the circumstances of the

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[1094] Impugned Decision, paras 138-140.
[1095] Impugned Decision, para. 138.
[1096] Impugned Decision, para. 140.
[1097] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 202 (emphasis added) (footnotes omitted).

specific case",[1098] and that trial chambers enjoy "a certain amount of flexibility in the assessment of claims that have been submitted",[1099] in the sense that "an assessment of the 'sufficiency' of the evidence is not limited to the evidence submitted by the victim in question".[1100] The Appeals Chamber also stated:

> Rather, corroboration may come from extrinsic evidence, including the testimonial and documentary evidence entered into the record and the statements of other victims in their requests. In the exercise of its discretion, a trial chamber may consider that a victim's account has sufficient probative value in light of the totality of the evidence so as to find that the allegations therein satisfy the burden of proof, even in the absence of supporting documents. A trial chamber may also consider the significance of the allegation sought to be proven. In this respect, some allegations are critical to the overall assessment of the person's eligibility and, unless they are otherwise corroborated, the trial chamber may decline to find the person eligible without documentation supporting those allegations.[1101]

513. The Appeals Chamber notes that the Defence has cited to the following passage (excluding the first two sentences which have been included by the Appeals Chamber), arguing that, in contrast to this, and in particular the part emphasised below, the Trial Chamber failed to take similar measures in this case, "circumventing the need for the kind of substantiation of applications that was a minimum condition in other cases".[1102] The passage reads as follows:

> The Appeals Chamber notes that, as just discussed, a trial chamber may find a person eligible for reparations, even where he or she has not supplied any documentation. It also recalls that the difficulty victims may face in obtaining supporting documentation can be taken into consideration when determining the appropriate standard of proof in reparations proceedings. The Appeals Chamber considers that a trial chamber is also not prevented from finding a person eligible for reparations in circumstances where he or she did not give reasons for his or her inability to provide supporting documentation. *However, to allow the trial chamber to properly reach a conclusion, it is in the interest of the person who is unable to supply any documentation to explain his or her reasons for this inability.* At any rate, the trial chamber's enquiry is whether the relevant facts have been established to the applicable standard of proof. Such was the Trial

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[1098] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 203 *referring to* 2015 *Lubanga* Appeals Chamber Judgment on Reparations, para. 81; *Katanga* Appeals Chamber Judgment on Reparations, para 75.
[1099] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 203 *referring to* *Kony et al.* OA and OA2 Appeals Chamber Judgment on Decisions on Participation, para. 38.
[1100] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 203 *referring to* *Case 001* Appeal Judgment, paras 592, 636.
[1101] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 204 (footnotes omitted).
[1102] Defence Appeal Brief, para. 130.

> Chamber's enquiry in the present case. The Appeals Chamber also notes the Trial Chamber's finding that, in most cases the potentially eligible victims were not in a position to submit supporting documentation to prove their allegations, and its reference to the circumstances in the DRC and the many years that have elapsed since the material events.[1103]

514. The Appeals Chamber emphasises that, indeed, "to allow the trial chamber to properly reach a conclusion, it is in the interest of the person who is unable to supply any documentation to explain his or her reasons for this inability".[1104]

515. The Appeals Chamber finds that the fact that the Trial Chamber did not cite to these passages does not impugn its overall findings. However, it would have been helpful had it referred to them and emphasised the need for the burden of proof to be met even if no documentary evidence is submitted in support of an application. Ultimately, the "enquiry is whether the relevant facts have been established to the applicable standard of proof"; this will govern the assessment of an application. In other words, an application will not be granted, with or without supporting documentation, if the application (and other information and evidence) does not support the claim being made.

516. The Defence further argues that the Trial Chamber should have given more guidance as to the documents that could be provided, as was done by other trial chambers, stating that failing to do so, with the lower burden of proof, created a situation where it was optional whether or not an application should be substantiated. As has been stated above, the Appeals Chamber does not consider that the Trial Chamber rendered the provision of documentation optional, nor did it presume that the provision of documents is impossible. If documentary support cannot be provided, this may affect the substantiation of a claim, which must in any event meet the requisite standard of proof. The trial chamber decisions referred to by the Defence were decisions rendered *after* the trial chambers in question had decided on applications, explaining what their approach had been. What the Trial Chamber stated in this case was general in nature, noting that no applications were ruled on by it which would have allowed it

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[1103] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 204 (emphasis added), *referring to* *Lubanga* 2015 Reparations Order, para. 22; *Al Mahdi* Appeals Chamber Judgment on Reparations, para. 42.
[1104] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 204.

to assess the information that may or may not be available to claimants.[1105] Considering the matters remanded to the Trial Chamber under other grounds of appeal,[1106] it will now be the task of the Trial Chamber to do this, and to decide whether it is necessary to provide further guidance to prospective applicants as to what documentation or proof it will require.

517. It is emphasised that the Trial Chamber has cited to the standard of proof required, and acknowledged that difficulties may exist for victims to produce documentary evidence. However, as stated above, this cannot be understood as providing *carte blanche* to victims to come forward without supporting evidence. The Trial Chamber will be expected to conduct an appropriate enquiry, on a case-by-case basis, and to ensure that what it receives meets the appropriate standard of proof, that is, proving harm and the causal nexus.

518. In view of the foregoing, the Appeals Chamber finds that the Defence has not demonstrated an error. As a result, its arguments in this regard are rejected.

3. Destruction of the health centre in Sayo

(a) Relevant parts of the Impugned Decision

519. In relation to the health centre in Sayo, the Trial Chamber recalled that reparations could be awarded to direct victims who showed they had suffered harm as a result of the crime of intentionally directing attacks against protected objects as a war crime, namely, against the health centre in Sayo, in the context of the First Operation, for which Mr Ntaganda had been convicted under count 17.[1107]

520. When setting out the harm suffered by direct victims of the attacks, the Trial Chamber found as follows:

> According to the Second Expert Report, the attack on the health centre in Sayo not only damaged its physical structures, but also caused harm to its service provision and exacerbated the vulnerability and suffering of the civilian population. After the attack, the centre ceased services, regaining functionality soon after, but at reduced capacity. To date, the number of beds is still reduced,

[1105] *See* Impugned Decision, para. 196.
[1106] *See supra* paras 345-346.
[1107] Impugned Decision, para. 116.

> and there is still a lack of skilled personnel. However, the Appointed Experts report that simply providing material assets or repairing its structures would not reinstate the prior level of healthcare provision.[1108]

521. The Trial Chamber defined one form of material harm suffered by direct victims of the attacks, as "[d]amage to the health centre in Sayo and loss of adequate healthcare provision to the community that benefitted from it".[1109]

522. In setting out the cost to repair the victims' harms, it stated:

> As to the cost of repairing the health centre in Sayo, the Second Expert Report notes that the centre is operational today as repairs were made through the NGO Mediar in 2005, with money raised locally. It recalls that the TFV estimated the cost of a new health care facility to be USD 50,000. In the view of the Expert, Dr Gilmore, to focus only on rebuilding infrastructure 'does not correspond to the harm caused or the level of service provision', as the centre ceased services following the attack, but soon after regained functionality at a reduced capacity and there is lack of skilled personnel. Focusing on the costs of reinstating the level of healthcare provision, Dr Gilmore attempts to quantify the appropriate total cost for repair the attack on the Sayo health centre, suggesting the total sum of USD 130,000. This would include the damage caused to the health centre (USD 5,000), large equipment (USD 40,000), transport (USD 5,000), maintenance for five years (USD 10,000), equipment and essential medications (USD 10,000), and the costs for one doctor and two nurses for five years (USD 60,000).[1110]

523. Footnotes within this paragraph included further information provided in the Second Expert Report as to the costs for equipment, and doctors and nurses per month.[1111]

(b) Defence submissions before the Appeals Chamber

524. The Defence submits that the Trial Chamber "erred by relying on unreliable evidence to meet the burden of proof in relation to the damage to the Sayo health centre".[1112] The Defence argues that the Trial Chamber relied "only on the views of the Appointed Experts", but that it "was not in a position to establish, on the basis of the

[1108] Impugned Decision, para. 159 (footnotes omitted).
[1109] Impugned Decision, para. 183.
[1110] Impugned Decision, para. 242 (footnotes omitted).
[1111] Impugned Decision, fns 659-661.
[1112] Defence Appeal Brief, p. 45.

evidence presented at trial, the extent of the damage caused to the centre during the First Operation by the UPC/FPLC".[1113]

525. The Defence avers that the Trial Chamber relied only on the Second Expert Report to conclude that the centre and the services it provides were affected, and that the report relied on information from interviews, TFV submissions that refer to the Sentencing Judgment, intermediaries, information collected by VPRS in 2005 and an MSF document of 2020.[1114] According to the Defence, the information from the interviews has not been tested nor made available to the Defence, and the probative value of the information in the report "is so low that it cannot sustain a finding that meets the burden of proof or the causal nexus that the damage to the centre was extensive, and was caused by the UPC/FPLC".[1115] The Defence argues that the only information provided by a witness in this case was that the staff from the Mongbwalu hospital fled to Sayo to help and that the doors of the centre were damaged.[1116] Moreover, according to the Defence, the Second Expert Report states that, although the health centre in Sayo stopped its activities following the attack, its activities, although reduced, resumed shortly thereafter, which undermines its conclusions on the damage.[1117] The Defence further challenges the Trial Chamber's finding that the attack on the health centre in Sayo exacerbated the vulnerabilities of the civilian population, by averring that the Trial Chamber relied only on the findings of the Second Expert Report in this regard while, according to the Defence, the findings of the report as to "the vulnerability of the population via the destruction of healthcare facilities, are based on modern-day examples, rather than being related to alleged damage in 2002".[1118] Accordingly, the Defence argues that the evidence is "unclear, unreliable, and lacks any causal nexus to any damage caused to the Sayo health centre by the UPC/FPLC".[1119]

526. The Defence submits that, consequently, "the Trial Chamber erred in considering the cost of repair as suggested by Dr Gilmore in her Report, which was not based on reliable evidence that meets the burden of proof on the balance of

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[1113] Defence Appeal Brief, para. 135.
[1114] Defence Appeal Brief, paras 136-137.
[1115] Defence Appeal Brief, para. 137.
[1116] Defence Appeal Brief, para. 137.
[1117] Defence Appeal Brief, para. 138.
[1118] Defence Appeal Brief, para. 138.
[1119] Defence Appeal Brief, para. 138.

probability".[1120] In its view, "[t]his error has a material impact on the Impugned Decision, as Mr Ntaganda's liability is undoubtedly impacted by an erroneous assessment of Sayo health center damage and need for its repair".[1121]

(c) Victims Group 1's submissions before the Appeals Chamber

527. Victims Group 1 do not make submissions on the destruction of the health centre in Sayo.

(d) Victims Group 2's submissions before the Appeals Chamber

528. Regarding the burden of proof in relation to the damage to the health centre in Sayo, Victims Group 2 challenge the argument that the Trial Chamber erred in considering the cost of repair as suggested by one of the appointed experts.[1122] They recall that the experts were appointed "for the specific purpose of being able to rely on their expertise in order to assist its determinations during the reparations proceedings" and it would "be self-defeating if the Trial Chamber could not rely on the reports of the Experts it has appointed".[1123] They note that the Defence itself indicates that the Second Expert Report is based on several sources and, although critical of its approach, the Defence "does not explain how the Expert was supposed to further proceed for the purpose of her assessment of the cost to repair the harm related to the damage to the Sayo health centre".[1124]

529. Victims Group 2 submit that, in arguing that the Second Expert Report cannot sustain a finding that meets the causal nexus that the damage was extensive and caused by the UPC/FPLC, and that the Trial Chamber erred in relying on it,[1125] the Defence is alleging an abuse of discretion by the Trial Chamber; however, they argue that the Defence has failed to demonstrate that the criteria for establishing an abuse of discretion have been met.[1126] Victims Group 2 submit that the Trial Chamber, "in referring to Dr Gilmore's assessment of the cost to repair the damage to the Sayo health centre, […]

[1120] Defence Appeal Brief, para. 139.
[1121] Defence Appeal Brief, para. 139.
[1122] Victims Group 2's Response, para. 104.
[1123] Victims Group 2's Response, para. 105.
[1124] Victims Group 2's Response, para. 105.
[1125] Victims Group 2's Response, para. 106.
[1126] Victims Group 2's Response, para. 107.

did not make any finding as to whether and to which extent it endorsed said assessment".[1127] They argue that, "[i]n setting the overall cost to repair, the Trial Chamber did not set specific amounts of money aimed at addressing different types of harm" and that it provided discretion to the TFV.[1128] Accordingly, Victims Group 2 submit that the Defence fourth ground of appeal should be dismissed in its entirety.[1129]

(e) Determination by the Appeals Chamber

530. The Defence submits that "[t]he Trial Chamber erred by relying on unreliable evidence to meet the burden of proof in relation to the damage to the Sayo health centre".[1130] For the reasons that follow, the Appeals Chamber finds that the Trial Chamber indeed erred.

531. The Appeals Chamber first notes that the purpose of reparations proceedings is for the Trial Chamber to quantify the harm caused by the crimes for which Mr Ntaganda was convicted, to the appropriate standard of proof and based on evidence of a causal nexus between the crimes in question and the harm alleged. In terms of how this should be done, and the evidence required, the Appeals Chamber recalls that "a trial chamber should, generally speaking, establish the types or categories of harm caused by the crimes for which the convicted person was convicted, based on all relevant information before it, including the decision on conviction, sentencing decision, submissions by the parties or *amici curiae*, expert reports and the applications by the victims for reparations".[1131] The Appeals Chamber also notes that, "in order to protect the rights of the convicted person and ensure that reparations are not awarded to remedy harms that are not the result of the crimes for which he or she was convicted and to also protect the right of the victims to appeal the exclusion of any harms that they consider have been shown to be caused by these crimes", it referred to the need for a trial chamber to "clearly *define* the harms that result from the crimes for which the person was convicted".[1132] Furthermore, the Appeals Chamber has found "that the Court's statutory

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[1127] Victims Group 2's Response, para. 107.
[1128] Victims Group 2's Response, para. 107.
[1129] Victims Group 2's Response, para. 108.
[1130] Defence Appeal Brief, p. 45.
[1131] *Katanga* Appeals Chamber Judgment on Reparations, para. 70. *See also* 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 78, *referring to* *Katanga* Appeals Chamber Judgment on Reparations, para. 70; *Case 001* Appeal Judgment, para. 512.
[1132] 2015 *Lubanga* Appeals Chamber Judgment on Reparations, para. 184.

framework provides for the convicted person to be able to challenge any such evidence that could potentially be relied upon in the eventual order for reparations".[1133]

532. The Appeals Chamber notes that Mr Ntaganda was convicted, under count 17, of the crime of intentionally directing attacks against protected objects as a war crime, namely against the health centre in Sayo, in the context of the First Operation,[1134] and the Trial Chamber, in the Impugned Decision, found that reparations could be awarded for direct victims who showed they had suffered harm as a result of this crime.[1135] However, although submissions relating to the harm to the health centre were made before the Trial Chamber,[1136] it did not rule, as noted above, on any applications seeking reparations,[1137] including any application regarding the harm to the health centre in Sayo.

533. When referring to the health centre in Sayo, the Trial Chamber relied on an expert report. Rule 97(2) of the Rules allows for a Chamber to "appoint appropriate experts to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations", and provides for the parties to respond to any report.[1138] This process was followed in this case,[1139] with the Trial Chamber appointing four

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[1133] 2015 *Lubanga* Appeals Chamber Judgment on Reparations, para. 185.
[1134] Conviction Decision, paras 1145-1148, p. 538.
[1135] Impugned Decision, para. 116.
[1136] Victims Group 2 made submissions on the issue in response to the two expert reports that addressed the conviction related to this centre (*see* CLR2 Final Submissions, paras 69-72).
[1137] *See* Impugned Decision, para. 196.
[1138] Rule 97(2) of the Rules provides: "At the request of victims or their legal representatives, or at the request of the convicted person, or on its own motion, the Court may appoint appropriate experts to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations. The Court shall invite, as appropriate, victims or their legal representatives, the convicted person as well as interested persons and interested States to make observations on the reports of the experts". *See also* 2015 *Lubanga* Appeals Chamber Judgment on Reparations, para. 183.
[1139] On 5 December 2019, the Trial Chamber requested the Registry to identify experts with expertise on a list of five issues. *See* Order setting deadlines in relation to reparations, para. 9.b: "[…] the Registry, in consultation with the parties, is directed to identify three or more experts with expertise in, inter alia: (i) the scope of liability of the convicted person; (ii) 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; (iii) appropriate modalities of reparations; (iv) sexual violence, in particular sexual slavery, and the consequences thereof on direct and indirect victims; and (v) any other matter deemed relevant after the aforesaid consultation. The proposed expertise should focus on the specific circumstances of the Ntaganda case".

experts on 14 May 2020, one of whom later filed the Second Expert Report,[1140] on which the parties filed observations on 18 December 2020.

534. The Defence's main argument is that the evidence relied upon on this issue is unclear, unreliable and untested. The Appeals Chamber notes that the argument is based on the alleged unreliability of the Second Expert Report upon which the Trial Chamber relied to reach its findings as to the damage caused to the health centre in Sayo, and the cost to repair that damage.

535. First, the Defence correctly points out that the extent of the damage caused to the health centre was not quantified at trial. In the Conviction Judgment, the Trial Chamber found that the UPC/FPLC soldiers "fired projectiles at the health centre", but did not make any findings as to what damage had been caused to the centre; it found that a woman was left behind at the centre and "was killed by the UPC/FPLC during the assault".[1141]

536. In the Sentencing Judgment, the Trial Chamber found as follows:

> The protected object found to have been attacked by the UPC/FPLC in Sayo was a health centre. Injured persons were present in the health centre at the time, as could have been expected in times of ongoing hostilities. By launching an attack against the health centre, a facility that cares for patients, the perpetrators accepted the consequential severe impact on the welfare and/or lives of any patients present at the centre at the relevant time. Furthermore, by attacking the health centre, the UPC/FPLC disrupted the medical care for persons in need.[1142]

537. In finding that, "by attacking the health centre, the UPC/FPLC disrupted the medical care for persons in need",[1143] the Trial Chamber referred to its aforementioned finding in the Conviction Judgment:

[1140] Decision Appointing Experts on Reparations, para. 9, fn. 28.
[1141] Conviction Decision, para. 506 ("The UPC/FPLC soldiers advanced from the church towards the health centre in Sayo, and fired projectiles at the health centre. Furthermore, a shell hit a house behind the health centre. Two persons present at the health centre fled because they felt that they were in danger. Three seriously injured men, as well as a Lendu woman and her child – who was approximately two years old and whom the woman had brought to the health centre for treatment – were left behind at the centre. The woman, who was wearing rags and was unarmed at the time she came to the health centre, was killed by the UPC/FPLC during the assault".).
[1142] Sentencing Judgment, para. 144.
[1143] Sentencing Judgment, para. 144.

> Three seriously injured men, as well as a Lendu woman and her child – who was approximately two years old and whom the woman had brought to the health centre for treatment – were left behind at the centre.[1144]

538. The Trial Chamber later stated, in the Sentencing Judgment:

> 153. With regards to the attack on the Sayo health centre, while the Chamber recalls that it found that more than one projectile was fired at the health centre, and that the centre was intentionally made the object of the attack, it is not clear on the basis of the evidence whether the weapon used destroyed the health centre in full or merely damaged it. *It is therefore not clear whether the centre was damaged as a result of the crime, and this matter is not considered in aggravation.*
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> 154. The Chamber found that 'two persons present at the health centre fled because they felt that they were in danger', leaving behind at the centre '[t]hree seriously injured men, as well as a Lendu woman and her child'. These persons who were unable to leave by themselves, and were thus left without medical care, were, as such, particularly defenceless. This is considered by the Chamber to be an aggravating factor.[1145]

539. Although Mr Ntaganda was convicted, under count 17, of the crime of intentionally directing attacks against protected objects as a war crime, namely, against the health centre in Sayo, in the context of the First Operation,[1146] neither the Conviction Judgment nor the Sentencing Judgment finds that, as a result of that crime, damage was caused to the health centre.

540. Importantly, during the reparations stage, the Trial Chamber did not address the issue of whether actual damage caused to the health centre in Sayo indeed falls within the scope of the conviction and sentencing judgments, and whether Mr Ntaganda could therefore be held liable to repair any such harm. The Trial Chamber, when discussing causation more generally, correctly noted that "the relevant victims [must] fall within the scope of the conviction".[1147] In this regard, it is recalled that the Appeals Chamber has stated that, "in awarding reparations, a trial chamber must remain within the confines of the conviction and sentencing decisions".[1148] However, in addressing the issue of damage and repair to the health centre in Sayo, in the Impugned Decision, the

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[1144] Conviction Decision, para. 506.
[1145] Sentencing Judgment, paras 153-154 (emphasis added).
[1146] Conviction Decision, paras 1145-1148, p. 538.
[1147] Impugned Decision, para. 134.
[1148] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 311.

Trial Chamber did not consider the fact that the Sentencing Judgment states that "[i]t is […] not clear whether the centre was damaged as a result of the crime".[1149]

541. In its final submissions before the Trial Chamber, the Defence underscored that, in relation to the health centre, "the Trial Chamber could not establish the exact extent of the destruction caused by the UPC/FPLC", citing to the relevant paragraph of the Sentencing Judgment.[1150] It argued that, therefore, "Mr Ntaganda should not be held liable to provide the community with a health center that exceeds the state of the center, prior to the attack".[1151] The Trial Chamber did not address this submission. Given that the conviction and sentencing judgments define the scope of Mr Ntaganda's liability to repair, the Appeals Chamber considers that the Trial Chamber should have first considered whether, and on what basis, the cost to repair damage to the centre could be included within the order for reparations. It should also have given the parties an opportunity to make submissions on this issue.

542. In the Impugned Decision, however, the Trial Chamber made findings of harm in relation to the health centre in Sayo, and the cost to repair that harm, and it held Mr Ntaganda liable for it. To do so, in addition to the abovementioned findings, the Trial Chamber had before it submissions from the parties and the TFV during the reparations stage, and two expert reports. However, in dealing with the extent of the damage to the health centre, the Trial Chamber referred, as stated by the Defence, solely to the Second Expert Report.[1152] The Defence argues that this evidence was "unclear, unreliable, and lacks any causal nexus to any damage caused to the Sayo health centre by the UPC/FPLC".[1153]

543. When setting out the harm suffered by direct victims of the attacks, the Trial Chamber, referring to the parts of the Sentencing Judgment set out above, observed that "[t]he attack against the health centre, a facility that provided care for patients, had a severe impact on the welfare and/or lives of any patients present at the centre at the relevant time", and that "[t]hese patients were unable to leave on their own and were

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[1149] Sentencing Judgment, para. 153.
[1150] Defence Final Submissions, para. 136.
[1151] Defence Final Submissions, para. 136.
[1152] Defence Appeal Brief, para. 136.
[1153] Defence Appeal Brief, para. 138.

left without medical care".[1154] Apart from referring, in a footnote, to the Sentencing Judgment when making this finding, it is not clear upon what basis the Trial Chamber made the finding; for example, it is unknown whether patients made applications to obtain reparations in relation to the destruction of the Sayo health centre.

544. The Trial Chamber then noted that, according to the Second Expert Report, the attack damaged not only the health centre's physical structures, but also its service provision, and "exacerbated the vulnerability and suffering of the civilian population";[1155] the centre ceased services after the attack and, although it resumed functionality soon thereafter, this was at a reduced capacity; "[t]o date, the number of beds is still reduced, and there is still a lack of skilled personnel";[1156] "simply providing material assets or replacing its structures would not reinstate the prior level of healthcare provision".[1157] On this basis, the Trial Chamber concluded that, one of the "[h]arms suffered by the direct victims of the attacks" was the "[d]amage to the health centre in Sayo and loss of adequate healthcare provision to the community that benefitted from it".[1158] The Trial Chamber made these findings simply citing to the Second Expert Report, without any analysis of what the expert stated, what she relied on to make her assertions, and whether what she stated was credible. Indeed, discrepancies between what the Trial Chamber found, and what the Second Expert Report states, can also be seen.[1159]

545. Subsequently, under the sub-heading "Cost to repair the victims' harms",[1160] the Trial Chamber referred to the Second Expert Report as to the cost to repair the health centre in Sayo.[1161] In particular, it noted that the expert referred to repairs that had been done in 2005 by an NGO and that the centre was operational today. It noted her finding that, contrary to the estimate of the TFV of 50,000 USD to build a new centre, this "'does not correspond to the harm caused or the level of service provision', as the centre

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[1154] Impugned Decision, para. 158.
[1155] Impugned Decision, para. 159, *referring to* Second Expert Report, paras 160, 161, 168.
[1156] Impugned Decision, para. 159.
[1157] Impugned Decision, para. 159, *referring to* Second Expert Report, para. 169.
[1158] Impugned Decision, para. 183(a)(x).
[1159] *See infra* para. 547.
[1160] Impugned Decision, p. 86.
[1161] Impugned Decision, para. 242, *referring to* Second Expert Report, paras 168-169, 172-173, fns 663, 669, 686.

ceased services following the attack, but soon after regained functionality at a reduced capacity and there is lack of skilled personnel".[1162] It noted the expert's attempt to quantify the total cost of repair focusing on the cost of reinstating the level of healthcare provision, and her suggestion of a "total sum of USD 130,000", including "the damage caused to the health centre (USD 5,000), large equipment (USD 40,000), transport (USD 5,000), maintenance for five years (USD 10,000), equipment and essential medications (USD 10,000), and the costs for one doctor and two nurses for five years (USD 60,000)".[1163] Again, the Trial Chamber drew no conclusions from its recitation of the Second Expert Report's findings.

546. In this regard, the Appeals Chamber notes that it is unclear how the costs summarised in the Impugned Decision, in relation to the health centre in Sayo, relate to the sum of 30 million USD awarded against Mr Ntaganda. The Defence argues that the Trial Chamber's "error has a material impact on the Impugned Decision, as Mr Ntaganda's liability is undoubtedly impacted by an erroneous assessment of [the] Sayo health center damage and need for its repair".[1164] As explored elsewhere in this judgment, the Trial Chamber did not set out clearly how it reached the decision that the sum of money for which Mr Ntaganda was liable was 30 million USD.[1165] Indeed, as noted by Victims Group 2, the Trial Chamber, "while referring to Dr Gilmore's assessment of the cost to repair the damage to the Sayo health centre, […] did not make any finding as to whether and to which extent it endorsed said assessment"[1166] and, "[i]n setting the overall cost to repair, the Trial Chamber did not set specific amounts of money aimed at addressing different types of harm".[1167]

547. Furthermore, the Appeals Chamber notes that the Defence, with some merit, challenges some specific findings of the Second Expert Report and some of the Trial Chamber's conclusions. The Defence argues that the expert undermines her own conclusions on damage to the health centre in Sayo by stating that, although the centre stopped activities after the attack, it resumed shortly thereafter.[1168] It also challenges

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[1162] Impugned Decision, para. 242, *referring to* Second Expert Report, paras 168-169.
[1163] Impugned Decision, para. 242, *referring to* Second Expert Report, paras 169, 172-173, fns 669, 686.
[1164] Defence Appeal Brief, para. 139.
[1165] *See supra* paras 243, 248-265, 274.
[1166] Victims Group 2's Response, para. 107.
[1167] Victims Group 2's Response, para. 107.
[1168] Defence Appeal Brief, para. 138.

the Trial Chamber's finding that the attack exacerbated the vulnerabilities of the civilian population, because, according to the Defence, this finding was based only on the report and the report relied on a modern day example, not related to damage in 2002.[1169] The Trial Chamber stated that, according to the Second Expert Report, the attack on the health centre in Sayo "exacerbated the vulnerability and suffering of the civilian population".[1170] In fact, the Second Expert Report did not give a view specifically in relation to the health centre in Sayo. It footnoted to a report by MSF in 2020, regarding an attack in Ituri that year. The Second Expert Report stated:

> Mr Ntaganda was convicted of Count 17, attacks on a protected object. Although the attack on Saïo represents a small part of the victimisation in this case, it speaks to broader patterns of attacks on healthcare that exacerbate the vulnerability and suffering of the civilian population. Moreover, it highlights the way in which reparations can also serve an expressive function to promote certain values, especially in light of ongoing attacks on healthcare in Ituri.[1171]

548. In this regard, the Appeals Chamber finds that the Trial Chamber erred in failing to properly assess the credibility and reliability of the Second Expert Report, and the basis for its findings, and that it erred in failing to explain how it reached its findings as to causation and harm to the centre. The Appeals Chamber again recalls that neither the Conviction Judgment nor the Sentencing Judgment finds that, as a result of Mr Ntaganda's crime of intentionally directing attacks against protected objects, namely the health centre in Sayo, damage was caused to the health centre or loss of adequate healthcare provision was caused to the community. Therefore, to make such findings in these reparations proceedings, evidence would need to have been presented, establishing to the appropriate standard of proof, that the damage exists, that there is a causal nexus between that damage and Mr Ntaganda's crimes and that, as a result, Mr Ntaganda's liability to pay for repair to this centre has been established. The Appeals Chamber finds that the Impugned Decision is unclear in this regard. It simply adopts conclusions presented in the Second Expert Report without assessing its reliability or the credibility of the expert.

549. In light of these considerations, the Appeals Chamber considers that the Trial Chamber's findings, in the Impugned Decision, regarding the issue of the health centre

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[1169] Defence Appeal Brief, para. 138.
[1170] Impugned Decision, para. 159, *referring to* Second Expert Report, para. 160.
[1171] Second Expert Report, para. 160 (footnote omitted).

in Sayo are inadequate. Without further reasoning, it is impossible for the Appeals Chamber to assess their accuracy. It thus finds that the Trial Chamber failed to meet the requirement to provide a reasoned opinion on the matter. Accordingly, the Appeals Chamber considers it appropriate to reverse the Trial Chamber's findings in relation to the health centre in Sayo and to remand the matter to the Trial Chamber for it to address the matter again, taking into account submissions by the parties, addressing the issue of disclosure to the Defence of relevant information, and addressing the overall liability of the Mr Ntaganda for repair in this respect.

550. On this point, Judge Ibáñez Carranza observes that, even if no individual applications for reparations for the harm to the health centre in Sayo have been submitted, the Trial Chamber should also consider that such harm affected the Sayo community, and the latter may be eligible for reparations as a collective victim. In this regard, Judge Ibáñez Carranza recalls that, in her separate opinion in the *Lubanga* case, she observed that "harm that affects collective interests of a community would define a separate type of victim: the collective victim".[1172] In her view, "[a] community becomes a collective victim whenever the collective rights that such community enjoys are harmed because of the commission of the atrocious crime".[1173]

C. The third ground (in part) and ninth ground of the Defence appeal

551. This section addresses the Defence's more general arguments as to how the Trial Chamber erred in dealing with the issue of breaks in the chain of causation, including in relation to the protracted armed conflict, as also raised in the Defence's third ground of appeal.

1. Relevant parts of the Impugned Decision

552. Regarding the requisite standard of causation, when setting out the criteria that beneficiaries for reparations must meet, the Trial Chamber stated that "there must be a direct causal nexus between the crime and the harm".[1174] It stated that victims may be

[1172] Separate Opinion of Judge Ibáñez to the 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 140.
[1173] Separate Opinion of Judge Ibáñez to the 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 138.
[1174] Impugned Decision, para. 31 (footnote omitted).

direct or indirect, "provided they suffered a personal, but not necessarily direct, harm" but that "a causal link must always exist between the crimes for which the person was convicted and the harm alleged by both, direct and indirect victims".[1175]

553. When dealing specifically with the question of harm, and the causal link, the Trial Chamber held as follows:

> 131. The Chamber recalls that the causal link between the crime and the personal harm for the purposes of reparations is to be determined in light of the specific circumstances of a case.
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> 132. The Chamber adopts the 'but/for' standard of causation as to the relationship between the crimes and the harm. Moreover, it is required that the crimes for which a person was convicted were the 'proximate cause' of the harm for which reparations are sought, as established in the *Lubanga* case.
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> 133. The Chamber underlines that the 'proximate cause' is one that is legally sufficient to result in liability, assessing, *inter alia*, whether it was reasonably foreseeable that the acts and conduct underlying the conviction would cause the resulting harm.
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> 134. The Chamber notes the Defence's submissions that attention should be paid to the possible breaks in the chain of causation. The Chamber acknowledges that causation between an act and its result may be broken by a subsequent event which the person who committed the initial act could not have reasonably foreseen. However, the Chamber notes that, as long as the relevant victims fall within the scope of the conviction and meet the applicable evidentiary standard, the issue does not arise.
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> 135. Furthermore, the Chamber stresses that the applicant shall provide sufficient proof of the causal link between the crime and the harm suffered, based on the specific circumstances of the case.[1176]

2. Defence submissions before the Appeals Chamber

554. Under its ninth ground of appeal, the Defence argues that the Trial Chamber erred in law in applying a wrong standard for the establishment of the causal link with regard to the possible breaks in the chain of causation.[1177] The Defence submits that the Trial Chamber correctly found that causation could be broken by an event that the convicted person could not have reasonably foreseen, but that it erred in finding that, "as long as the relevant victims fall within the scope of the conviction and meet the

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[1175] Impugned Decision, para. 33 (footnote omitted).
[1176] Impugned Decision, paras 131-135 (footnotes omitted).
[1177] The Defence argues that this error falls within ground 9. *See* Defence Appeal Brief, fn. 207.

applicable evidentiary standard, the issue does not arise".[1178] In the Defence's view, "[i]t is not enough for victims to fall within the scope of the conviction and meet the applicable evidentiary standard, if the harm suffered is not attributable to the Convicted Person".[1179] It submits that the Trial Chamber failed to consider that in the context of a protracted armed conflict the causal link can be broken by other incidents which may have an impact on the type and extent of harm suffered by victims and the extent and scope of damage to property.[1180] The Defence further submits that, "[b]y simply stating that the applicant must establish the causal nexus between the harm and the crime, [the Trial Chamber] made no reference to the necessity of meeting the standard of proximate cause; and then failed to even consider whether the chain of causation between an act and its result had been broken by a subsequent unforeseeable event".[1181] The Defence states, by way of example, that the Trial Chamber erred in relation to how it dealt with the issues of transgenerational harm and in its findings as to harm caused in relation to the health centre in Sayo.[1182]

555. In addition to the submissions made by the Defence under its fourth ground of appeal in relation to transgenerational harm, which have been addressed above,[1183] the Defence makes further submissions alleging breaks in the chain of causation in respect of transgenerational harm. It submits that the Trial Chamber should have considered whether any transgenerational harm, which arises after a long period of time and is continuous, may have been caused by other traumatic events unrelated to the crimes for which Mr Ntaganda was convicted or whether such crimes are the only possible cause.[1184] Referring to the *Katanga* case, in which, according to the Defence, Trial Chamber II showed caution in noting that a neuropsychiatrist found that a multifactorial etymology of the emotional disorder of the applicants alleging their transgenerational harm could not be ruled out, and found no causal nexus to such harm, it argues that, despite the fact that the circumstances and the crimes of the *Katanga* and *Ntaganda* cases are not meaningfully different, the Trial Chamber showed no such caution in this

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[1178] Defence Appeal Brief, para. 140, *referring to* Impugned Decision, paras 133-134.
[1179] Defence Appeal Brief, para. 140
[1180] Defence Appeal Brief, para. 140.
[1181] Defence Appeal Brief, para. 141.
[1182] Defence Appeal Brief, paras 142-148.
[1183] *See supra* paras 470-497.
[1184] Defence Appeal Brief, paras 142-143, *referring to* *Katanga* Decision on Transgenerational Harm, paras 16-17, 30-31.

case.[1185] The Defence further argues that, in contrast with the *Katanga* case, in which Trial Chamber II found that the closer the applicant's date of birth to the date of the attack, the more likely it is that the attack had an impact on the applicant, the Trial Chamber in the present case erred by finding that the date of birth of the applicant was not a relevant factor.[1186]

556. In its reply, the Defence reiterates the need for a causal nexus to "be established between the harm and the crimes for which Mr Ntaganda was convicted".[1187] In the case of transgenerational harm, it argues "that this is a fact-intensive inquiry that requires, at the very least, baseline prerequisites to establish a chain of events and identify traumatic events that could break the causal link".[1188] It argues that "sufficient proof of the causal link" should be provided.[1189] It avers that the Expert's submissions support at least, "a requirement of date of birth",[1190] but argues that it is a fact intensive inquiry.

557. In addition to the submissions made by the Defence under its fourth ground of appeal in relation to the health centre in Sayo, which have been addressed above,[1191] the Defence makes further submissions alleging breaks in the chain of causation of the harm in relation to the health centre. It submits that Mr Ntaganda was held "liable to pay for the 'full remaining rehabilitation of the health centre'", based solely on expert evidence which in "turn relied on information received from the VPRS field staff that some rehabilitation of the Sayo health centre had been carried out since the event (for which no evidence was provided)".[1192] It argues, however, that, "in the context of a protracted conflict in Ituri, it is impossible to establish on the basis of the proximate cause standard that any damage to the Sayo health centre was caused by the UPC/FPLC in 2002", and that this was "particularly so in light [of] the Trial Chamber's finding that the extent of the damage caused by Mr Ntaganda's armed forces is impossible to

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[1185] Defence Appeal Brief, paras 143-145, *referring to* *Katanga* Decision on Transgenerational Harm, paras 30-31; *Katanga* Reparations Order, para. 134.
[1186] Defence Appeal Brief, para. 146, *referring to* Impugned Decision, para. 182; *Katanga* Decision on Transgenerational Harm, para. 29.
[1187] Defence Reply to Victims' Responses, para. 44.
[1188] Defence Reply to Victims' Responses, para. 44.
[1189] Defence Reply to Victims' Responses, para. 47.
[1190] Defence Reply to Victims' Responses, para. 48.
[1191] *See supra* paras 530-550.
[1192] Defence Appeal Brief, para. 147.

identify".[1193] The Defence avers that the Trial Chamber "did not rule on the quantum to be paid, referencing only the TFV submission about the cost of a brand new health centre and the estimated cost suggested by Dr Gilmore to rebuild it".[1194] In the Defence's view, what was missing was "any attempted justification as to how a new health centre", equipment and costs for a doctor and nurse "could be linked to any damage caused by the UPC/FPLC in 2002".[1195] According to the Defence, the "Trial Chamber failed to identify the causal link between the attack of the UPC/FPLC on the health centre and the damage that it caused", nor did it "even attempt to exclude the possibility that subsequent attacks by other groups had also caused damage to the same structure".[1196]

558. As has been set out under the Defence's third ground of appeal, while recalling the submissions of the TFV as to the "do no harm" principle, and what the TFV stated was its aim when it proposed the "do no harm" principle,[1197] the Defence submits that, one way the principle "can meaningfully inform the reparations process is to ensure that the identification of the extent of the harm suffered by victims in this case – and the determination of the cost to repair the same – take into consideration the circumstances of the ongoing protracted armed conflict in Ituri".[1198] In its view, "[t]his will be most important when determining whether there was a break in the chain of causality that would end the Convicted Person's liability for harm suffered in the 2002-2003 period".[1199]

3. Victims Group 1's submissions before the Appeals Chamber

559. Victims Group 1 submit that, "contrary to the Defence's assertion, it appears that the scope of the conviction and the applicable evidentiary standard are the only

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[1193] Defence Appeal Brief, para. 147.
[1194] Defence Appeal Brief, para. 148.
[1195] Defence Appeal Brief, para. 148.
[1196] Defence Appeal Brief, para. 148.
[1197] Defence Appeal Brief, para. 101: "When the TFV proposed the '*do no harm*' principle, its aim was '[…] to inform the choice of the types and modalities of reparations, as well as the advisability of their practical implementation throughout reparations proceedings'. The TFV also stated that '[a]t the development stage of reparations orders and implementation plans, the 'do no harm' principle would imply amending or discarding a reparation measure under consideration when there is a strong basis to believe that its execution would have a negative impact that would outweigh the positive outcome initially foreseen'".
[1198] Defence Appeal Brief, para. 102.
[1199] Defence Appeal Brief, para. 102.

guarantees needed when establishing who can benefit from reparations".[1200] They argue that, "[i]f a victim demonstrates that he or she has suffered a harm in relation to a crime for which Mr Ntaganda was convicted, it can logically be concluded that said harm is attributable to the convicted person".[1201]

560. Regarding the argument that a casual nexus should be established via the date of birth, Victims Group 1 argue that, "whether the children born out of rape were born in the militia or a few months later, the harm they are suffering from are the same and the struggle they are facing in the community in which their mother lives, is the same".[1202] They argue that, "[f]or the children of the victims born after the latter's ordeal in the militia, the date of birth does not matter more either, as transgenerational trauma is by nature transmitted to the next generation(s)".[1203] Victims Group 1 submit that, "[r]egarding transgenerational harm, in particular, the fact that other difficult events might have impacted the life of the victims concerned subsequent to the crimes attributed to Mr Ntaganda does not change the fact that the traumas and harm suffered then are more likely than not to be transmitted from a generation to another".[1204] In their view, the harms suffered as a result of Mr Ntaganda's crimes "will not be nullified nor diminished by further additional harm that might be suffered during one's life".[1205] They argue that, "[w]hether or not other traumas and harm attributable to other subsequent events will be also transmitted is irrelevant", stating that, "such sufferings are not quantifiable – unlike *e.g.* material loss, and accordingly do not infringe upon the convicted person's rights".[1206] They argue that, "[a]s a result, the date of birth of the children is irrelevant, all the more so since transgenerational trauma is also transmitted through behaviours, habits and emotions shared, over years and multiple generations".[1207]

561. Victims Group 1 emphasise that, in any event, it was their recruitment into the UPC/FPLC, under Mr Ntaganda's command, that constituted "the starting point of a

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[1200] Victims Group 1's Response, para. 73.
[1201] Victims Group 1's Response, para. 73.
[1202] Victims Group 1's Response, para. 68.
[1203] Victims Group 1's Response, para. 68.
[1204] Victims Group 1's Response, para. 74.
[1205] Victims Group 1's Response, para. 74.
[1206] Victims Group 1's Response, para. 74.
[1207] Victims Group 1's Response, para. 74.

series of harm the former child soldiers and their families have been suffering from ever since".[1208] They argue:

> Whether their situation has then been worsened by subsequent events, as observed by the Chamber itself, must be considered indeed, but not as a lens that would nuance or even reduce these established and recognised harm[s], to the contrary. Because of the time that has elapsed since the events concerned by the present case, the absence of any support or assistance ever provided since and the deleterious environment in which the victims have been living since their original victimisation, it is highly foreseeable that their respective situation could only have worsened. Whether the starting point of the harm they have been suffering from is, as established, their experience – or the experiences of their loved ones – as child soldiers is the fundamental element. Further widespread violence and poverty, associated to various pandemics and displacement are additional objective facts which reparations programs will have to take into consideration, as valuable information on the environment in which these victims have been maintained, in a holistic and victims-centred approach.[1209]

4. Victims Group 2's submissions before the Appeals Chamber

562. Victims Group 2 argue that the Defence contradicts itself by holding that the Trial Chamber correctly held that causation may be broken by subsequent events but later stating that the Trial Chamber failed to consider whether the chain of causation had been broken.[1210] Furthermore, Victims Group 2 argue that the Defence misrepresents the Trial Chamber's holding. They explain that, "contrary to the Defence's contention, the Trial Chamber did not negate that the harm suffered by the victim must be attributable to the convicted person", but rather stressed that the applicant has to provide sufficient proof of the causal link.[1211] They further submit that the Defence "takes issue with the extent of the harm to be repaired by Mr Ntaganda", but that "the Trial Chamber did not specify any amount of money aimed at concretely addressing different types of harm" but rather "provided the TFV with discretion on the matter", a question that Victims Group 2 address under the tenth ground of the Defence's appeal.[1212] They submit that the Defence's contention that the Trial Chamber did not consider possible breaks in the chain of causation amounts to "no more than a mere disagreement with the Trial Chamber's ruling, which is not sufficient to establish

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[1208] Victims Group 1's Response, para. 75.
[1209] Victims Group 1's Response, para. 76.
[1210] Victims Group 2's Response, para. 136.
[1211] Victims Group 2's Response, para. 137.
[1212] Victims Group 2's Response, para. 143.

an error".[1213] As such, Victims Group 2 submit that the ninth ground of the Defence's appeal should be dismissed.[1214]

563. Victims Group 2 argue that, contrary to the *Katanga* case, in the present case, the Trial Chamber decided that reparations should be collective and that it, consequently, does not have to individually assess victims' applications alleging transgenerational harm but rather has to explain how transgenerational harm may occur, as the Trial Chamber sufficiently did, further making it clear that the causal nexus needs to be established.[1215] Regarding the example of the date of birth of the applicant, they argue that the "Trial Chamber did not find that the date of birth of a child was an irrelevant factor" but rather that such factor is not the sole factor that should be taken into account, concluding that "[w]hat is crucial is that the victim concerned is able to demonstrate that he or she suffered transgenerational harm as a result of the crimes for which Mr Ntaganda has been convicted".[1216]

5. *Determination by the Appeals Chamber*

(a) Breaks in the chain of causation in relation to the requisite standard for causation in reparations proceedings

564. The Defence submits that the Trial Chamber erred in relation to what it stated generally as to possible breaks in the chain of causation. In its 2015 *Lubanga* Appeals Chamber Judgment on Reparations, the Appeals Chamber stated:

> 79. The Appeals Chamber notes that, pursuant to rule 85 (a) of the Rules of Procedure and Evidence, victims are "natural persons who have suffered harm *as a result of* the commission of any crime within the jurisdiction of the Court" […]. The Appeals Chamber considers that the relevant principle embodied in this rule is that: Reparation is to be awarded based on the harm suffered as a result of the commission of any crime within the jurisdiction of the Court.
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> 80. The Appeals Chamber further recalls its holding that "[w]hether or not a person has suffered harm as the result of a crime within the jurisdiction of the Court and is therefore a victim before the Court *would have to be determined in light of the particular circumstances*" […]. The Appeals Chamber considers that the principle which finds expression in this holding is that: The causal link

[1213] Victims Group 2's Response, para. 144.
[1214] Victims Group 2's Response, para. 145.
[1215] Victims Group 2's Response, paras 138-139.
[1216] Victims Group 2's Response, para. 140.

> between the crime and the harm for the purposes of reparations is to be determined in light of the specificities of a case.[1217]

565. The Appeals Chamber proceeded to set out the law as follows:

> Accordingly, the Appeals Chamber articulates the principle that: In the reparation proceedings, the applicant shall provide sufficient proof of the causal link between the crime and the harm suffered, based on the specific circumstances of the case. In this sense, what is the "appropriate" standard of proof and what is "sufficient" for purposes of an applicant meeting the burden of proof will depend upon the circumstances of the specific case. For purposes of determining what is sufficient, Trial Chambers should take into account any difficulties that are present from the circumstances of the case at hand.[1218]

566. In the *Lubanga* Amended Reparations Order, the Appeals Chamber required the following standard:

> The standard of causation is a "but/for" relationship between the crime and the harm and, moreover, it is required that the crimes for which Mr Lubanga was convicted were the "proximate cause" of the harm for which reparations are sought.[1219]

567. The Appeals Chamber notes that, in the Impugned Decision, the Trial Chamber explicitly referred to the abovementioned findings of the Appeals Chamber regarding the standard of causation. Having noted that the causal link depends on the circumstances of the case,[1220] the Trial Chamber observed that "it is required that the crimes for which a person was convicted were the 'proximate cause' of the harm for which reparations are sought, as established in the *Lubanga* case".[1221]

568. The Trial Chamber noted "the Defence's submissions that attention should be paid to the potential breaks in the chain of causation"[1222] and, in a footnote, it explicitly referenced the Defence's submissions as follows: "While acknowledging that protracted violence can affect potential beneficiaries, the Defence submits that, for instance, the conflict that erupted again in Ituri in 2017 constitutes a break in the chain

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[1217] 2015 *Lubanga* Appeals Chamber Judgment on Reparations, paras 79-80 (footnotes omitted) (emphasis in the original).
[1218] 2015 *Lubanga* Appeals Chamber Judgment on Reparations, para. 81.
[1219] *Lubanga* Amended Reparations Order, para. 59.
[1220] Impugned Decision, para. 131, *referring to* 2015 *Lubanga* Appeals Chamber Judgment on Reparations, para. 80.
[1221] Impugned Decision, para. 132, *referring to* *Lubanga* Amended Reparations Order, para. 59.
[1222] Impugned Decision, para. 134.

of causation and Mr Ntaganda cannot be held responsible for its effects on the victims of the case".[1223] Referring to the *Katanga* Decision on Transgenerational Harm and some decisions of domestic courts, the Trial Chamber "acknowledge[d] that causation between an act and its result may be broken by a subsequent event which the person who committed the initial act could not have reasonably foreseen".[1224] It proceeded to hold, however, that, "as long as the relevant victims fall within the scope of the conviction and meet the applicable evidentiary standard, the issue [of possible breaks in the chain of causation] does not arise".[1225] Having said this, the Trial Chamber, referring to the 2015 *Lubanga* Appeals Chamber Judgment on Reparations, "stress[ed] that the applicant shall provide sufficient proof of the causal link between the crime and the harm suffered, based on the specific circumstances of the case".[1226]

569. The Appeals Chamber can find no error. Contrary to the Defence's submissions, and as seen above, the Trial Chamber did refer to the proximate cause standard. It is also incorrect to state that the Trial Chamber failed to consider that the causal link may be broken by other incidents; the Trial Chamber referred to the Defence's submissions that breaks in the chain of causation should be taken into account, and it stated clearly that this was indeed the case, and that they should be taken into account. This will be assessed further when addressing specifically the two examples raised by the Defence.

570. The Defence also argues that the Trial Chamber erred in finding that the issue of breaks in the chain of causation does not arise, "*as long as* the relevant victims fall within the scope of the conviction and meet the applicable evidentiary standard".[1227] To the extent that this could be read as stating that breaks in the chain of causation are irrelevant, it would be incorrect. However, in this context, the Appeals Chamber notes that the Trial Chamber, in the sentence immediately preceding this, clearly stated that breaks in the chain of causation must be taken into account. This sentence must be read in that light: that is, that the issue will not arise if an applicant falls within the scope of

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[1223] Impugned Decision, fn. 347, *referring to* Defence Observations on the Registry's Second Report on Reparations, paras 57-58.
[1224] Impugned Decision, para. 134, *referring to* *Katanga* Decision on Transgenerational Harm, para. 17; *Rahman v. Arearose Ltd & Anor*, paras 27-29; *Knightley v. Johns & Ors*; *R. v. Maybin*, paras 60-61.
[1225] Impugned Decision, para. 134.
[1226] Impugned Decision, para. 135, *referring to* 2015 *Lubanga* Appeals Chamber Judgment on Reparations, para. 81.
[1227] Impugned Decision, para. 134 (emphasis added).

the Conviction Judgment, meets the evidentiary threshold, and provides sufficient proof of the causal link, with any alleged breaks in the chain of causation having been assessed. In this regard, the Trial Chamber explicitly stressed that the applicant shall provide sufficient proof of the causal link.[1228] Furthermore, in so doing, the Trial Chamber relied on the jurisprudence of the Appeals Chamber that the sufficiency of evidence to establish the causal link between the crime and the harm suffered depends on the specific circumstances of the case.[1229] As a result, the Defence's arguments on this point are rejected.

571. Turning to the more specific submission that, "particularly in the context of a protracted armed conflict", the Trial Chamber failed to consider that "the causal link may be broken by other incidents",[1230] the Appeals Chamber notes that this submission is related to an argument the Defence raised under its third ground of appeal. Under that ground of appeal, the Defence argued that the reparations process can be meaningfully informed by the "do no harm" principle, namely by ensuring that the circumstances of the ongoing protracted armed conflict in Ituri are considered in the identification of the extent of the harm, especially "when determining whether there was a break in the chain of causality" which would exclude Mr Ntaganda's liability for such harm.[1231] As noted above, and found by the Trial Chamber, harm cannot be attributed to a convicted person if a break in the chain of causation is established in a particular case. If this break is shown, based on the circumstances of the protracted armed conflict, then causation will not have been established. The Trial Chamber and the TFV will be required to assess, when presented with claims for reparations, whether the chain of causation has been established, and whether specifically alleged events, as a result of the protracted armed conflict, break that chain; if it is not established to the requisite standard that the harm alleged by a victim has been caused by Mr Ntaganda, because of a break in the chain of causation related to, for example, the protracted armed conflict, or, in fact, for any other reason, then this claim would have to be rejected.

[1228] Impugned Decision, para. 135.
[1229] Impugned Decision, para. 135, *referring to* 2015 *Lubanga* Appeals Chamber Judgment on Reparations, para. 81.
[1230] Defence Appeal Brief, para. 140.
[1231] Defence Appeal Brief, para. 102.

(b) Examples

572. Turning to the more specific arguments, the Defence states, by way of example, that the Trial Chamber erred in relation to how it dealt with the issues of transgenerational harm and in its findings as to harm caused in relation to the health centre in Sayo.[1232] Without prejudice to the errors that the Appeals Chamber has found in relation to the Trial Chamber's lack of sufficient reasoning to make findings on these matters,[1233] the Appeals Chamber will address these arguments to provide further guidance.

(i) Breaks in the chain of causation in relation to transgenerational harm

573. The Defence argues that the Trial Chamber should have considered that transgenerational harm may have been caused by other traumatic events unrelated to the crimes for which Mr Ntaganda was convicted. It argues that, given that transgenerational harm is continuous and long-lasting, it was essential to consider whether such crimes were the only possible cause.[1234] The Defence argues that, although the circumstances and the crimes of the *Katanga* and *Ntaganda* cases are not meaningfully different, Trial Chamber II, in the former case, was cautious in finding that a multifactorial etymology of the emotional disorder of the applicants alleging transgenerational harm could not be ruled out, while the Trial Chamber in the present case showed no such caution.[1235] The Defence further submits that, in contrast with *Katanga*, in this case, the Trial Chamber erred by finding that the date of birth of the applicant was not a relevant factor.[1236]

574. The Appeals Chamber recalls that the Trial Chamber stated that possible breaks in the chain of causation needed to be considered when assessing if harm had been proven in a particular case.[1237] Although it did not state this in the context of its findings on transgenerational harm specifically, but in a more general context, the finding was,

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[1232] Defence Appeal Brief, paras 142-148.
[1233] *See supra* paras 470-497 (regarding transgenerational harm) and 530-550 (regarding the destruction of the health centre in Sayo).
[1234] Defence Appeal Brief, para. 142.
[1235] Defence Appeal Brief, paras 143-145.
[1236] Defence Appeal Brief, para. 146.
[1237] *See* Impugned Decision, para. 134.

in the view of the Appeals Chamber, intended to apply in all cases. The Appeals Chamber therefore rejects the argument that the Trial Chamber failed to consider that other traumatic events could have broken the chain of causation in relation to this type of harm.

575. The Defence also argues that the Trial Chamber erred in departing from the approach taken in *Katanga* regarding transgenerational harm,[1238] and that the Trial Chamber in the present case "showed no such caution or care".[1239] The Appeals Chamber notes first that the situation in both cases differs insofar as, in the former, Trial Chamber II reached its conclusions after having individually assessed the five applications before it,[1240] while, in the case at hand, the Trial Chamber has not yet ruled on any applications.[1241]

576. Turning to the Defence's contention that the Trial Chamber erred in finding that the date of birth of the applicant was not a relevant factor for the assessment of transgenerational harm,[1242] the Appeals Chamber notes that the Trial Chamber made the following finding:

> Regarding transgenerational harm, the Chamber considers that given the short and long-term consequences of certain crimes, children of the direct victims may have suffered transgenerational trauma *regardless* of the date when they were born, if they can show that their harm is a result of the crimes for which Mr Ntaganda was found guilty.[1243]

577. Contrary to the Defence's assertion,[1244] the Appeals Chamber finds that the Trial Chamber, in stating as such, did not intend to find that the date of birth was irrelevant. First, this sentence follows a paragraph wherein the Trial Chamber was discussing the long-term effects of crimes. There is a potential link between what is said regarding the date of birth, and that paragraph. Second, the adverb "regardless" does not necessarily imply irrelevance of something, but it may indicate that *in spite of*

[1238] Defence Appeal Brief, para. 145.
[1239] Defence Appeal Brief, para. 145. *See also* paras 143-144 *referring to* *Katanga* Decision on Transgenerational Harm, paras 30-31 and *Katanga* Reparations Order, para. 134.
[1240] *Katanga* Decision on Transgenerational Harm, paras 35-142.
[1241] *See* Impugned Decision, para. 196.
[1242] Defence Appeal Brief, para. 146, *referring to* Impugned Decision, para. 182.
[1243] Impugned Decision, para. 182 (emphasis added).
[1244] Defence Appeal Brief, para. 146.

it, something else is considered.[1245] Third, the Appeals Chamber – in line with the submissions of Victims Group 2[1246] – understands the Trial Chamber's statement as saying that the date of birth shall only be taken into consideration as one factor among many, rather than it being the sole factor.

578. The Appeals Chamber, in this context, places, once again, particular emphasis on the second limb of the Trial Chamber's statement, namely that victims *may* suffer transgenerational trauma "*if* they can show that their harm is a result of the crimes for which Mr Ntaganda was found guilty".[1247] Further, the Appeals Chamber recalls that the Trial Chamber stated that the "applicant shall provide sufficient proof of the causal link between the crime and the harm suffered".[1248] The Appeals Chamber considers that this makes clear that, in the Trial Chamber's view, the question of transgenerational harm is in essence an evidentiary issue. The Trial Chamber's statement implies that, even an applicant born a long time after the events in question may be considered to suffer from transgenerational harm if they meet the evidentiary criteria. Similarly, an applicant born shortly after the events may not be considered to suffer from transgenerational harm if the causal link is not established to the requisite standard of proof. The date of birth will certainly be one factor that can go to show the causal link. However, the Trial Chamber will be required to assess all factors presented before it and, based on the relevant standard of proof, reach a decision as to whether reparations should be awarded.

(ii) Breaks in the chain of causation related to the health centre in Sayo

579. The Defence also argues that it is impossible to establish, on the basis of the proximate cause standard, that any damage to the health centre in Sayo was caused by the UPC/FPLC in 2002, in particular as the Trial Chamber, in the conviction and sentencing judgments, found that it is impossible to identify the extent of the damage

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[1245] According to the Oxford English Dictionary, "regardless" is an adverb that means "[d]espite the prevailing circumstances" *or* "[w]ithout regard or consideration for" (*see* Oxford English Dictionary (online edition)). The Cambridge Dictionary defines it as an adverb that means "despite; not being affected by something" or "despite what has been said or done" (*see* Cambridge Dictionary (online edition)).
[1246] Victims Group 2's Response, para. 140.
[1247] Impugned Decision, para. 182 (emphasis added).
[1248] Impugned Decision, para. 135.

caused by Mr Ntaganda's armed forces.[1249] In this context, the Defence notes that the Trial Chamber relied only on the Second Expert Report's recommendation that Mr Ntaganda should be liable to pay for the full remaining rehabilitation of the centre.[1250] The Defence argues that the Trial Chamber did not rule on the amount to be paid, referring only to the submissions of the TFV as to the cost of a brand new centre and the estimated cost to rebuild it presented in the Second Expert Report.[1251] The report's findings as to what needed to be rebuilt or provided for the centre lack, in the Defence's view, any attempted justification as to how all of it could be linked to any damage caused by the UPC/FPLC in 2002.[1252] It submits that the Trial Chamber failed to identify the causal link between the attack on the health centre and the damage it caused and it "did not even attempt to exclude the possibility that subsequent attacks by other groups had also caused damage to the same structure".[1253]

580. The Appeals Chamber has already found that the Trial Chamber erred in relation to its findings as to the health centre in Sayo, and its reliance on the Second Expert Report in the manner in which it did.[1254] In terms of alleged breaks in the chain of causation, although the Trial Chamber, as discussed above, generally explained the need for proof of a chain of causation when establishing that harm has been caused by one of the crimes for which Mr Ntaganda was convicted, and that breaks in that chain of causation should be taken into account,[1255] it did not consider the issue specifically when addressing harm to the health centre in Sayo. The Defence had argued, before the Trial Chamber, that it should not be held liable to repair the centre beyond its state before the attack:

> Regarding the Sayo Health Center in particular, the Defence takes issue with the Joint Experts' suggestion to renovate and improve the health center, noting that only minor surgery can presently be performed. In this regard, the Defence underscores that the Trial Chamber could not establish the exact extent of the destruction caused by the UPC/FPLC. Hence, Mr Ntaganda should not be held liable to provide the community with a health center that exceeds the state of the center, prior to the attack. In the absence of evidence establishing that the Sayo

[1249] Defence Appeal Brief, para. 147.
[1250] Defence Appeal Brief, para. 147.
[1251] Defence Appeal Brief, para. 148.
[1252] Defence Appeal Brief, para. 148.
[1253] Defence Appeal Brief, para. 148.
[1254] *See supra* paras 530-550.
[1255] Impugned Decision, para. 132.

> Health Center was performing more than minor surgery before the November 2002 operation in Mongbwalu, Mr Ntaganda should not be held responsible to pay for repair to the extent suggested by the Joint Experts' and Dr Gilmore.[1256]

581. Although the Defence did not point to evidence to support the assertion that others could have been responsible, the Trial Chamber, at the same time, had an obligation to ensure that the chain of causation was established. It is not clear, as seen above, that this was done. Therefore, the Appeals Chamber finds that the Trial Chamber erred in failing to properly reason its decision as to the chain of causation establishing that Mr Ntaganda is responsible for the harm caused to the health centre in Sayo. In these circumstances, the Appeals Chamber also remands this matter to the Trial Chamber, and in addition requires it to assess the Defence's submissions on the issue.

582. On this point, Judge Ibáñez Carranza observes that, in assessing the issue of causation, the Trial Chamber should also consider her views, as noted in the appeal against the Conviction Judgment in this case, that "the term 'attack' includes the preparation, the carrying out of combat action and the immediate aftermath thereof, including criminal acts committed during *ratissage* operations carried out in the aftermath of combat action".[1257]

D. The second ground (in part), and the sixth and seventh grounds of the Defence appeal

583. The Defence argues that the Trial Chamber "erred in law when ruling on the status of certain victims", raising arguments thereon within the sixth and seventh grounds of the Defence appeal.[1258] As these grounds of appeal raise the issue of how to categorise certain types of victims – as direct or indirect victims – the Appeals Chamber shall deal with them in the same section.

584. More specifically, under its sixth ground of appeal, the Defence argues that the Trial Chamber erred in law by holding that the harm suffered by children born out of rape and sexual slavery is a direct result of the commission of such crimes and that these children may thus qualify as direct victims.[1259] Under its seventh ground of

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[1256] Defence Final Submissions, para. 136.
[1257] Appeals Chamber Judgment on Conviction, para. 1168.
[1258] Defence Appeal Brief, p. 35.
[1259] Defence Appeal Brief, para. 107.

appeal, the Defence argues that the Trial Chamber erred in law by finding that a person who did not have a close personal relationship with a direct victim, but was nevertheless "of significant importance in their lives", may be an indirect victim.[1260]

585. The Defence also argues, under its second ground of appeal, that the Trial Chamber erred in failing to provide a reasoned opinion and to take into consideration its submissions on both of these categories of victims.[1261]

1. Relevant parts of the Impugned Decision

586. When setting out principles related to reparations, and describing beneficiaries of reparations, the Trial Chamber stated the following:

> 33. Natural persons may be direct or indirect victims, provided they suffered a personal, but not necessarily direct, harm. However, a causal link must always exist between the crimes for which the person was convicted and the harm alleged by both, direct and indirect victims.
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> 34. Direct victims are those whose harm is the result of the commission of a crime for which the defendant was convicted. As such, a causal link must exist between the crimes for which the person was convicted and the victims' harm: the injury, loss, or damage suffered by the victims must be a result of the crimes for which the person was convicted.
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> 35. Indirect victims are those who suffer harm as a result of the harm suffered by the direct victims. Accordingly, they must establish that, 'as a result of their relationship with the direct victim, the loss, injury, or damage suffered by the latter gives rise to harm to them'. It follows that the harm suffered by indirect victims must arise out of the harm suffered by direct victims, brought about by the commission of the crimes for which the defendant was convicted.
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> 36. There may be four categories of indirect victims:
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> a. the family members of direct victims;
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> b. anyone who attempted to prevent the commission of one or more of the crimes under consideration;
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> c. individuals who suffered harm when helping or intervening on behalf of direct victims; and
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> d. other persons who suffered personal harm as a result of these offences.

[1260] Defence Appeal Brief, para. 114, *referring to* Impugned Decision, para. 127.
[1261] Defence Appeal Brief, paras 86-87.

> 37. The concept of "family" may have many cultural variations and the Court ought to have regard to the applicable social and familial structures. The Court should take into account the widely accepted presumption that individuals are succeeded by their spouses or partners and their children.
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> 38. The key consideration in order to determine if a person qualifies as an indirect victim is whether they have suffered personal harm as a result of the commission of a crime against another person, and for which the defendant was convicted.[1262]

587. The Trial Chamber later described "the characteristics of the categories of eligible victims, in order to enable their identification by the TFV".[1263] In relation to direct victims, and under a sub-heading entitled "[c]hildren born out of rape and sexual slavery", it stated as follows:

> 120. The Chamber recalls its finding that a number of female members of the UPC/FPLC, including girls under the age of 15, became pregnant during their time in the UPC/FPLC, as 'they were regularly raped and subjected to sexual violence'. In addition, children may have been born as a result of rapes and sexual slavery committed against the civilian population.
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> 121. In determining the status of children born out of rape and sexual slavery, the Chamber recalls the difference between the definition of direct and indirect victims. For direct victims, a causal link must exist between the harm suffered and the crimes of which an accused is found guilty. Indirect victims must establish that, because of their relationship with the direct victim, the loss, injury, or damage suffered by the direct victim gives rise to their harm.
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> 122. The parties argue that children born out of rape should qualify as indirect victims[]. However, the Chamber concluded that, in light of the circumstances of the case, children born out of rape and sexual slavery may qualify as direct victims, as the harm they suffered is a direct result of the commission of the crimes of rape and sexual slavery. In contrast, other children who were not born out of rape and sexual slavery, but who are children of women and girls who were victims of rape or sexual slavery within the context of the crimes for which Mr Ntaganda was convicted, may be considered as indirect victims of such crimes, as they may have suffered harm as a consequence of the harm suffered by the direct victims.
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> 123. The Chamber notes that recognising children born out of rape and sexual slavery as direct rather than indirect victims, is an acknowledgment of the particular harm they suffered and may constitute an adequate measure of satisfaction, in addition to other forms of reparations that may be awarded to them.[1264]

[1262] Impugned Decision, paras 33-38 (footnotes omitted). *See also* para. 31.
[1263] Impugned Decision, para. 105.
[1264] Impugned Decision, paras 120-123 (footnotes omitted).

588. The Trial Chamber further noted as follows in relation to the submissions of the appointed experts and the LRVs regarding the harm suffered by children born out of rape and sexual slavery:

> The Chamber notes that the Appointed Experts and the LRVs similarly draw attention to the harm of children born out of rape and sexual slavery, who were often rejected by their mothers, as well as by the community and nicknamed 'snake children'. It is noted that they do not have legal status and therefore may not have the Congolese nationality, which in itself can be discriminatory. In addition, due to multiple factors (rejection on multiple levels, discrimination from employment, feelings of frustration, marginalisation, and vulnerability to conscription or enlistment); these children are viewed as 'time bombs' in Iturian communities.[1265]

589. In relation to indirect victims, the Trial Chamber stated:

> 124. As stated in previous decisions, the Chamber relies on the Appeals Chamber jurisprudence and recognises as indirect victims all categories identified in the *Lubanga* case. Regarding family members of the direct victims, the Chamber notes that the First Experts Report indicates that the concept of 'family' in the DRC includes both the nuclear family and extended family. The CLR2 concurs with this and stresses the importance of recognising the local traditions and family structures to honour the victim's culture. The Defence acknowledges the need to adapt the definition of 'family member' to the local culture, beyond the nuclear family members, but argues that 'extended' or 'remote' family must be construed as strictly as possible for the purposes of this case. The Chamber stresses that due regard ought to be given to the applicable social and familial structures in the affected communities. For example, the Chamber notes that the Extraordinary African Chambers held that, 'in Chad, and more broadly in the African continent, the family goes beyond the strict frame of a couple and their children, it includes their father and mother, brothers and sisters and other relatives'.
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> 125. In addition, the Chamber stresses that, as noted by the Appeals Chamber in the case of *The Prosecutor v. Germain Katanga* (the '*Katanga* case['']), the definition of victims under rule 85(a) of the Rules emphasises the requirement of the existence of a harm, rather than how close or distant the family member is from the direct victim. To receive reparations, family members must always have suffered personal harm, which may stem, for instance, from the'[p]sychological suffering experienced as a result of the sudden loss of a family member'. The Appeals Chamber in the *Katanga* case further held that, demonstrating the existence of a 'close personal relationship' with the direct victim, is one way in which the applicant can prove the harm suffered and that the harm resulted from the crimes of which the person in question was convicted, thereby satisfying both eligibility requirements. It follows that, contrary to the Defence's submission, it is not relevant whether the family member is close or distant to the direct victim in the abstract, as long as the indirect victim can demonstrate they have suffered

[1265] Impugned Decision, para. 176.

personal harm as a result of the commission of the crime committed against the direct victim.

126. Additionally, the Chamber stresses that the concept of indirect victims shall not lead to the discrimination of individuals on the basis of birth or marital status. Unmarried partners and children born out of wedlock may also qualify as indirect victims and be eligible to benefit from reparations, subject to demonstrating that they suffered personal harm at the required standard of proof.

127. Similarly, the Chamber notes that individuals who suffered personal harm as a result of the commission of a crime against a person with whom they did not have a close personal relationship, but which nevertheless was of significant importance in their lives, may be entitled to reparations. The indirect victim must nevertheless demonstrate to have suffered harm because of the commission of a crime against the direct victim.

128. Finally, the Chamber recalls that in its Sentencing Judgment, it held that in some instances, crimes may irreversibly impact not only direct victims but also those who witnessed the crimes being committed. These indirect victims are also eligible for reparations under the present Order, insofar as their personal harm is demonstrated pursuant to the required standard of proof.[1266]

590. In addressing the issue of the harm suffered by indirect victims, in respect of *Abbé* Bwanalonga, the Trial Chamber found:

178. In this regard, the Chamber emphasises its previous finding that due to the particularly cruel nature of some of the murders and attempted murders, those who witnessed them or found the bodies later on, including of their family members, were also deeply affected. Some individuals who witnessed these crimes are still traumatised by what they witnessed. For instance, the Chamber found that following the massacre in Kobu, people often found the mutilated bodies of those killed, including of those they had known and of their family members. Several witnesses testified seeing the corpses at the banana field in Kobu, one of them explaining that they were traumatised because of 'the manner in which those people had found their death. They had died in a horrible way'.

179. In particular, the Chamber noted in the Sentencing Judgment the deep psychological impact that the death of *Abbé* Bwanalonga (who served as a priest for 40 years and was well known in Ituri) had on those who witnessed the crime. This included not only the people who knew him, but also the clergy, and the population in general, particularly within the Lendu/Ngiti community. A witness recalled the impact that the murder of *Abbé* Bwanalonga had on the population, expressing that it was 'a great loss and it affected many people of all ethnicities'.[1267]

[1266] Impugned Decision, paras 124-128 (footnotes omitted).
[1267] Impugned Decision, paras 178-179 (footnotes omitted).

2. Defence submissions before the Appeals Chamber

591. Under its second ground of appeal, the Defence argues that the Trial Chamber erred in failing "to provide a reasoned opinion and to take into consideration submissions on behalf of the Convicted Person".[1268] It submits that the Trial Chamber's "errors in this regard include its pronouncements on: (i) children born out of rape as direct victims whereas none of the parties or participants made representations to that effect"; (ii) creation of a new category of indirect victims including persons who did not have a close personal relationship with the victim, who was nevertheless a person of significant importance in their lives […]".[1269]

592. Under its sixth ground of appeal, the Defence challenges the Trial Chamber's finding that the harm suffered by children born out of rape and sexual slavery is a direct result of the commission of such crimes and that these children may thus qualify as direct victims.[1270]

593. The Defence argues that, although "no precise definition of 'direct victim' appears in the jurisprudence of the Court", the Trial Chamber found that there must be "a causal link […] between the harm suffered and the crimes of which an accused is found guilty".[1271] Referring to a separate opinion from the IACtHR and a decision by a trial chamber on direct victims, it argues "that to be considered as a direct victim, the applicant must be the direct object of the crime which forms part of the conviction, and there must be a causal link to the harm alleged".[1272] It avers that, for this reason, the parties all submitted that children born out of rape and sexual slavery could not properly be considered direct victims, but rather as indirect victims, but that the Trial Chamber decided not to follow their submissions, and that it did so "without sufficient justification".[1273]

594. Additionally, regarding the Trial Chamber's finding that, considering these children as direct victims was a way of acknowledging their harm, and "may constitute

[1268] Defence Appeal Brief, para. 86.
[1269] Defence Appeal Brief, para. 87.
[1270] Defence Appeal Brief, para. 107.
[1271] Defence Appeal Brief, para. 107.
[1272] Defence Appeal Brief, para. 109.
[1273] Defence Appeal Brief, para. 109.

an adequate measure of satisfaction",[1274] the Defence argues that "[t]he determination of the status of a victim as direct or indirect is a legal finding; it should not be considered as a symbolic act or as an acknowledgment of harm suffered".[1275] In its view, "[v]ictims' satisfaction is not a criterion that can be considered in the process of determining whether a victim is a direct or indirect victim of a crime".[1276]

595. The Defence further argues that this error of law also "materially impacts the reparations process".[1277] It submits that, because the Trial Chamber held that victims of sexual violence benefit from a presumption of harm, these victims "would also appear to benefit from the same presumptions […] as well as being subject to a lower burden of evidentiary proof".[1278] It submits that while that the Trial Chamber "did not pronounce on this explicitly, it appears to be the logical corollary of its own reasoning".[1279] The Defence argues that, although children born out of rape may suffer some of the same harms as direct victims of sexual violence, they "also experience harms of a completely different nature"[1280] and "packaging them into the same category as direct victims and affording them the same presumptions of physical harm is an unsound approach, which may preclude an accurate characterisation of the harm suffered".[1281] According to the Defence, "[t]his error of law materially impacts the Impugned Decision, as it will necessarily lead to an inaccurate number of direct victims, with the resultant presumptions of harms artificially enlarging the financial liability of the Convicted Person".[1282]

596. In its reply to the victims' responses, the Defence argues that qualifying children born out of rape as direct victims also "enlarges […] the number of indirect victims".[1283] According to the Defence, "the offspring of the children born out of rape and/or sexual slavery would in turn qualify as indirect victims, thereby transcending Mr Ntaganda's

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[1274] Defence Appeal Brief, para. 110 *referring to* Impugned Decision, para. 123.
[1275] Defence Appeal Brief, para. 110.
[1276] Defence Appeal Brief, para. 110.
[1277] Defence Appeal Brief, para. 111.
[1278] Defence Appeal Brief, para. 111.
[1279] Defence Appeal Brief, para. 111.
[1280] Defence Appeal Brief, para. 112.
[1281] Defence Appeal Brief, para.112.
[1282] Defence Appeal Brief, para. 113.
[1283] Defence Reply to Victims' Responses, para. 11.

liability to two generations unborn at the time of the commission of the crimes".[1284] It argues that the Trial Chamber enlarged the group of indirect victims "to include distant family members and other persons who did not have a close personal relationship with the direct victims".[1285] It argues that "this leads to an inaccurate number of victims and artificially enlarges the liability of the convicted person".[1286] It recalls the unanimous submissions by the parties that such persons should be classified as indirect victims, and the submissions of the expert who also stated as such.[1287]

597. Under its seventh ground of appeal, the Defence argues that the Trial Chamber erred in law, by departing from the holding of Trial Chamber II in the *Lubanga* case, "without any justification",[1288] by finding that a person who did not have a close personal relationship with the direct victim, but was nevertheless "of significant importance" in their lives, may be an indirect victim.[1289] The Defence further argues that this error was compounded by the Trial Chamber's "failure to adequately define this new legal standard, which will undoubtedly lead to confusion".[1290] By way of example, the Defence argues that, while the death of *Abbé* Bwanalonga may be a great loss for the community, not everyone within his extended congregation will necessarily suffer deep emotional distress, such as to qualify for reparations as an indirect victim.[1291] The Defence also avers that the Trial Chamber misconstrued the Sentencing Judgment in respect of the *Abbé*. The Defence further argues that requiring indirect victims to prove that they were of "significant importance" to a direct victim rather than their "close personal relationship" introduces subjectivity to the process, is "nearly impossible to assess", expands the Appeals Chamber's definition of "indirect victim" and "introduces a level of uncertainty that is incompatible with existing burdens of proof".[1292]

[1284] Defence Reply to Victims' Responses, para. 11.
[1285] Defence Reply to Victims' Responses, para. 12.
[1286] Defence Reply to Victims' Responses, para. 12.
[1287] Defence Reply to Victims' Responses, para. 13.
[1288] Defence Appeal Brief, para. 114.
[1289] Defence Appeal Brief, p. 38, *referring to* Impugned Decision, para. 127.
[1290] Defence Appeal Brief, para. 115.
[1291] Defence Appeal Brief, para. 115.
[1292] Defence Appeal Brief, para. 117.

3. Victims Group 1's submissions before the Appeals Chamber

598. Regarding the Defence's argument, under its second ground of appeal, that the Trial Chamber failed to provide reasoning for its pronouncements on some categories of victims, Victims Group 1 submit that these arguments are not substantiated and that the Defence simply referred to parts of the Impugned Decision with which it disagrees, without explaining how the Trial Chamber made an error in its reasoning.[1293]

599. In response to the Defence's sixth ground of appeal, Victims Group 1 submit that they "agree[] with the Defence that the nature and types of harm suffered by victims of rape and sexual slavery are not the same as the one suffered by their children born out of these crimes", but they disagree with how the Defence interpreted the Trial Chamber's reasoning.[1294] They submit that, although the Trial Chamber recognised several categories of direct victims, such as direct victims of the attacks, murders and rape, it did not find that their harm was identical, and "it is only logical that if, within one broad category of direct victims, several sub-categories co-exist, such as victims of sexual violence, with victims of rape and victims born out of rape for instance, the same reasoning shall apply".[1295] Victims Group 1 submit that "the recognition provided by the Chamber is an important step for the children born of rape and/or sexual slavery".[1296] They argue that, although recognising these children as direct victims "bears no legal consequences, it can however make a substantial difference in acknowledging the crimes suffered and therefore bring upon psychological benefits for the persons concerned, but also more generally for the affected communities".[1297] Victims Group 1 contend that, in any event, the Defence fails to substantiate how considering these children as direct victims "bears any legal consequences and therefore, its argument is intrinsically unsupported".[1298]

600. Victims Group 1 submit that it is "reasonable to describe children born out of rape and/or sexual slavery as direct victims of these crimes, as their birth is indeed one

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[1293] Victims Group 1's Response, para. 40.
[1294] Victims Group 1's Response, para. 57.
[1295] Victims Group 1's Response, para. 58.
[1296] Victims Group 1's Response, para. 59.
[1297] Victims Group 1's Response, para. 59.
[1298] Victims Group 1's Response, para. 59.

of the direct consequences of said crimes".[1299] Victims Group 1 refer to previous submissions where they argued that these children have suffered from the crimes in question.[1300] They refer to the evidentiary regime in relation to the establishment of acts of sexual violence and the Appeals Chamber's jurisprudence regarding difficulties in being able to present evidence.[1301] They argue that "the qualification of direct or indirect victims does not impact the reparations process, nor the financial liability of the convicted person contrary to the Defence's contentions".[1302] In their view, "both direct and indirect beneficiaries will access the relevant services and support corresponding to the nature of the harm they have been suffering from and to their needs, on an equal footing, and not because of their qualification as direct or indirect victim".[1303]

601. In response to the Defence's seventh ground of appeal, Victims Group 1 submit that, contrary to the Defence's contention, the Trial Chamber correctly interpreted the term "indirect victims".[1304] In their view, the definition of "family" and "close relationship" vary from one case to another.[1305] They submit that "it squarely falls within the Chamber's duty to rule taking due account of the specific context of the case, in more general terms" and they cite to jurisprudence of the Appeals Chamber, where it focuses on the demonstration of harm.[1306] Furthermore, they aver that the argument presented in the seventh ground of appeal was addressed by the Trial Chamber, rendering it moot.[1307]

4. Victims Group 2's submissions before the Appeals Chamber

602. In response to the sixth ground of the Defence's appeal, Victims Group 2 submit that there is nothing in the Trial Chamber's approach to suggest that it committed a

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[1299] Victims Group 1's Response, para. 60.
[1300] Victims Group 1's Response, para. 60, *referring to* *Ntaganda* Trial Transcript, 3 September 2015 pp. 8-9; Victims Group 1's Closing Brief, para. 180.
[1301] Victims Group 1's Response, paras 61-62.
[1302] Victims Group 1's Response, para. 63.
[1303] Victims Group 1's Response, para. 63.
[1304] Victims Group 1's Response, para. 70.
[1305] Victims Group 1's Response, para. 70.
[1306] Victims Group 1's Response, para. 70, *referring to* *Katanga* Appeals Chamber Judgment on Reparations, paras 119-120.
[1307] Victims Group 1's Response, para. 71, *referring to* Decision on the First Report, paras 52-56.

discernible error.[1308] They state that the Trial Chamber found "that, in its appreciation, the child conceived by virtue of the sexual violence committed is the direct consequence of the criminal act", and that the Defence did not demonstrate that the Trial Chamber committed an error by "finding that the conception in such specific circumstances in itself constituted the harm".[1309] They submit that, "[e]ven if a legal error was committed, the Defence fails to show how the Trial Chamber's finding that children born out of rape are direct rather than indirect victims materially affects the Impugned Decision".[1310] Regarding the Defence's arguments as to presumptions, they argue that, as both direct and indirect victims can benefit from presumptions, whether these victims are classified as one or the other would not materially affect the reparation process.[1311] As to the arguments related to characterising the harm suffered by children born out of rape with that of the raped or sexually enslaved woman, they argue that "granting two different groups of victims the same lowered evidentiary standard, namely the presumption of harm, does not mean recognising that they have suffered the same harm".[1312] They also refute the arguments that the Trial Chamber's approach would inflate Mr Ntaganda's financial liability, as "when benefitting from a certain type of reparation, it will not matter whether the victim is a direct or indirect one", and the differentiation between direct and indirect victims "has no bearing on the financial liability of Mr Ntaganda".[1313] Accordingly, Victims Group 2 submit that the sixth ground of appeal of the Defence should be dismissed in its entirety.[1314]

603. In response to the seventh ground of the Defence's appeal, Victims Group 2 argue that the Trial Chamber was in line with the Appeals Chamber's reasoning in the *Katanga* case, which focuses on the existence of harm.[1315] They state that "the Trial Chamber clearly and explicitly focused on the need to show personal harm, rather than proving one belonging to a specific category of persons".[1316] In relation to the

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[1308] Victims Group 2's Response, paras 110-111.
[1309] Victims Group 2's Response, para. 111.
[1310] Victims Group 2's Response, para. 112.
[1311] Victims Group 2's Response, para. 113.
[1312] Victims Group 2's Response, para. 114.
[1313] Victims Group 2's Response, para. 115.
[1314] Victims Group 2's Response, para. 116.
[1315] Victims Group 2's Response, para. 119, *referring* to *Katanga* Appeals Chamber Judgment on Reparations, para. 120.
[1316] Victims Group 2's Response, para. 119.

Defence's arguments concerning the murder of *Abbé* Bwanalonga in Mongbwalu, they argue that "the Trial Chamber made it clear that only the persons who can prove on a balance of probabilities that the priest had a significant importance in their lives ***and*** that they suffered harm as a consequence of his murder may be entitled to reparations".[1317] They submit that the Defence failed to demonstrate that the Trial Chamber committed a discernible error and that the seventh ground of appeal of the Defence should thus be rejected.[1318]

5. Determination by the Appeals Chamber

604. As the definition of indirect victims pertains to both the sixth and seventh grounds of appeal, the Appeals Chamber shall first address the issue of indirect victims as it pertains to the seventh ground of appeal and second, whether children born out of rape and sexual slavery qualify as direct or indirect victims.

(a) Whether persons to whom a direct victim was of significant importance may qualify as indirect victims

(i) Preliminary issue

605. As a preliminary issue, the Appeals Chamber notes that Victims Group 1, without any further supporting argumentation, submit that the Defence's argument under this ground of appeal is moot because the Defence had already raised it earlier in the proceedings, and the Trial Chamber had already addressed it.[1319]

606. The Appeals Chamber notes that the Trial Chamber addressed the issue raised under this ground of appeal in a decision of 15 December 2020, the purpose of which was stated to be "to provide guidance to the Registry in the context of its assessment of the potential eligibility of victims with a view to determining the overall number of victims that may be potentially eligible for reparations".[1320] Despite having addressed

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[1317] Victims Group 2's Response, para. 120.
[1318] Victims Group 2's Response, para. 121.
[1319] Victims Group 1's Response, para. 71, *referring to* Decision on the First Report, paras 52-56.
[1320] Decision on the First Report, para. 12. *See also* para. 55: "In relation to the Defence's argument that the fourth category should only include persons demonstrating a close personal relationship with the direct victim, the Chamber notes that scenarios can be envisaged where individuals have suffered personal harm as a result of the commission of a crime against a person with whom they did not have a close personal relationship, but which nevertheless was of significant importance in their lives. Such individuals should not be barred, without more, from receiving reparations, should they be able to

the matter, it also stated that, "[r]egarding the concept of indirect victims, the Chamber notes that the definition or interpretation of 'indirect victim' will be addressed by the Chamber in the Reparations Order".[1321]

607. Victims Group 1 have provided no further argumentation as to why the matter raised under this ground of appeal should not be appealable now. Indeed, the Appeals Chamber notes that the issue in question was also decided upon in the Impugned Decision, leaving it in principle open to appeal. The overall relevance of the finding made in the decision of 15 December 2020, to the reparations order now under appeal, was not necessarily clear at that time, and the Trial Chamber indeed stated in that decision that the definitions would be decided upon in the reparations order. Without more, the Appeals Chamber considers that the Defence was not precluded from raising this issue now on appeal. Accordingly, Victims Group 1's arguments in this regard are rejected.

(ii) Merits

608. The Appeals Chamber notes that, under its second ground of appeal, the Defence argues that the Trial Chamber failed to provide a reasoned opinion, and failed to consider its submissions, in relation to various matters.[1322] One of those matters, the Defence argues, was the "creation of a new category of indirect victims including persons who did not have a close personal relationship with the victim, who was nevertheless a person of significant importance in their lives".[1323] Within its arguments under its seventh ground of appeal specifically, it also submits that the Trial Chamber departed from the previous standard related to indirect victims, "without justification",[1324] and that this error was compounded by its "failure to adequately define this new legal standard, which will undoubtedly lead to confusion".[1325]

609. In this regard, the Appeals Chamber has recalled above that a trial chamber, in setting out its reasoning, is not required to refer to every aspect of a party's submissions

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demonstrate that they have suffered a harm as a result of the commission of a crime against the direct victim."

[1321] Decision on the First Report, para. 52.
[1322] Defence Appeal Brief, para. 86.
[1323] Defence Appeal Brief, para. 87.
[1324] Defence Appeal Brief, para. 114.
[1325] Defence Appeal Brief, para. 115.

on the issue on which it is deciding.[1326] However, "it is essential that it indicates with sufficient clarity the basis of the decision".[1327]

610. The Appeals Chamber notes that the Defence made submissions regarding indirect victims on at least two occasions before the Trial Chamber.[1328] In its February 2020 submissions, the Defence argued, *inter alia*, that the indirect victims in this case are "limited to: [f]amily members of direct victims; [i]ndividuals who suffered harm when helping or intervening on behalf of direct victims; and [o]ther persons who suffered personal harm as a result of these offences".[1329] It proceeded to argue as follows:

> For the purpose of this case, "family members of direct victims" can qualify as indirect victims only if they are "close family members", such as spouses and children, if they demonstrate the harm they have suffered. Moreover, *"other persons who suffered personal harm as a result of these offences" should be limited to a person demonstrating a 'close personal relationship' with the direct victim, if they can substantiate their claim with documents proving they have suffered harm that results from the crimes, pursuant to the applicable jurisprudence on victim participation.*[1330]

611. In the Decision on issues raised in the Registry's first report on reparations (of 15 December 2020), the Trial Chamber stated that, "[r]egarding the concept of indirect victims, the Chamber notes that the definition or interpretation of 'indirect victim' will be addressed by the Chamber in the Reparations Order".[1331] It proceeded, however, to elaborate some issues, including that currently under appeal. In particular, referring to the Defence's argument above that the fourth category of indirect victims, *i.e.*, "other persons who suffered personal harm as a result of these offences",[1332] as found in the *Lubanga* case, should only include those who can demonstrate a close personal relationship with the direct victim, the Trial Chamber found that

> scenarios can be envisaged where individuals have suffered personal harm as a result of the commission of a crime against a person with whom they did not have

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[1326] *See supra* paras 58-59.
[1327] *Lubanga* OA5 Appeals Chamber Judgment, para. 20.
[1328] *See* Defence February 2020 Submissions, paras 18-23; and Defence Final Submissions, paras 139-143.
[1329] Defence February 2020 Submissions, para. 21.
[1330] Defence February 2020 Submissions, para. 22 (emphasis added) (footnotes omitted).
[1331] Decision on the First Report, para. 52.
[1332] *Lubanga* Amended Reparations Order, para. 6(b)(iv).

> a close personal relationship, but which nevertheless was of significant importance in their lives. Such individuals should not be barred, without more, from receiving reparations, should they be able to demonstrate that they have suffered a harm as a result of the commission of a crime against the direct victim.[1333]

612. No explanation of what type of scenarios this would involve, or what the "more" relates to, was provided and the Trial Chamber did not cite to any authorities to make this finding.[1334]

613. In the Defence Final Submissions, the Defence submitted that it agreed with the categories of indirect victims identified in the *Lubanga* Amended Reparations Order, except for that regarding "[a]nyone who attempted to prevent the commission of one or more of the crimes under consideration".[1335] However, in relation to the issue of extended family, contrary to the submissions of other parties and the First Experts Report that the category of "family member" should include "extended" or "remote" family members, the Defence submitted that

> "family members" can be qualified as indirect victims only if they are "close family members", such as spouses and children. This category should be limited to person[s] demonstrating a "close personal relationship" with the direct victim. The Defence accepts and acknowledges that the definition of "family member" must be culturally adapted, including not only the nuclear family. Nevertheless, the "extended" or "remote" family must be defined for the purpose of this case, and not encompass an unlimited number of individuals following a broad definition.[1336]

614. Having referred to jurisprudence of the ECCC and that of the ICC in the *Katanga* Appeals Chamber Judgment on Reparations, the Defence argued that "'extended family members' must be construed as strictly as possible", and that the indirect victim "must still be able to establish the harm suffered".[1337] It seemed to then argue, more generally, that "indirect victims are eligible for reparations, however they must establish they have personally suffered the harm and that he or she had 'a close personal relationship with the direct victim'".[1338]

[1333] Decision on the First Report, para. 55.
[1334] Decision on the First Report, para. 55.
[1335] Defence Final Submissions, para. 140.
[1336] Defence Final Submissions, para. 141.
[1337] Defence Final Submissions, para. 143.
[1338] Defence Final Submissions, para. 143.

615. In the Impugned Decision, the Trial Chamber referred to the Defence's submissions regarding extended family members.[1339] In addressing the Defence's argument, the Trial Chamber referred to the jurisprudence of the Appeals Chamber requiring a "'close personal relationship' with the direct victim" as "one way in which the applicant can prove the harm suffered and that the harm resulted from the crimes of which the person in question was convicted, thereby satisfying both eligibility requirements".[1340] It expressly rejected the Defence's arguments regarding extended family members, by finding that, "contrary to the Defence's submission, it is not relevant whether the family member is close or distant to the direct victim in the abstract, as long as the indirect victim can demonstrate they have suffered personal harm as a result of the commission of the crime committed against the direct victim".[1341]

616. The Trial Chamber then proceeded to find that those for whom the direct victim is of significant importance, but with whom they have no close personal relationship, may receive reparations as indirect victims.[1342] Neither did it cite to any authority to make this finding, nor, in doing so, did it refer to the Defence's argument that the category of "'other persons who suffered personal harm as a result of these offences' should be limited to a person demonstrating a 'close personal relationship' with the direct victim, if they can substantiate their claim with documents proving they have suffered harm that results from the crimes, pursuant to the applicable jurisprudence on victim participation".[1343]

617. The Trial Chamber then stated that "[t]he indirect victim must nevertheless demonstrate to have suffered harm because of the commission of a crime against the direct victim",[1344] referring in a footnote to a decision by another trial chamber, wherein it was found as follows:

> Indirect victims must establish that, as a result of their relationship with the direct victim, the loss, injury, or damage suffered by the latter gives rise to harm to

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[1339] Impugned Decision, para. 124.
[1340] Impugned Decision, para. 125, *referring to* *Katanga* Appeals Chamber Judgment on Reparations, para. 116 and *Lubanga* Amended Reparations Order, para. 58.
[1341] Impugned Decision, para. 125, *referring to* *Katanga* Appeals Chamber Judgment on Reparations, para. 116 and *Lubanga* Amended Reparations Order, para. 58.
[1342] Impugned Decision, para. 127.
[1343] Defence February 2020 Submissions, para. 22 (footnotes omitted).
[1344] Impugned Decision, para. 127, *referring to* *Lubanga* Judgment on Indirect Victims, para. 49.

> them. It follows that the harm suffered by indirect victims must arise out of the harm suffered by direct victims, brought about by the commission of the crimes charged.[1345]

618. The Appeals Chamber recalls that, in 2008, in an appeal dealing with victims' participation in the *Lubanga* case, and as related to former child soldiers, it referred to "a close personal relationship between the victims such as the relationship between a child soldier and the parents of that child" as an example where the harm caused to one person can give rise to harm in other persons:

> Harm suffered by one victim as a result of the commission of a crime within the jurisdiction of the Court can give rise to harm suffered by other victims. This is evident for instance, when there is a close personal relationship between the victims such as the relationship between a child soldier and the parents of that child. The recruitment of a child soldier may result in personal suffering of both the child concerned and the parents of that child. It is in this sense that the Appeals Chamber understands the Trial Chamber's statement that "people can be the direct or indirect victims of a crime within the jurisdiction of the Court". The issue for determination is whether the harm suffered is personal to the individual. If it is, it can attach to both direct and indirect victims. Whether or not a person has suffered harm as the result of a crime within the jurisdiction of the Court and is therefore a victim before the Court would have to be determined in light of the particular circumstances.[1346]

619. In 2015, in the same case, but in the context of reparations proceedings, the Appeals Chamber issued an amended reparations order. First, in defining in general terms the beneficiaries of reparations, it stated that reparations can be granted to direct and indirect victims, the latter "including" the following sub-categories:

> (i) the family members of direct victims,
>
> (ii) anyone who attempted to prevent the commission of one or more of the crimes under consideration,
>
> (iii) individuals who suffered harm when helping or intervening on behalf of direct victims, and
>
> (iv) other persons who suffered personal harm as a result of these offences.[1347]

620. Later, in setting out the terms of the order for reparations specifically against Mr Lubanga, it found:

[1345] *Lubanga* Judgment on Indirect Victims, para. 49.
[1346] *Lubanga* Appeals Chamber Judgement on Victims' Participation, para. 32.
[1347] *Lubanga* Amended Reparations Order, para. 6(b).

> The present order for reparations covers direct as well as indirect victims who have suffered harm as a result of the crimes for which Mr Lubanga was convicted. In order to determine whether a suggested "indirect victim" is to be included in the reparation scheme, a determination should be made as to whether there was a close personal relationship between the indirect and direct victim, for instance as exists between a child soldier and his or her parents.[1348]

621. In 2018, in the reparations proceedings in the *Katanga* case, having referred to its previous jurisprudence identifying "family members of direct victims" as one of the sub-categories of "indirect victims", the Appeals Chamber further observed that the demonstration of a "close personal relationship" is one way of proving the existence of harm and that it resulted from the loss of the family member. It noted:

> The Appeals Chamber has recognised that, pursuant to rule 85 of the Rules, reparations may be granted to indirect victims, including "family members of direct victims". It has also stated, in relation to the concept of 'harm', that "harm does not necessarily need to have been direct, but it must have been personal to the victim" and it may be psychological. In the *Lubanga* case, the Appeals Chamber found that one of the heads of harm caused to indirect victims in that case was "[p]sychological suffering experienced as a result of the sudden loss of a family member". Therefore, individuals may claim reparations for psychological harm from the loss of a family member as a result of the crimes for which a conviction has been entered. In such cases, they must demonstrate both the existence of the psychological harm and that the harm resulted from the loss of the family member – and therefore, indirectly, from the commission of the relevant crimes. One way in which an indirect victim may satisfy these requirements is by demonstrating a 'close personal relationship' with the direct victim, supported by evidence and established on a balance of probabilities. Establishing a close personal relationship may prove both the harm and that the harm resulted from the crimes committed.[1349]

622. In the Appeals Chamber's view, the relevant jurisprudence does not limit the category of "indirect victims" to family members of direct victims who can show a "close personal relationship", such as the one between victimised children and their parents. It has referred to the demonstration of a close personal relationship as being *one* way of proving harm. However, it has not expressly closed the door to other ways in which this can be done, yet these findings were made in the context of decisions interpreting the scope of family members as indirect victims.

[1348] *Lubanga* Amended Reparations Order, para. 63.
[1349] *Katanga* Appeals Chamber Judgment on Reparations, para. 116 (footnotes omitted).

623. In any event, the Appeals Chamber considers that the category of "indirect victims" may also include persons falling within the abovementioned four subcategories, as identified in the *Lubanga* Amended Reparations Order.[1350] In this regard, the question still remains as to whether those to whom direct victims are of significant importance, but with whom they have no close personal relationship, may be included within the category of "indirect victims", specifically under the fourth subcategory of the *Lubanga* Amended Reparations Order, *i.e.*, "other persons who suffered personal harm as a result of these offences".[1351] This matter has not been dealt with by the Appeals Chamber before.

624. The Appeals Chamber's jurisprudence has, to date, focused largely on establishing the degree to which family members may claim reparations as indirect victims, although it has also made more general statements as to the demonstration of harm.[1352] Other than that, in the Appeals Chamber's view, the relevant jurisprudence does not clearly establish the limits to the category of persons who may claim indirect victimhood at the Court and thereby be eligible for reparations. The Appeals Chamber notes that international jurisprudence is also not unambiguous as to whether liability should extend beyond indirect victims who are family members of a direct victim or who at least have a close bond of affection.[1353]

[1350] *Lubanga* Amended Reparations Order, para. 6(b): "(i) the family members of direct victims, (ii) anyone who attempted to prevent the commission of one or more of the crimes under consideration, (iii) individuals who suffered harm when helping or intervening on behalf of direct victims, and (iv) other persons who suffered personal harm as a result of these offences".
[1351] *Lubanga* Amended Reparations Order, para. 6(b)(iv).
[1352] *Katanga* Appeals Chamber Judgment on Reparations, para. 116.
[1353] At the EAC, the category of indirect victims is not restricted to family members but to those who have suffered harm: "La Chambre d'assises d'appel note que la catégorie des victimes indirectes n'est pas restreinte à une « *catégorie particulière de personnes telle que les membres d'une famille* ». C'est le critère du préjudice qui détermine la recevabilité de la victime indirecte. Partant, « *les personnes qui n'ont pas subi de préjudice ne seront pas considérées comme des victimes indirectes, et ce même si elles appartiennent à la famille proche de la victime directe* ». […]" (*Habré* Judgment, paras 584-585). As for the ECCC, the Pre-Trial Chamber (which is an appellate chamber) has defined "indirect victims" as "persons 'who personally suffered injury as a direct result of the crime committed against the direct person'" (*Case 004* Considerations, para. 36, *referring to* *Case 004/2* Considerations , para. 35; *Case 003* Considerations, para. 38; *Case 001* Appeal Judgment, para. 418). On the other hand, the Supreme Court Chamber, also an appellate chamber, has found that this category may include, *inter alios*, friends and other beneficiaries if their injury can be demonstrated, and that indirect victims are not limited to any specific class of persons such as family members: "Absent any limiting provision, the category of indirect victims is not restricted to any specific class of persons such as family members. It may encompass common law spouses, distant relatives, *friends*, *de facto* adopters and adoptees, *or other beneficiaries, provided that the injury on their part can be demonstrated*. On the other hand, persons who did not suffer injury will not be considered indirect victims even if they were immediate family

625. Although the Trial Chamber's precise finding on this issue is not explained further, the Appeals Chamber considers that its references to the Appeals Chamber's jurisprudence provides support for its conclusion. To the extent that the applicable law, including the jurisprudence to which the Trial Chamber referred, can show that the definition of "indirect victims" includes "other persons who suffered personal harm as a result of these offences",[1354] this amounts to sufficient reasoning. The Trial Chamber, generally speaking, cited to the relevant Appeals Chamber jurisprudence, which does not, on its face, exclude this type of victim, even though it does not expressly define what the sub-category encompasses. It is further noted that, having found that individuals for whom a direct victim is of significant importance may be entitled to reparations, the Trial Chamber underscored that "[t]he indirect victim must nevertheless demonstrate to have suffered harm because of the commission of a crime against the direct victim", referring to the jurisprudence of this Court regarding indirect

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members of the direct victim" (*Case 001* Appeal Judgment, para. 418 (emphasis added)). It further found "that the criterion of special bonds of affection or dependence connecting the applicant with the direct victim captures the essence of inter-personal relations, the destruction of which is conducive to an injury on the part of indirect victims. This criterion applies to all persons who claim to be indirect victims, whether family or not, because without prior bonds tying the claimants emotionally, physically or economically to the direct victim, no injury would have resulted from the commission of the crime" (*Case 001* Appeal Judgment, para. 447). At the IACtHR, the category of "indirect victims" typically requires proof of kinship with the direct victim (*see, e.g.*, in *Hernández v. Argentina*, victim status was granted to the direct victim's mother; in *Gonzáles Lluy et al v. Ecuador*, victim status was granted to the direct victim's mother and brother; in *Rodríguez Vera et al. v. Colombia*, victim status was granted to the direct victims' parents, siblings, children, spouses and partners; in *Santo Domingo Massacre v. Colombia*, victim status was extended to some of the direct victims' spouses, partners, parents, children, siblings, grandmothers, granddaughters, aunts, uncles, stepsons, stepdaughters, nephews, nieces and surrogate mothers and siblings; in *Gomes Lund et al. v. Brazil*, victims status was granted to the direct victims' parents, partners, wives, children, siblings and nephews; in *Kawas-Fernández v. Honduras*, victim status was extended to the direct victim's parents, son, daughter and siblings; in *Pueblo Bello Massacre v. Colombia*, victim status was applied to the direct victims' parents, siblings, spouses, partners and children. The criteria of next of kin has been determined as "the closeness of the family relationship, the particular circumstances of the relationship with the victim, the degree to which the family member was a witness of the events related to the violation, the way in which the family member was involved in attempts to obtain information about the violation and the state's response to the steps undertaken" (*Bámaca Velásquez v. Guatemala*, para. 163). At the ECtHR, the word "victim" denotes the person or persons directly or indirectly affected by the alleged violation, defining indirect victims as those "to whom the violation would cause harm or who would have a valid and personal interest in seeing it brought to an end" (*Vallianatos and Others v. Greece*, para. 47). Nonetheless, it has determined that it is not sufficient to be a family member to claim victim status, holding that "there must be a sufficiently direct link between the applicant and the harm which they consider they have sustained on account of the alleged violation" (*Gorraiz Lizarraga and Others v. Spain*, para. 35; *see also Çakıcı v. Turkey*, para. 98).

[1354] *Lubanga* Amended Reparations Order, para. 6(b).

victims.[1355] Furthermore, the Appeals Chamber notes that the Defence had notice as to the issue which is now being considered in this ground of appeal, the Trial Chamber having already indicated, in its decision of 15 December 2020, what its approach on this question would be.[1356]

626. That notwithstanding, in the Appeals Chamber's view, the TFV requires guidance as to what the concept of "person of significant importance, with whom the indirect victim did not have a close personal relationship" could encompass and where its limits lie. For example, renowned world figures or leaders could be of significant importance to particular persons, but it does not necessarily follow that the latter would be eligible to receive reparations. It is not clear whether the Trial Chamber's finding allowed for these persons to potentially seek reparations as indirect victims within this concept. Therefore, to provide further guidance on this concept, particularly whether the Trial Chamber's approach was correct to make the challenged finding, the Appeals Chamber turns to address the rest of the arguments raised under this ground of appeal.

627. In this regard, the Appeals Chamber notes the Defence's submission that the Trial Chamber's "failure to adequately define this new legal standard […] will undoubtedly lead to confusion".[1357] The Defence submits that the Trial Chamber's finding "introduces a level of subjectivity into the process of the assessment of indirect victims", that it would be nearly impossible to assess, expanding the definition beyond what the Appeals Chamber has stated in *Lubanga*, and would "introduce[] a level of uncertainty that is incompatible with existing burdens of proof".[1358]

628. Although it is a matter of evidence as to whether a claimant satisfies the Trial Chamber, or the TFV under the Trial Chamber's review, that he or she meets the requisite standard of proof to establish both his or her harm and relationship to the direct victim, the Appeals Chamber considers that, leaving the concept of "significant importance" undefined could result in the TFV having to define this legal concept, before it can carry out its administrative implementation task. Thus, the Appeals

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[1355] *See* Impugned Decision, para. 127 *referring to* *Lubanga* Judgment on Indirect Victims, para. 49. *See also* para. 125, *referring to* *Katanga* Appeals Chamber Judgment on Reparations, para. 116 and para. 124, *referring to* *Lubanga* Amended Reparations Order, para. 58.
[1356] Decision on the First Report, para. 52.
[1357] Defence Appeal Brief, para. 115.
[1358] Defence Appeal Brief, para. 117.

Chamber finds that, in determining whether a direct victim was of significant importance to an applicant requesting to be recognised as an indirect victim, the Trial Chamber and the TFV shall be guided by the "criterion of special bonds of affection or dependence connecting the applicant with the direct victim", which "captures the essence of inter-personal relations, the destruction of which is conducive to an injury on the part of indirect victims".[1359]

629. Turning to the argument that the Trial Chamber erred in departing from relevant jurisprudence,[1360] the Defence mistakenly attributes to the Appeals Chamber what seems instead to be a finding by a trial chamber – that "close personal relationships, such as those between parents and children, are a precondition of participation by indirect victims".[1361] Furthermore, the Appeals Chamber observes that, in the case at hand, rather than relying on a restricted class of persons, the Trial Chamber followed the approach requiring proof of harm to qualify as an indirect victim. In recognising the possibility that "individuals who suffered personal harm as a result of the commission of a crime against a person with whom they did not have a close personal relationship, but which nevertheless was of significant importance in their lives, may be entitled to reparations",[1362] the Trial Chamber found that this was simply a possibility, and that "[t]he indirect victim must nevertheless demonstrate to have suffered harm because of the commission of a crime against the direct victim".[1363] In so finding, the Trial Chamber was not inconsistent with the Appeals Chamber's jurisprudence that indirect victims are required to show that they suffered harm as a result of the crime committed or attempted against the direct victim.[1364] It also retained a sense of closeness, with the idea of "significant importance", without broadening the concept unnecessarily. Whether a person is able to establish victimhood is a question of fact.

[1359] *See* *Case 001* Appeal Judgment, para. 447. *See also* para. 418.
[1360] Defence Appeal Brief, para. 114.
[1361] Defence Appeal Brief, para. 114, fn. 160, *referring to* 2015 *Lubanga* Appeals Chamber Judgment on Reparations, paras 190-191 (while the finding quoted by the Defence is made by Trial Chamber I in its *Lubanga* Decision on Indirect Victims, para. 50).
[1362] Impugned Decision, para. 127.
[1363] Impugned Decision, para. 127.
[1364] *Katanga* Appeals Chamber Judgment on Reparations, paras 115-117.

630. Although there is, as also referred to by the Defence, a "level of subjectivity"[1365] in the concept of "significant importance", in the sense that a case-by-case analysis will be needed, this is not necessarily "impossible to assess", nor does it on its face "introduce[] a level of uncertainty that is incompatible with existing burdens of proof".[1366] No reasons have been provided by the Defence to support the latter argument and, overall, it will be for the Trial Chamber, or the TFV under the Trial Chamber's review, to assess if the relationship between the claimant and direct victim, and the harm suffered, reach a level to lead to reparations. As argued by Victims Group 2, the Trial Chamber did not create a presumption of harm by finding that persons for whom a direct victim is of significant importance may receive reparations as indirect victims. Applicants who claim that a direct victim was of significant importance in their life still need to submit proof of their harm to the appropriate standard of proof and demonstrate the causal link with the crimes of which Mr Ntaganda was convicted. It is a matter of evidence. Accordingly, the Appeals Chamber rejects the Defence's argument.

631. Turning to the remainder of the Defence's arguments, the Appeals Chamber notes that the Defence proceeds to argue that the confusion created by the Trial Chamber's failure is illustrated by the Trial Chamber's findings as to the disappearance of *Abbé* Bwanalonga.[1367] It submits that, although clearly his disappearance "may well be a great loss for the community, this will not necessarily cause deep emotional distress to everyone within his extended congregation, such as warranted by an international regime for reparations", citing to the UN Basic Principles and its definition of victim.[1368] The Defence also disputes the Trial Chamber's reliance on the Sentencing Judgment, finding it to be misconstrued.[1369]

632. First, the Appeals Chamber notes that the Trial Chamber did not make any conclusion linking its findings in relation to *Abbé* Bwanalonga and its finding that indirect victims may include those to whom a direct victim represented a person of significant importance in their lives. Second, as to what it stated about *Abbé*

[1365] Defence Appeal Brief, para. 117.
[1366] Defence Appeal Brief, para. 117.
[1367] Defence Appeal Brief, para. 115.
[1368] Defence Appeal Brief, para. 115, *referring to* the UN Basic Principles on the Right to a Remedy and Reparation, para. 8.
[1369] Defence Appeal Brief, para. 116.

Bwanalonga, the Trial Chamber discussed the harm suffered by witnesses to crimes and referred in particular to the death of *Abbé* Bwanalonga in the subsequent paragraph.[1370] At the same time, however, it seems to go beyond discussing witnesses to crimes, and recalls findings in the Sentencing Judgment regarding the impact of the crime. In this regard, the Trial Chamber stated that, "due to the particularly cruel nature of some of the murders and attempted murders, those who witnessed them or found the bodies later on, including of their family members, were also deeply affected", and noted that "[s]ome individuals who witnessed these crimes are still traumatised by what they witnessed".[1371] It proceeded to make the following observations:

> In particular, the Chamber noted in the Sentencing Judgment the deep psychological impact that the death of *Abbé* Bwanalonga (who served as a priest for 40 years and was well known in Ituri) had on those who witnessed the crime. This included not only the people who knew him, but also the clergy, and the population in general, particularly within the Lendu/Ngiti community. A witness recalled the impact that the murder of *Abbé* Bwanalonga had on the population, expressing that it was 'a great loss and it affected many people of all ethnicities'.[1372]

633. The Trial Chamber did not make a clear finding that persons could claim reparations based on harm suffered as a result of what happened to *Abbé* Bwanalonga because he was a person of significant importance to them. The Trial Chamber, as stated above, having found that those to whom a direct victim is of significant importance may receive reparations as indirect victims, stated that they "must nevertheless demonstrate to have suffered harm because of the commission of a crime against the direct victim".[1373] Therefore, the Trial Chamber did not find that the entire congregation of *Abbé* Bwanalonga, or indeed any of the population, would automatically qualify as indirect victims.

634. To be able to qualify as an indirect victim under this sub-category, a potential beneficiary would be required to prove both that *Abbé* Bwanalonga was a person of significant importance to him or her and that he or she suffered harm as a result of the crime committed against *Abbé* Bwanalonga, or seek reparations based on another category of indirect victimhood. As stated above, in determining whether a direct victim

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[1370] Impugned Decision, paras 178-179.
[1371] Impugned Decision, para. 178 (footnotes omitted).
[1372] Impugned Decision, para. 179 (footnotes omitted).
[1373] Impugned Decision, para. 127 (footnotes omitted).

was of significant importance to an applicant requesting to be recognised as an indirect victim, the Trial Chamber and the TFV shall be guided by the "criterion of special bonds of affection or dependence connecting the applicant with the direct victim", which "captures the essence of inter-personal relations, the destruction of which is conducive to an injury on the part of indirect victims".[1374] The Appeals Chamber, therefore, considers that the Defence misinterprets the Trial Chamber's findings in this respect.

635. On this point, Judge Ibáñez Carranza recalls that harm affecting "collective interests of a community" defines "a separate type of victim: the collective victim".[1375] In her view, subject to the assessment of the Trial Chamber, or the TFV under the Trial Chamber's oversight, the congregation of *Abbé* Bwanalonga could potentially be considered as a collective victim in the circumstances of this case.

636. Turning to the Defence's submission that the Trial Chamber misconstrued the Sentencing Judgment "by alleging that the Trial Chamber 'noted […] the deep psychological impact that the death of the *Abbé* Bwanalonga […] had on those who witnessed the crime'", the Defence argues first that "the case record does not contain any reference to anyone witnessing the murder" of the *Abbé*.[1376] Second, the Defence argues that, although the Sentencing Judgment notes that his death was badly received by the Lendu/Ngiti community, there is no basis to conclude that it resulted in the level of trauma alleged by the Prosecutor, as the witnesses of the Prosecutor who so testified were not experts and could not be relied on to make findings on these issues.[1377]

637. As to the first argument, the Appeals Chamber notes that the Trial Chamber, in making the finding challenged by the Defence, cited to the following paragraph of the Sentencing Judgment and an accompanying footnote:

> The Chamber received evidence on the impact of *Abbé* Bwanalonga's death from P-0824 who knew him personally. Having served as a priest for 40 years, *Abbé* Bwanalonga was a well-known person in Ituri. After *his* murder, the *Abbé*'s death

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[1374] *See* *Case 001* Appeal Judgment, para. 447. *See also* para. 418.
[1375] Separate Opinion of Judge Ibáñez to the 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 140.
[1376] Defence Appeal Brief, para. 116.
[1377] Defence Appeal Brief, para. 116, *referring to* Impugned Decision, para. 179; Sentencing Judgment, fns 130, 132.

> became notorious among the clergy and the population. P-0824 was approached by many people, who expressed their regrets about the murder. P-0824 further testified that the nuns who were abducted by the UPC/FPLC together with *Abbé* Bwanalonga still refuse to speak about what they witnessed. Even now, many years after the event, some Lendu reportedly still refer to the murder of the *Abbé*.[1378]

638. The Defence submits that the Trial Chamber erred in referring to the psychological impact the death of the *Abbé* had on witnesses to the crime, as the record contains no reference "to anyone witnessing to *the murder*".[1379] It is noted that the part of the Sentencing Judgment cited above, and relied on in the Impugned Decision, refers to nuns being abducted with the *Abbé* refusing to speak about what they witnessed, but does not state that they witnessed the murder of the *Abbé*, which was the crime for which Mr Ntaganda was convicted. The Appeals Chamber does not find it unreasonable for the Trial Chamber to have spoken of the effect on those who witnessed the crime, on the understanding that this meant witnesses of the circumstances surrounding the murder. It sees no reason to review further and *de novo* the evidence supporting the relevant finding.

639. As to the credibility of the witnesses relied upon, the Appeals Chamber recalls that "in awarding reparations, a trial chamber must remain within the confines of the conviction and sentencing decisions".[1380] It is no longer open to the Defence, at this stage of the proceedings, to challenge findings in either of those decisions. This argument does not raise an issue of misinterpretation of those decisions, but challenges the basis for the conclusions of the Trial Chamber in the Sentencing Judgment. The Appeals Chamber therefore dismisses the Defence's argument.

640. In light of the foregoing, the Appeals Chamber rejects the Defence's seventh ground of appeal.

(b) Whether the Trial Chamber erred in finding that children born out of rape and sexual slavery may qualify as direct victims

641. The Defence argues that, contrary to the submissions of all of the parties and the experts' reports, the Trial Chamber nevertheless found, "without sufficient

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[1378] Sentencing Judgment, para. 46 (footnotes omitted) (emphasis in the original).
[1379] Defence Appeal Brief, para. 116 (emphasis added).
[1380] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 311.

justification", that children born out of rape and sexual slavery are direct rather than indirect victims.[1381] The Appeals Chamber notes that, related to this argument, the Defence, under its second ground of appeal, argues that the Trial Chamber failed to provide a reasoned opinion, and to consider its submissions, regarding different matters,[1382] including "children born out of rape as direct victims whereas none of the parties or participants made representations to that effect".[1383]

642. Although the Defence does not point to specific submissions it made on this issue during the reparations proceedings, the Appeals Chamber notes that, in its final submissions, the Defence argued that "children born out of rape could only be considered as indirect victims of the crime of rape of their mother, if both the harm is proved and the causal link requirement is met, subject to judicial review".[1384] This argument was made in the context of its broader submission that children born out of rape should not be presumed to have suffered harm.[1385] It was not making submissions as to whether such a child should be considered as a direct or indirect victim.

643. The Trial Chamber, however, stated, in the Impugned Decision, that the parties had argued "that children born out of rape should qualify as indirect victims".[1386] It referred in a footnote to the aforementioned submission by the Defence and submissions by Victims Group 1 and Victims Group 2.[1387] Notably, the former submissions were not on point, while the latter were submissions simply arguing for the inclusion of children born out of rape as victims at the Court – the question of them being considered direct, as opposed to indirect, victims was not at issue.[1388] The Trial Chamber nevertheless proceeded to find that children born out of rape and sexual slavery may qualify as *direct* victims.[1389]

644. The Appeals Chamber recalls that trial chambers are not limited by requests made by the victims, and are therefore not bound by the *ultra petita* prohibition,

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[1381] Defence Appeal Brief, para. 109.
[1382] Defence Appeal Brief, para. 86.
[1383] Defence Appeal Brief, para. 87.
[1384] Defence Final Submissions, para. 107.
[1385] Defence Final Submissions, paras 86-107.
[1386] Impugned Decision, para. 122.
[1387] Impugned Decision, fn. 326.
[1388] Impugned Decision, para. 122.
[1389] Impugned Decision, para. 122.

observing that "a trial chamber, in making an award for reparations, has the discretion to depart from an applicant's claim for reparations, if it considers it to be appropriate".[1390] However, as is the case generally, and as is observed above,[1391] it is expected that a trial chamber adequately justifies any approach it takes on issues before it, so that the parties and the public fully understand its reasoning and so that it is clear that the trial chamber properly deliberated on the issues raised before it.

645. The Appeals Chamber observes that, in the Impugned Decision, the Trial Chamber noted that "the parties argue[d] that children born out of rape should qualify as indirect victims".[1392] It then explained that it, nevertheless, concluded that, "in light of the circumstances of the case, children born out of rape and sexual slavery may qualify as direct victims, as the harm they suffered is a direct result of the commission of the crimes of rape and sexual slavery".[1393] The Trial Chamber further made the distinction between these children and those who, despite being children of victims of the same crimes, were not born out of rape or sexual slavery, but "may be considered as indirect victims of such crimes, as they may have suffered harm as a consequence of the harm suffered by the direct victims".[1394] Finally, it further justified its conclusion by observing "that recognising children born out of rape and sexual slavery as direct rather than indirect victims, is an acknowledgment of the particular harm they suffered and may constitute an adequate measure of satisfaction, in addition to other forms of reparations that may be awarded to them".[1395]

646. The Appeals Chamber notes that, during the reparations proceedings, the Trial Chamber "invite[d] the parties and TFV to address in their upcoming submissions the issue of whether children born out of rape should be presumed as having suffered harm as a result of the commission of these two crimes".[1396] Although the Trial Chamber did not specifically request submissions on the issue of whether these children should be considered to be direct victims, the Appeals Chamber notes that the parties, the TFV

[1390] *Katanga* Appeals Chamber Judgment on Reparations, para. 147. *See also* 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 329.
[1391] *See supra* paras 58-59.
[1392] Impugned Decision, para. 122.
[1393] Impugned Decision, para. 122.
[1394] Impugned Decision, para. 122.
[1395] Impugned Decision, para. 123.
[1396] First Decision on Reparations Process, para. 46.

and the experts addressed the harm suffered by such persons, apparently on the simple assumption that such children would be recognised as indirect victims.[1397]

647. Although the reasoning provided by the Trial Chamber in the Impugned Decision is sparse, the Appeals Chamber considers that the Trial Chamber nevertheless provided reasoning for why it took the approach it did. In this regard, it stated that such persons should be considered direct victims, "as the harm they suffered is a direct result of the commission of the crimes of rape and sexual slavery", contrasting this with children who are the children of women and girls who were the victims of rape and sexual slavery but not the direct result of such crimes.[1398] It also referred to this recognition being "an acknowledgement of the particular harm they suffered and [that it] may constitute an adequate measure of satisfaction, in addition to other forms of reparations that may be awarded to them".[1399]

648. The Defence challenges the above findings, arguing that, in light of the jurisprudence of this and other courts, "to be considered as a direct victim, the applicant

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[1397] Victims Group 1 submitted that it "would be helpful to add as specific examples of family members of direct victims those children born as a result of pregnancy from rape, as in the *Ntaganda* case they are in a particularly vulnerable situation" (CLR1 Final Submissions, para. 25). They further stated that "while the situation of children born out of rape is different, in some respects, from that of their siblings and relatives", in their view, "all children of former child soldiers, as well as grandchildren, parents and other immediate family members, may qualify as indirect victims eligible for reparations" (CLR1 Final Submissions, para. 44. *See also* paras 42, 49, 51). Victims Group 2 submitted that, akin to the relatives of direct victims of the crimes of conscripting and enlisting children under the age of fifteen years into an armed group, and using them to participate actively in hostilities in the *Lubanga* case, children born out of rape and sexual slavery in this case should equally be considered indirect victims and benefit from a presumption of harm, once they demonstrate their close personal relationship with the direct victims of these crimes (CLR2 Final Submissions, paras 30-31; *see also* CLR2 Final Submissions, para. 12 ("[t]he Legal Representative maintains his previous submissions that children born out of the rape should also be eligible for reparations, as indirect victims, and their harm resulting from the crimes of rape and sexual slavery should be presumed"); *see also* paras 13-33). The experts also made submissions in this regard (*see* First Experts Report, paras 115 ("Harm suffered by indirect victims: […] v. […] physical, psychological and material harm suffered by children born out of rape"), 144 ("to recognise indirect victims, such as […] children born as a result of pregnancy from rape"); Second Expert Report, para. 80 ("Children born as a result of rape should be eligible, but their harm from the rape is more indirect (Category II)"). In turn, the Defence argued that "children born out of rape could only be considered as indirect victims of the crime of rape of their mother, if both the harm is proved and the causal link requirement is met, subject to judicial review" (Defence Final Submissions, para. 107). While the TFV did not argue for or against considering children born out of rape as direct victims, it observed (i) that it was reasonably foreseeable for the perpetrator that rape and sexual slavery could result in unwanted pregnancies, (ii) these children present symptoms of various form of trauma, and (iii) that they suffer from emotional harm and stigma, "in addition to other forms of harm such as the loss of life plan as a result of the rejection by their mother" (TFV Final Submissions, paras 33-35).
[1398] Impugned Decision, para. 122.
[1399] Impugned Decision, para. 123.

must be the direct object of the crime which forms part of the conviction, and there must be a causal link to the harm alleged".[1400]

649. The Appeals Chamber notes that this ground of appeal raises the issue of the determination of the extent of the harm directly caused by the conduct for which the convicted person was found criminally liable. In particular, it raises the issue of whether, for purposes of reparations, persons who suffered harm as a direct result of the crime, other than those against whom the convicted person committed the crime, can be considered as direct victims.

650. Rule 85(a) of the Rules defines "victims" as "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court". The Appeals Chamber has stated generally that victim status depends on "whether a person can show that he or she suffered harm as a result of the commission of a crime under the jurisdiction of the Court".[1401] As also recalled in the context of the Defence's seventh ground of appeal, it has stated that "the notion of victim necessarily implies the existence of personal harm but does not necessarily imply the existence of direct harm".[1402] The Appeals Chamber has, however, to date not provided any further specific detail as to how to define direct victimhood. At the same time, what the Appeals Chamber has said in relation to the requisite causation in reparations is relevant:

> The standard of causation is a "but/for" relationship between the crime and the harm and, moreover, it is required that the crimes for which Mr Lubanga was convicted were the "proximate cause" of the harm for which reparations are sought.[1403]

651. The Appeals Chamber finds it helpful to consider relevant jurisprudence in the international and national context. First, it notes that, as referred to by the Defence, at the IACtHR, Judge García Ramírez observed, in *Ituango Massacres v. Colombia*, that a direct victim is "the individual against whom the illegal conduct of the State agent is directed immediately, explicitly and deliberately; the individual who loses his life, whose integrity or liberty is harmed, who is deprived of his patrimony, thereby violating

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[1400] Defence Appeal Brief, para. 109.
[1401] *Katanga* Appeals Chamber Judgment on Reparations, para. 117.
[1402] *Lubanga* Appeals Chamber Judgement on Victims' Participation, paras 32, 38.
[1403] *Lubanga* Amended Reparations Order, para. 59.

the provisions of the Convention that establish these rights".[1404] Judge García Ramírez further noted that an indirect victim is an "individual who does not suffer this illegal conduct in the same way – immediately, directly and deliberately – but who also sees his own rights affected or violated, from the impact on the so-called direct victim".[1405] In the context of criminal liability, the Appeals Chamber further notes that the Pre-Trial Chamber of the ECCC has defined "direct victims" as "the category of persons whose rights were violated or endangered by the crime charged", while "indirect victims" are defined as "persons 'who personally suffered injury as a direct result of the crime committed against the direct person'".[1406] Moreover, regarding the question of children born as a result of rape, the Appeals Chamber notes that some national legal systems have passed legislation or generally made findings regarding the right of such children to receive compensation, regardless of whether they are considered as direct or indirect victims as such.[1407] In some jurisdictions, courts have recognised children born out of rape as victims, because of the psychological harm they suffer after learning about the

[1404] *See* Defence Appeal Brief, para. 108, *referring to* *Ituango Massacres v. Colombia*, Separate Concurring Opinion of Judge S. Garcia Ramirez, para. 11.
[1405] *See* Defence Appeal Brief, para. 108, *referring to* *Ituango Massacres v. Colombia*, Separate Concurring Opinion of Judge S. Garcia Ramirez, para. 11.
[1406] *Case 004* Considerations, para. 36, *referring to* *Case 004/2* Considerations, para. 35; *Case 003* Considerations, para. 38; *Case 001* Appeal Judgment, paras 416, 418.
[1407] In Bosnia and Herzegovina, a person who was born as a result of rape committed during wartime is considered as a victim of war (*see* Law on Civilian Victims of War, article 2(g)). In Colombia, children born as a result of rape perpetrated in connection with an armed conflict can be considered victims of that crime (*see* Law 1448, article 181). In Sierra Leone, the Truth and Reconciliation Commission recognised children born out of rape as eligible for reparations as long as they are under 18 years old and their mother is a single parent (*see* Sierra Leone Truth and Reconciliation Commission Report, p. 250, para. 97). In Peru, children born out of rape are recognised as beneficiaries of the country's reparations plan, which entitles them to economic compensation and preferential access to education services, and they are classified as indirect victims (*see* Law 28592, article 6(c)).

circumstances surrounding their conception and birth,[1408] or in consideration of the aggravating circumstances of the crime.[1409]

652. In the case at hand, the Trial Chamber found that, "[f]or direct victims, a causal link must exist between the harm suffered and the crimes of which an accused is found

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[1408] In France, the *Cour de Cassation* has recognised that, in light of the circumstances surrounding the conception and birth of a child born out of rape, the child may obtain reparations for the psychological harm suffered as a result of the crime. In a judgment of 2010, it quashed a trial decision refusing to award reparations to a minor who suffered psychological harm after learning that his conception and birth were a result of the rape of his mother. The *Cour de Cassation* found that, because the child had been born out of rape, he was not alleging harm caused solely by his being born but also by the *circumstances* of his conception and birth. On this ground, it quashed the decision and accepted that the plaintiff, who had been born out of the rape committed against his mother, had suffered from psychological harm. It thus found that the psychological harm was the direct consequence of the crime of rape to which his mother was subjected. *See* Cour de Cassation Case 09-82.438, p. 3 (« le mineur Jarod Y... sollicitait la réparation, non pas d'un préjudice né du seul fait de sa naissance, mais d'un préjudice résultant des circonstances qui avaient entouré sa conception et sa naissance; qu'en repoussant la demande sur le fondement de l'article L. 114-5 du code de l'action sociale et des familles, les juges du fond, qui ont méconnu le champ d'application du texte, l'ont donc violé »).

[1409] In India, the Delhi High Court recognised a child born out of rape as a victim entitled to compensation, in consideration of the circumstances of the case. In the case of *Gaya Prasad Pal @ Mukesh v. State*, the Delhi High Court confirmed the conviction of a perpetrator for, *inter alia*, the crime of rape, and the recognition as victims of both the minor who was raped and the child who was born as a result of the rape. Importantly, the case takes into account not only the act of the penetrative sexual assault, but also facts and aggravating circumstances such as those that the perpetrator was the stepfather and guardian of the raped minor and that the latter became pregnant as a result of the rape (*see* *Gaya Prasad Pal @ Mukesh v. State*, paras 29, 70). The trial court found "one of the most demanding circumstances" to be that "the heinous offence is committed by the convict on his daughter and made her pregnant resulting a birth of child"; it observed that "there are two victims of crime, *i.e.* the child and the baby born out of said offence" (*see* *Gaya Prasad Pal @ Mukesh v. State*, para. 88). The Delhi High Court concurred with the trial court in finding that both the raped minor and the baby born out of rape were victims of the act of the offender: "We find that there is a complete vacuum in the consideration of compensation so far as the sexual offence resulting in the birth of a child. *Such a child is clearly a victim of the act of the offender and entitled to compensation independent of the amount of compensation paid to his/her mother. Such award would require to include amount towards his/her maintenance and support*" (*Gaya Prasad Pal @ Mukesh v. State*, para. 114. While the Delhi High Court found an error regarding the statute under which the crime was charged, such error was considered to be inconsequential (*see* *Gaya Prasad Pal @ Mukesh v. State*, paras 30, 68-71)). To consider the child born out of rape as a victim of the crime, the trial court took into account the aggravating circumstances of the case, and not the act of rape alone (*see* *Gaya Prasad Pal @ Mukesh v. State*, para. 88). In the United Kingdom, in *Regina v. CKL*, the Court of Appeal recognised the child born out of rape as a second victim of the offences, considering the aggravating circumstances that a young girl was systematically raped by her parent, a child had been conceived and he had developmental difficulties (*see* *Regina v. CKL* ("The systematic abuse of a young child by a parent over a substantial period is to a degree a serial rape, particularly having regard to the conception of the child who has become a second victim of the offences. That, to our mind, greatly aggravates the case that has come before us from those that were otherwise reported in the books, particularly having regard to that child's developmental difficulties")). However, in cases where their mothers seek social benefits for the children under the Criminal Injuries Compensation Scheme, disabled children who are born out of rape and incest have not obtained compensation because "the concept of injury presupposes a pre-injury state which is capable of assessment and comparison with the post-injury state ... this… was a claim for wrongful life, which is not recognised in English law" (*see* *Criminal Injuries Compensation Authority and First-tier Tribunal v. Y*, paras 1, 26, 29, 31, *referring to* *Millar (Curator Bonis to AP) v. Criminal Injuries Compensation Board*).

guilty", while "[i]ndirect victims must establish that, because of their relationship with the direct victim, the loss, injury, or damage suffered by the direct victim gives rise to their harm".[1410] It proceeded to note that "*in light of the circumstances of the case*, children born out of rape and sexual slavery may qualify as direct victims, as *the harm they suffered is a direct result of the commission* of the crimes of rape and sexual slavery".[1411] For the following reasons, the Appeals Chamber finds no error in this conclusion.

653. First, the Appeals Chamber finds that, as correctly noted by the Trial Chamber, the harm that children born out of rape and sexual slavery suffer – although emerging only after being born – is a *direct* result of the commission of the crimes of rape and sexual slavery. Such harm can include the children being psychologically affected as a result of learning about the violent circumstances surrounding their conception,[1412] and being socially stigmatised and rejected by the community,[1413] not knowing who their fathers were.[1414] He or she can also suffer materially through, for example, loss of job prospects and social exclusion,[1415] and be physically injured, for example, if he or she suffers from HIV/AIDS or another illness transmitted from the offender.[1416] The harm is both directly linked to the crime (as it would not have happened "but for" the crime) and was entirely foreseeable at the time the crime was committed.[1417] This type of victim – a child born out of rape/sexual slavery – is a unique type of victim, and also one that has suffered a unique type of harm that merits being recognised for what it is: direct harm inflicted on the child.

654. Second, the Appeals Chamber notes the other findings made by the Trial Chamber as to the circumstances of the crimes of rape and sexual violence in this case. For instance, the Trial Chamber recalled that "a number of female members of the UPC/FPLC, including girls under the age of 15, became pregnant during their time in

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[1410] *See* Impugned Decision, para. 121.
[1411] Impugned Decision, para. 122 (emphasis added).
[1412] For a similar approach, *see* Cour de Cassation Case 09-82.438, p. 3.
[1413] *See* Impugned Decision, para. 176.
[1414] Impugned Decision, para. 120, fn. 321, *referring, inter alia, to* Sentencing Judgment, para. 113 (emphasis added).
[1415] Impugned Decision, para. 176.
[1416] *See, e.g.*, Neenan, p. 21 (on HIV); *Regina v. CKL* (on developmental difficulties).
[1417] Impugned Decision, para. 120, fn. 322, *referring, inter alia, to* Second Expert Report, para. 80.

the UPC/FPLC, as 'they were regularly raped and subjected to sexual violence'", and that "children may have been born as a result of rapes and sexual slavery committed against the civilian population".[1418] In reaching these findings, it referred in a footnote to paragraphs in both the conviction and sentencing judgments.[1419] It referred, *inter alia*, to a finding in the Conviction Judgment that a number of female members of the UPC/FPLC, who "were regularly raped and subjected to sexual violence", "became pregnant during their time in the UPC/FPLC".[1420] The parts of the Conviction Judgment, to which reference was made, also note that one of the victims, "who was under 15 years old at the relevant time, was transported in a car with armed soldiers to Bule training camp, where she stayed for several months", that "she was followed at all times within the camp, that the UPC/FPLC soldiers were behind the recruits with weapons, and that she had been threatened to be killed in case she tried to flee".[1421] It further found that, "after having been injured during a battle", another victim "was sent to Camp Baudouin for treatment, where she found out that she was pregnant, without knowing 'who was responsible for that pregnancy'".[1422]

655. The Trial Chamber further cited to the following findings in the Sentencing Judgment:[1423]

> *Particular difficulties were faced by female children under the age of 15 who had been associated with an armed group in returning to their families and communities where they returned with a child and where the communities assumed that these young women had undergone sexual abuses*; in this respect, the Chamber recalls its finding that, after having been raped multiple times at Bule camp, P-0883 found out that she was pregnant, *without knowing 'who was responsible for that pregnancy'. Children born as a result of sexual violence, as well as their mothers, faced rejection from their communities*.[1424]

656. Finally, the Trial Chamber referred to the TFV's submission that "the Court's current case law fully supports the view that it was reasonably foreseeable for the

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[1418] Impugned Decision, para. 120.
[1419] Impugned Decision, fn. 321, *referring, inter alia, to* Conviction Judgment, paras 407-409.
[1420] Conviction Judgment, para. 407.
[1421] Conviction Judgment, para. 409.
[1422] Conviction Judgment, para. 409.
[1423] Impugned Decision, fn. 321, *referring, inter alia, to* Sentencing Judgment, para. 113.
[1424] Sentencing Judgment, para. 113 (emphasis added).

accused that the crimes of sexual slavery and rape could result in unwanted pregnancies".[1425]

657. The Appeals Chamber considers that the *circumstances* surrounding the commission of the crimes of rape and sexual slavery in this case, in particular the fact that the pregnancies were unwanted, create a direct causal link with the harm that these children suffered after being born.[1426] Furthermore, it is noted that some victims of rape and sexual slavery were minor, constantly threatened and unable to flee, including at the times when they realised that they were pregnant, which provides for a causal link between the circumstances of the crimes of rape and sexual slavery, and the birth of the children.[1427] In addition, and as elaborated elsewhere, once born, the children faced rejection by the community, and it was unknown who their fathers were.[1428] As a result, these children suffer harm directly caused by the circumstances surrounding these crimes and can, thus, be categorised as direct victims whose harm must be repaired.

658. The Defence also argues that the Trial Chamber "erred in finding that classifying children born out of rape as direct victims was a means of acknowledging 'the particular harm they suffered', and it erred when it held that it 'may constitute an adequate measure of satisfaction'".[1429] The Defence submits that recognising these children as direct victims is a legal finding and it should not be seen as a symbolic act or acknowledgment of harm, and that "[v]ictims' satisfaction is not a criterion that can be considered in the process of determining whether a victim is a direct or indirect victim of a crime".[1430]

659. The Appeals Chamber notes that the criteria for classification as a direct or indirect victim are indeed legal criteria that have been determined by the Trial Chamber and in this judgment, and that victims' satisfaction is not *per se* a factor to consider in according a particular classification of victimhood. Nevertheless, identifying a particular harm as causing direct or indirect victimhood acknowledges the harm suffered by individual applicants, in the sense of acknowledging them as either direct

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[1425] Impugned Decision, para. 120, fn. 322, *referring, inter alia, to* TFV Final Submissions, para. 33.
[1426] For similar approaches *see* Cour de Cassation Case 09-82.438, p. 3; *Gaya Prasad Pal @ Mukesh v. State*, paras 29, 70, 88, 114; *Regina v. CKL*.
[1427] Impugned Decision, fn. 321, *referring, inter alia, to* Conviction Judgment, paras 407-409.
[1428] Impugned Decision, para. 120, fn. 321, *referring, inter alia, to* Sentencing Judgment, para. 113.
[1429] Impugned Decision, para. 123.
[1430] Defence Appeal Brief, para. 110. *See also* Defence Reply to Victims' Responses, paras 10-11.

or indirect victims. In the view of the Appeals Chamber, as long as an applicant meets the requirements to fall within the definition of a direct victim, it is not an error to consider more generally that such classification, and as a result acknowledgment of harm in that way, could suffice as a form of satisfaction in a particular case. The Appeals Chamber recalls that in the reparations process, "[m]easures of satisfaction should aim at remedying moral or non-physical harm suffered by victims of human rights violations" and that, with such measures, "victims of atrocious crimes receive social recognition that the crimes occurred, that the crimes harmed them, and that they are victims and survivors of such crimes".[1431] Furthermore, the Appeals Chamber is of the view that in the case of children born out of rape and sexual slavery, being recognised as direct victims can serve not only as a measure of satisfaction but also as a guarantee of non-repetition of their harm.

660. Finally, the Appeals Chamber is not persuaded by the Defence's argument that recognising these children as direct victims actually enlarges the number of direct and indirect victims as "the offspring of the children born out of rape and/or sexual slavery would in turn qualify as indirect victims, thereby transcending Mr Ntaganda's liability to two generations unborn at the time of the commission of the crimes".[1432] First, the Appeals Chamber notes that the Trial Chamber "presume[d] material, physical, and psychological harm for […] (ii) direct victims of rape and sexual slavery; and (iii) indirect victims who are close family members of direct victims of […] rape, and sexual slavery".[1433] The Trial Chamber made no presumption regarding the offspring of the children of victims of rape and sexual slavery. It is not necessarily the case that the children of a person who is born out of rape and sexual slavery would presumably suffer harm because of the harm caused to that person. In fact, in the case of transgenerational harm, as noted above, the Trial Chamber expressly required that "the causal nexus between the alleged harm and the crime for which the defendant was convicted needs to be established".[1434] Contrary to the Defence argument, by recognising children born out of rape and sexual slavery as direct victims, the pool of indirect victims would not automatically be enlarged to include the offspring of those

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[1431] Separate Opinion of Judge Ibáñez to the 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 264, *referring to* Grossman, p. 322.
[1432] Defence Reply to Victims' Responses, para. 11.
[1433] Impugned Decision, para. 145.
[1434] Impugned Decision, paras 71, 73-75 (footnotes omitted).

children as such offspring would not be included in this presumption, and would therefore still need to demonstrate their harm. The Defence's argument amounts to speculation and is, therefore, rejected.

661. For the above reasons, the Appeals Chamber finds that the Trial Chamber did not err in finding that children born out of rape and sexual violence can be classified as direct victims.

E. The second ground (in part), fourth ground (in part) and eighth ground of the Defence appeal

662. In this section, the Appeals Chamber will address the Defence's eighth ground of appeal, which challenges the Trial Chamber's approach to adopt presumptions, as well as some related arguments the Defence raised in its second and fourth grounds of appeal. In making these arguments, the Defence challenges the Trial Chamber's presumptions of the harm allegedly suffered by the victims of the attacks and victims of sexual violence.

1. Relevant parts of the Impugned Decision

663. In relation to victims of sexual and gender-based violence, the Trial Chamber noted:

> 63. Gender-based crimes are those committed against persons because of their sex and/or gender expression or identity. They are not always manifested as a form of sexual violence.
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> 64. The Court's legal framework accords a special status to sexual violence crimes and the victims thereof. All victims, regardless of their sex and gender expression or identity, may be affected by sexual and gender-based crimes.
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> 65. In line with rule 86 of the Rules, the Court has the obligation to adopt all necessary and appropriate measures to ensure that victims of sexual and gender-based violence come forward for the purposes of claiming reparations. The Court should not operate on the assumption that victims of sexual and gendered-based violence are unable or unwilling to come forward.
>
> 66. When designing reparations for victims of sexual and gender-based violence, the especially grave nature and consequences of sexual violence crimes, in particular against children, must be recognised. Reparations should reflect and address the multifaceted harm suffered by victims, noting that both their relatives and their communities may be impacted. Reparation measures should take into account the potential obstacles, including stigma and ostracism, involved in seeking and obtaining access to reparations. It is paramount that they do not

> reinforce pre-existing discriminatory patterns, but rather seek to transform them to ensure that everyone has equal access to reparations. In addition, while stressing the importance of broad rehabilitation measures, that include a cultural perspective, the Court should also adopt a gender-sensitive approach in relation to all other modalities, such as compensation.
>
> 67. Evidentiary standards and procedures should be sensitive to the difficulties faced by victims of sexual and gender-based violence to obtain and produce evidence and documentation, without prejudice to the rights of the convicted person. An intrinsically consistent, credible, and reliable account from a victim of sexual and gender-based violence may have sufficient probative value, in light of the circumstances of the case, for the allegations therein to satisfy the burden of proof, even in the absence of supporting documents.[1435]

664. As for the applicable standard of proof, the Trial Chamber found:

> 136. The Chamber notes that reparations proceedings require a less exacting standard of proof than trial proceedings. In line with the previous jurisprudence, the Chamber adopts the 'balance of probabilities' test as the appropriate standard of proof in reparations proceedings.
>
> 137. Victims eligible for reparations must provide sufficient proof of identity, of the harm suffered, and of the causal link between the crime and the harm. Victims may use official or unofficial identification documents, or any other means of demonstrating their identities. In the absence of acceptable documentation, a statement signed by two credible witnesses establishing the identity of the victim and describing the relationship between the victim and any individual acting on their behalf is acceptable.
>
> 138. The Chamber is aware of some of the difficulties the victims may face in producing the relevant information. For instance, the Chamber notes that one of the consequences of the crimes against property for which Mr Ntaganda was convicted is the loss of important documents, such as diplomas, identity cards, and land ownership titles. In addition, the Chamber notes that victims may often have difficulties obtaining or producing copies of official documents in the DRC.
>
> 139. The Chamber also emphasises the need to adopt a gender-inclusive and sensitive approach when applying the 'balance of probabilities' standard to sexual crimes. In this regard, the Chamber recalls rule 63(4) of the Rules and stresses that this prohibition should be translated into taking into account the additional difficulties that these victims may face in obtaining or producing evidence to demonstrate that they were victims of rape and/or sexual slavery. Accordingly, the Chamber considers that the victim's coherent and credible account shall be accepted as sufficient evidence to establish their eligibility as victims on a balance of probabilities.[1436]

[1435] Impugned Decision, paras 63-67 (footnotes omitted).
[1436] Impugned Decision, paras 136-139 (footnotes omitted).

665. Regarding presumptions, the Trial Chamber made the following findings:

> 141. In addition, in the particular circumstances of this case, where applicants lack direct proof, the Chamber considers that factual presumptions shall be relied upon in order to consider certain fact[s] to be established to the requisite standard of proof.
>
> 142. The Chamber recalls that the Appeals Chamber in the *Katanga* case held that the trial chambers should approach with caution the issue of whether to adopt a presumption of psychological harm for victims who have suffered material harm, but not personally experienced the attack.
>
> 143. Considering the difficulties to obtain or produce evidence, as mentioned above, and the severe harms suffered by the victims as a result of the types of crimes committed, the Chamber finds that certain harms may be presumed, once a victim has proved, on a balance of probabilities standard, to be a victim of the crimes for which Mr Ntaganda was convicted.
>
> 144. The Chamber notes that in the *Lubanga* case, it was determined that 'any child who was conscripted or enlisted into an armed group or who participated in combat suffers psychologically, as well as in a physical and material sense'. Trial Chamber II also found that, owing to their close personal relationship with the direct victim, indirect victims 'suffered personally in an emotional, material and, in some cases, a physical sense as a result of the direct victim's enlistment'. Accordingly, Trial Chamber II decided that there was 'no need to scrutinize the specific harm alleged by each potential eligible victim' and applied a presumption of harm to each direct and indirect victim once child soldier status (in the case of a direct victim) and close personal relationship with a child soldier (in the case of an indirect victim) have been established on a balance of probabilities.
>
> 145. The Chamber finds the same reasoning above to apply in the present case in relation to former child soldiers, victims of rape and sexual slavery, and their close family members. The Chamber recalls its previous findings as to the 'physical, psychological, psychiatric, and social consequences (ostracisation, stigmatisation and social rejection), both in the immediate and longer term', suffered by victims of rape and sexual slavery, while some were deprived of liberty, captured, physically restrained, and/or hurt by their perpetrators. In addition, the Chamber established the impact on school attendance, and generally notes the socioeconomic implications of these crimes for the victims and their families. Accordingly, the Chamber presumes material, physical, and psychological harm for (i) former child soldiers; (ii) direct victims of rape and sexual slavery; and (iii) indirect victims who are close family members of direct victims of the crimes against child soldiers, rape, and sexual slavery. Close family members for the purposes of presuming their harm are understood to be all those members of a family living within the same household.
>
> 146. The Chamber recalls its findings that victims of the attacks, particularly the victims of attempted murder still bear permanent scars with serious consequences, including trauma, psychological harms, and extensive physical scarring. The Chamber also considers unquestionable that direct victims that

> personally experienced the crimes committed during the attacks endured physical suffering in connection with the very nature of the context of armed conflict and the attack against the civilian population within which the crimes were committed. Similarly, 'it is inherent to human nature that all those subjected to brutal acts […] experience intense suffering, anguish, terror and insecurity'. Consequently, the Chamber is of the view that it is not necessary to scrutinise the specific physical and psychological harm alleged by each potential eligible direct victim of the attacks once their eligibility has been established on a balance of probabilities. Accordingly, the Chamber presumes physical and psychological harm for (i) direct victims of attempted murder; and (ii) direct victims of the crimes committed during the attacks, who personally experienced the attacks.
>
> 147. Lastly, the Chamber recalls its findings regarding the suffering experienced by close family members of direct victims of murder, and those who lost their home or material assets with significant impact in their lives. The Chamber also considers that it is not necessary to scrutinise the specific psychological harm alleged by those victims once their eligibility has been established on a balance of probabilities. Accordingly, the Chamber also presumes psychological harm for (i) victims who lost their home or material assets with a significant effect on their daily life; and (ii) indirect victims who are close family members of direct victims of murder.[1437]

2. Defence submissions before the Appeals Chamber

666. Under its second ground of appeal, the Defence argues that the Trial Chamber failed to meet the requirement to provide a reasoned opinion regarding its "resort to presumptions of fact to establish certain types of harm suffered by categories of victims"; and "lowering the applicable standard of evidentiary proof for certain categories of victims".[1438]

667. As for its eighth ground of appeal, the Defence divides it into three sections. First, under the heading "Trial Chamber VI erred in its approach to presumptions",[1439] the Defence challenges, in a general manner, the Trial Chamber's approach to adopt presumptions.[1440] Subsequently, the Defence turns to specifically challenge two of the presumptions,[1441] under the headings "Trial Chamber VI erred in creating presumptions of physical harm for victims of the attacks who personally experienced the attacks",[1442]

[1437] Impugned Decision, paras 141-147 (footnotes omitted).
[1438] Defence Appeal Brief, paras 86-87.
[1439] Defence Appeal Brief, p. 51.
[1440] *See* Defence Appeal Brief, paras 150-158.
[1441] *See* Defence Appeal Brief, paras 159-168.
[1442] Defence Appeal Brief, p. 55.

and "Trial Chamber VI erred in creating a presumption of psychological harm for victims who lost their home or material assets with significant impact in their lives".[1443]

668. Under this ground of appeal, the Defence challenges the allegedly erroneous presumption of physical and psychological harm for direct victims of the attacks and that of psychological harm for victims who lost their home or material assets with a significant effect on their daily life.[1444] The Defence argues that, by adopting these presumptions, the Trial Chamber abused its discretion because, contrary to the relevant jurisprudence, it failed to counterbalance the victims' difficulties against the right of due process of the convicted person by not making an assessment of the alleged evidentiary difficulties for specific types of harm and the impact that the reversal of the burden of proof would have on Mr Ntaganda.[1445]

669. The Defence argues that the Trial Chamber provided "only broad and general statements" instead of a "meaningful analysis" of the victims' harm and their evidentiary difficulties.[1446] It highlights that, to adopt the challenged presumptions, the Trial Chamber referred to an IACtHR's judgment without noting that in that judgment, the IACtHR modulated its findings by adopting a similar presumption "in the context" of a specific case.[1447] It further argues that, to make similar presumptions, in the *Katanga* case, Trial Chamber II assessed the victims' applications and the evidence of their harm, as well as specific findings of Mr Katanga's conviction decision, the parties' submissions, the impossibility of some victims to provide medical certificates and jurisprudence of other courts.[1448] The Defence argues that the Trial Chamber did not engage in any analysis of the kind in this case.[1449]

670. Further, the Defence argues that in the *Lubanga* case, Trial Chamber II assessed findings of Mr Lubanga's sentencing decision and 473 victims' applications, in the specific context of former child soldiers, where access of the Defence to the

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[1443] Defence Appeal Brief, p. 57.
[1444] Defence Appeal Brief, para. 149, *referring to* Impugned Decision, para. 146.
[1445] Defence Appeal Brief, paras 150-152, *referring to* *Katanga* Reparations Order, paras 57-61, 84, 90, 98; *Katanga* Appeals Chamber Judgment on Reparations, paras 4, 66, 75.
[1446] Defence Appeal Brief, para. 153.
[1447] Defence Appeal Brief, paras 153-154, *referring to* Impugned Decision, para. 146; *Pueblo Bello Massacre v. Colombia*, para. 255.
[1448] Defence Appeal Brief, para. 155, *referring to* *Katanga* Reparations Order, paras 64-65, 123-131.
[1449] Defence Appeal Brief, para. 155.

applications was deemed necessary to make the relevant presumption.[1450] According to the Defence, the Trial Chamber thus adopted seven unreasonable presumptions that no reasonable trier of fact could have reasonably adopted, and it further erred in presuming that all victims present during the attack, and those who lost their homes or material assets significant to their life, suffered psychological harm.[1451]

671. The Defence further argues that the Trial Chamber "erred in creating presumptions of physical harm for victims of the attacks who personally experienced the attacks".[1452] It alleges that the Impugned Decision departs from the relevant jurisprudence, because Trial Chamber II in the *Katanga* case presumed psychological harm only for victims of the attack who could prove that they suffered an additional type of harm, and because the Appeals Chamber held that to make such a presumption for victims who did not experience the attack, a trial chamber should ensure to provide clear reasons as to the basis to make such a presumption.[1453] The Defence argues that although the Trial Chamber referred to the jurisprudence in *Katanga*, it departed from it and thus abused its discretion by failing to require the victims to establish another type of harm in order for their psychological harm to be presumed, and by "allowing presumptions of physical harm for victims having experienced the attack".[1454] It avers that the Defence has not had access to the victims' applications and is therefore unable to rebut such presumptions.[1455]

672. The Defence argues that, regardless, the crimes for which the presumptions were made do not necessarily imply physical harm.[1456] In its view, the war crimes of pillaging, attacking protected objects, and destroying or seizing the property of an adversary do not necessarily and automatically imply physical and psychological harm, as none of them require infliction of physical injury.[1457] It argues that, in contrast, the conduct on its own would amount to an "unlawful conduct directed against property

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[1450] Defence Appeal Brief, paras 156-157, *referring to* *Lubanga* Second Reparations Order, paras 180-185, fn. 232.
[1451] Defence Appeal Brief, para. 158.
[1452] Defence Appeal Brief, p. 55.
[1453] Defence Appeal Brief, paras 159-161, *referring to* *Katanga* Reparations Order, para. 129; *Katanga* Appeals Chamber Judgment on Reparations, para. 149.
[1454] Defence Appeal Brief, para. 162.
[1455] Defence Appeal Brief, para. 163.
[1456] Defence Appeal Brief, para. 164.
[1457] Defence Appeal Brief, para. 164.

and/or (civilian) objects", quoting the exact conduct for which Mr Ntaganda was sentenced under count 11.[1458] It argues that some of the underlying acts of persecution in this case, such as pillaging and destruction of property, do not involve physical harm.[1459] Similarly, as for the crime of attack against the civilian population, it argues that the number of civilians injured is limited and that not all instances resulted in injuries; referring to the testimony of witness P-0017, the Defence argues that no civilian was hurt in an instance where Mr Ntaganda ordered the witness to launch a grenade.[1460]

673. The Defence further submits that the Trial Chamber "erred in creating a presumption of psychological harm for victims who lost their home or material assets with significant impact in their lives".[1461] In its view, the Trial Chamber acted contrary to the jurisprudence in *Katanga*, where the Appeals Chamber held that "if, in the future, trial chambers were to presume psychological harm associated with the experience of an attack for all applicants who have proved material harm, but have not personally experienced the attack, they should carefully approach this issue, providing clear reasons as to the basis on which such a presumption is made".[1462] It notes that the Trial Chamber also found that indirect victims who are close family members of direct victims of the crimes against child soldiers, rape and sexual slavery, also benefit from a presumption of material, physical and psychological harm, thereby lowering the burden of proof.[1463]

674. Lastly, under part of its fourth ground of appeal, the Defence submits that the Trial Chamber "erred in lowering the burden of proof in accepting that a coherent and credible account is sufficient in relation to victims of sexual violence".[1464] Specifically, it challenges the Trial Chamber's finding that "the victim's coherent and credible account shall be accepted as sufficient evidence to establish their eligibility as victims

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[1458] Defence Appeal Brief, para. 164.
[1459] Defence Appeal Brief, para. 164.
[1460] Defence Appeal Brief, para. 165, *referring to* Sentencing Judgment, paras 144, 154; Conviction Judgment, para. 508; Appeals Chamber Judgment on the Conviction Judgment, para. 719.
[1461] Defence Appeal Brief, p. 57.
[1462] Defence Appeal Brief, paras 166-167, *referring to* Impugned Decision, paras 142, 147; *Katanga* Appeals Chamber Judgment on Reparations, para. 149.
[1463] Defence Reply to Victims' Responses, para. 11.
[1464] Defence Appeal Brief, p. 41.

on a balance of probabilities".[1465] The Defence concedes that this is the established standard but argues that the Trial Chamber erroneously adopted a lower burden for victims of sexual violence by making a presumption about their harm while precluding the Defence from challenging their eligibility.[1466] In its view, victims of sexual violence only had to provide a coherent and credible account to fall within the presumption of harm.[1467] It submits that, under the Impugned Decision, the eligibility of victims of sexual violence remains unchallenged considering that "the Defence has been cut out of the process and the Trial Chamber is not looking at individual forms".[1468]

675. Referring to this "lower documentation burden" being combined with the decision not to rule on individual applications, the Defence finds this to be "significant".[1469] It argues that, "having lowered the burden, Trial Chamber VI then extricated itself from the process of reviewing victims' applications in order to ensure that they are sufficiently substantiated as per the new standard".[1470]

3. Victims Group 1's submissions before the Appeals Chamber

676. Regarding the Defence's argument, under its second ground of appeal, that the Trial Chamber failed to provide reasoning for its pronouncements on the use of presumptions for certain types of harms and the standard of proof for certain categories of victims, Victims Group 1 submit that these arguments are not substantiated and that the Defence simply referred to parts of the Impugned Decision with which it disagrees, without explaining how the Trial Chamber made an error in its reasoning.[1471]

677. As for the Defence's eighth ground of appeal, Victims Group 1 submit that, contrary to the allegations of the Defence, the Trial Chamber had before it submissions on the use of presumptions from the parties and participants as well as the experts.[1472]

[1465] Defence Appeal Brief, para. 122, *referring to* Impugned Decision, paras 67, 139.
[1466] Defence Appeal Brief, para. 123, *referring to* 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para.181; *Katanga* Appeals Chamber Judgment on Reparations, para. 42; 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 181; *Katanga* Appeals Chamber Judgment on Reparations, para. 42; *Al Mahdi* Reparations Order, para. 44.
[1467] Defence Appeal Brief, para. 123.
[1468] Defence Appeal Brief, para. 123.
[1469] Defence Appeal Brief, para. 126.
[1470] Defence Appeal Brief, para. 126.
[1471] Victims Group 1's Response, para. 40.
[1472] Victims Group 1's Response, para. 41.

In their view, when adopting any such presumptions, the Trial Chamber considered the rights of the convicted person and, in light of the relevant jurisprudence of the Appeals Chamber, it was cautious by taking into consideration the environment of the victims and the applicable standard of proof – the balance of probabilities.[1473] They further argue that, contrary to the relevant jurisprudence of the Appeals Chamber, the Defence does not demonstrate that no reasonable trier of fact could have formulated such presumptions in light of the circumstances of the case before it.[1474] According to Victims Group 1, the Trial Chamber referred to the specific circumstances of the case, applied the relevant standard of proof and therefore adopted reasonable and appropriate presumptions.[1475] They further argue that, contrary to the submissions of the Defence, it had the opportunity to formulate observations on the victims' individual applications throughout the trial proceedings, and to respond to their submissions on the harm they suffered as well as the submissions of the Registry and the TFV.[1476] Moreover, in their view, the fact that the Trial Chamber did not follow the practice of other trial chambers during the reparations phase does not necessarily constitute an error of law or procedure, and such an allegation, therefore, does not constitute a valid ground of appeal.[1477]

678. As for the argument in the Defence's fourth ground of appeal that the Trial Chamber lowered the standard of proof for victims of sexual violence, Victims Group 1 submit that "the Defence seems to be overlooking the existing special evidentiary regime established by the legal texts of the Court in relation to the establishment of acts of sexual violence, which reflects principles recognised in international criminal law".[1478]

[1473] Victims Group 1's Response, para. 41, *referring to* *Katanga* Appeals Chamber Judgment on Reparations, para. 70.
[1474] Victims Group 1's Response, para. 41, *referring to* *Katanga* Appeals Chamber Judgment on Reparations, para. 77.
[1475] Victims Group 1's Response, para. 41, *referring to* *Katanga* Appeals Chamber Judgment on Reparations, paras 64, 75-76.
[1476] Victims Group 1's Response, para. 43.
[1477] Victims Group 1's Response, paras 44-45.
[1478] Victims Group 1's Response, para. 60.

4. Victims Group 2's submissions before the Appeals Chamber

679. Victims Group 2 argue that the Defence failed to demonstrate that it was unreasonable for the Trial Chamber to consider the difficulties in obtaining evidence in general terms rather than identifying the specific difficulties.[1479] They submit that the Trial Chamber "relied, *inter alia*, on submissions made by two neutral bodies" and the Court's practice.[1480] Victims Group 2 further submit that the Defence misrepresented the findings in *Katanga*,[1481] mischaracterized the Impugned Decision and failed to properly substantiate the alleged error of law.[1482] For these reasons, Victims Group 2 submit that the eighth ground of the Defence appeal should be rejected in its entirety.[1483]

680. As for the standard of proof for victims of sexual violence, Victims Group 2 argue that the Defence failed to demonstrate "how the introduction of the presumption of harm purportedly lowers the standard of proof of a coherent credible account".[1484] In their view, the Trial Chamber's findings on the nature of harm suffered by victims of sexual violence "in no uncertain terms set out that these victims have typically suffered various forms of harm".[1485]

5. Determination by the Appeals Chamber

681. The Appeals Chamber notes that the overarching argument of the Defence is that the Trial Chamber "erred in law when resorting to presumptions of specific harms in relation to certain categories of victims, thereby unjustifiably departing from the relevant jurisprudence".[1486] Although the Defence challenges in particular the Trial Chamber's presumptions (i) that direct victims of the attacks suffered physical and psychological harm, and (ii) that victims who lost their home or material assets with a significant effect on their daily life suffered psychological harm,[1487] it appears to further

[1479] Victims Group 2's Response, paras 125-126.
[1480] Victims Group 2's Response, para. 126.
[1481] Victims Group 2's Response, paras 127-128, *referring* to *Katanga* Reparations Order, para. 25.
[1482] Victims Group 2's Response, paras 131-133.
[1483] Victims Group 2's Response, para. 134.
[1484] Victims Group 2's Response, para. 95.
[1485] Victims Group 2's Response, para. 95.
[1486] Defence Appeal Brief, p. 51.
[1487] Defence Appeal Brief, para. 149, *referring to* Impugned Decision, para. 146.

challenge the Trial Chamber's approach in relation to all of "[t]he seven presumptions" it adopted.[1488] The Appeals Chamber will address these arguments in turn.

(a) Whether the Trial Chamber erred in its approach to adopt presumptions in this case

682. To challenge the Trial Chamber's approach to adopt all seven presumptions in the case at hand, the Defence argues that, by adopting these presumptions, the Trial Chamber abused its discretion because, contrary to the relevant jurisprudence, it failed to counterbalance the victims' difficulties against the right of due process of the convicted person.[1489] The Defence argues that the Trial Chamber provided "only broad and general statements" instead of a "meaningful analysis" of the victims' harm and their evidentiary difficulties.[1490] It submits that, to make similar presumptions, in *Katanga*, Trial Chamber II assessed victims' applications and evidence of their harm, as well as the conviction decision, the parties' submissions, the impossibility of some victims to provide medical certificates, and the jurisprudence of other courts, and that, for the same purposes, in *Lubanga*, Trial Chamber II assessed the sentencing decision and 473 victims' applications, where access of the Defence to the applications was deemed necessary to make the relevant presumption.[1491] According to the Defence, "the seven presumptions thus adopted by Trial Chamber VI are not reasonable in light of the circumstances of the case", and "[n]o reasonable trier of fact could have reasonably concluded that their adoption was necessary in light of the evidence on the record".[1492]

683. As regards factual presumptions, the Appeals Chamber recalls that it has previously held that:

> As opposed to presumptions that are explicitly provided for in the legal text, for example, the presumption of innocence, factual presumptions permit a trial chamber to presume a given fact to be established to the requisite standard of proof in the absence of direct evidence. The Appeals Chamber recalls that, in reparations proceedings, a standard "less exacting" than that for trial applies. This is, in part, due to the difficulties victims may face in obtaining evidence in support

[1488] Defence Appeal Brief, para. 158.
[1489] Defence Appeal Brief, paras 150-152, *referring to* *Katanga* Reparations Order, paras 57-61, 84, 90, 98; *Katanga* Appeals Chamber Judgment on Reparations, paras 4, 66, 75.
[1490] Defence Appeal Brief, para. 153.
[1491] Defence Appeal Brief, paras 155-157, *referring to* *Katanga* Reparations Order, paras 64-65, 123-131; *Lubanga* Decision on the Size of Reparations Award, paras 180-185, fn. 232.
[1492] Defence Appeal Brief, para. 158. *See also* paras 155-158.

> of their claims. The Appeals Chamber considers that, in the absence of direct evidence in certain circumstances, for example, owing to difficulties in obtaining evidence, a trial chamber may resort to factual presumptions in its identification of the heads of harm. *The Appeals Chamber considers that resort to factual presumptions in reparations proceedings is within a trial chamber's discretion in determining "what is 'sufficient' for purposes of an applicant meeting the burden of proof".*[1493]

684. Importantly, the Appeals Chamber proceeded to restrict that discretion as follows:

> However, the Appeals Chamber emphasises that, while a trial chamber has discretion to freely evaluate the evidence of harm in a particular case, *this discretion is not unlimited. A trial chamber must respect the rights of victims as well as the convicted person when resorting to presumptions.*[1494]

685. Furthermore, the Appeals Chambers recalls that, in determining appropriate reparations, fairness requires that "the trial chamber must give notice to the parties of the manner in which it intends to conduct the reparations proceedings before it, especially where it does not intend to make individual determinations with respect to each victim who has filed a request".[1495] In this regard, a trial chamber "must ensure that the convicted person is adequately on notice as to the information on which it will rely in making its order, so that he or she has a meaningful opportunity to make representations thereon, and it must give notice as to the manner in which it intends to assess that information".[1496]

686. The Appeals Chamber notes that the Trial Chamber made seven presumptions. First, it presumed "material, physical, and psychological harm for (i) former child soldiers; (ii) direct victims of rape and sexual slavery; and (iii) indirect victims who are close family members of direct victims of the crimes against child soldiers, rape, and sexual slavery".[1497] To draw these presumptions, the Trial Chamber referred to one of the expert reports, submissions of Victims Group 2, as well as the Appeals Chamber's jurisprudence and other chamber's decisions on reparations.[1498] The Trial Chamber

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[1493] *Katanga* Appeals Chamber Judgment on Reparations, para. 75 (emphasis added) (footnotes omitted).
[1494] *Katanga* Appeals Chamber Judgment on Reparations, para. 75 (emphasis added) (footnotes omitted).
[1495] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 90.
[1496] 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 90.
[1497] Impugned Decision, para. 145.
[1498] *See* Impugned Decision, para. 145, *referring to* First Experts Report, paras 16, 48, 66, fn. 218; CLR2 February 2020 Submissions, paras 30, 37; *Lubanga* Decision on the Size of Reparations Award, paras

proceeded to presume "physical and psychological harm for (i) direct victims of attempted murder; and (ii) direct victims of the crimes committed during the attacks, who personally experienced the attacks".[1499] To that end, it referred to the conviction and sentencing judgments in this case, one of the expert reports, submissions of Victims Group 2, and other trial chambers' decisions on reparations.[1500] Finally, to presume "psychological harm for (i) victims who lost their home or material assets with a significant effect on their daily life; and (ii) indirect victims who are close family members of direct victims of murder",[1501] it referred to the Sentencing Judgment, one of the expert reports, submissions from the TFV, and the Reparations Order in *Katanga*.[1502]

687. The Appeals Chamber observes that the Trial Chamber specifically invited the parties and the TFV to make submissions on, *inter alia*, "whether any type of harm suffered by the victims of Mr Ntaganda's crimes may be presumed".[1503] The Appeals Chamber highlights that the Defence had the opportunity to submit, and in fact submitted, its observations on the presumptions recommended by the experts and requested by the victims.[1504]

688. The Appeals Chamber further notes that the Trial Chamber did not expressly refer to the Defence's submissions. However, the Appeals Chamber recalls, as noted above,[1505] that a trial chamber, in setting out its reasoning, is not required to refer to every aspect of a party's submissions on the issue on which it is deciding, "but it is essential that it indicates with sufficient clarity the basis of the decision".[1506] Although it would have been preferable for the Trial Chamber to have referred to those submissions expressly, the Appeals Chamber notes that the Trial Chamber duly referred

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179-185; *Lubanga* Order on Framework for Collective Reparations, *referring to* TFV Information on collective reparations, paras 86, 88; *Katanga* Reparations Order, paras 112-122.
[1499] Impugned Decision, para. 146.
[1500] *See* Impugned Decision, para. 146, *referring to* Sentencing Judgment, para. 50; Conviction Judgment, fns 1975, 1867; First Experts Report, para. 48, fn. 218; CLR2 Final Submissions, para. 108; *Lubanga* Second Reparations Order, paras 184-185; *see Katanga* Reparations Order, paras 123-131.
[1501] Impugned Decision, para. 147.
[1502] *See* Impugned Decision, para. 147, *referring to* Sentencing Judgment, paras 44, 137, 139, 146; First Experts Report, paras 48, 73, 76; TFV February 2020 Submissions, para. 89; *Katanga* Reparations Order, paras 112-122.
[1503] First Decision on Reparations Process, para. 46.
[1504] *See* Defence Final Submissions, paras 42-98.
[1505] *See supra* paras 58-59.
[1506] *Lubanga* OA5 Appeals Chamber Judgment, para. 20.

to the information on which it relied to make the seven presumptions, *i.e.*: the Conviction Judgment, the Sentencing Judgment, the expert reports, submissions from the TFV and Victims Group 2, and jurisprudence from the Appeals Chamber as well as decisions from other chambers. Furthermore, the Defence was able to fully challenge the expert report and the submissions of the victims and the TFV on which the Trial Chamber relied to make the presumptions in the case at hand. In those circumstances, the Appeals Chamber does not find an error in the way that the Trial Chamber adopted these presumptions.

689. In any event, the aforementioned is without prejudice to the Defence's right to challenge the applicability of the presumption when the Trial Chamber assesses a sample of applications and for purposes of the procedure that the Trial Chamber will eventually adopt for the screening of victims' eligibility at the implementation stage. As determined elsewhere in this judgment, the Trial Chamber has been directed to take into account and rule on at least a sample of applications for reparations.[1507] Considering that presumptions of fact are rebuttable, shifting the burden of proof to those who wish to challenge their applicability, it is expected that the Trial Chamber will devise an avenue whereby the Defence is provided with a reasonable opportunity to rebut presumptions in proceedings before the Trial Chamber, for example, by having access to at least a minimum amount of information contained in the applications for reparations, so as to be able to make specific submissions and provide evidence to rebut presumptions that may not be applicable to such applications. The Appeals Chamber observes that in granting the Defence access to the victims' applications, the necessary redactions shall be made to protect the victims' safety, physical and psychological well-being, dignity and privacy, pursuant to article 68 of the Statute.[1508]

690. Furthermore, the Appeals Chamber is not persuaded by the argument of the Defence that, instead of making an individual analysis of each victim's harm, the Trial Chamber made "only broad and general statements".[1509] The Defence supports this assertion by arguing that the Trial Chamber referred to a judgment in which the IACtHR made a similar presumption but did not note that the IACtHR qualified that presumption

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[1507] *See supra* paras 345-346.
[1508] *See also* 2019 *Lubanga* Appeals Chamber Judgment on Reparations, paras 249-254, 256.
[1509] Defence Appeal Brief, para. 163.

"in the context" of the specific case before it.[1510] The Appeals Chamber observes that the Defence is referring to the Trial Chamber's findings (i) that it is "unquestionable that direct victims that personally experienced the crimes committed during the attacks endured physical suffering in connection with the very nature of the context of armed conflict and the attack against the civilian population within which the crimes were committed" and (ii) that "[s]imilarly, 'it is inherent to human nature that all those subjected to brutal acts […] experience intense suffering, anguish, terror and insecurity'".[1511]

691. The Appeals Chamber observes that the Trial Chamber did not base its findings solely on the decision of the IACtHR to which the Defence refers. For the first sentence, the Trial Chamber referred to the *Lubanga* Second Reparations Order,[1512] in which Trial Chamber II found that "it is unquestionable that victims endure physical suffering in connection with the very nature of the armed conflicts in which they were involved".[1513] For the second sentence, the Trial Chamber relied on the *Katanga* Reparations Order,[1514] which in turn relied on the aforementioned IACtHR's judgment, to find that "an Applicant sustained psychological harm connected to the experience of the attack on Bogoro, where it is proven that that person suffered other harm during the attack, even if he or she makes no explicit allegation of psychological harm".[1515] Having referred to the relevant statements in *Lubanga* and *Katanga*, the Trial Chamber considered it to be unnecessary to "scrutinise the specific physical and psychological harm alleged by each potential eligible direct victim of the attacks *once their eligibility has been established on a balance of probabilities*".[1516] Subsequently, on the basis of the record, *i.e.*, the conviction and sentencing judgments in this case, one of the expert reports, and submissions of Victims Group 2,[1517] the Trial Chamber proceeded to make

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[1510] Defence Appeal Brief, paras 153-154, *referring to* Impugned Decision, para. 146; *Pueblo Bello Massacre v. Colombia*, para. 255.
[1511] Impugned Decision, para. 146.
[1512] Impugned Decision, para. 146, *referring to* *Lubanga* Second Reparations Order, para. 184.
[1513] *Lubanga* Second Reparations Order, para. 184.
[1514] Impugned Decision, para. 146, *referring to* *Katanga* Reparations Order, para. 128.
[1515] *Katanga* Reparations Order, para. 129.
[1516] Impugned Decision, para. 147 (emphasis added).
[1517] *See* Impugned Decision, para. 146, *referring to* Sentencing Judgment, para. 50; Conviction Judgment, fns 1975, 1867; First Experts Report, para. 48, fn. 218; CLR2 Final Submissions, para. 108; *Lubanga* Decision on the Size of Reparations Award, paras 184-185; *See* *Katanga* Reparations Order, paras 123-131.

the presumptions that direct victims of attempted murder and direct victims of the crimes committed during the attacks, who personally experienced the attacks, suffered physical and psychological harm.[1518]

692. The Appeals Chamber highlights that, having made the two challenged statements, the Trial Chamber considered it unnecessary to scrutinise the victims' harm to the extent that "*their eligibility has been established on a balance of probabilities*".[1519] In the Appeals Chamber's view, this means that the victims must in any event satisfy the applicable standard to establish that they are victims of the crimes for which Mr Ntaganda was convicted.

693. Moreover, the Appeals Chamber notes that the Trial Chamber relied not only on two cases in which victims suffered harm in a similar context to the one in this case, but also on the record of the case. The Appeals Chamber recalls that the Trial Chamber relied on the conviction and sentencing judgments in this case, one of the expert reports, and submissions of Victims Group 2.[1520] Furthermore, the information on which the Trial Chamber based the challenged presumptions was available to the Defence and it was able to challenge it. In those circumstances, the Trial Chamber did not err.

694. In light of the forgoing, the Appeals Chamber rejects the Defence's arguments on this point.

(b) Whether the Trial Chamber erred in making specific presumptions for victims of the attacks and victims who lost their home and material assets

695. The Defence argues that the Trial Chamber "erred in creating presumptions of physical harm for victims of the attacks who personally experienced the attacks".[1521] It further submits that the Trial Chamber "erred in creating a presumption of psychological harm for victims who lost their home or material assets with significant impact in their lives".[1522]

[1518] Impugned Decision, para. 146.
[1519] Impugned Decision, para. 147 (emphasis added).
[1520] *See* Impugned Decision, para. 146, *referring to* Sentencing Judgment, para. 50; Conviction Judgment, fns 1975, 1867; First Experts Report, para. 48 and fn. 218; CLR2 Final Submissions, para. 108.
[1521] Defence Appeal Brief, p. 55.
[1522] Defence Appeal Brief, p. 57.

696. The Appeals Chamber observes that these are presumptions of fact, as opposed to presumptions provided by law.[1523] In this regard, the Appeals Chamber has previously emphasised that "the reasonableness of a factual presumption drawn by a trial chamber in reparation proceedings will depend upon the circumstances of the case".[1524] As for the standard of appellate review regarding factual presumptions, the Appeals Chamber has further observed:

> On appeal, bearing in mind the standard of review, a party challenging a factual presumption must demonstrate that no reasonable trier of fact could have formulated the presumption in question in light of the particular set of circumstances in that case.[1525]

697. With this standard in mind, the Appeals Chamber turns to address the arguments raised by the Defence against the two challenged presumptions.

(i) Whether the Trial Chamber erred in adopting a presumption of physical harm for victims of the attacks

698. The Defence argues that the Trial Chamber "erred in creating presumptions of physical harm for victims of the attacks who personally experienced the attacks".[1526] The Defence submits that the Impugned Decision departs from the relevant jurisprudence because, in the *Katanga* case, Trial Chamber II presumed psychological harm only for victims of the attack who could prove that they suffered an additional type of harm, and because the Appeals Chamber held that to make such a presumption for victims who did not experience the attack, a trial chamber should provide clear reasons as to the basis to make such a presumption.[1527] The Defence argues that although the Trial Chamber referred to the jurisprudence in *Katanga*, it departed from it and thus abused its discretion by failing to require the victims to prove another type of harm to enable their psychological harm to be presumed, and by "allowing presumptions of physical harm for victims having experienced the attack".[1528]

[1523] *See* *Katanga* Appeals Chamber Judgment on Reparations, para. 75.
[1524] *Katanga* Appeals Chamber Judgment on Reparations, para. 76.
[1525] *Katanga* Appeals Chamber Judgment on Reparations, para. 77.
[1526] Defence Appeal Brief, p. 55.
[1527] Defence Appeal Brief, paras 159-161, *referring to* *Katanga* Reparations Order, para. 129; *Katanga* Appeals Chamber Judgment on Reparations, para. 149.
[1528] Defence Appeal Brief, para. 162.

699. The Appeals Chamber observes that the Defence refers to the Appeals Chamber's finding in *Katanga* that "if, in the future, trial chambers were to presume psychological harm associated with the experience of an attack for all applicants who have proved material harm, but have not personally experienced the attack, they should carefully approach this issue, providing clear reasons as to the basis on which such a presumption is made".[1529] The Appeals Chamber notes that it made this finding in the context of Mr Katanga's allegation that Trial Chamber II erred by awarding reparations *ultra petita* and, in particular, for compensating moral harm connected to the attack in Bogoro, including for applicants who did not claim any such particular harm.[1530]

700. Although the challenged presumption was expressly requested by Victims Group 2,[1531] the Appeals Chamber notes that the Defence challenged the use of presumptions in this case.[1532] Specifically, the Defence argued that "the harms suffered by victims as a result of the crimes Mr Ntaganda was convicted of should be limited to: […] civilians who were present in Mongbwalu and Sayo in the context of the First Operation and in Bambu, Jitchu and Buli in the context of the Second Operation *and suffered from attacks on these villages*".[1533] The Defence added that "[i]t should be noted that Lendus combatants lived in the affected villages, and it should be carefully scrutinized if the claimant did participate in hostilities or not".[1534] Regardless, the Trial Chamber found that it was "not necessary to scrutinise the specific physical and psychological harm alleged by each potential eligible direct victim of the attacks once their eligibility has been established on a balance of probabilities".[1535]

701. For the reasons that follow, the Appeals Chamber finds that the Trial Chamber erred in reaching, without more, its presumption that victims of the attack suffered physical harm.

702. On appeal, the Defence argues that the war crimes of pillaging, attacking protected objects, and destroying or seizing the property of an adversary do not

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[1529] *Katanga* Appeals Chamber Judgment on Reparations, para. 149.
[1530] *Katanga* Appeals Chamber Judgment on Reparations, paras 134, 144.
[1531] *See* CLR2 February 2020 Submissions, paras. 49-53; CLR2 Final Submissions, paras 8, 108.
[1532] *See* Defence Final Submissions, paras 42-98.
[1533] *See* Defence Final Submissions, para. 160 (emphasis added).
[1534] Defence Final Submissions, para. 160.
[1535] Impugned Decision, para. 146.

necessarily and automatically imply physical and psychological harm, as none of them require infliction of physical injury.[1536] It further argues that some of the underlying acts of persecution in this case, such as pillaging and destruction of property, do not involve physical harm.[1537] Similarly, as for the crime of attack against the civilian population, it argues that the number of civilians injured is limited and that not all instances resulted in injuries.[1538]

703. The Appeals Chamber recalls that the "concept of 'harm', while not defined in the Statute or the Rules of Procedure and Evidence, denotes 'hurt, injury and damage'", and that it "may be material, physical and psychological".[1539] The Appeals Chamber further recalls that "material harm" includes "lost earnings and the opportunity to work; loss of, or damage to, property; unpaid wages or salaries; other forms of interference with an individual's ability to work; and the loss of savings".[1540] It further notes that, according to the ECCC Supreme Court, while the concept of "material injury" refers to "a material object's loss of value, such as complete or partial destruction of personal property, or loss of income",[1541] the concept of "physical injury" denotes "biological damage, anatomical or functional", and "may be described as a wound, mutilation, disfiguration, disease, loss or dysfunction of organs, or death".[1542]

704. Although the Defence seems to be restricting the concept of "physical harm" to that of "infliction of physical injury" when arguing that no infliction of physical harm necessarily occurs in the war crimes of pillaging, attacking protected objects, destroying or seizing the property of an adversary, and attacking the civilian population, nor in some of the underlying acts of persecution, the Appeals Chamber considers that the scarce reasoning of the Trial Chamber allows for this interpretation. The Appeals Chamber notes that the Trial Chamber presumed "physical and psychological harm" for, *inter alios*, "direct victims of the crimes committed during the attacks, who

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[1536] Defence Appeal Brief, para. 164.
[1537] Defence Appeal Brief, para. 164.
[1538] Defence Appeal Brief, para. 165 *referring to* Sentencing Judgment, paras 144, 154; Conviction Judgment, para. 508; Appeals Chamber Judgment on Conviction, para. 719.
[1539] *Lubanga* Amended Order for Reparations, para. 10.
[1540] *Lubanga* Amended Order for Reparations, para. 40.
[1541] *Lubanga* Amended Order for Reparations, para. 40.
[1542] *Case 001* Appeal Judgment, para. 415.

personally experienced the attacks".[1543] In the same paragraph in which the Trial Chamber adopted this presumption, the Trial Chamber considered it "unquestionable that direct victims that personally experienced the crimes committed during the attacks endured physical suffering in connection with the very nature of the context of armed conflict and the attack against the civilian population within which the crimes were committed".[1544] On its face, this finding appears to presume that all victims of the attacks were physically injured. Considering that not every victim of an attack necessarily suffers a bodily injury, and the Trial Chamber did not provide sufficient reasoning to support this conclusion, the Appeals Chamber is unable assess whether no reasonable trier of fact would have reached the same conclusion.

705. In light of the foregoing, the Appeals Chamber considers that the Trial Chamber erred, and it thus remands the matter for the Trial Chamber to address the submissions of the Defence and provide sufficient reasoning for its findings.

(ii) Whether the Trial Chamber erred in creating a presumption of psychological harm for victims who lost their home or material assets with significant impact on their lives

706. The Defence argues that the Trial Chamber "erred in creating a presumption of psychological harm for victims who lost their home or material assets with significant impact [on] their lives".[1545] In its view, the Trial Chamber acted contrary to the jurisprudence in *Katanga*, in which the Appeals Chamber held that "if, in the future, trial chambers were to presume psychological harm associated with the experience of an attack for all applicants who have proved material harm, but have not personally experienced the attack, they should carefully approach this issue, providing clear reasons as to the basis on which such a presumption is made".[1546] The Defence alleges that "no justification was provided as to why this presumption was adopted" and that

[1543] Impugned Decision, para. 146.
[1544] Impugned Decision, para. 147 (emphasis added).
[1545] Defence Appeal Brief, p. 57.
[1546] Defence Appeal Brief, paras 166-167, *referring to* Impugned Decision, paras 142, 147; *Katanga* Appeals Chamber Judgment on Reparations, para. 149.

the "Trial Chamber's blanket statement fails to apply any caution or care in relation to whether the victim has or has not personally experienced the attack".[1547]

707. The Appeals Chamber notes that the Defence is challenging the Trial Chamber's presumption of "psychological harm" for, *inter alios*, "victims who lost their home or material assets with a significant effect on their daily life".[1548] The Appeals Chamber notes that the Trial Chamber recalled specific findings it made in its Sentencing Judgment, and it further relied on one of the expert reports and submissions from the TFV.[1549] In particular, the Trial Chamber referred to its findings from the Sentencing Judgment that "when destruction of property concerns houses, the perpetrators do not merely destroy structures, but they also destroy people's homes – a place where the victims ought to have been able to feel shielded and safe", and that this "crime also deprives civilians of a private place, a shelter and a sense of security".[1550] It also referred to its finding from the Sentencing Judgment that the items looted from the victims "represented the bulk of the victims' possessions, played an important role in the victims' day-to-day lives and/or their business", that "the pillage of harvest affected the victims' 'livelihood and availability of food until new crops would ha[ve] grown and could be harvested'", and that "[m]any civilians were affected by the looting and were sometimes left without anything".[1551] The Trial Chamber further referred to its finding from the Sentencing Judgment that "[w]hen someone's dwelling is burned down, the allegedly low value of rebuilding the structure does not change the fact that someone's home was destroyed, and that the lives of those living in the dwelling were significantly disrupted".[1552]

708. Contrary to the Defence's assertion that "no justification was provided as to why this presumption was adopted",[1553] the Appeals Chamber considers that the Trial Chamber was clear in indicating the information on which it relied to make the

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[1547] Defence Appeal Brief, para. 168.
[1548] Impugned Decision, para. 147.
[1549] *See* Impugned Decision, para. 147, fns 383-384, *referring to* Sentencing Judgment, paras 137, 139, 146; First Experts Report, paras 48, 73, 76; TFV February 2020 Submissions, para. 89.
[1550] Sentencing Judgment, para. 137.
[1551] Sentencing Judgment, para. 139. It further noted: "In Mongbwalu, for example, many inhabitants returned to their houses to find that nothing was left, as everything had been taken. The pillaging was of a large scale and in some cases lasted for a considerable period. The looting in Mongbwalu, for example, lasted for about a week".
[1552] Sentencing Judgment, para. 146.
[1553] Defence Appeal Brief, para. 168.

challenged presumption. Specifically, having found in the Sentencing Judgment the particularly distressing circumstances of victims who lost their homes or properties that are significant in their lives, it was not unreasonable for the Trial Chamber to presume that they suffered psychological harm. Therefore, the Defence has not demonstrated that no reasonable trier of fact could have made the same presumption in the particular circumstances of this case.

(c) Whether the Trial Chamber erred by lowering the standard of proof by adopting presumptions in relation to victims of sexual crimes

709. Under its fourth ground of appeal, the Defence challenges the Trial Chamber's finding that "the victim's coherent and credible account shall be accepted as sufficient evidence to establish their eligibility as victims on a balance of probabilities".[1554] While the Defence concedes that this is the established standard, it argues that the Trial Chamber erroneously adopted a lower burden for victims of sexual violence by making a presumption about their harm while precluding the Defence from challenging their eligibility.[1555]

710. The Appeals Chamber observes that these arguments relate to the Trial Chamber's presumption of harm for victims of sexual violence. The Trial Chamber presumed "material, physical, and psychological harm" for, *inter alios*, "direct victims of rape and sexual slavery".[1556] To draw this presumption, the Trial Chamber referred to one of the expert reports, submissions of Victims Group 2, as well as the Appeals Chamber's jurisprudence and the decisions of other chambers on reparations.[1557]

711. Regarding the Defence's argument that the Trial Chamber lowered the burden of proof for victims of sexual violence, the Appeals Chamber notes that, in its 2019 *Lubanga* Appeals Chamber Judgment on Reparations, it rejected a similar argument.

[1554] Defence Appeal Brief, para. 122 *referring to* Impugned Decision, paras 67, 139.
[1555] Defence Appeal Brief, para. 123 *referring to* 2019 Lubanga Appeals Chamber Judgment on Reparations, para.181; *Katanga* Appeals Chamber Judgment on Reparations, para. 42; 2019 Lubanga Appeals Chamber Judgment on Reparations, para. 181; *Katanga* Appeals Chamber Judgment on Reparations, para. 42; *Al Mahdi* Reparations Order, para. 44.
[1556] Impugned Decision, para. 145.
[1557] *See* Impugned Decision, para. 145, *referring to* First Experts Report, paras 16, 48, 66, and fn. 218; CLR2 February 2020 Submissions, paras 30, 37; *Lubanga* Decision on the Size of Reparations Award, paras 179-185; *Lubanga* Order on Framework for Collective Reparations *referring to* TFV Information on collective reparations, paras 86, 88; *Katanga* Reparations Order, paras 112-122.

Mr Lubanga had submitted that, by finding that a number of victims were eligible because their accounts were "coherent and credible", Trial Chamber II had applied a standard lower than that of a balance of probabilities.[1558] Having noted that Mr Lubanga was not challenging the applicability of the standard of a balance of probabilities,[1559] the Appeals Chamber noted that Trial Chamber II had in fact referred to that standard,[1560] and that its reference to coherent and credible accounts was not to find that "it was finally persuaded to a degree that all the allegations therein were proved, *but simply that the accounts were, as stated, generally reliable*".[1561] The Appeals Chamber further noted that Trial Chamber II had in any event proceeded to weigh the victims' accounts with the other available evidence "with a view to finally determining whether the factual allegations were proven to the requisite standard".[1562] For these reasons, the Appeals Chamber did not consider that Trial Chamber II had erred when assessing the coherence and credibility of the victims' accounts.[1563]

712. Similarly, in the instant case, the Appeals Chamber notes that the Defence does not assert that the standard of a balance of probabilities, which the Trial Chamber set out to apply to its reparations proceedings,[1564] should not be employed, or that some other standard should apply in the circumstances. Therefore, the Appeals Chamber will not address whether that standard was appropriate.

713. However, the Defence does allege that, by accepting credible and coherent accounts from victims of sexual violence, and simultaneously making a presumption of harm for these victims, the Trial Chamber erroneously adopted a lower burden of proof and precluded the Defence from challenging their eligibility.[1565] In practice, according to the Defence, victims of sexual violence only have to provide a coherent and credible account to fall within such a presumption, and their eligibility will remain unchallenged

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[1558] *See* 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 197.
[1559] *See* 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 197.
[1560] *See* 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 198.
[1561] *See* 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 200.
[1562] *See* 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 200.
[1563] *See* 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 200.
[1564] Impugned Decision, para. 136.
[1565] Defence Appeal Brief, para. 123 *referring to* 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para.181; *Katanga* Appeals Chamber Judgment on Reparations, para. 42; 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 181; *Katanga* Appeals Chamber Judgment on Reparations, para. 42; *Al Mahdi* Reparations Order, para. 44.

considering that "the Defence has been cut out of the process and the Trial Chamber is not looking at individual forms".[1566] The Appeals Chamber will address these arguments in turn.

714. As for the first argument – that the Trial Chamber lowered the burden of proof for victims of sexual violence – the Appeals Chamber finds this argument to be based upon an incorrect premise because it is apparent that the Trial Chamber did indeed set out to apply the standard advocated by the Defence. That is, the Trial Chamber clearly stated that "reparations proceedings require a less exacting standard of proof than trial proceedings" and that "[i]n line with the previous jurisprudence, the Chamber adopts the 'balance of probabilities' test as the appropriate standard of proof in reparations proceedings".[1567] Moreover, although the Trial Chamber found that the coherent and credible account of victims of sexual violence "shall be accepted as sufficient evidence to establish their eligibility as victims on a balance of probabilities",[1568] and proceeded to set a specific presumption of harm for these victims,[1569] it clearly required that a harm can be presumed "*once a victim has proved, on a balance of probabilities standard, to be a victim of the crimes for which Mr Ntaganda was convicted*".[1570] That is, contrary to the Defence's argument that the burden of proof for these victims is lower, paragraphs 107, 139, 143 and 145 of the Impugned Decision, read as a whole, require that victims of sexual violence first provide, under the applicable standard of a balance of probabilities, a coherent and credible account that the sexual crimes to which they were subjected were perpetrated within the scope of the crimes for which Mr Ntaganda was convicted, and only then may they benefit from the applicable presumption of harm.

715. Regarding the second part of the Defence's argument – that "the Defence has been cut out of the process and the Trial Chamber is not looking at individual forms"[1571] – the Appeals Chamber is not persuaded either. First, in the Impugned Decision, the Trial Chamber duly referred to the information on which it relied to make the seven

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[1566] Defence Appeal Brief, para. 123.
[1567] Impugned Decision, para. 136.
[1568] Impugned Decision, para. 139.
[1569] Impugned Decision, para. 145.
[1570] Impugned Decision, para. 143.
[1571] Defence Appeal Brief, para. 123.

presumptions, and, during the reparations proceedings, it invited the parties and the TFV to make submissions on "whether any type of harm suffered by the victims of Mr Ntaganda's crimes may be presumed".[1572] The Defence had the opportunity to submit, and in fact submitted, its observations on the presumptions recommended by the experts and requested by the victims.[1573] Second, although the Trial Chamber did not make a ruling on the eligibility of any victim,[1574] this does not mean that the Defence may not challenge the applicability of the presumption when the Trial Chamber assesses a sample of applications on remand,[1575] and, subsequently, if the Trial Chamber so determines, during the procedure that it will adopt for the screening of victims' eligibility at the implementation stage.[1576]

716. In any event, in so finding, the Appeals Chamber stresses that this is without prejudice to the procedure that the Trial Chamber will adopt for the screening of victims' eligibility at the implementation stage in light of this judgment.[1577]

717. In light of the foregoing, the Defence' arguments are rejected.

X. GROUNDS CHALLENGING THE TIMELINESS OF THE IMPUGNED DECISION

A. Relevant parts of the Impugned Decision

718. In the introductory section of the Impugned Decision, entitled "Overview", the Trial Chamber made, *inter alia*, the following observations:

> 5. Considering that the mandate of two of the Chamber's three Judges comes to an end on 10 March 2021, including that of the Judge who presided over the trial, the Chamber has decided to issue this Order prior to the issuance of the appeals judgment on the conviction and sentence. In that respect, the Chamber recalls (i) the victims' right to prompt reparations; (ii) that the crimes for which Mr Bosco Ntaganda ('Mr Ntaganda') was convicted took place almost two decades ago and most victims have received little to no assistance so far; and (iii) that, due to their particular vulnerability, some victims may require urgent assistance. The Chamber considers that issuing this Order now may contribute to more expeditious reparations proceedings.

[1572] First Decision on Reparations Process, para. 46.
[1573] *See* Defence Final Submissions, paras 42-98.
[1574] Impugned Decision, para. 136.
[1575] *See supra* paras 345-346, 689.
[1576] *See supra* para. 387.
[1577] *See supra* para. 387.

> 6. The Chamber has taken into account the submission that the victims' expectations should not be unduly raised before the outcome of the appeals on Mr Ntaganda's conviction and sentence. The Chamber acknowledges the need to take into account and manage the victims' expectations, while respecting their agency and capacity as parties to the proceedings, and stresses that their right to prompt reparations is of paramount importance. After the issuance of this Order, it will be the duty of the Court as a whole, including the Registry as appropriate, and of all those who assist its work, including the Legal Representatives of Victims (the 'LRVs') and the Trust Fund for Victims (the 'TFV'), depending on their roles, to manage the victims' expectations through proper outreach and communication.
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> 7. After detailed consideration of the submissions of the parties and other participants in the proceedings, reports from the Registry and the Appointed Experts, the TFV, relevant case records, and the applicable legal framework, the Chamber has concluded that awarding collective reparations with individualised components is the most appropriate course of action in the present proceedings.[1578]

B. Victims Group 2's submissions before the Appeals Chamber

719. Under their seventh ground of appeal, Victims Group 2 submit that the Trial Chamber "erred in fact and/or procedure by taking into account extraneous factors that led [to] it unduly expediting the reparations process with prejudice to the fairness of its determination of the scope of Mr Ntaganda's liability for reparations, in particular the overall cost to repair".[1579] Victims Group 2 refer to the Impugned Decision taking into account that the judicial mandate of two of the judges of the Trial Chamber came to an end on 10 March 2021, as well as the fact that the mandate of the judge who presided over the trial came to an end on that day.[1580] This, according to Victims Group 2, constituted an error in the exercise of its discretion, as there is no bar to the extension of judicial mandates in the Statute, the Rules or the jurisprudence of the Court.[1581]

720. Victims Group 2 submit that the Trial Chamber ignored the parties' submissions that no reparations order should be issued or any steps undertaken towards reparations prior to the judgment on Mr Ntaganda's conviction appeal.[1582] They argue that the Trial Chamber thus prioritised the expediency of its decision over considerations of unduly

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[1578] Impugned Decision, paras 5-7.
[1579] Victims Group 2's Appeal Brief, para. 136.
[1580] Victims Group 2's Appeal Brief, para. 136.
[1581] Victims Group 2's Appeal Brief, paras 136, 140.
[1582] Victims Group 2's Appeal Brief, para. 137.

raising expectations and the rights of the convicted person.[1583] According to Victims Group 2, the Trial Chamber was driven by the perceived restraint of the end of the regular judicial mandate of two of its judges, and therefore issued the Impugned Decision on the basis of incomplete information.[1584] According to Victims Group 2, this is illustrated by the extent of the Registry's mapping exercise being a "preliminary" one – further limited by COVID-19 restrictions – as well as the fact that the Trial Chamber rejected Victims Group 2's request to collect further and more concrete information about the population census.[1585]

721. Victims Group 2 argue that the ending of judicial mandates was an irrelevant factor and taking it into consideration amounted to an error.[1586] They further submit that, at the time that it was issued, the Trial Chamber left many of the reparations order's "fundamental parameters" undefined.[1587] They argue that there is no obligation for the judges of a trial bench to issue the reparations order, and in any event, the bench in the present case was no longer in its original composition, as Judge Ozaki had been replaced by Judge Herrera Carbuccia at the beginning of the reparations proceedings.[1588] Victims Group 2 further refer to the Presidency's decision in the *Katanga* case to grant the requests of two judges of the bench to end their judicial mandate upon the conclusion of sentencing and prior to the reparations stage.[1589]

722. Victims Group 2 argue that even if the end of the judicial mandates had been a valid consideration, those mandates could have been extended until the issuance of the Impugned Decision.[1590] To this end, Victims Group 2 refer to the *Lubanga* case in which the composition of the relevant trial chamber changed during the reparations phase of that case, namely after the issuance of the reparations order.[1591] According to Victims Group 2, the judges' mandates should have been extended for the necessary period of time rather than the Trial Chamber issuing the Impugned Decision in

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[1583] Victims Group 2's Appeal Brief, para. 137.
[1584] Victims Group 2's Appeal Brief, para. 138.
[1585] Victims Group 2's Appeal Brief, para. 138.
[1586] Victims Group 2's Appeal Brief, paras 140, 143.
[1587] Victims Group 2's Appeal Brief, para. 139.
[1588] Victims Group 2's Appeal Brief, para. 140.
[1589] Victims Group 2's Appeal Brief, para. 142.
[1590] Victims Group 2's Appeal Brief, para. 144.
[1591] Victims Group 2's Appeal Brief, para. 145.

accordance with a perceived deadline "without giving due consideration to resolving the most basic questions relevant to the order".[1592] Victims Group 2 submit that it is the established practice of the Court that the Presidency would grant such a request under article 38(8)(a) of the Statute where it is required for the completion of a specific stage of the proceedings.[1593]

723. Victims Group 2 argue that the perceived constraint of the judicial mandates impacted the Trial Chamber's decision-making, as it led it to issue the Impugned Decision before it had the necessary information and "before it had decided the most basic parameters of the reparations award".[1594] They argue that the Trial Chamber thus failed to give appropriate consideration to several factors that were highly relevant to the fair determination of the scope of Mr Ntaganda's liability for reparations.[1595] Victims Group 2 submit that the Trial Chamber left a number of matters unresolved such as the basis for the cost to repair, the allocation of funds between the different groups of victims, the allocation of funds for the prioritisation of reparations to specific groups of victims, and general implementation criteria to be followed by the TFV.[1596] Victims Group 2 submit that had the Trial Chamber extended the judicial mandates in question for the time necessary to finish resolving the above matters, it would have rendered a substantially different decision in which the question of the number of potential beneficiaries and the basis for the cost to repair would have been settled in a way that would have allowed for the TFV to set up an implementation plan in accordance with clear directions from the Trial Chamber.[1597]

724. In response to the Defence's first ground of appeal, Victims Group 2 argue that the Defence did not provide "cogent arguments that would clearly set out the alleged errors and the material impact thereof", thus failing to comply with the applicable standards of appellate review.[1598] However, Victims Group 2 agree with the Defence in that the Trial Chamber erred by failing to address key issues before issuing the Impugned Decision, but not for the reasons set out by the Defence in its first ground of

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[1592] Victims Group 2's Appeal Brief, para. 145.
[1593] Victims Group 2's Appeal Brief, para. 146.
[1594] Victims Group 2's Appeal Brief, para. 146.
[1595] Victims Group 2's Appeal Brief, para. 147.
[1596] Victims Group 2's Appeal Brief, para. 148.
[1597] Victims Group 2's Appeal Brief, para. 148.
[1598] Victims Group 2's Response, paras 45-46.

appeal.[1599] Victims Group 2 submit that while they in principle agree with the Defence's argument that the premature issuance of the Impugned Decision inappropriately raised the expectations of potential beneficiaries, they consider that the Defence's submissions remain vague and unarticulated.[1600] They submit that the Defence's arguments regarding the premature issuance of the Impugned Decision "do not demonstrate *how* the fairness *vis-à-vis* the convicted person was allegedly impacted, *how* the implementation of the reparations process was prejudiced and *how* the TFV's activities were likely to be impacted by the error".[1601]

725. Victims Group 2 further argue that the Defence failed to substantiate its argument that the Trial Chamber had not adequately taken into account the effects of the COVID-19 pandemic, as it left "unaddressed whether the Trial Chamber was meant to wait until the end of the pandemic and/or the end of the ongoing insecurity in Ituri, or what kind of information it expected to be further collected by the VPRS".[1602] They further submit that the Defence contradicted its own subsequent submissions under its tenth to fifteenth grounds of appeal, according to which the Trial Chamber had sufficient information to have made a reasonable assessment of potential beneficiaries.[1603]

726. In relation to the Defence's argument that the Trial Chamber had to establish the potential number of beneficiaries "with a sufficient degree of precision" before issuing the Impugned Decision, Victims Group 2 argue that the Trial Chamber was merely required to arrive at an estimate that was "as accurate as possible".[1604] Regarding the Defence's argument that the Trial Chamber failed to "set out clearly the eligibility criteria and the parameters of any administrative screening process" by the TFV and to "design an implementation calendar",[1605] Victims Group 2 submit that such contentions are not sufficiently substantiated.[1606] Furthermore, while Victims Group 2 concur with the Defence's "contention that the Trial Chamber erred when it took the

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[1599] Victims Group 2's Response, para. 47.
[1600] Victims Group 2's Response, para. 48.
[1601] Victims Group 2's Response, para. 48 (emphasis in the original).
[1602] Victims Group 2's Response, para. 51.
[1603] Victims Group 2's Response, para. 51, *referring to* Defence Appeal Brief, para. 43.
[1604] Victims Group 2's Response, para. 52.
[1605] Victims Group 2's Response, para. 53, *referring to* Defence Appeal Brief, para. 43.
[1606] Victims Group 2's Response, para. 53.

end of the mandate of two of its members into account in the Impugned Decision", Victims Group 2 submit that the Defence failed to demonstrate how the alleged error materially affects the Impugned Decision.[1607]

C. Defence submissions before the Appeals Chamber

727. In response to the seventh ground of Victims Group 2's appeal, the Defence submits that it aligns itself with Victims Group 2's position that the issuance of the Impugned Decision was premature, that the expiry of judicial mandates should not have been a relevant factor to issue the Impugned Decision, and that its premature issuance adversely influenced the Trial Chamber's decision-making process.[1608] It reiterates that the "rush to judgment" prevented the Trial Chamber from determining the number of potential beneficiaries and that this led to an arbitrary determination of Mr Ntaganda's liability.[1609] It further agrees with Victims Group 2 that if the Trial Chamber had considered the involvement of the departing judges as crucial to the delivery of the reparations order, it should have sought the extension of their mandates.[1610]

728. Similarly, under its first ground of appeal, the Defence submits that it agrees with the views of Victims Group 2 that the Trial Chamber issued the Impugned Decision prematurely.[1611] The Defence submits that it raises similar arguments, by arguing that before issuing the Impugned Decision, the Trial Chamber should have (i) considered and adjudicated certain issues raised by the Defence, including the Defence access to the dossiers of participating victims; (ii) "take[n] into consideration the ongoing COVID-19 pandemic and the difficulties encountered by the VPRS, *inter alia*, in collecting sufficient information"; (iii) "establish[ed] the potential number of beneficiaries with a sufficient degree of precision"; (iv) "set out clearly the eligibility criteria and the parameters of any administrative screening process to be conducted by the TFV and/or engage[d] the parties and the VPRS in this regard"; (v) "take[n] into consideration the current security situation in Ituri and the consequences thereon of [*sic*] issuing a reparations order at this stage"; and (vi) "design[ed] an implementation

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[1607] Victims Group 2's Response, para. 54.
[1608] Defence Response to Victims Group 2's Appeal Brief, paras 77-78.
[1609] Defence Response to Victims Group 2's Appeal Brief, para. 79.
[1610] Defence Response to Victims Group 2's Appeal Brief, para. 80.
[1611] Defence Appeal Brief, para. 41.

calendar protecting the right of appeal of the parties".[1612] The Defence argues that by not doing so, the Trial Chamber impacted the fairness of its determination of Mr Ntaganda's liability, inappropriately raised the expectations of potential beneficiaries of reparations, and affected the implementation of the reparations process.[1613]

729. The Defence refers to previous submissions on the following issues which, the Defence argues, the Trial Chamber overlooked: (i) the number of victims, (ii) mechanisms to identify new potential beneficiaries, (iii) the need for VPRS to meet the participating victims who had not filed applications for reparations, (iv) inapplicability of the process of authorising victims to participate in the trial phase as a way of determining eligible beneficiaries of reparations, (v) the involvement of the Defence in the assessment of reparations requests, and (vi) other challenges to the issuance of an order finding Mr Ntaganda liable for applications for reparations that the Defence had no opportunity to individually assess.[1614] In particular, the Defence submits that the Trial Chamber rejected the Defence request to allow it to be involved in or, at least, order disclosure of the results of the assessment of VPRS regarding the number of victims participating in the trial proceedings who remained eligible to receive reparations.[1615]

730. The Defence argues that the first Registry's report identified relevant issues that the Trial Chamber had failed to address and that it only determined those issues three days before the Defence had to submit its final observations, "significantly hampering the ability of the Defence to take stock of and address the guidelines set therein".[1616] According to the Defence, it had already sought clarification and further guidance from the Trial Chamber on different issues regarding "its role as a party to the reparation proceedings",[1617] but the Trial Chamber "had rejected the Defence request in its entirety and refused to provide any clarification or guidance".[1618] In particular, the Defence argues that the Trial Chamber denied the Defence's request for access to the victims'

[1612] Defence Appeal Brief, para. 43.
[1613] Defence Appeal Brief, para. 44.
[1614] Defence Appeal Brief, paras 45-46.
[1615] Defence Appeal Brief, para. 47.
[1616] Defence Appeal Brief, para. 48.
[1617] Defence Appeal Brief, para. 49.
[1618] Defence Appeal Brief, para. 50.

application forms on the grounds that the Trial Chamber would not individually assess any of them because it had not yet determined the types and modalities of reparations, while, according to the Defence, access to the application forms concerns a matter of due process regardless of the types and modalities of reparations.[1619] The Defence further argues that, although the second Registry's report provided a final assessment of the number of participating victims eligible for reparations, an update on the sample of potential beneficiaries and an update on the mapping of new victims, this information was compiled in consultation with the legal representatives of victims and not with the Defence.[1620] The Defence argues that, besides the Trial Chamber's failure to pronounce on whether the right to due process entailed the Defence's access to the application forms, the Trial Chamber required the consent of participating victims who did not file application forms, but failed to consider that such consent was not available by the time it issued the Impugned Decision.[1621] In its view, it was not possible for the Trial Chamber "to determine either the number of potential beneficiaries or accurate estimates thereof with any degree of certainty".[1622]

731. In addition, the Defence argues that although the Trial Chamber asked the parties and participants for submissions on the consequences of the measures and restrictions of the COVID-19 pandemic, it failed to consider that the pandemic delayed and prevented VPRS from collecting sufficient information in the field for the purposes of issuing a reparations order and determining the sum of reparations for which Mr Ntaganda is liable.[1623] In its view, the Trial Chamber "arbitrarily" set the reparations award of 30 million USD, "in the absence of sufficient evidence and/or information", and this was "premature and unfair" to Mr Ntaganda.[1624]

732. The Defence submits that the end of the mandate of two of the Trial Chamber's judges does not constitute sufficient justification for issuing the Impugned Decision prematurely.[1625] It argues that (i) one of the two departing judges had become a member of the Trial Chamber only after the delivery of the Sentencing Judgment; (ii) the Trial

[1619] Defence Appeal Brief, para. 50.
[1620] Defence Appeal Brief, paras 52-53.
[1621] Defence Appeal Brief, para. 53.
[1622] Defence Appeal Brief, para. 54.
[1623] Defence Appeal Brief, paras 55-56.
[1624] Defence Appeal Brief, para. 56.
[1625] Defence Appeal Brief, para. 57.

Chamber had since been dissolved and the proceedings against Mr Ntaganda reassigned to a new trial chamber; (iii) one of the judges assigned to the new trial chamber was actually the judge who presided over the reparations process from the beginning; and (iv) in any event, if the presence of the two judges whose mandates were about to end was necessary, their mandates could have been extended.[1626] According to the Defence, issuing the Impugned Decision before the two judges ended their mandate was less important than ensuring the fairness of the reparations proceedings.[1627] The Defence submits that the Trial Chamber erred in balancing the expeditiousness and the fairness of the proceedings.[1628] It further argues that by prematurely issuing the Impugned Decision, it is likely that the Trial Chamber has further delayed the reparations process to the detriment of the potential beneficiaries.[1629]

D. Victims Group 1's submissions before the Appeals Chamber

733. As for the Defence's argument that the Impugned Decision raised the victims' expectations, Victims Group 1 submit that the Impugned Decision did not raise new expectations but, to the contrary, they were informed that reparations proceedings "ha[d] merely begun and require to be translated into services for their benefit".[1630] Furthermore, they consider that rather than an error of law, it is normal that, at this stage of the proceedings, a trial chamber is not yet in a position to identify the exact number of beneficiaries.[1631] They argue that, according to the Appeals Chamber's jurisprudence on reparations, a trial chamber does not err by making a determination on the convicted person's scope of liability before knowing the exact number of beneficiaries.[1632] They thus consider that the Defence's argument in this regard is unsupported.[1633]

734. Victims Group 1 submit that it was not an error for the Trial Chamber not to ask the Defence to contribute to the making of a list of potential beneficiaries, because, in

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[1626] Defence Appeal Brief, para. 57.
[1627] Defence Appeal Brief, para. 58.
[1628] Defence Appeal Brief, para. 58.
[1629] Defence Appeal Brief, para. 59.
[1630] Victims Group 1's Response, para. 21.
[1631] Victims Group 1's Response, para. 23, *referring to* 2019 *Lubanga* Appeals Chamber Judgment on Reparations.
[1632] Victims Group 1's Response, para. 25, *referring to* 2019 *Lubanga* Appeals Chamber Judgment on Reparations, para. 92.
[1633] Victims Group 1's Response, para. 26.

their view, the potential beneficiaries are victims of the crimes of Mr Ntaganda and, as such, they would not have approached his Defence team but rather the legal representatives of victims.[1634] Furthermore, Victims Group 1 argue that the Defence is challenging not only the Impugned Decision but also decisions previously taken by the Trial Chamber.[1635] They submit that "[c]hoosing not to appeal them in due course, the Defence foreclosed its ability to question these decisions at the present stage".[1636] In their view, interlocutory appeal proceedings were the avenue to challenge such decisions and, "[h]aving knowingly relinquished its rights, the Defence is no longer entitled to question issues that it could have appealed, or sought leave to appeal, throughout the trial and which it suddenly disagrees with at the present stage of the proceedings".[1637]

735. Victims Group 1 consider that the Defence did not substantiate its argument that the Trial Chamber prematurely issued the Impugned Decision in light of the delays resulting from the COVID-19 pandemic.[1638] They further point out that, having admitted that the Trial Chamber took the pandemic and its implications into account, the Defence is simply disagreeing with the Trial Chamber having reached a different conclusion.[1639] Victims Group 1 argue that the Defence also failed to substantiate its argument that the Trial Chamber did not balance the competing interests of issuing the Impugned Decision before the mandate of two of the Trial Chamber's judges expired and ensuring the fairness of the proceedings.[1640] In their view, the Trial Chamber took an informed and substantiated decision in this regard.[1641] Lastly, as for the Defence's argument that, by prematurely issuing the Impugned Decision, the Trial Chamber is likely to delay its implementation process, Victims Group 1 submit that implementation plans are "only draft documents by nature, on the basis of which proceedings can move

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[1634] Victims Group 1's Response, para. 27.
[1635] Victims Group 1's Response, para. 28.
[1636] Victims Group 1's Response, para. 28, *referring to* *Katanga* OA10 Appeals Chamber Judgment, paras 54, 64, and 77.
[1637] Victims Group 1's Response, para. 29.
[1638] Victims Group 1's Response, para. 30.
[1639] Victims Group 1's Response, para. 30.
[1640] Victims Group 1's Response, para. 31.
[1641] Victims Group 1's Response, para. 31, *referring to* Impugned Decision, paras 5-6.

forward with propositions to be debated amongst the parties, and under the control of the Chamber".[1642]

E. Determination by the Appeals Chamber

1. Preliminary issue

736. At the outset, the Appeals Chamber notes that Victims Group 1 contend that the Defence is barred from challenging in its appeal against the Impugned Decision previous decisions in respect of which the Defence did not previously seek leave to appeal.[1643] In particular, Victims Group 1 refer to two decisions that the Trial Chamber issued in relation to victims allowed to participate in the trial proceedings against Mr Ntaganda.[1644] Victims Group 1 seem to understand that, by challenging the Trial Chamber's finding that participating victims who had not submitted reparations forms would not need to file another form,[1645] the Defence is further challenging the two decisions setting the regime of victims' participation.[1646] Even if Victims Group 1 were correct in this understanding, and regardless of the findings reached elsewhere in this judgment on the issue the Defence raises regarding the participating victims, the Appeals Chamber, for the following reasons, rejects Victims Group 1's argument that the Defence had to seek leave to appeal the two abovementioned decisions, failing which it cannot raise certain of its arguments within the first ground of its appeal.

737. The Appeals Chamber notes that, in making this argument, Victims Group 1 refer to a judgment of the Appeals Chamber in the *Katanga* case in 2010 which dealt generally with obligations on parties who claim to have enforceable rights to exercise due diligence in asserting such rights and raise issues in a timely manner.[1647] However, the Appeals Chamber observes that the facts of that case concerned the obligation to file a motion alleging unlawful pre-surrender arrest and detention, and seeking a stay

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[1642] Victims Group 1's Response, para. 32.
[1643] Victims Group 1's Response, para. 28.
[1644] *See* Victims Group 1's Response, fn. 46 *referring to* Decision on victims' participation in trial proceedings and Fourth decision on victims' participation in trial proceedings.
[1645] Victims Group 1's Response, fn. 45, *referring to* Defence Appeal Brief, para. 53.
[1646] *See* Victims Group 1's Response, fn. 46 *referring to* Decision on victims' participation in trial proceedings and Fourth decision on victims' participation in trial proceedings.
[1647] Victims Group 1's Response, paras 28-29, 33, *referring to* *Katanga* OA10 Appeals Chamber Judgment, paras 54, 64 and 77.

of the proceedings during the trial phase under article 64(2) of the Statute.[1648] It did not address the obligation of a party to seek leave, under article 82(1)(d) of the Statute, to appeal any decision taken in the proceedings leading to the decision ultimately impugned on appeal.

738. Article 82(1)(d) of the Statute does not require parties to seek leave in the circumstances described in that provision, but provides that they "*may*" do so.[1649] The Appeals Chamber has found that not seeking leave to appeal a matter arising in the proceedings leading up to another decision subsequently impugned on appeal does not necessarily preclude the appellant from bringing that matter in the appeal.[1650] Although the Appeals Chamber may determine that a party was expected to seek leave to appeal a matter decided in the course of the proceedings, this depends on the circumstances of each case.[1651]

739. Regarding the two decisions in respect of which Victims Group 1 argue that the Defence should have sought leave to appeal, the Appeals Chamber does not consider that the Defence could have reasonably been expected to seek such leave. Both

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[1648] *Katanga* OA10 Appeals Chamber Judgment, para. 53.
[1649] *See Kony et al.* OA3 Appeals Chamber Judgment, para. 46; *Lubanga* A5 Appeals Chamber Judgment, para. 20; *Ngudjolo Chui* Appeals Chamber Judgment on the Prosecutor's Appeal, para. 43; 2019 *Lubanga* Appeals Chamber Judgment on Reparations, paras 133-136; *Abd-Al-Rahman* OA9 Appeals Chamber Judgment, para. 25.
[1650] In *Kony et al.* OA3, the Appeals Chamber found that an appellant is not precluded from raising in an appeal under article 82(1)(a) of the Statute errors which arise out of a decision issued in the proceedings leading up to the decision impugned on appeal and which "may be germane to the legal correctness or procedural fairness of the Chamber's decision [impugned on appeal]" (*see Kony et al.* OA3 Appeals Chamber Judgment, para. 46). In *Lubanga* A5, this approach was confirmed in the context of appeals under article 81 of the Statute (*see Lubanga* A5 Appeals Chamber Judgment, para. 20). In the 2019 *Lubanga* Appeals Chamber Judgment on Reparations, the Appeals Chamber addressed the issue in a slightly different context as the party had in fact applied for leave to appeal against a decision regarding the issue the appellant was bringing in its appeal against the reparation order and such request for leave had been rejected, although the party had not asked for such leave against another related decision. The Appeals Chamber held that the party could nevertheless raise the point for which leave had been rejected, in the final appeal of the reparations order (2019 *Lubanga* Appeals Chamber's Judgment on Reparations, paras 133-136). In *Abd-Al-Rahman* OA9, the Appeals Chamber "reject[ed] the Prosecutor's argument that the appeal is inadmissible because it is an appeal of 'the wrong decision'", holding that "[t]o the contrary, the Appeals Chamber finds that the appeal challenges the procedural correctness of the Impugned Decision" (*see Abd-Al-Rahman* OA9 Appeals Chamber Judgment, para. 25).
[1651] For example, in its final judgment in the case of *Ngudjolo*, the Appeals Chamber touched on this issue, referring to "reasonable expectations to appeal". In particular, the Appeals Chamber found that "the Prosecutor could not reasonably have been expected to appeal the Severance Decision" as Mr Ngudjolo's acquittal was not the inevitable result of that decision and, at the time of that decision, neither had the acquittal been handed down nor were the reasons for it known (*see Ngudjolo Chui* Appeals Chamber Judgment on the Prosecutor's Appeal, para. 43).

decisions were issued in the context of the trial proceedings leading up to the Trial Chamber's decision under article 74 of the Statute. The first decision, issued on 6 February 2015, *inter alia*, adopted a system under which the Registry would assess and transmit to the Trial Chamber all applications it received, categorising within group A the applicants who clearly qualify as victims; within group B, those who clearly do not qualify; and within group C, those for whom the Registry is unable to make a clear determination.[1652] The second decision, issued on 1 September 2015, *inter alia*, admitted some applicants to participate as victims and made a number of determinations about other applicants.[1653] At that stage of the proceedings, Mr Ntaganda had not yet been convicted and his liability for reparations, therefore, had not yet arisen. Neither of the two decisions made any determination regarding the reparations that the participating victims could eventually be awarded. Consequently, the Appeals Chamber finds no reason to expect that the Defence should have known that any such decisions would have had any impact on an eventual reparations order. As a result, the Appeals Chamber rejects Victims Group 1's request to dismiss the Defence's first ground of appeal.

2. Merits

740. Under Victims Group 2's seventh ground of appeal and the Defence's first ground of appeal, both appellants challenge the timeliness of the Impugned Decision. They argue that the Trial Chamber issued the Impugned Decision because the judicial mandates of two of its judges were about to end while some issues on which it was incumbent for the Trial Chamber to make a decision,[1654] issues of "paramount importance",[1655] and "key matters"[1656] had not yet been settled.

741. The Appeals Chamber notes that the "issues" and "matters" to which the appellants refer underpin the core of their appeals. Victims Group 2 argue that the Impugned Decision "leaves a number of key matters unresolved, including the basis for the cost to repair, the allocation of funds between the different groups of victims, the

[1652] *See* Decision on victims' participation in trial proceedings, para. 24, p. 24.
[1653] *See* Fourth decision on victims' participation in trial proceedings, pp. 8-9.
[1654] *See* Defence Appeal Brief, para. 43.
[1655] *See* Defence Appeal Brief, paras 45-46.
[1656] Victims Group 2's Appeal Brief, para. 148.

allocation of funds for the prioritisation of reparations to specific different groups of victims, and general implementation criteria to be followed by the TFV".[1657] In turn, the Defence argues that, before issuing the Impugned Decision, it was incumbent on the Trial Chamber to conduct the following activities:

a. "consider and adjudicate certain issues raised by the Defence, including in particular access to the *dossiers* of participating victims";

b. "take into consideration the ongoing COVID-19 pandemic and the difficulties encountered by the VPRS, *inter alia*, in collecting sufficient information";

c. "establish the potential number of beneficiaries of reparations with a sufficient degree of precision";

d. "set out clearly the eligibility criteria and the parameters of any administrative screening process to be conducted by the TFV and/or engage the parties and the VPRS in this regard";

e. "take into consideration the current security situation in Ituri and the consequences thereon of issuing a reparations order at this stage"; and

f. "design an implementation calendar protecting the right of appeal of the parties".[1658]

742. According to the Defence, the Trial Chamber overlooked the following issues of "paramount importance" in the Impugned Decision:

a. "the need to assess the number of victims authorized to participate in the proceedings who remained eligible to receive reparations further to the Trial Judgment, in particular victims of the attacks, as their status appeared 'to have been significantly impacted with the removal of specific crimes and village locations in the Judgement'";

[1657] Victims Group 2's Appeal Brief, para. 148.
[1658] Defence Appeal Brief, para. 43.

b. "the need to put in place an effective mechanism allowing […] the identification of new potential reparations beneficiaries who fulfil the minimum criteria and are entitled to reparations, *while fully respecting the rights of the convicted person and fairness* considerations";

c. "the necessity for the VPRS to meet the 2,094 participating victims who had not yet submitted a request for reparations, for the purpose of determining whether they intended to request reparations and if so, to collect their requests";

d. "the inapplicability of the process to authorizing participation in the proceedings in the trial phase to determining eligible beneficiaries, of awarded reparations";

e. "that involving the Defence in the assessment of requests for reparations from the beginning, in respect of participating victims in particular, would contribute to expediting the reparations process"; and

f. "that legally speaking, the perspective of issuing a reparations order ascribing liability to Mr Ntaganda for reparations awarded to certified beneficiaries, without having had the opportunity to assess and offer submissions on individual applications for reparations, was a non-starter".[1659]

743. The Appeals Chamber observes that many of these issues are brought under different grounds of both the Defence's and Victims Group 2's appeals, and are thus central themes of this judgment. The Appeals Chamber has already addressed (i) the role of the Defence in the process of assessing the eligibility of victims, both before the Trial Chamber and at the implementation stage;[1660] (ii) the Registry's submissions noting difficulties in the mapping exercise related to, *inter alia*, the pandemic;[1661] (iii) the Trial Chamber's decision not to rule on applications for reparations;[1662] (iv) the

[1659] Defence Appeal Brief, para. 45 (emphasis in the original).
[1660] *See supra* paras 358-369.
[1661] *See supra* para. 297, fns 637-638, *referring to* Registry's Second Report, para. 58.
[1662] *See supra* paras 321-346.

Trial Chamber's alleged failure to establish an actual, or estimated, number of victims of the award that was as concrete as possible and based upon a sufficiently strong evidential basis;[1663] (v) the issue of whether the number of actual victims likely to come forward to claim reparations would be the same, or less than, those potentially eligible to do so;[1664] (vi) the Trial Chamber's decision to set the reparations award without having any concrete estimate as to one of its fundamental parameters, namely the number of victims whose harm it was intended to repair;[1665] (vii) the manner in which the Trial Chamber addressed the cost to repair;[1666] and (viii) the Trial Chamber's alleged failure to take into consideration the current security situation in Ituri.[1667] Having ruled on the issues listed above, the Appeals Chamber finds no need to address these arguments again in this context.

XI. SUMMARY OF CONCLUSIONS

744. The Appeals Chamber has found that the Trial Chamber committed the following errors in the issuance of the Impugned Decision.

745. First, in relation to the grounds of appeal relating to the number of potentially eligible beneficiaries of the award for reparations, the Appeals Chamber has found that the Trial Chamber erred in failing to make any appropriate determination in relation to the number of potentially eligible or actual victims of the award and/or to provide a reasoned decision in relation to its conclusion about that number.

746. Second, in relation to the grounds of appeal challenging the amount of the award for reparations, the Appeals Chamber has found that the Trial Chamber erred in failing to provide an appropriate calculation, or set out sufficient reasoning, for the amount of the monetary award against Mr Ntaganda.

747. Third, in relation to the grounds of appeal relating to applications for reparations, the eligibility assessment and delegation of functions to the TFV, the Appeals Chamber has found that the Trial Chamber erred in issuing the Impugned Decision without having assessed and ruled upon victims' applications for reparations,

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[1663] *See supra* paras 168-169.
[1664] *See supra* paras 170-172.
[1665] *See supra* para. 235.
[1666] *See supra* paras 248-252.
[1667] *See supra* paras 441-456.

and that the Trial Chamber did not lay out at least the most fundamental parameters of a procedure for the TFV to carry out the eligibility assessment.

748. Fourth, in relation to the grounds on evidentiary issues, the Appeals Chamber has found that the Trial Chamber erred in failing to provide reasons in relation to the concept of transgenerational harm and the evidentiary guidance to establish such harm, the assessment of harm concerning the health centre in Sayo and the breaks in the chain of causation when establishing harm caused by the destruction of that health centre, and the presumption of physical harm for victims of the attacks.

749. The Appeals Chamber recalls that it will only reverse a decision if it is materially affected by the error. The cumulative effect of the errors identified within this judgment materially affects the Impugned Decision issued in this case. This reparations order was made without having any concrete estimate as to one of its fundamental parameters, namely the number of victims whose harm it was intended to repair, and without ruling upon any requests of victims for reparations. It is also not discernible from the reparations order how the monetary award of 30 million USD was arrived at and, therefore, whether it is capable of appropriately repairing the harms suffered by the victims or fairly establishing the liability of Mr Ntaganda. Furthermore, the Trial Chamber did not provide sufficient reasoning for some evidentiary issues.

XII. APPROPRIATE RELIEF

750. On an appeal pursuant to article 82(4) of the Statute against a reparations order, the Appeals Chamber may confirm, reverse or amend the reparation order appealed (rule 153(1) of the Rules). In light of the above, the Appeals Chamber deems it appropriate to reverse the findings of the Trial Chamber on the aforementioned matters and to remand them for the Trial Chamber to issue a new reparations order taking into account the terms of this judgment.

751. The Appeals Chamber notes that it is remanding this matter to the Trial Chamber which is presently differently composed from the trial chamber that issued the Impugned Decision. The Appeals Chamber has previously found that it is permissible for a newly constituted chamber to oversee the implementation stage of the

reparation proceedings;[1668] and, in the *Lubanga* case, albeit in different circumstances as a result of the amount of the award having not been determined in the initial order for reparations, the Appeals Chamber left it to the newly constituted trial chamber to determine an essential element of the order for reparations, namely the size of the award.[1669] The Appeals Chamber finds that it is also appropriate for the trial chamber in this case to address the errors identified in the present judgment, notwithstanding its different composition.

752. The Appeals Chamber is remanding this matter to the Trial Chamber because it does not regard it to be appropriate, in the circumstances of the present case, itself to address the questions on which it has found errors, because the Trial Chamber, in the Impugned Decision, either failed appropriately to determine the issues and/or to provide appropriate reasoning in relation to them. Were the Appeals Chamber to determine the issues itself, its judgment would be final and the parties would not be able to exercise their right to appeal in relation to its findings under article 82(4) of the Statute. This limitation to the parties' right to appeal would be particularly significant in this case, where, as seen above, fundamental aspects of this reparations order, which are central parameters of the order in the present case, and which affect the rights of both the victims and the Defence, were not properly determined, including the number of beneficiaries and the amount of the monetary award. It is therefore essential that both parties retain their right to appeal in this regard.[1670] In addition, the Appeals Chamber notes that the proceedings in this case have advanced since the time that the Impugned Decision was issued and that the Trial Chamber is therefore likely to have further information available to it at the present time than was available at the time of the Impugned Decision – a matter that is addressed further below. The Trial Chamber is

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[1668] 2015 *Lubanga* Appeals Chamber Judgment on Reparations, para. 236.
[1669] 2015 *Lubanga* Appeals Chamber Judgment on Reparations, paras 237-243. *See also* *Lubanga* Amended Reparations Order, paras 80-81.
[1670] *See also* in this context, 2015 *Lubanga* Appeals Chamber Judgment on Reparations, para. 237: "[…] the Appeals Chamber stresses that the imposition of liability on a convicted person, including the precise scope of that liability, should be done by the Trial Chamber in the order for reparations. Indeed, the Appeals Chamber considers it to be beyond question that a person subject to an order of a court of law must know the precise extent of his or her obligations arising from that court order, particularly in light of the corresponding right to effectively appeal such an order, and that the extent of those obligations must be determined by a court in a judicial process".

therefore clearly better placed to make this determination than the Appeals Chamber at this stage of the proceedings.[1671]

753. In remanding this matter, the Appeals Chamber has also not determined the various factual submissions that the parties have raised in their appeals, for example, which estimate as to the number of victims likely to come forward for reparations is more appropriate, nor any of the other factual arguments made surrounding this issue, including the question of how the Trial Chamber resolved uncertainties in favour of the convicted person. Certain factual issues have also been raised in relation to the calculation of the monetary award. All such issues relate to the matter being remanded and are therefore more appropriately determined by the Trial Chamber.

754. The Appeals Chamber is aware that reversing and remanding issues to the Trial Chamber at this stage of the proceedings needs to take account of the nature of the Impugned Decision under appeal, because of the particular circumstances that apply to reparation proceedings.

755. The Impugned Decision represented the start of the implementation process of the award for reparations, rather than an aspect of the proceedings that has remained static and unchanged since that decision was issued. The TFV has already undertaken steps in relation to the implementation of the order for reparations; and the parties are able to make submissions in relation to those further developments during the course of the implementation process. Those developments are outside the scope of the present appeal, as they have occurred since the Impugned Decision was issued. However, the Appeals Chamber bears in mind that the reality is that the Trial Chamber will have extensive knowledge of them; and that they are likely to be of relevance when the Trial Chamber has to reconsider the questions being remanded now.

756. In the above circumstances – and bearing in mind the overall objective of ensuring that reparations in this case are awarded to victims as expeditiously as possible – the Appeals Chamber therefore deems it appropriate for the Trial Chamber to reconsider the above issues in light of all of the information that it currently has before it, including those matters that have come to its attention since the Impugned Decision

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[1671] *See*, albeit in different factual circumstances, 2015 *Lubanga* Appeals Chamber Judgment on Reparations, paras 238-239.

was issued. That ensures not only that the reparation process can continue as expeditiously as possible, but also that the Trial Chamber comes to its decision based upon the most updated information that is available to it.

757. Subject to the terms of this judgment, it is for the Trial Chamber to decide how to conduct its proceedings, but the Appeals Chamber notes that the Trial Chamber may wish to have regard to the submissions that have been made on appeal and to obtain further updated submissions from the parties and participants on the relevant issues, as it deems appropriate, before providing its revised ruling. Should those submissions, or the current state of the proceedings more generally, lead to the Trial Chamber considering that it requires further information that it feels is necessary to assist its reconsideration of the fundamental issues being remanded, the Trial Chamber will no doubt exercise its discretion in that regard as well.[1672] In light of the findings of the Appeals Chamber that require fundamental aspects of the Impugned Decision to be reversed, the objective at this stage of the proceedings must be to correct the errors identified in a way that both enables the order for reparations to be based upon an appropriately solid foundation and that causes minimum disruption to the overall reparation process.

[1672] The Appeals Chamber recalls that, as set out above, the Trial Chamber will need, *inter alia*, to take the following steps:
- Either attempt to obtain all applications for reparations by potential beneficiaries, within a specific time frame, and rule on them, or assemble and rule upon a proper representative sample of applications for reparations in the event that information is obtained that shows that it is not possible to assemble all potential applications within a reasonable time. The Trial Chamber may seek the assistance of the VPRS and legal representatives of victims in this task, noting the efforts already made in this regard by, in particular, the former;
- Establish the actual number of victims, or estimate the number of potential beneficiaries who will come forward, in the manner described in this judgment;
- Set the reparations award with the overall number of potential beneficiaries in mind, bearing in mind the harm it has found to be established in the applications for reparations it has ruled upon, and basing its award on concrete information as to the cost to repair;
- Set out at least the most fundamental parameters of a procedure for the TFV to carry out the administrative screenings of eligibility of applicants seeking to benefit from reparations, providing for the requirement of a judicial approval of the outcome of any such administrative screenings of eligibility and for the possibility for those who are found not to be eligible, to challenge the TFV's findings before the Trial Chamber (namely, those whom the TFV finds not to be eligible should be able to challenge the TFV's findings before the Trial Chamber);
- Address the evidentiary issues that have been remanded above; and
- Ensure that the Defence is on notice as to how the Trial Chamber intends to assess the information contained in, among other sources, applications for reparations, as described in this judgment, and that the Defence is able to challenge this information by means of reviewing the applications and making representations thereon prior to issuing the new order for reparations.

758. What is imperative is that the reparation process proceeds as expeditiously as possible and is conducted with full respect for the rights of both the victims and the Defence. In that latter connection, the Appeals Chamber emphasises that each party will have a fresh right to appeal against the new decision of the Trial Chamber which will, given the significance of the remand, and the changes required, in essence constitute a new "order for reparations" within the meaning of article 82(4) of the Statute in the circumstances of this case.

759. For all of the above reasons, the Impugned Decision is partially reversed and remanded. Trial Chamber II is directed to issue a new order for reparations, taking into account the terms of this judgment.

760. The remainder of the arguments of the Defence and Victims Group 2 are rejected.

Done in both English and French, the English version being authoritative.

Judge Marc Perrin de Brichambaut
Presiding

Judge Piotr Hofmański **Judge Luz del Cármen Ibáñez Carranza**

Judge Solomy Balungi Bossa **Judge Gocha Lordkipanidze**

Dated this 12th day of September 2022
At The Hague, The Netherlands