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**International  
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**TRIAL CHAMBER VI**

**Before: Judge Chang-ho Chung, Single Judge**

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

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

**Public**

**Joint Response of the Legal Representatives of Victims to the  
Registry's Observations on Reparations**

**Source: Office of Public Counsel for Victims**

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

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## I. INTRODUCTION

1. The Common Legal Representative of the Victims of the Attacks and the Common Legal Representative of the Former Child Soldiers (jointly the “Legal Representatives”) hereby submit a joint response to the “Registry's observations, pursuant to the Single Judge's ‘Order for preliminary information on reparations’”.<sup>1</sup>

2. The Legal Representatives submit that reparations proceedings in the present case shall be designed so as to ensure both the effectiveness of the process and the best interests of the victims, and to avoid, to the extent possible, raising undue expectations pending appeals against the Judgment. The reparations ultimately ordered by the Chamber should aim to repair to the fullest possible extent the harm suffered by the victims and should not be awarded based on a pre-established list of beneficiaries. Accordingly, the reparations order to be issued by the Chamber pursuant to Article 75 of the Statute should not identify/list the eligible victims but only set out criteria of eligibility along with the applicable standard of proof, principles, types and modalities of reparations. Victims should be screened pursuant to those criteria during the implementation stage of the reparations process by the Trust Fund for Victims, with the collaboration of the Registry and the Legal Representatives. The eligibility criteria should be designed, *inter alia*, based on information elicited from a sample of potential eligible victims.

3. The Legal Representatives welcome the preliminary mapping completed to date and submit that it would now be appropriate to proceed to a fuller mapping of victims, to better understand the scope of victimisation and to properly categorise the victims in accordance with their most pressing needs. Efforts made at the present stage would save time and resources during the implementation phase.

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<sup>1</sup> See the “Registry's observations, pursuant to the Single Judge's ‘Order for preliminary information on reparations’ of 25 July 2019, ICC-01/04-02/06-2366”, [No. ICC-01/04-02/06-2391](#), 5 September 2019 filed with Public Annex I and Confidential Annex II. The observations have been submitted in the Annex I, “Registry's Preliminary Observations on Reparations” (Registry), [No. ICC-01/04-02/06-2391-Anx1](#), 6 September 2019 (the “Preliminary Observations”).

## II. PROCEDURAL BACKGROUND

4. On 8 July 2019, Trial Chamber VI (the “Chamber”) found Mr Bosco Ntaganda (“Mr Ntaganda”) guilty of 18 counts of war crimes and crimes against humanity.<sup>2</sup>

5. On 25 July 2019, Judge Chang-ho Chung, acting as Single Judge on behalf of the Chamber, issued the “Order for preliminary information on reparations” (the “Order”).<sup>3</sup> The Order requested the Registry to submit by 5 September 2019 *“i. information on, and any proposed methodology for, the identification of victims (not yet participating); ii. observations on whether experts may be usefully appointed to assist the Chamber pursuant to Rule 97 of the Rules of Procedure and Evidence and, if so, submit a list of relevant experts available to assist the Chamber; and iii. an update on the security situation in the Democratic Republic of the Congo based on information currently available”*.<sup>4</sup> It invited responses from the Legal Representatives, the Defence, the Office of the Prosecutor (the “OTP”) and the Trust Fund for Victims (the “TFV”) by 19 September 2019.

6. On 5 September 2019, the Registry filed its Observations on Reparations.

7. On 18 September 2019, 24 hours prior to the expiration of the original deadline, the Defence filed a request for a variation of time limit to submit its response to Registry’s observations.<sup>5</sup> Said request was granted by way of email and the deadline for responses to or observations on the Registry’s observations was postponed to 3 October 2019.<sup>6</sup>

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<sup>2</sup> See the “Judgment” (Trial Chamber VI), [No. ICC-01/04-02/06-2359](#), 8 July 2019 (the “Judgment”).

<sup>3</sup> See the “Order for preliminary information on reparations” (Single Judge, Trial Chamber VI), [No. ICC-01/04-02/06-2366](#), 25 July 2019.

<sup>4</sup> *Idem*, para. 4.

<sup>5</sup> See the “Request for a variation of time limit to submit the Defence response to ‘Registry’s observations, pursuant to the Single Judge’s ‘Order for preliminary information on reparations’ of 25 July 2019, ICC-01/04-02/06-2366’”, [No. ICC-01/04-02/06-2411](#), 18 September 2019.

<sup>6</sup> See the email from Trial Chamber VI Communications to the Parties and Participants, 18 September 2019, 18:50.

### III. SUBMISSIONS

8. The submissions *infra* only focus on the most salient aspects of the Preliminary Observations, and particularly on the design of the identification process proposed by the Registry. The fact that any given issue arising from the Preliminary Observations is not addressed in the present submissions should not be understood as either support or opposition to said issue by the victims represented by the Legal Representatives. The Chamber has already announced its intention to allow the filing of additional observations six weeks after the issuance of the Chamber's decision on sentence pursuant to Article 76 of the Statute.<sup>7</sup> The Legal Representatives will avail themselves of this opportunity, and/or of any hearing that may be convened by the Chamber or the Single Judge during the reparations process,<sup>8</sup> to provide further detail or address additional topics.

#### A. The identification of beneficiaries

9. The Appeals Chamber set out, in the *Lubanga* case, five elements which, at a minimum, need to be addressed by the Chamber in its reparations order. Accordingly, the order should:

- i. be directed against the convicted person, and establish and inform him of his liability;
- ii. set out the type of reparations ordered (individual, collective or both) and reasons underpinning the determination;
- iii. define the harm caused to direct and indirect victims;
- iv. identify the modalities of reparations; and
- v. identify the victims eligible or set out eligibility criteria.<sup>9</sup>

10. In relation to the fifth element, the Appeals Chamber stated that the reparations order "*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*

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<sup>7</sup> *Ibid.*, para. 4(b).

<sup>8</sup> *Ibid.*, para. 4.

<sup>9</sup> See the "Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2", [No. ICC-01/04-01/06-3129](#), 3 March 2015 (the "*Lubanga* 2015 Appeals Judgment on Reparations"), para. 32.

*the victims and the crimes for which the person was convicted*".<sup>10</sup> It is on this element that the Order seeks submissions.<sup>11</sup>

11. The identification of victims eligible for reparations has been approached in different manners in the practice and jurisprudence of the Court. In the *Prosecutor v. Katanga* case, Trial Chamber II listed the victims eligible to benefit from the reparation awards in the reparations order.<sup>12</sup> In the *Prosecutor v. Al Mahdi* case, Trial Chamber VIII did not identify specific beneficiaries in the reparations order but set out eligibility criteria instead. These criteria were developed for application by the TFV at the implementation stage of the reparations proceedings.<sup>13</sup> Finally, in the *Prosecutor v. Lubanga* case, Trial Chamber II set out eligibility criteria to be applied by the TFV at the implementation stage, based on a sample of potentially eligible victims. With respect to the victims who were part of the sample, the Chamber made individual eligibility determinations.<sup>14</sup>

### 1. *An application-based Approach?*

12. The Preliminary Observations suggest that it is appropriate and necessary for the Chamber to identify in the reparations order (all) victims eligible to benefit from reparations.<sup>15</sup> The proposal is that the Chamber adopts in this respect an approach akin to the one followed in the *Katanga* case. In that case, Trial Chamber II decided to award symbolic individual reparations of USD 250 in addition to collective reparations to 297 individuals for whom applications were collected and assessed by the Chamber individually prior to issuing its eligibility decisions reflected in an

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<sup>10</sup> *Idem*.

<sup>11</sup> See the "Order for preliminary information on reparations", *supra* note 3, para. 4.

<sup>12</sup> See the "Order for Reparations pursuant to Article 75 of the Statute" (Trial Chamber II), [No. ICC-01/04-02/06-2366](#), 24 March 2017, paras. 32 and 33.

<sup>13</sup> See the "Reparations Order" (Trial Chamber VIII), [No. ICC-01/04-02/06-236](#), 18 August 2017.

<sup>14</sup> See the "Corrected version of the 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable'" (Trial Chamber II), [No. ICC-01/04-01/06-3379-Red-Corr-tENG](#), 21 December 2017, paras. 190 *et seq.*

<sup>15</sup> See the Preliminary Observations, *supra* note 1, paras. 10 *et seq.*

annex, of over 1000 pages, to the Reparations Order.<sup>16</sup> This type of procedure has been referred to as “*application based*”.<sup>17</sup>

13. The Appeals Chamber reviewed the *Katanga* Reparations Order and noted that although Chambers have ample margin to determine, depending on the concrete circumstances, how best to deal with reparations,<sup>18</sup> proceedings must be as expeditious and cost effective as possible and “*avoid unnecessarily protracted, complex and expensive litigation*”.<sup>19</sup> The Appeals Chamber established that there may be circumstances where a Trial Chamber considers it necessary to enter individual findings in respect of the eligibility of each applicant in order to identify the harm in question.<sup>20</sup> This would be the case, in the Appeals Chamber’s view, when the number of victims to whom the chamber intends to award individual and personalised reparations is very small.<sup>21</sup> However, said Chamber also specified that “*when there are more than a very small number of victims, this is neither necessary nor desirable*”.<sup>22</sup>

14. More recently in the *Lubanga* case, the Appeals Chamber maintained that the Chamber may find it appropriate to award individual reparations based on an individual assessment of the specific harm suffered by each victim who filed a request.<sup>23</sup> This may be the case, for instance, where the number of victims of the crimes for which the person was convicted “*was very low*” and it is apparent that a large majority (or all) of these victims has filed requests.<sup>24</sup> Of significance in such cases, the Appeals Chamber determined, is rule 94 of the Rules “*in that it sets out the particulars which a request shall contain and it provides for notification of the request to,*

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<sup>16</sup> See the “Order for Reparations pursuant to Article 75 of the Statute”, *supra* note 12, paras. 32 and 33.

<sup>17</sup> See the *Lubanga* 2015 Appeal Judgment on Reparations, *supra* note 9, para. 142.

<sup>18</sup> See the “Public redacted Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled ‘Order for Reparations pursuant to Article 75 of the Statute’” (Appeals Chamber), [No. ICC-01/04-01/07-3778-Red](#), 8 March 2018, para. 64.

<sup>19</sup> *Idem*.

<sup>20</sup> *Ibid.*, para. 71.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> See the “Judgment on the appeals against Trial Chamber II’s ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’” (Appeals Chamber), [No. ICC-01/04-01/06-3466-Red](#), 18 July 2019, para. 86.

<sup>24</sup> *Idem*.

inter alia, *the convicted person*".<sup>25</sup> By contrast, when the number of victims is more than a few, it is more efficient for the Chamber not to proceed to individual assessments of requests for reparations under rule 94 of the Rules.<sup>26</sup> Here, the Trial Chamber "*is not required to rule on the merits of the individual requests for reparations*".<sup>27</sup>

15. This interpretation is consistent with the drafting history of the Court's legal texts. The explanatory note related to the interpretation of article 75(1) of the Statute, adopted by the Committee of the Whole, indicates:

*"[t]his provision intends that where there are only a few victims the Trial Chamber may make findings about their damage, loss and injury. Where there are more than a few victims, however, the Trial Chamber will not attempt to take evidence from or enter orders identifying separate victims or concerning their individual claims for reparations. Instead, the Trial Chamber may make findings as to whether reparations are due because of the crimes and will not undertake to consider and decide claims of individual victims"*.<sup>28</sup>

16. There is little doubt that the number of victims involved in reparations proceedings in the present case is "*more than a few*", it is not "*very low*". As noted in the example of the *Katanga* case, a number of 297 victims have been considered to exceed these parameters, making it inappropriate for the relevant Chamber to rule on the merits of individual requests for reparations. In the *Ntaganda* case, the total number of victims participating at this juncture is 2129 individuals, of whom 1849 are victims of the attacks and 283 are former child soldiers.<sup>29</sup> The potential number of victims in the *Lubanga* case, which bears close similarities with the case at hand but only concerns the crimes of conscription, enlistment and the active use in hostilities

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<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*, paras. 87 and 88.

<sup>27</sup> *Ibid.*, para. 87 quoting the *Lubanga* 2015 Appeal Judgment on Reparations, *supra* note 9, para. 152.

<sup>28</sup> See Report of the Working Group on Procedural Matters, [UN Doc. A/CONF.183/C.1/WGPM/L.2/Add.7](#), p. 5, footnote 6. See also LEWIS (P.) and FRIMAN (H.), "Reparations to Victims", in R. S. LEE (Ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, 2001, p. 478 and SCHABAS (W.A.), *The International Criminal Court: A Commentary on the Rome Statute (2nd Edition)*, Oxford University Press, 2016, p. 1138.

<sup>29</sup> See the Preliminary Observations, *supra* note 1, para. 5.



of child soldiers, is approximately 3 000.<sup>30</sup> Further, it is safe to assume that only a fraction of the potential victims in the present case have been identified to date, given in particular that entire villages across Ituri were affected. Hence, in the submission of the Legal Representatives, designing the current reparations proceedings in a manner requiring that eligible victims be identified in the reparations order would not be in line with the jurisprudence of the Appeals Chamber and is not practically feasible. Furthermore, designing reparations based on a pre-established list of beneficiaries would undermine the very objective of reparations, that is to repair to the fullest extent the harm suffered by the victims concerned.

## 2. *Administrative Screening*

17. The procedure proposed in the Preliminary Observations entails the Chamber setting out the criteria to be applied for the assessment of potential beneficiaries. The Registry would then carry out a victim identification process for potential new beneficiaries in advance of the reparations order,<sup>31</sup> with a residual identification mechanism to address victims coming forward during the implementation stage of the proceedings.<sup>32</sup> The reparations forms received would be processed by the VPRS and divided into three groups, mirroring the system already applied by the Chamber for the assessment of victim applications at trial.<sup>33</sup> Clearly, victims' participation at trial is distinct from reparations proceedings *inter alia* because the standard of proof to be applied may not be the same. The Registry proposes the screening systems at trial and reparations to mirror each other only in terms of the process applicable to each of the three groups. For applicants identified by the VPRS as clear beneficiaries for reparations (so-called Group A applicants), the Chamber would *ratify* the VPRS's assessment. For those not clearly beneficiaries for reparations (Groups B and C),

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<sup>30</sup> *Idem*, para. 9. See footnote 12 for the references to the TFV submissions setting out the approximate number of victims in the *Lubanga* reparations proceedings.

<sup>31</sup> *Ibid.*, para. 11.

<sup>32</sup> *Ibid.*, footnote 19.

<sup>33</sup> *Ibid.*, para. 13.

further judicial proceedings are envisaged, engaging the Legal Representatives and the Defence, as necessary.<sup>34</sup>

18. The Legal Representatives agree that aspects relevant to the screening process and the identification of beneficiaries of reparations may be *delegated* by the Judges. Delegation is acceptable to the extent the eligibility determinations are subject to judicial control, for which it is sufficient that the process includes a step where the Chamber endorses screenings made by the delegated body and retains the ability to amend the results thereof.<sup>35</sup> Article 75(1) of the Statute and rule 97(1) of the Rules confer discretion on the Trial Chamber and are silent as to the process leading up to the Reparations Order, including on the issue of who may, on delegated authority, conduct the screening.

19. However, what the Court's legal texts do envisage is that where, at the time of making the reparations order, it is impossible or impracticable to make individual awards directly to each victim, then the TFV may become involved pursuant to Rule 98(2) of the Rules. Whilst this provision is applicable to situations where an award for reparations against the convicted person is deposited with the TFV, its rationale has been interpreted to entail that the TFV may be relied upon to enhance the efficiency and effectiveness of the reparations process.<sup>36</sup> This includes, as stressed by the Appeals Chamber, giving the "*TFV [the] responsibility for identifying a group of beneficiaries, when not already identified by the Trial Chamber (regulations 60 to 65 of the Regulations of the TFV)*".<sup>37</sup> Accordingly, in the Legal Representatives' submission, while the Registry and its VPRS are not necessarily excluded from consideration as an Organ and section of the Court to be relied upon for the purposes of screening and identification of beneficiaries, the legal framework and the jurisprudence of the Court suggest that these matters fall within the remit of expertise and responsibilities

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<sup>34</sup> *Ibid.*, para. 18(2).

<sup>35</sup> See the "Public redacted Judgment on the appeal of the victims against the 'Reparations Order'", [No. ICC-01/12-01/15-259-Red2](#), 8 March 2018, paras. 60 and 72.

<sup>36</sup> *Idem*, para. 62.

<sup>37</sup> *Ibid.*, para. 63.

of the TFV. As set out *infra*, given the specific circumstances of the reparations process in the case, the Chamber should not depart from this legal framework and practice.

20. The Preliminary Observations invoke the following reasons for the Registry, instead of the TFV, to be delegated the authority to screen victims' applications:

*"11. If this process were to be adopted, the identification of potential new reparations beneficiaries would not be left to the implementation phase (i.e. subsequent to the appeals phase, if any, and the Chamber's reparations order). Instead, utilizing the period prior to the Chamber's reparations order for the purpose of identifying potential beneficiaries may reduce (and focus) the litigation period of the parties and facilitate implementation-related activities for a certified list of beneficiaries during the implementation phase (since most, if not all, of the legal matters would have been settled in advance).*

[...]

*15. Additional potential benefits of early action on reparations include: 1) the ability to manage expectations of victims from the outset with clear and precise information regarding the procedure to be applied; 2) the ability to quickly identify the most pressing needs of victims (including urgent medical or psychological assistance) and act on any risks related to the reparations process; and 3) the possibility of reducing the number of procedural hurdles and time required for victims to qualify for reparations".<sup>38</sup>*

21. The Legal Representatives welcome and share the Registry's focus on ensuring the speed and efficiency of reparations proceedings, particularly in light of the 16-year period elapsed since the commission of the crimes that harmed the victims. However, the approach to be adopted must also take into account the specificity of the case, and ensure the effectiveness of the process, as well as the best interests and the well-being of victims. This case is unprecedented and the largest ever dealt with by the Court. In the view of the Legal Representatives, the Court's previous practice cannot be transposed automatically and in full to the present case, where the victims' situation is particularly complex in light of the following factors: (i) the high number of individuals likely to be concerned by and interested in the reparations proceedings; (ii) the geographical scope of the case, which includes several affected villages across the Ituri region; (iii) the current volatile security

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<sup>38</sup> See the Preliminary Observations, *supra* note 1, para. 11.

situation in the area; (iv) the Ebola outbreak; (v) the fact that many victims have been displaced since the events and will likely continue to be displaced during the reparations process; and (vi) the time elapsed since the events, *i.e.* some 16 years.

22. As noted, the crimes for which Mr Ntaganda was convicted took place 16 years ago. Since then, the overwhelming majority of victims, if not all of them, have not benefited from any sort of assistance. They live in a situation of extreme poverty, permanent insecurity, and humanitarian conditions classified by the United Nations over many years as humanitarian crisis of high level.<sup>39</sup> Reparations in the case will need to address harm unaddressed and accumulated since 2002-2003, including trans-generational harm, loss of opportunities and life plans, deaths, and post-traumatic stress disorders. Indeed, victims have consistently complained that they are not benefiting from the TFV projects or from any other support.<sup>40</sup> This contrasts with the progress in the reparations proceedings in the *Katanga* case and, to a lesser extent, in the *Lubanga* case – a factor that is reinforcing the victims’ frustration with regard to the absence of support by the TFV.<sup>41</sup> In particular, the situation of the former girl child soldiers continues to be very concerning due to the lack of psychological support and targeted medical treatments.<sup>42</sup> The Legal Representatives have met virtually all victims represented at trial on various occasions since their respective appointment. For the victims they represent, reparations are a vital issue. Accordingly, the Legal Representatives are acutely aware that it will be crucial, at this stage and indeed through the reparations process, both to proceed expeditiously and to avoid unduly raising victims’ expectations.

23. The Legal Representatives therefore submit that the procedure adopted for reparations should take into account the fact that the Judgment has been appealed by

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<sup>39</sup> See for all the “Thirteenth Periodic Report on Victims in the Case and their General Situation With one Confidential EX PARTE Annex, only available to the Registry and both Legal Representatives of Victims” (Registry), [No. ICC-01/04-02/06-2353](#), 6 June 2019 (the “Thirteenth Periodic Report on Victims”).

<sup>40</sup> *Idem.*

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

the Defence and that, pursuant to Article 83(2) of the Statute, “*the Appeals Chamber [...] may: (a) [r]everse [...] the decision*”, which brings with it the real possibility that reparations could be fundamentally affected.<sup>43</sup> Reparations proceedings imply great effort, going significantly beyond what is visible on the case record.<sup>44</sup> Screening thousands of victims for the purposes of deciding their eligibility for reparations is a cumbersome and costly process for the Court and will inevitably raise the victims’ expectations. Their anticipated frustration and disappointment, should Mr Ntaganda’s conviction be wholly or partly reversed on appeal, consequently excluding them from envisaged reparations, will be incalculable. This possibility must be balanced against the competing, and fully legitimate, interest in expeditiousness pursued by the Registry to have all victims screened before Mr Ntaganda’s conviction becomes final, so that reparations may start to be implemented and awards distributed more promptly.

24. Crucially, the procedure chosen by the Chamber must mitigate the risk of victims’ re-traumatisation. Asking victims to come forward and provide information about the harm they have suffered is a sensitive process that may lead to re-traumatisation, even more so considering the time that elapsed since the commission of the crimes at the origin of their victimisation. In addition, the mere fact of contacting the victims at this stage may give rise to security issues, including exposure of their status as victims. Such risks arise each time the victim is contacted and asked to provide details on his or her ordeal and reflect on the harm suffered or the modalities with which it can be redressed. Logically, the prospect of mitigating these risks is greater if victims are asked to come forward for screening only once Mr Ntaganda’s conviction and the extent of his responsibility have been finally confirmed, and shortly before their ultimate receipt of awards. Such a course appears also more efficient in that it serves to avoid unnecessary or duplicative work.

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<sup>43</sup> The jurisprudence of the Court indicates that a reparations order can only be made when the person has been found guilty. See the “Final decision on the reparations proceedings” (Trial Chamber III), [No. ICC-01/05-01/08-3653](#), 4 August 2018, para. 3.

<sup>44</sup> *Idem*, para. 9.

Requiring the various stakeholders involved to make efforts to locate a victim now, assuming that the awards cannot be provided until the conviction is final, does not sufficiently take into account that victims are likely to be further displaced or migrate for reasons including the Ebola outbreak and the recent upsurge of inter-ethnic violence in the region.<sup>45</sup>

25. Concerning the screening of the eligible victims, the proposed approach entails that a large group of individuals, namely the former child soldiers, will be subject to screening, simultaneously, by two ICC-related entities, the TFV and the VPRS. As mentioned by the Registry, the on-going reparations proceedings in the *Lubanga* case may impact approximately 3 000 victims and there are close similarities between the territorial, temporal and subject matter scope of that case and the present case in relation to Mr Ntaganda's conviction for conscripting, enlisting and using child soldiers to participate actively in hostilities.<sup>46</sup> The screening process in the *Lubanga* case has been delegated to the TFV and a significant number of victims involved would potentially have to be screened, virtually at the same time, by the VPRS. This course would be at odds with the jurisprudence of the Appeals Chamber according to which "*all applications [should preferably] be screened at the same time and by the same entity, which would ensure that the screening would be done in a consistent and equal manner*".<sup>47</sup> In addition to inconsistency and inequality, this approach may unnecessarily duplicate the Court resources expended and the risks involved for victims. In the submission of the Legal Representatives, the process must be as cost-efficient as possible: it shall be designed in a manner that preserves as many financial resources as possible for the benefit of the victims.

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<sup>45</sup> See the "[300,000 flee flare-up of ethnic violence in north-eastern DR Congo](#)", published at UN News 18 June 2019, stating that "[m]ore than 300,000 people have been forced to flee resurgent inter-ethnic violence in north-east Democratic Republic of the Congo (DRC) just this month".

<sup>46</sup> See the Preliminary Observations, *supra* note 1, para. 9. See footnote 12 for the references to the TFV submissions setting out the approximate number of victims in the *Lubanga* reparations proceedings.

<sup>47</sup> See the "Public redacted Judgment on the appeal of the victims against the 'Reparations Order'", *supra* note 35, para. 56.

### 3. *Timeline*

26. Notwithstanding, while the Appeals Chamber considers the appeals lodged by the Defence and the OTP, significant reparations-related work can be completed. Rather than attempting to identify and screen all victims eligible for reparations at this stage, the approach may envisage contacting a representative sample of victims from which information can be elicited for the Chamber to decide on the five essential elements of the reparations order to be issued. It is submitted that taking into consideration observations from the Defence, the Legal Representatives, the OTP, the TFV, and the Registry and the views expressed by the victims forming part of the representative sample, the Chamber should develop eligibility criteria, set out the relevant standards of proof, rule on the applicable principles, and determine the types and modalities of reparations. The Chamber can work towards ruling on these key elements while the Appeals Chamber reviews the conviction.

27. Moreover, at this juncture, the mapping of potential victims can already be undertaken. The Legal Representatives welcome the preliminary mapping effected to date,<sup>48</sup> which will save time later during the implementation phase, and request that this exercise be supplemented. It is important to note in this respect that, regarding the victims of the attacks, the villages affected were those with a vast majority of Lendu inhabitants. However, as a result of the acute security and humanitarian situation, many have left their villages of origin.<sup>49</sup> Others have moved across the region, escaping insecurity, the Ebola outbreak<sup>50</sup> or simply in search of a source of income. For the reasons set out *infra*, the mapping should include community

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<sup>48</sup> See the Preliminary Observations, *supra* note 1, para. 8.

<sup>49</sup> See the Thirteenth Periodic Report on Victims, *supra* note 40, page 7. In said report, at page 8, reference is made to the “[2019 Plan opérationnel d’urgence](#)”, devised by the UN Office for the Coordination of Humanitarian Affairs, which stressed that the humanitarian situation in North Kivu and Ituri which has been alarming for many years, has recently even worsened due to the deterioration of the security situation and to a significant increase of internally displaced persons. In particular, in Ituri, about 715 000 persons are classified under phase 4 (humanitarian urgency) and 2 171 000 persons are classified under phase 3 (humanitarian crisis).

<sup>50</sup> See the “Annex 2 to the Registry’s observations, pursuant to the Single Judge’s ‘Order for preliminary information on reparations’ of 25 July 2019, ICC-01/04-02/06-2366”, [No. ICC-01/04-02/06-2391-Conf-Anx2](#), 5 September 2019, paras. 16 and 17.

buildings, such as churches, hospitals, and schools that were and remain damaged or destroyed in the affected villages. The Legal Representatives are willing and available to collaborate in the mapping exercise, if ordered by the Chamber. This exercise may be useful to understanding the scope of victimisation and categorising the victims in accordance with their most pressing needs.

28. In addition, the VPRS may be instructed to verify whether the existing forms of the participating victims are complete and identify what information, if any, is missing. As noted *infra*, such information may be collected by the Legal Representatives during the implementation stage of reparations. This will ensure a timely transmission of the existing forms to the TFV, upon the issuance of the reparations order. Should there be any need to develop a form to be used by the TFV while discharging its mandate to screen unknown victims during the implementation stage of the process, the Legal Representatives are equally available to cooperate in the best interest of the victims.

29. The Chamber may also conceive a bifurcated reparations procedure and order, prior to the final decision of the Appeals Chamber, measures that can be implemented without identifying individual beneficiaries. In the *Lubanga* case, such measures included projects “aiming at providing prompt symbolic reparations, [...] [which] may take the form of, inter alia, a commemoration and/or building a statute for child soldiers who have suffered from the events”.<sup>51</sup> Similarly, some types of collective measures such as community-based educational and awareness-raising programmes may proceed without a need to identify the individual beneficiaries.<sup>52</sup> The Legal Representatives do not submit, at this stage, that the victims they represent prefer the limited funds that may be available to be invested in symbolic awards of this kind.

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<sup>51</sup> See the “Order approving the proposed plan of the Trust Fund for Victims in relation to symbolic collective reparations” (Trial Chamber II), [No. ICC-01/04-01/06-3251](#), 21 October 2016, para. 11.

<sup>52</sup> See the “Public redacted version of ‘Corrected version of Draft Implementation Plan for Reparations, With public redacted Annex I, 20 April 2018, ICC-01/12-01/15-265-Conf’, 30 April 2018 ICC-01/12-01/15-265-Conf-Corr+Corr-Anx” (TFV), [No. ICC-01/12-01/15-265-Corr-Red](#), 18 May 2018, para. 237.



Rather, consideration should be given to community-based collective measures<sup>53</sup> targeting for instance community buildings, such as churches, hospitals or schools that remain damaged or destroyed in the several villages affected.

30. This raises a natural question as to the convenience of proceeding with community-based reparations in circumstances where Mr Ntaganda's conviction could be affected by the appeal. The Legal Representatives propose that, if the conviction were overturned entirely or in part, then any community-based measures implemented meanwhile should nevertheless be considered to be awarded under the assistance mandate of the TFV. As noted in the *"Report of the Court on the Revised strategy in relation to victims"*,<sup>54</sup> the reparations and assistance mandates can have a significant effect in contributing to the healing process of societies and the Court must constantly monitor and adjust strategies to respond to the local dynamics; "[t]o do so requires from the entire Court system immense flexibility, creativity and, at times, speed".<sup>55</sup> This would, indeed, be a novel procedure involving a significant degree of flexibility from all actors in the interests of victims. Yet it may have the potential to ensure some degree of timely and meaningful redress to victims, without incurring the risks highlighted *supra*. The reality is that, in the only instance before the ICC where a conviction has been overturned by the Appeals Chamber pending reparations proceedings (the *Bemba* precedent), the assistance mandate of the TFV was reactivated to address the harm suffered by victims in the case.<sup>56</sup>

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<sup>53</sup> See the "Order for Reparations pursuant to Article 75 of the Statute" (Trial Chamber II), [No. ICC-01/04-01/07-3728-tENG](#), 18 August 2017, paras. 278 *et seq.*

<sup>54</sup> See the "Report of the Court on the Revised strategy in relation to victims: Past, present and future", [No. ICC-ASP/11/40](#), 31 May 2014, paras. 46, 80 and 83: "46. One of the unique features of the Rome Statute system is that victims have been granted the right to request reparations and may benefit from support by the TFV under its assistance mandate. The further advantage presented by the reparations and assistance mandates is that positive and pro-active engagement with victims can have a significant effect on how they experience and perceive justice, thus contributing to their healing process and the rebuilding of peaceful societies. [...] 80. Overall, the Court must adapt to the unique aspects of each case and situation. [...] 83. The Court must constantly monitor and adjust strategies and messages in order to respond not only to judicial developments but also to local dynamics. To do so requires from the entire Court system immense flexibility, creativity and, at times, speed".

<sup>55</sup> *Idem.*

<sup>56</sup> See "[Following Mr Bemba's acquittal, Trust Fund for Victims at the ICC decides to accelerate launch of assistance programme in Central African Republic](#)", ICC Press Release, 13 June 2018.

31. As noted *supra*, with respect to the victims forming part of the sample, the Chamber could make individual eligibility determinations.<sup>57</sup> This sample could be populated by victims already authorised to participate in the proceedings. If, and only if, more information from the victims forming part of the representative sample is necessary, then the LRV together with the TFV could assist in compiling it and transmitting it to the Chamber.<sup>58</sup>

32. In the submission of the Legal Representatives, victims already authorised to participate in the proceedings who have not expressed views on their wish to receive reparations shall be presumed to be willing to receive them with no need to be re-contacted for this purpose, unless there are specific reasons to believe they might not be interested.<sup>59</sup> Those who were authorised to participate in the proceedings and have already expressed their willingness to also participate in the reparations proceedings should be eligible for reparations without being required to complete any additional application form.<sup>60</sup> Importantly, in relation to former child soldiers, there needs to be a system in place whereby those who filled in applications for the purposes of the *Lubanga* reparations proceedings will not need to fill in new forms to be considered beneficiaries in the present case.

33. The Appeals Chamber established that reparations are voluntary and therefore it is necessary to “seek the [sic] victims’ consent when a collective award is made”.<sup>61</sup> Further, with reference to Regulations 118(2) of the Regulations of the Registry, the Appeals Chamber noted that victims should be consulted through their Legal Representatives on their consent to disclosure of confidential information contained in their application forms to the TFV for the purposes of participation in

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<sup>57</sup> See the “Corrected version of the ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’”, *supra* note 14, para. 190 *et seq.*

<sup>58</sup> See the “Submissions on the Evidence Admitted in the Proceedings for the Determination of Thomas Lubanga Dyilo’s Liability for Reparations” (OPCV), [No. ICC-01/04-01/06-3360-tENG](#), 8 September 2017, para. 9.

<sup>59</sup> The Legal Representatives are available to assist, on a victim by victim basis, in setting out who may not be willing to receive reparations, if anyone.

<sup>60</sup> See the “Submissions relevant to reparations” (OPCV), [No. ICC-01/05-01/08-3455](#), 31 October 2016, para. 29.

<sup>61</sup> See the *Lubanga* 2015 Appeal Judgment on Reparations, *supra* note 9, para. 160.

the eventual collective projects.<sup>62</sup> The Legal Representatives invite the Chamber, already at the outset of the present reparations proceedings, to abandon these aspects of the existing jurisprudence. Instead, said consent should be presumed and *de facto* confirmed once the victims come forward to benefit from reparations at the implementation stage. Similarly, victims who submitted applications for reparations should be presumed to have consented to their details being provided to those who will administer the projects delivering the reparations measures they requested.<sup>63</sup>

34. In the view of the Legal Representatives, the identification of new beneficiaries should be conducted at the implementation stage of the reparations proceedings by the TFV and the Registry. If supplementary information relevant to reparations is required from victims already participating in the proceedings, it is preferable that it be collected by the Legal Representatives at the implementation stage of the process.

35. Thereafter, and in application of criteria pre-established by the Chamber in its reparations order, the TFV should conduct the victims' screening with appropriate judicial oversight, in a manner reflective of the Appeals Chamber jurisprudence discussed *supra*.<sup>64</sup>

36. The Legal Representatives note that individuals tend to come forward once they know the potential content of the TFV projects, due to the psychosocial and security implications said step may have.<sup>65</sup> Attempting to identify and screen the victims prior to the issuance of a reparations order, when the types and modalities of reparations are yet to be established, will not take due account of this reality. This applies in particular to victims of rape and sexual slavery. Said victims, often highly traumatised and rejected by their communities, are not likely to come forward before

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<sup>62</sup> *Idem*, paras. 161 and 162.

<sup>63</sup> See the "OPCV Further Submissions in the appeals proceedings concerning the 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable'" (OPCV), [No. ICC-01/04-01/06-3437](#), 31 January 2019, paras. 28 *et seq.*

<sup>64</sup> See *supra*, para. 18.

<sup>65</sup> See *supra*, paras. 21, 22, 24 and 27.

having knowledge on the projects envisaged. The same holds true for former child soldiers of Hema ethnicity.

37. In the view of the Legal Representatives, outreach is a first step in recognising and acknowledging the extent of the victimisation and the types of harm suffered by victims. Outreach activities should be designed in a manner that those victims who are particularly likely to be subject to social stigmatisation because of the crimes to which they were subjected, including former Hema child soldiers when residing in villages mostly populated by members of the Hema ethnicity, and victims who suffered rape and sexual slavery, are not discouraged from participating in the process. This continues to be a matter of concern in the present case. With respect to the victims of the attacks, it is important to note that entire villages and communities have been affected and therefore a number of victims may be efficiently reached by targeting these villages.

38. Lack of information or misinformation as to the purpose and nature of the reparations proceedings may negatively impact on the possibility for potential beneficiaries to come forward. In this regard, it will be important to coordinate the efforts of all interlocutors with whom victims and potential beneficiaries may come into contact in order to agree on key messages to be delivered, to avoid creating confusion or misunderstandings about the procedure, to manage expectations, and to create the necessary trust which will be indispensable for victims to meaningfully engage in the reparations process. In this sense, coordination and cooperation between the Registry, the Legal Representatives and the TFV is essential to ensuring that clear and understandable information is delivered gradually and timely. Moreover, considering that some victims are displaced internally in the Democratic Republic of the Congo (the "DRC") while others are in countries such as Uganda, outreach activities may also need to be carried out in areas outside the Ituri region and the DRC.

## **B. Legal Representation**

39. With regard to the legal representation of victims, the Legal Representatives agree that the arrangement in place should continue during the reparations phase of the case.<sup>66</sup> To change said arrangement at the present stage would be an inefficient use of the Court's resources; it would jeopardise the continuity and the coherence of representation and create gaps in the legal representation scheme. The Legal Representatives agree with the recommendation of the VPRS that any new victim qualifying as a former child soldiers or a victim of the attacks be represented by the relevant Legal Representative.

## **C. Experts**

40. Regarding the possibility to call experts, the Legal Representatives note that these are not the first reparations proceedings that are being conducted at the ICC. The Court already received, in other cases, a significant number of reports from organisations and experts addressing issues, general in nature, of reparations. This material is part of the public record of those cases and the Chamber may refer to it without needing to re-call experts or instruct new reports. This will avoid significant litigation, streamline the proceedings and ensure that the limited financial resources available are used for the benefit of victims. One aspect, however, in which the present case is distinct from previous reparations proceedings, concerns the long-term consequences of the crimes on the affected communities as a whole with no assistance being provided over 16 years following the crimes. This is an area where the Chamber may consider calling expert witnesses.

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<sup>66</sup> See the Preliminary Observations, *supra* note 1, para. 29.

Respectfully submitted,



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Former Child soldiers



Dmytro Suprun  
Common Legal Representative of the  
Victims of the Attacks

Dated this 3<sup>rd</sup> Day of October 2019

At The Hague, The Netherlands