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Pénale  
Internationale**



**International  
Criminal  
Court**

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No.: ICC-01/04-02/06  
Date: 31 October 2023

**THE APPEALS CHAMBER**

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

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

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

**Public**

**Public Redacted Version of the “Appeal Brief of the Common Legal Representative of the Victims of the Attacks against the ‘Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659’”  
(No. ICC-01/04-02/06-2875-Conf, dated 30 October 2023)**

**Source:** Office of Public Counsel for Victims (CLR2)

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## I. INTRODUCTION

1. Pursuant to regulation 58 of the Regulations of the Court (the “Regulations”), the Common Legal Representative of the Victims of the Attacks (the “Legal Representative” or the “CLR2”) hereby submits his Appeal Brief against the “Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659” issued by Trial Chamber II (the “Chamber”) on 14 July 2023 (the “Impugned Decision” or the “Addendum”),<sup>1</sup> on the Grounds identified in his Notice of Appeal filed on 16 August 2023.<sup>2</sup>

## II. PROCEDURAL BACKGROUND<sup>3</sup>

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

3. On 7 November 2019, Mr Ntaganda was sentenced to 30 years of imprisonment.<sup>5</sup>

4. On 8 March 2021, Trial Chamber VI issued the “Reparations Order”, ordering collective reparations with individualised components to be awarded to direct and

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<sup>1</sup> See the “Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659” (Trial Chamber II), [No. ICC-01/04-02/06-2858-Conf](#), 14 July 2023. A public redacted version was issued on the same date as [No. ICC-01/04-02/06-2858-Red](#) (the “Impugned Decision” or the “Addendum”), with Public “Annex I to the Addendum to the Reparations Order of 8 March 2021, ICC-01/04-01/02-2659”, [No. ICC-01/04-02/06-2858-AnxI](#), 14 July 2023, (the “Annex I”); Confidential *ex parte* and Confidential Redacted “Annex II to the Addendum to the Reparations Order of 8 March 2021, ICC-01/04-01/02-2659”, No. ICC-01/04-02/06-2858-Conf-Exp-AnxII, and [No. ICC-01/04-02/06-2858-Conf-AnxII-Red](#) (the “Annex II”); and Public “Annex III to the Addendum to the Reparations Order of 8 March 2021, ICC-01/04-01/02-2659”, [No. ICC-01/04-02/06-2858-AnxIII](#), 14 July 2023.

<sup>2</sup> See the “Notice of Appeal of the Common Legal Representative of the Victims of the Attacks against the ‘Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659’, and Request for Suspensive Effect in relation to Trial Chamber II’s Decision on the eligibility of Victims a/01636/13, a/00212/13, a/00199/13 and a/00215/13”, [No. ICC-01/04-02/06-2862](#), 16 August 2023 (the “CLR2’s Notice of Appeal”).

<sup>3</sup> The procedural background provided in the present submissions is limited to the main procedural steps preceding the Impugned Decision. It does not reflect the entire record of the reparations proceedings during the mentioned period.

<sup>4</sup> See the “Judgment” (Trial Chamber VI), [No. ICC-01/04-02/06-2359](#), 8 July 2019.

<sup>5</sup> See the “Sentencing Judgment” (Trial Chamber VI), [No. ICC-01/04-02/06-2442](#), 7 November 2019.

indirect victims of the crimes for which Mr Ntaganda has been convicted and setting the total reparations award for which Mr Ntaganda is liable at 30 million USD.<sup>6</sup>

5. On 16 March 2021, the Presidency assigned the present case to a newly constituted Trial Chamber II.<sup>7</sup>

6. On 30 March 2021, the Appeals Chamber upheld the Judgment and the Sentencing Judgment.<sup>8</sup>

7. On 8 April 2021, the Legal Representative and the Defence filed their respective notices of appeal against the Reparations Order.<sup>9</sup>

8. On 7 June 2021, the Legal Representative and the Defence filed their respective appeal briefs against the Reparations Order.<sup>10</sup>

9. On 23 July 2021, the Chamber issued its “Decision on the TFV’s initial draft implementation plan with focus on priority victims”.<sup>11</sup>

10. On 12 September 2022, the Appeals Chamber issued its “Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled ‘Reparations

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<sup>6</sup> See the “Reparations Order” (Trial Chamber VI), [No. ICC-01/04-02/06-2659](#), 8 March 2021 (the “Reparations Order”).

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

<sup>8</sup> See the “Public redacted version of Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled ‘Judgment’” (Appeals Chamber), [No. ICC-01/04-02/06-2666-Red A A2](#), 30 March 2021 (the “Appeals Judgment”); and the “Public redacted version of Judgment on the appeal of Mr Bosco Ntaganda against the decision of Trial Chamber VI of 7 November 2019 entitled ‘Sentencing judgment’” (Appeals Chamber), [No. ICC-01/04-02/06-2667-Red A3](#), 30 March 2021 (the “Appeals Sentencing Judgment”).

<sup>9</sup> See the “Notice of Appeal of the Common Legal Representative of the Victims of the Attacks against the Reparations Order”, [No. ICC-01/04-02/06-2668](#), 8 April 2021, and the “Defence Notice of Appeal against the Reparations Order, ICC-01/04-02/06-2659”, [No. ICC-01/04-02/06-2669](#), 8 April 2021.

<sup>10</sup> See the “Appeal Brief of the Common Legal Representative of the Victims of the Attacks against the Reparations Order”, [No. ICC-01/04-02/06-2674](#), 7 June 2021 (the “CLR2’s First Appeal Brief”), and the “Defence Appellant Brief against the 8 March Reparations Order”, [No. ICC-01/04-02/06-2675](#), 7 June 2021.

<sup>11</sup> See the “Decision on the TFV’s initial draft implementation plan with focus on priority victims” (Trial Chamber II), [No. ICC-01/04-02/06-2696](#), 23 July 2021.

Order” (the “*Ntaganda* Appeals Judgment”).<sup>12</sup> The Appeals Chamber partially remanded the Reparations Order to the Chamber finding that Trial Chamber VI failed, *inter alia*, 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 (the “TFV”) to carry out the eligibility assessment; and (v) provide reasons in relation to the concept of transgenerational harm and the evidentiary guidance to establish such harm, the assessment of the harm concerning the Sayo health centre and the breaks in the chain of causation when establishing harm caused by the destruction of that health centre, and the presumption of physical harm for victims of the attacks.<sup>13</sup>

11. On 25 October 2022, the Chamber issued an Order for the implementation of the *Ntaganda* Appeals Judgment,<sup>14</sup> which set in motion processes to address and implement said Judgment.

12. On 14 July 2023, the Chamber issued the Impugned Decision.<sup>15</sup>

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<sup>12</sup> See the “Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled ‘Reparations Order’” (Appeals Chamber), 12 September 2022, [No. ICC-01/04-02/06-2782 A4 A5](#) (the “*Ntaganda* Appeals Judgment”).

<sup>13</sup> *Idem*, paras. 745-748.

<sup>14</sup> See the “Order for the implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled “Reparations Order” (Trial Chamber II), [No. ICC-01/04-02/06-2786](#), 25 October 2022.

<sup>15</sup> See the Impugned Decision, *supra* note 1.

13. On 11 August 2023, the Chamber issued its “First Decision on the Trust Fund for Victims’ Draft Implementation Plan for Reparations” (the “Decision on the TFV’s DIP”).<sup>16</sup>

14. On 16 August 2023, the Legal Representative submitted his Notice of Appeal against the Impugned Decision, including a request for suspensive effect of his appeal in relation to the Chamber’s decision on the eligibility for reparations with respect to four victims.<sup>17</sup>

15. On the same date, the Defence submitted its Notice of Appeal against the Impugned Decision and its Request for suspensive effect of its appeal.<sup>18</sup>

16. On 18 August 2023, the Appeals Chamber assigned Judge Gocha Lordkipanidze as the Presiding Judge in the Legal Representative’s and Defence’s appeals against the Impugned Decision.<sup>19</sup>

17. On 23 August 2023, the Appeals Chamber issued its “Order inviting the Trust Fund for Victims to submit observations on the requests for suspensive effect and setting a time limit for responses to the requests and observations”.<sup>20</sup> In particular, the Appeals Chamber invited the TFV to submit observations on issues arising from the

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<sup>16</sup> See the “First Decision on the Trust Fund for Victims’ Draft Implementation Plan for Reparations” (Trial Chamber II), [No. ICC-01/04-02/06-2860-Conf](#), 11 August 2023. A public redacted version was filed on 30 August 2023 as [No. ICC-01/04-02/06-2860-Red](#) (the “Decision on the TFV’s DIP”).

<sup>17</sup> See the CLR2’s Notice of Appeal, *supra* note 2.

<sup>18</sup> See the “Public Redacted Version of ‘Defence Notice of Appeal against the 14 July Addendum to the Reparations Order of 8 March 2021’, dated 16 August 2023, ICC-01/04-02/06-2863-Conf”, [No. ICC-01/04-02/06-2863-Red](#), 22 August 2023; and the “Public Redacted Version of ‘Request for the Defence appeal against the Addendum issued by Trial Chamber II on 14 July 2023 to be given suspensive effect’, dated 16 August 2023, ICC-01/04-02/06-2864-Conf”, [No. ICC-01/04-02/06-2864-Red](#), 22 August 2023.

<sup>19</sup> See the “Decision on the Presiding Judge of the Appeals Chamber in the appeals of the common legal representative of the victims of the attacks and of Mr Bosco Ntaganda against the decision of Trial Chamber II entitled ‘Addendum to the Reparations Order of 8 March 2021, ICC-01/04-02/06-2659’” (Appeals Chamber), [No. ICC-01/04-02/06-2865 A6 A7](#), 18 August 2023.

<sup>20</sup> See the “Order inviting the Trust Fund for Victims to submit observations on the requests for suspensive effect and setting a time limit for responses to the requests and observations” (Appeals Chamber), [No. ICC-01/04-02/06-2866 A6 A7](#), 23 August 2023.

parties' requests for suspensive effect, by 31 August 2023.<sup>21</sup> It further invited the Legal Representative and the Defence to submit a response to the opposing party's request for suspensive effect and the TFV's observations, by 7 September 2023.<sup>22</sup>

18. On 31 August 2023, the TFV submitted its "Observations on Requests for Suspensive Effect and Request under rule 103 of the Rules of Procedure and Evidence".<sup>23</sup>

19. On 7 September 2023, the "Response of the Common Legal Representative of the Former Child Soldiers to the request for suspensive effect of the Addendum to the Reparations Order introduced by the Defence (No. ICC-01/04-02/06-2864-Red)" was submitted.<sup>24</sup> On the same day, the "Defence Response to the request for suspensive effect of the Common Legal Representative of the victims of the attacks and the observations of the Trust Fund for Victims"<sup>25</sup> and the "Response of the Common Legal Representative of the Victims of the Attacks to the 'Request for the Defence appeal against the Addendum issued by Trial Chamber II on 14 July 2023 to be given suspensive effect' and the Trust Fund for Victims' 'Observations on the Requests for Suspensive Effect and Request under rule 103 of the Rules of Procedure and Evidence'"<sup>26</sup> (the "CLR2's 7 September 2023 Response"), were submitted.

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<sup>21</sup> *Idem*, para. 7.

<sup>22</sup> *Idem*, paras. 8-9.

<sup>23</sup> See the "Observations on Requests for Suspensive Effect and Request under rule 103 of the Rules of Procedure and Evidence", [No. ICC-01/04-02/06-2867](#), 31 August 2023.

<sup>24</sup> See the "Response of the Common Legal Representative of the Former Child Soldiers to the request for suspensive effect of the Addendum to the Reparations Order introduced by the Defence (No. ICC-01/04-02/06-2864-Red)", [No. ICC-01/04-02/06 A6 A7](#), 7 September 2023.

<sup>25</sup> See the "Defence Response to the request for suspensive effect of the Common Legal Representative of the victims of the attacks and the observations of the Trust Fund for Victims", [No. ICC-01/04-02/06-2871](#), 7 September 2023.

<sup>26</sup> See the "Response of the Common Legal Representative of the Victims of the Attacks to the 'Request for the Defence appeal against the Addendum issued by Trial Chamber II on 14 July 2023 to be given suspensive effect' and the Trust Fund for Victims' 'Observations on the Requests for Suspensive Effect and Request under rule 103 of the Rules of Procedure and Evidence'", [No. ICC-01/04-02/06-2869](#), 7 September 2023 (the "CLR2's 7 September 2023 Response").



20. On 13 September 2023, the Appeals Chamber issued an “Order concerning reclassification”,<sup>27</sup> the Legal Representative responded by email on the same day,<sup>28</sup> and the CLR2’s 7 September 2023 Response was reclassified as public also on the same day.<sup>29</sup>

21. On 29 September 2023, the Defence submitted, by email, a request for extension of time to submit its appeal brief against the Impugned Decision till 30 October 2023.<sup>30</sup> On 2 October 2023, the Legal Representative submitted, by email, his response to the Defence’s request for extension of time wherein he did not oppose the request provided that the same extension of time is also granted to him.<sup>31</sup>

22. On the same day, the Common Legal Representative of the Former Child Soldiers (the “CLR1”) informed the Appeals Chamber, by email, that she did not oppose the Defence’s request for an extension of time, nor she did oppose the CLR2’s similar request.<sup>32</sup>

23. On 5 October 2023, the Appeals Chamber decided that the: (i) time limit for the filing of the appeal briefs for the Defence and the CLR2 is extended to 30 October 2023 at 16:00; and (ii) responses may be filed within 60 days of notification of the appeal briefs, pursuant to regulation 59 of the Regulations.<sup>33</sup>

24. On 6 October 2023, the TFV inquired with the Legal Representative for instructions regarding the processing of the dossiers of six victims he previously referred to the TFV for inclusion in the IDIP programme, who are in a similar situation to the four victims whose eligibility was negatively determined by the Chamber,

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<sup>27</sup> See the “Order concerning reclassification” (Appeals Chamber), [No. ICC-01/04-02/06-2872 A6A7](#), 13 September 2023.

<sup>28</sup> See the Email correspondence from the CLR2 dated 13 September 2023 at 11:32.

<sup>29</sup> See the Email correspondence from the CMS dated 13 September 2023 at 18:30.

<sup>30</sup> See the Email correspondence from the Defence dated 29 September 2023 at 19:03.

<sup>31</sup> See the Email correspondence from the CLR2 dated 2 October 2023 at 12:10.

<sup>32</sup> See the Email correspondence from the CLR1 dated 2 October 2023 at 12:30 and at 14:34.

<sup>33</sup> See the Email correspondence from the Appeals Chamber dated 5 October 2023 at 15:21.

noting that said decision is the subject of the Legal Representative's current Appeal Brief and that the CLR2's request for suspensive effect is currently pending before the Appeals Chamber.<sup>34</sup>

25. On 9 October 2023, the Legal Representative requested the TFV to put the dossiers of the concerned six victims on hold pending the Appeals Chamber's determination of his request for suspensive effect and further clarity on the matter.<sup>35</sup>

### III. CLASSIFICATION

26. Pursuant to regulation 23bis(1) of the Regulations, the present submissions are classified as confidential, since they refer to the content of Annex II to the Impugned Decision, which is likewise classified as confidential. A public redacted version will be filed forthwith.

### IV. STANDARDS OF APPELLATE REVIEW

27. The Legal Representative's appeal identifies errors of law, fact and procedure, and in certain situations, in combination with, or in addition to, errors in the exercise of the Chamber's discretion. The Appeals Chamber has previously established the relevant standards of review regarding these different categories of errors.

#### *a) Errors of Law*

28. With respect to alleged errors of law, the Appeals Chamber will not defer to the first instance Chamber's interpretation of the law, but arrive at its own conclusions as to the appropriate law and determine whether or not the first instance Chamber misinterpreted the law. If the first instance Chamber committed a legal error, the

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<sup>34</sup> See the Email correspondence from the TFV dated 6 October 2023 at 12:45.

<sup>35</sup> See the Email correspondence from the CLR2 dated 9 October 2023 at 09:26.

Appeals Chamber will only intervene if the error “*materially affected the Impugned Decision*”.<sup>36</sup>

29. An impugned decision is “*materially affected by an error of law*” if the first instance 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*”.<sup>37</sup>

#### **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 a clear error was committed, which includes a misappreciation of the facts, consideration of irrelevant facts, or a failure to take into account the relevant facts. Regarding the “*misappreciation of facts*”, the Appeals Chamber “*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*” and “[i]t 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”.<sup>38</sup>

31. The Appeals Chamber further highlighted that “*factual findings in a decision under article 74 of the Statute are entered in light of a standard of proof (“beyond reasonable*

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<sup>36</sup> See the *Ntaganda* Appeals Judgment, *supra* note 12, para. 29 which refers to 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 A7 A8](#), 18 July 2019 (the “*Lubanga* 2019 Appeals Judgment on Reparations”), para. 28 (footnotes omitted), which refers to 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 A3 A4 A5](#), 9 March 2018 (the “*Katanga* Appeals Judgment on Reparations”), para. 39, which quotes the “Public redacted Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction” (Appeals Chamber), [No. ICC-01/04-01/06-3121-Red A5](#), 1 December 2014, (the “*Lubanga* Appeals Judgment on Conviction”), paras 18-19 (footnotes omitted).

<sup>37</sup> See the *Ntaganda* Appeals Judgment, *supra* note 12, para. 28 (footnotes omitted), which refers to the *Katanga* Appeals Judgment on Reparations, *supra* note 36, para. 40, which refers to the *Lubanga* Appeals Judgment on Conviction, *supra* note 36, para. 20.

<sup>38</sup> See the *Ntaganda* Appeals Judgment, *supra* note 12, para 30 which refers to the *Lubanga* 2019 Appeals Judgment on Reparations, *supra* note 36, para. 27, which refers to the *Katanga* Appeals Judgment on Reparations, *supra* note 36, para. 41, which quotes the *Lubanga* Appeals Judgment on Conviction, *supra* note 36, para. 21.

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", and "[t]hat 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".<sup>39</sup>

32. With respect to factual presumptions drawn by a trial chamber in reparations proceedings, the Appeals Chamber has previously stated that "the reasonableness of a factual presumption drawn by a trial chamber in reparation proceedings will depend upon the circumstances of the case".<sup>40</sup> The Appeals Chamber has further observed that for the standard of appellate review regarding factual presumptions, "[o]n 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".<sup>41</sup>

### c) *Procedural Errors*

33. With respect to alleged procedural errors, these 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".<sup>42</sup> The appellant will need to demonstrate that in the absence of the procedural error, the impugned decision "would have substantially differed from the one rendered".<sup>43</sup>

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<sup>39</sup> See the *Ntaganda* Appeals Judgment, *supra* note 12, para. 31.

<sup>40</sup> See the *Ntaganda* Appeals Judgment *supra* note 12, para. 32 which refers to the *Katanga* Appeals Judgment on Reparations, *supra* note 36, para. 76.

<sup>41</sup> See the *Ntaganda* Appeals Judgment *supra* note 12, para. 33 which refers to the *Katanga* Appeals Judgment on Reparations, *supra* note 36, para. 77.

<sup>42</sup> See the *Ntaganda* Appeals Judgment, *supra* note 12, para. 33, which refers to the *Lubanga* 2019 Appeals Judgment on Reparations, *supra* note 36, para. 29, which refers to the *Katanga* Appeals Judgment on Reparations, *supra* note 36, para. 40, which quotes the *Lubanga* Appeals Judgment on Conviction, *supra* note 36, para. 20.

<sup>43</sup> *Ibid.*

*d) Errors in Discretionary Decisions*

34. The Appeals Chamber has set out the standard for review for a decision involving the exercise of discretion in a judgment in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*<sup>44</sup> and affirmed said standard of review in the Judgment on the appeal of the victims against the “Reparations Order” in the *Al Mahdi* case<sup>45</sup> and in the appeal against the decision on the size of the reparations award in the *Lubanga* case.<sup>46</sup>

35. In the *Ntaganda* Appeals Judgment, the Appeals Chamber recalled that it “*will not interfere with the Chamber’s exercise of its discretion merely because the Appeals Chamber, if it had the power, might have made a different ruling*”. The Appeals Chamber recalled that it “*will only disturb the exercise of a Chamber’s discretion where it is shown that an error of law, fact or procedure was made*” and 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*”.<sup>47</sup>

36. The Appeals Chamber further considered that “[w]ith respect to an exercise of discretion based upon an alleged erroneous interpretation of the law or an alleged incorrect conclusion of fact, the Appeals Chamber will apply the standard of review with respect to errors of law and errors of fact [...]”.<sup>48</sup>

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<sup>44</sup> See the “Judgment on the Prosecutor’s appeal against Trial Chamber V(B)’s ‘Decision on Prosecution’s application for a finding of non-compliance under Article 87(7) of the Statute’” (Appeals Chamber), [No. 01/09-02/11-1032 OA 5](#), 19 August 2015, paras. 22-25.

<sup>45</sup> See the “Judgment on the appeal of the victims against the ‘Reparations Order’” (Appeals Chamber), [No. ICC-01/12-01/15-259-Red2 A](#), 9 March 2018, para. 24.

<sup>46</sup> See the *Lubanga* 2019 Appeals Judgment on Reparations, *supra* note 36, para. 31.

<sup>47</sup> See the *Ntaganda* Appeals Judgment, *supra* note 12, para. 34 (references omitted).

<sup>48</sup> See the *Lubanga* 2019 Appeals Judgment on Reparations, *supra* note 36, para. 46.

37. Where a discretionary decision allegedly amounts to an abuse of discretion, the Appeals Chamber has stated that “[e]ven if an error [...] 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 instance Chamber gave weight to extraneous or irrelevant considerations or failed to give weight or sufficient weight to relevant considerations in exercising its discretion, [and] [t]he degree of discretion afforded to a Chamber may depend upon the nature of the decision in question”.<sup>49</sup>

## V. SUBMISSIONS ON APPEAL

38. Pursuant to regulation 58 of the Regulations, the Legal Representative herewith submits his Appeal Brief in relation to the three Grounds of Appeal as identified in his Notice of Appeal.

### **1. Ground 1: The Chamber committed a combination of errors of law, fact and procedure in its estimation of the number of potential beneficiaries of reparations amongst the victims of the attacks**

#### *a) Sub-Ground 1.1: The Chamber erred in law and in the exercise of its discretion by failing to provide estimates as concrete as possible*

39. The Legal Representative recalls that in the *Lubanga* Appeals Judgment on the Size of Reparations, the Appeals Chamber held that when collective reparations are awarded, the number of victims is an important parameter for determining what reparations are suitable, as “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”.<sup>50</sup> The Appeals Chamber further elaborated that it “would be

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<sup>49</sup> See the *Ntaganda* Appeals Judgment, *supra* note 12, para. 35, which refers to the *Lubanga* 2019 Appeals Judgment on Reparations, *supra* note 36, para. 32, which refers to the *Katanga* Appeals Judgment on Reparations, *supra* note 36, para. 44, which quotes the “Judgment on the Prosecutor’s appeal against Trial Chamber V(B)’s ‘Decision on Prosecution’s application for a finding of non-compliance under Article 87(7) of the Statute’” (Appeals Chamber), [No. ICC-01/09-02/11-1032 OA5](#), 19 August 2015, para. 25.

<sup>50</sup> See the *Lubanga* 2019 Appeals Judgment on Reparations, *supra* note 36, para. 89.

*incorrect to assume that the number of victims may only be established based on individual requests for reparations received by the Court” and that 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”.*<sup>51</sup> Importantly, and as applicable to the victims of attacks, a *“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”* such that the *“number of victims at the time of the crimes may be a starting point for this consideration”*.<sup>52</sup> It recognised that other considerations for determining the appropriateness of the size of a reparations award include the type of reparations measures intended and how many victims are likely to come forward and benefit from them, which is 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”*, and that these determinations can be made, *inter alia*, on the submissions received from the parties and reports of experts.<sup>53</sup>

40. Regarding the appropriateness of reparations for the purposes of article 75(2) of the Statute, the *Lubanga* Appeals Chamber held that the number of victims likely to come forward and benefit from collective reparations programs during the implementation phase is a factor the trial chamber *must* consider.<sup>54</sup> The trial chamber *must* strive to obtain an estimate that is *“as concrete as possible”*.<sup>55</sup>

41. Affirming said jurisprudence, the *Ntaganda* Appeals Chamber also emphasised the importance for the Chamber to provide estimates on the number of victims to be *“as concrete as possible and based upon a sufficiently strong evidential basis”* to establish the actual or estimated number of beneficiaries of reparations amongst the victims of the

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<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

attacks.<sup>56</sup> The *Ntaganda* Appeals Chamber held that this was a mandatory duty<sup>57</sup> in order for the reparations process to move forward. In particular, the *Ntaganda* Appeals Chamber found that Trial Chamber VI had “*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*”,<sup>58</sup> and the 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 [...]*”, as 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*”.<sup>59</sup>

42. It is therefore clear from the established jurisprudence of the Court that for the purpose of determining the cost of the reparations award, and in the absence of the possibility to establish the actual total number of potential beneficiaries of reparations, a Chamber *must* still obtain an estimate that is “*as concrete as possible*” and “*based upon a sufficiently strong evidential basis*”, even if they have not all yet come forward, before the cost of the reparations award can be determined.

43. The Legal Representative submits that, contrary to the applicable law on the size of the reparations award<sup>60</sup> and the *Ntaganda* Appeals Chamber’s directions,<sup>61</sup> the Chamber did not obtain an estimate that is “*as concrete as possible*” based on all the available information before it. In the Impugned Decision, the Chamber was provided with concrete and corroborative figures by the Legal Representative<sup>62</sup> and the Registry,<sup>63</sup> which were obtained from different, independent and identifiable sources,

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<sup>56</sup> See the *Ntaganda* Appeals Judgment, *supra* note 12, para. 168.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> *Idem*, para. 749.

<sup>60</sup> See the *Lubanga* 2019 Appeals Judgment on Reparations, *supra* note 36, paras. 89 and 224.

<sup>61</sup> See the *Ntaganda* Appeals Judgment, *supra* note 12, paras. 168-169 and 172.

<sup>62</sup> See the Impugned Decision, *supra* note 1, para. 275.

<sup>63</sup> *Idem*, para. 286.



and included publicly available figures on the population size of the affected localities – which the Chamber dismissed as lacking in weight and irrelevant.<sup>64</sup>

44. For the benefit of the Appeals Chamber, the Legal Representative reiterates below in full his previous submissions, made before the Chamber<sup>65</sup> and the Appeals Chamber,<sup>66</sup> on estimating the total number of potential beneficiaries of reparations, the rationale behind his submissions, and the total number of potential beneficiaries as direct victims.

45. He reiterates that the most efficient and pragmatic method for the Chamber to estimate the number of potential beneficiaries of reparations eligible as *direct victims* was to rely on the population size of the affected villages at the time the crimes were committed.<sup>67</sup> The following findings, facts and information are in support of this approach.

46. First, Mr Ntaganda was convicted for, *inter alia*, mass-crimes affecting 13 villages,<sup>68</sup> forcing inhabitants to flee,<sup>69</sup> in particular intentionally directing attacks against civilians in Mongbwalu, Sayo, Bambu, Jitchu and Buli,<sup>70</sup> persecution in Mongbwalu, Nzebi, Sayo, Kilo, Nyangaray, Lipri, Tsili, Bambu, Kobu, Sangi, Gola, Jitchu and Buli,<sup>71</sup> forcible transfer of population in Mongbwalu, Lipri, Tsili, Kobu and Bambu,<sup>72</sup> ordering the displacement of civilians from Mongbwalu, Lipri, Tsili, Kobu

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<sup>64</sup> *Idem*, paras. 301-307.

<sup>65</sup> See the “Submissions by the Common Legal Representative of the Victims of the Attacks pursuant to the 25 October 2022 Order and 25 November 2022 Decision”, [No. ICC-01/04-02/06-2820](#), 30 January 2023 (the “CLR2’s 30 January 2023 Submissions”), paras. 45-46.

<sup>66</sup> See the CLR2’s First Appeal Brief, *supra* note 10, para. 77.

<sup>67</sup> See the CLR2’s First Appeal Brief, *supra* note 10, para. 77; and the CLR2’s 30 January 2023 Submissions, *supra* note 65, paras. 45-46.

<sup>68</sup> See the CLR2’s First Appeal Brief, *supra* note 10, para. 77.

<sup>69</sup> See the Judgment, *supra* note 4, paras. 497, 505, 537, 549, 571, 573, 585-586, 603, 604, 612, 615-617, and 640.

<sup>70</sup> *Idem*, paras. 535-536.

<sup>71</sup> *Idem*, para. 537.

<sup>72</sup> *Ibid.*

and Bambu.<sup>73</sup> Trial Chamber VI found that a great number of people who fled Mongbwalu arrived in the Walendu-Djatsi *collectivité* and were concentrated in Lipri, Kobu and Bambu,<sup>74</sup> while the objective of the UPC/FPLC's operation in said villages was to destroy that triangle.<sup>75</sup> The crimes were committed with a predetermined aim to drive out all the Lendu from the localities targeted and to prevent their return, while prior to November 2002, the Lendu constituted the majority of the inhabitants of Mongbwalu and the surrounding villages, including Sayo.<sup>76</sup> They also predominated the villages of the Walendu-Djatsi *collectivité*, notably Kobu, Bambu, Lipri, Tsili, Jitchu and Nyangaray.<sup>77</sup>

47. Second, there are publicly available figures on the estimated population size of Mongbwalu in 2002 and 2004. According to a United Nations Special Report, the population of Mongbwalu in 2002 was around 80,000 with the Lendu constituting the majority, and in 2004 this shrunk to 26,176.<sup>78</sup> The United Nations also estimated that around 60,000 persons were displaced in the *shika na mukono* operation, which is evidence on the record.<sup>79</sup>

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<sup>73</sup> *Idem*, para. 538.

<sup>74</sup> *Idem*, para. 549.

<sup>75</sup> *Idem*, para. 558.

<sup>76</sup> *Idem*, para. 470.

<sup>77</sup> *Idem*, para. 549.

<sup>78</sup> See the "Corrigendum of the 'Public Redacted Version of the 'Submissions by the Common Legal Representative of the Victims of the Attacks on Reparations'" (ICC-01/04-02/06-2477-Red)", [No. ICC-01/04-02/06-2477-Red-Corr](#), 20 November 2020, para. 71, which refers to DRC-OTP-0074-0422, the [Special Report on the events in Ituri, January 2002-December 2003](#), 16 July 2004, S/2004/573 (the "UN Special Report"), para. 98 (which states that "Mongbwalu, an important gold mining centre, was the second most populated town in Ituri after Bunia, with around 80,000 inhabitants before the conflict"); and the [World Gazetteer, Congo \(Dem. Rep.\): largest cities and towns and statistics of their population](#) ( which states that Mongbwalu had an estimated population of 26,176 in 2004).

<sup>79</sup> See the CLR2's First Appeal Brief, *supra* note 10, para. 81, which refers to the UN Special Report, *supra* note 78, para. 70, which states that: "MONUC human rights investigators were able to visit Lipri, Bambu and Kobu on 3 April 2003. The team saw several villages on the way that were burned and deserted, visited the place where 47 persons were killed in Kobu and interviewed around 90 victims of abuse or eyewitnesses of killings. The interviewees gave the team the names of 250 victims, but more victims were identified by another investigation team in May 2003, and still more during the investigations in the Beni area in November 2003. Operation Chikana Namukono resulted in the killing of at least 350 persons and the complete destruction of 26 localities. Around 60,000 civilians were forced to flee to the relative safety of the surrounding bush, and the number of those who died of hunger and sickness remains unknown".

48. Third, the Registry provided figures on the number of inhabitants at the time of the events in some other affected villages (*e.g.*, Kobu and Bambu).<sup>80</sup>

49. Based on the above findings, facts and information, the Legal Representative reiterates his previous submissions that the estimated total number of potential beneficiaries of reparations amongst the victims of the attacks as *direct victims* is at least 100,000.<sup>81</sup> He posits that had the Chamber not been inclined to order the collection of figures on the population size of all affected communities at the time of the events, it was nevertheless in a position to estimate the number of potential beneficiaries as direct victims based on the evidence available on the record as referred to above, in particular the figures on the population size of Mongbwalu, Kobu and Bambu; and the estimated number of displaced persons in the *shika na mukono* operation. He also reiterates the need to take into account the likelihood of a very high number of an additional category of potentially eligible *direct victims*, as acknowledged by Trial Chamber VI in its 15 December 2020 Decision<sup>82</sup> and as endorsed in the Reparations Order<sup>83</sup> and by the TFV's Established Eligibility Criteria<sup>84</sup> – namely, the victims originating from any other location, provided they suffered harm in the forest or bush surrounding the affected localities under “*positive findings*” at the time of the events.<sup>85</sup>

50. On the last point, given the extent of the mass-crimes for which Mr Ntaganda was convicted – most, if not all, the inhabitants of the affected villages presumably fled to escape the violence and to hide in the surrounding forest or bush due to the

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<sup>80</sup> See the CLR2's First Appeal Brief, *supra* note 10, para. 64. The reference is made to the figures provided in Annex II to the “Registry's Observations on Reparations”, [No. ICC-01/04-02/06-2475-Conf-AnxII-Red](#), 28 February 2020, pp. 12-13.

<sup>81</sup> See the CLR2's 30 January 2023 Submissions, *supra* note 65, para. 46.

<sup>82</sup> See the “Decision on issues raised in the Registry's First Report on Reparations” (Trial Chamber VI), [No. ICC-01/04-02/06-2630](#), 15 December 2020, (the “Decision of 15 December 2020”), para. 19(f).

<sup>83</sup> See the Reparations Order, *supra* note 6, paras. 19 and 107.

<sup>84</sup> See the “Annex 1 to Trust Fund for Victims' Fourth Update Report on the Implementation of the Initial Draft Implementation Plan”, [No. ICC-01/04-02/06-2751-Conf-Anx1](#), 25 March 2022 (the “Established Eligibility Criteria”), para. 31.

<sup>85</sup> See the CLR2's 30 January 2023 Submissions, *supra* note 66, para. 46.

UPC/FPLC taking control over the affected area. However, they continued to be persecuted and/or were forced to live in difficult conditions, and therefore should be eligible for reparations. The Legal Representative submits that in the Impugned Decision the Chamber disregarded or misapplied its previous findings on this matter, which will be separately addressed under Ground 3 below.

51. Finally, regarding the estimated number of potential beneficiaries of reparations as *indirect victims*, the Legal Representative reiterates his previous submissions that this estimation needs to be based on the average family composition of the victims, with due regard for the traditional family notion of “family” in the Democratic Republic of the Congo (the “DRC”), which includes both close and remote relatives.<sup>86</sup>

52. The Defence argued, *inter alia*, that: (i) the CLR2’s estimate of 100,000 potential beneficiaries of reparations is unreliable;<sup>87</sup> (ii) no conclusion can be drawn regarding the number of potential beneficiaries in the case;<sup>88</sup> and (iii) the appropriate way forward would have been for the VPRS to conduct a detailed mapping exercise as expeditiously as possible, with a view to identifying new potential beneficiaries and collect new application forms.<sup>89</sup>

53. The TFV observed that any current exercise to determine the number of potential beneficiaries prior to the implementation of reparations will not be accurate<sup>90</sup> and in its experience, potential beneficiaries can come forward at various stages,

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<sup>86</sup> *Idem*, para. 47. See also the “Corrigendum of the ‘Public Redacted Version of the ‘Submissions by the Common Legal Representative of the Victims of the Attacks on Reparations’ (ICC-01/04-02/06-2477-Red)”, [No. ICC-01/04-02/06-2477-Red-Corr](#), 20 November 2020, paras. 36 and 52.

<sup>87</sup> See the “Public Redacted Version of ‘Defence further submissions on transgenerational harm and the estimated total number of potential beneficiaries’, dated 30 January 2023, ICC-01/04-02/06-2823-Conf”, [No. ICC-01/04-02/06-2823-Red](#), 8 June 2023, (the “Defence’s 30 January 2023 Submissions”), para. 61.

<sup>88</sup> *Idem*, para. 56.

<sup>89</sup> *Idem*, paras. 59-60.

<sup>90</sup> See the “Trust Fund for Victims’ Submission pursuant to Trial Chamber II’s decisions on the implementation of the Appeals Chamber Judgment against the Reparations Order”, [No. ICC-01/04-02/06-2819](#), 30 January 2023 (the “TFV’s 30 January 2023 Submissions”), para. 44.

including during outreach campaigns and later in time, when other beneficiaries actually start receiving reparations.<sup>91</sup> The TFV acknowledged that following its consultations with leaders of certain affected localities, it learnt that around the time of the attacks more than 100,000 persons from different ethnic groups lived in the affected areas.<sup>92</sup> However, it argued that at the time of the attacks, most inhabitants had already left, and thus, do not appear to necessarily fall within the scope of the conviction.<sup>93</sup> The TFV finally calculated that at least about 21,500 individuals could be beneficiaries of reparations as direct *and* indirect victims of the attacks.<sup>94</sup>

54. The Registry indicated that after its preliminary mapping exercise in 2019, it estimated at least approximately 1,100 new potential applicants for the victims of the attacks may come forward to claim reparations.<sup>95</sup> It also reported mapping out a further 780 potential new applicants in 2022, who were mostly already accounted for in the context of the preliminary mapping. However, it noted that these estimates were “*conservative*” as they were collated in the “*context of a limited and carefully targeted approach aimed at identifying individuals*” for whom it could be said with a relative degree of certainty, based only on secondary sources, that they were victims of the case.<sup>96</sup> The Registry further noted that the figures of the preliminary mapping related to potential beneficiaries who resided or had returned to the localities relating to the First and Second Operation.<sup>97</sup> It observed that more than 70% of the pre-conflict population of these localities still had not returned.<sup>98</sup>

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<sup>91</sup> *Ibid.*

<sup>92</sup> *Idem*, para. 45.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

<sup>95</sup> See the “Registry Submission in compliance with the ‘Order for the implementation of the Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled ‘Reparations Order’ (ICC-01/04-02/06-2786)”, [No. ICC-01/04-02/06-2822](#), 30 January 2023 (the “Registry’s 30 January 2023 Submissions”), para. 25; with Annex, [No. ICC-01/04-02/06-2822-Anx-Red](#), 30 January 2023 (the “Annex to the Registry’s 30 January 2023 Submissions”).

<sup>96</sup> See the Registry’s 30 January 2023 Submissions, *supra* note 95, para. 25.

<sup>97</sup> *Idem*, para. 19.

<sup>98</sup> *Ibid.*

55. In its more recent submissions, the Registry indicated that it concurred with the CLR2's submissions that some crimes – such as an attack against the civilian population, forcible transfer, and displacement, are likely to have affected large portions of the population living at the time in these localities.<sup>99</sup> It further submitted that the Chamber could be further assisted with data on the number of individuals residing in or around each affected locality immediately prior to the conflict.<sup>100</sup> Accordingly, the Registry sought additional information by undertaking consultations in the field,<sup>101</sup> and provided the following details of the population purportedly living in the affected localities before the attacks:

(i) *Collectivity of Banyali-Kilo*

- a) Mongbwalu, Sayo and Nzebi, including most populated neighbourhoods of Sayo and Nzebi (Kilo-Moto), but excluding villages around the periphery of Mongbwalu: 102,000 inhabitants; and
- b) Kilo Mission: 3,800 inhabitants, including the population of its 27 surrounding villages and Kilo Etat: 6,350 inhabitants, including the population of its 14 surrounding villages.

(ii) *Collectivity of Walendu-Djatsi (excluding Sangi, Jitsu, Buli, Tsili and Gola)*

- a) Kobu: between 15,000 – 18,000 inhabitants;
- b) Bambu: between 12,000 – 13,000 inhabitants;
- c) Lipri and vicinity: 4,246 inhabitants, including the population of the following surrounding villages located within a range of five kilometres from Lipri Centre: Ngongo, Tuduchabo, Gamangilo, Ekolo, Makabo Ngongo, Simbabo, Ndigadu, Kishiga, Godu, Kabisabo, Nganda,

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<sup>99</sup> *Idem*, para. 20

<sup>100</sup> *Ibid.*

<sup>101</sup> *Idem*, para. 21.

Solasola, Anjabo, Waga, Kisiga II, Kalonga and Waga II, but excluding Lipri Centre; and

d) Nyangaray and vicinity: Nyangaray centre (3,200 inhabitants) and Nyangaray *groupement* (33,112 inhabitants).<sup>102</sup>

56. In the Impugned Decision, the Chamber noted at the outset that it “*once again finds itself in a situation where no reliable estimates based on a solid methodology was provided regarding the total number of victims belonging to [the victims of the attacks]*”.<sup>103</sup>

57. The Chamber then turned to its analysis of the Legal Representative’s submissions. First, while acknowledging that the crimes for which Mr Ntaganda was convicted “*affected thousands of people and entire communities*”, the Chamber held that it was not proven at trial that Mr Ntaganda was liable for crimes committed against the entirety of the 13 communities included in the conviction, which it has detailed in Annex I as the crimes and localities for which Mr Ntaganda was specifically convicted in relation to the victims of the attacks.<sup>104</sup>

58. The Legal Representative notes however that in Part II of Annex I, the Chamber listed the localities for which positive findings were made regarding the Victims of Attacks. For the First Operation this included Mongbwalu, Nzebi, Sayo, Kilo, and for the Second Operation this included Kobu, Sangi, Bambu, Jitchu, Buli, Nyangaray, Lipri, Tsili and Gola.<sup>105</sup> With respect to these 13 localities for which positive findings were made in the Judgment, the charges which were proven at trial included, *inter alia*, those which affected whole communities, such as intentionally directing attacks against civilians as a war crime (Count 3), persecution as a crime against humanity (Count 10), forcible transfer and deportation as a crime against humanity, and

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<sup>102</sup> See the Annex to the Registry’s 30 January 2023 Submissions, *supra* note 95.

<sup>103</sup> See the Impugned Decision, *supra* note 1, para. 299.

<sup>104</sup> *Idem*, para. 300.

<sup>105</sup> See Annex I, *supra* note 1, Part II - Positive Findings.

ordering displacement of civilian population as a war crime (Counts 12 and 13).<sup>106</sup> In light of the above, the Legal Representative finds it difficult to reconcile the Chamber's acknowledgment of the large and widespread scope of the victimisation in the present case with its mistaken conclusion that it was not proven at trial that Mr Ntaganda was liable for crimes committed against the entirety of the 13 communities.

59. Second, while acknowledging that "*an important part of the population located at the time of the attacks in several villages are to be considered when estimating the total number of potential beneficiaries of reparations*",<sup>107</sup> the Chamber found that "*many inhabitants had already left and do not appear to necessarily fall within the scope of the conviction*".<sup>108</sup> In making this finding, the Chamber referred to the TFV's submissions being in effect a simple statement with no reference to any source.<sup>109</sup>

60. In fact, although some civilians may have managed to leave the area, the majority of them could not simply do so as they were concentrated and encircled in the Walendu-Djatsi *collectivité*. In this regard, Trial Chamber VI found in the Judgment that a great number of people who fled Mongbwalu arrived in the Walendu-Djatsi *collectivité* and were concentrated in Lipri, Kobu and Bambu,<sup>110</sup> while the objective of the operation in said villages was to destroy that triangle.<sup>111</sup> Trial Chamber VI also found that Lipri, Kobu and Bambu were attacked simultaneously from three different sides on or about 18 February 2003 in the context of the UPC/FPLC's coordinated operation consisting of several assaults on villages in the Walendu-Djatsi *collectivité*. In particular, Kobu was attacked from Kilo, Lipri was attacked from Bunia, and Bambu was attacked from Nizi and Mabanga.<sup>112</sup> Accordingly, given the UPC/FPLC's *modus operandi*, the civilians in the Walendu-Djatsi *collectivité* could simply not leave

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<sup>106</sup> *Ibid.*

<sup>107</sup> See the Impugned Decision, *supra* note 1, para. 301.

<sup>108</sup> *Ibid.*

<sup>109</sup> See the TFV's 30 January 2023 Submissions, *supra* note 90, para. 45.

<sup>110</sup> See the Judgment, *supra* note 4, para. 549.

<sup>111</sup> *Idem*, para. 558.

<sup>112</sup> *Idem*, para. 562, and footnote 1736.



the area. The large number of civilians who were escaping the violence in the Walendu-Djatsi *collectivité* is consistent with the United Nations' estimate of 60,000 persons displaced in the *shika na mukono* operation.<sup>113</sup>

61. Third, the Chamber found that when estimating the number of potential beneficiaries of reparations, *"a distinction should be made between official figures and the number of persons not taking a direct part in hostilities likely present at the time of the crimes at the different villages"*.<sup>114</sup> In making this finding, the Chamber referred to the Defence's submissions being in effect again a simple statement with no reference to any source.<sup>115</sup> Furthermore, this finding is in contradiction with the general presumption of civilian status under international humanitarian law (the "IHL") as acknowledged by Trial Chamber VI and the Chamber. In this regard, Trial Chamber VI found that the general presumption of protection under IHL – that *"in case of doubt whether a person is a civilian, that person shall be considered to be a civilian"*, applies to non-international armed conflicts.<sup>116</sup> Similarly, in the Impugned Decision the Chamber stated that *"taking into account the presumption of civilian status under IHL, the Chamber considers that the account of persons claiming to be victims [...] shall be assessed on a case-by-case basis in order to determine whether they are persons protected under IHL"*, and that it *"does not consider that the absence of information concerning the occupation of the victims (or of their immediate family members) in their dossiers precludes a finding, on a balance of probabilities, that the victims are entitled to reparations"*.<sup>117</sup>

62. Therefore, it is submitted that the Chamber erred in the exercise of its judicial discretion by entirely disregarding the Legal Representative's submissions supported by several corroborative sources and by disregarding its own findings on the extent of the victimisation in the present case – while choosing to rely on the TFV's and

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<sup>113</sup> See *supra* para. 47.

<sup>114</sup> See the Impugned Decision, *supra* note 1, para. 301.

<sup>115</sup> See the Defence's 30 January 2023 Submissions, *supra* note 87, para. 60.

<sup>116</sup> See the Judgment, *supra* note 4, para. 883.

<sup>117</sup> See the Impugned Decision, *supra* note 1, para. 112.

Defence's submissions, which do not reference any sources and nor are they corroborative.

63. The Chamber then turned to its analysis of the Registry's submissions. At the outset, the Chamber noted "*with surprise that in its more recent filing the Registry sharply deviates from its prior consistent submissions*" regarding the estimated number of potential beneficiaries of reparations, and that "*when submitting the results of the preliminary mapping exercise in 2020, the Registry clearly identified the sources of information for each location*".<sup>118</sup> After having discussed the more recent figures provided by the Registry in 2023, the Chamber found that, when compared to the information provided by the Registry in 2020, the more recent figures lack support with clear sources, including the figures regarding the localities excluded from the conviction, and contain considerable differences as compared to the 2020 figures.<sup>119</sup> The Chamber concluded that it was unable to rely on them "*to project estimations as to the total number of beneficiaries of reparations in the case*".<sup>120</sup>

64. Surprisingly, the Chamber ultimately decided not only to disregard the Registry's 2023 figures, but also the 2020 figures, even though it appeared to consider the latter figures reliable and deemed them to be based on sufficient sources. Instead, and also surprisingly, the Chamber decided to take into consideration "*the Registry's observation that its previous [2020] estimations only included potential beneficiaries who resided in or had returned to the relevant localities*",<sup>121</sup> although it earlier found that "*this affirmation is not supported by any concrete source but only by a vague reference to 'information collected in the field by Registry staff'*".<sup>122</sup> It is submitted that rather than entirely disregarding the Registry's figures, a reasonable Chamber would have requested the Registry to clarify the sources of its figures. Instead, the Chamber took

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<sup>118</sup> *Idem*, para. 304.

<sup>119</sup> *Idem*, para. 305.

<sup>120</sup> *Idem*, para. 307.

<sup>121</sup> *Ibid.*

<sup>122</sup> *Idem*, para. 304.

the expedient route of not doing so, and thus it was easier for it to also dismiss the Legal Representative's figures, as both submissions suggested the likelihood of a large number of potential beneficiaries of reparations.

65. Regarding the Defence's submissions, the Chamber, *inter alia*, "did not find feasible the Defence's suggestion that the appropriate way forward would have been for the VPRS to conduct a detailed mapping exercise, to identify new potential beneficiaries and collect new application forms".<sup>123</sup>

66. Finally, the Chamber turned to its analysis of the TFV's submissions. At the outset, the Chamber acknowledged that the TFV was "cautious in noting that the calculations were imprecise",<sup>124</sup> noted that "its calculations were not exact estimations", and that the TFV had applied a "very conservative approach".<sup>125</sup> It further specified that the TFV projected that *at the very least*, approximately 7,500 direct and indirect victims of the attacks would qualify as beneficiaries who have suffered certain forms of material, psychological and possibly physical harm; and that it is likely that more than 14,000 individuals would qualify as indirect victims who suffered primarily from psychological harm.<sup>126</sup>

67. In the middle of its reasoning, after having referred to the Defence's submissions that the proposed figure of 21,500 victims of the attacks is speculative, and that the more accurate number of victims for this group would not go beyond 2,500 victims of the attacks having already been identified/mapped in the course of the proceedings,<sup>127</sup> the Chamber stated that it was not relying on "the full 21,500 potential victims of the attacks projected by the TFV, but only on the projection of 7,500 direct and indirect victims that would have suffered psychological, physical and material harm",<sup>128</sup>

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<sup>123</sup> *Idem*, para. 308.

<sup>124</sup> *Idem*, para. 311.

<sup>125</sup> *Idem*, para. 310.

<sup>126</sup> *Ibid.*

<sup>127</sup> *Idem*, para. 311.

<sup>128</sup> *Ibid.*

despite the TFV's disclaimer that their estimated 21,500 potential victims was "*conservative*".<sup>129</sup>

68. Thus, it appears that the Chamber decided to pick a figure between the TFV's conservative estimation and the Defence's estimation of the number of potential beneficiaries of reparations, and decided that 7,500 would be sufficient to accommodate both the TFV's minimum possible estimation and the Defence's opposition to the maximum 21,500 estimation provided by the TFV. In doing so, the Chamber completely disregarded the Legal Representative's and the Registry's figures, which are based on independent and different sources, which only enhances their probative value when considered together.

69. It is submitted that in comparison with the estimations given by the TFV and the Defence, which do not align with each other, it is difficult to reconcile how and why the Chamber decided not to rely on corroborative sources of information provided by the Legal Representative and the Registry to come to an estimate as concrete as possible regarding the number of beneficiaries of reparations amongst the victims of attacks.

70. As applied to the current situation in which a reasonable trier of fact with the four sources of information before it originating from the Defence, the TFV, the Registry and the Legal Representative – of which two sources are independent and corroborative – should have been enough for the Chamber to be satisfied that the estimation that there are at least 100,000 direct victims is "*as concrete as possible*". The figures on the population size provided by the Registry corroborate with the figures referred to by the Legal Representative. A reasonable approach the Chamber could have taken would be to rely on said corroborative figures with caution, rather than rejecting them outright.

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<sup>129</sup> *Idem*, para. 310.

71. It is further submitted that the figures on the population size of the affected villages could and should have been used by the Chamber as being indicative of the number of people who are potential beneficiaries of reparations. This would also have been consistent with Trial Chamber VI's and the Chamber's findings, already referred to above, on the large extent of victimisation in the present case. Even if used with caution, the figures on the population size of the affected villages show that the number of potential beneficiaries of reparations is much higher than the speculative figure of 7,500 chosen with no discernible basis.

72. The Chamber acknowledged that the TFV did not provide a list of identifiable sources, and only referred to meetings, consultations, and other information which informed the TFV's estimations.<sup>130</sup> While the Chamber further agreed with the Legal Representative that it would have been preferable for the TFV to provide further information regarding the sources it consulted, surprisingly it was satisfied that these consultations with different unnamed individuals were enough to inform Chamber's projections regarding the number of victims.<sup>131</sup> Yet at the same time, the Chamber found that the figure on the population size of Mongbwalu in 2002 and 2004 provided in the United Nations' report referred to by the Legal Representative was of a "*low probative value*" as it "*does not cite any source or reference*".<sup>132</sup> It also found unreliable the figure on the population size of Mongbwalu in 2004 provided by the World Gazetteer.<sup>133</sup> In doing so, the Chamber disregarded the very fact that said figures are corroborative and are also consistent with the figure provided by the Registry in 2023.

73. Additionally, while the United Nations' report may be deemed of a low probative value during the trial when determining the individual criminal liability of the accused, at the reparations stage, said information should be assessed at the

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<sup>130</sup> *Idem*, para. 312.

<sup>131</sup> *Ibid.*

<sup>132</sup> *Idem*, para. 302.

<sup>133</sup> *Ibid.*

relevant standard of proof – *i.e.* on the balance of probabilities, which is a *lower* threshold, regarding whether this information is of a sufficient probative value, either by itself or taken together with other relevant evidence – to determine the population size of the affected localities.

74. By relying on the minimum figure provided by the TFV, the Chamber failed to elaborate on the reasons why and how this figure could be deemed reasonable and reliable since it came from unidentifiable sources. Therefore, it is not discernible why the TFV's information was given more weight than the figures provided by the Legal Representative and the Registry which were obtained from independent, identifiable and corroborative sources. The Chamber's reasoning and conclusion on the matter is not discernible.

75. Accordingly, although being required by the applicable law to provide an estimate as concrete as possible and based upon a sufficiently strong evidential basis, the Chamber settled on a convenient figure without sufficient reasoning as to its evidential value, given that no reasonable trier of fact could have come to this estimation in light of the pool of information available on the record. The Chamber itself acknowledged that the estimated number of victims is "*based on projections with an uncertain basis*",<sup>134</sup> while the TFV indicated that it was in "*no position to provide an estimate*",<sup>135</sup> and that the "*figures provided are therefore not estimates [but] numbers that the Trust Fund currently considers that it is capable of accommodating within the amount of liability set by the Trial Chamber*".<sup>136</sup> In light of these acknowledgements, the Legal Representative questions whether the Chamber's decision to rely on a figure corresponding to the TFV's minimum estimate of only 7,500 direct victims of attacks

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<sup>134</sup> *Idem*, para. 360.

<sup>135</sup> See the "Corrigendum of Public redacted version of the Annex 1 of ICC-01/04-02/06-2750-Conf-Anx1, notified on 25 March 2022", [No. ICC-01/04-02/06-2750-Anx1-Red-Corr](#), 14 April 2022, para. 96.

<sup>136</sup> *Ibid.*

which was further limited by the Chamber to include both direct and indirect victims, is a reasonable use of its discretionary decision making.

76. It is submitted that the errors as described above materially affected the Impugned Decision through the Chamber's errors of law and fact and in the exercise of its discretion, such that it is shown on the balance of probabilities that the Chamber's arbitrary decision on the number of beneficiaries should be reviewed as per the standard of review applicable to reparations proceedings.<sup>137</sup> Had the Chamber not committed the above errors, the cost to repair would have been more accurately calculated and the overall award would have been commensurate with the number of persons eligible to receive appropriate and fair reparations.

*b) Sub-Ground 1.2: The Chamber committed a combination of errors of fact and procedure by taking into account irrelevant information, and by failing to take into account relevant information, facts and evidence and/or by mis-appreciating relevant facts*

77. By relying on the figure of 7,500 potential beneficiaries of reparations as direct and indirect victims of the attacks, the Chamber not only erred in law and in the exercise of its discretion,<sup>138</sup> but also committed additional errors of fact and procedure. It is submitted that the Chamber's reasoning, which led to the decision to give more weight to unidentifiable sources of information from the TFV regarding the number of potential beneficiaries amongst the victims of attacks, when presented with a range of independent, identifiable and corroborative sources on the same topic, begs the question of whether any reasonable trier of fact could have formulated the current total number of potential beneficiaries in light of the particular set of circumstances in the present case. As a result, the Legal Representative submits that the Chamber relied on a speculative figure to estimate the number of potential beneficiaries of reparations,

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<sup>137</sup> See *supra* paras. 30-32.

<sup>138</sup> See *supra*, Sub-Ground 1.1.

by taking into account irrelevant information without ascertaining, or at least properly inquiring into, the sources of said information and the methodology of its gathering.<sup>139</sup>

78. In an attempt to corroborate the figure of 7,500, the Chamber referred to the data from the Registry's preliminary mapping exercise in 2019<sup>140</sup> and the numbers respectively provided by the Appointed Experts.<sup>141</sup> The Registry indicated that more than 70% of the pre-conflict population was still displaced at the time of its 2019 mapping.<sup>142</sup> However, the strictly mathematical approach that the Chamber took in this regard,<sup>143</sup> is not appropriate in the current context as such, and given in addition that the Chamber could have estimated the number of potential beneficiaries of reparations based on relevant information and figures provided by the Legal Representative and the Registry.

79. The fact that the Registry could identify 2,276 victims in 30% of the population that was not displaced, does not mean that the most accurate method of estimating the number of the potentially eligible direct and indirect victims amongst the remaining 70% of the population, can be established by a simple mathematical projection. If indeed as observed by the Registry, during its preliminary mapping exercise more than 70% of the pre-conflict population of the affected localities had remained displaced as a result of the crimes committed at the time and had not returned because of the ongoing conflict in Ituri, the majority of those individuals, if not all, are very likely to have directly and indirectly suffered from some of the crimes for which Mr Ntaganda was convicted.

80. By relying for the purpose of its mathematical projection on the figures obtained by the Registry during its 2019 preliminary mapping exercise, the Chamber

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<sup>139</sup> See the Impugned Decision, *supra* note 1, para. 312.

<sup>140</sup> See the Registry's 30 January 2023 Submissions, *supra* note 95, para. 17.

<sup>141</sup> See the Impugned Decision, *supra* note 1, para. 316.

<sup>142</sup> See the Registry's 30 January 2023 Submissions, *supra* note 95, para. 19.

<sup>143</sup> See the Impugned Decision, *supra* note 1, para. 317.



referred to but failed to draw the appropriate conclusions from the Registry's indication that its estimates were "*conservative*"<sup>144</sup> and were collected "*in the context of a limited and carefully targeted approach aimed at identifying individuals who did not participate in the Case proceedings, and for whom it could be said with a relative degree of certainty - but still based only on secondary sources consulted - that they suffered harm as a result of at least one of the crimes subject to conviction in the Case*".<sup>145</sup> Furthermore, the Chamber also disregarded the Registry's more recent submissions that "*some crimes for which Mr Ntaganda was convicted [...] are likely to have victimized large portions of the populations living at that time in [the respective] localities*".<sup>146</sup>

81. As submitted above, the Legal Representative and the Registry provided the Chamber with independent, identifiable and relevant sources of information – which are corroborative – regarding the population sizes of the localities for which positive findings were made in the Judgment. Any reasonable Chamber would have used these corroborative sources for the purpose of its estimation on a basis as concrete as possible, as required by the established jurisprudence of the Court, rather than relying on a specious mathematical projection that does not reflect the true number of the affected victims of the attacks. Accordingly, the figure of 7,587 potential beneficiaries obtained by the Chamber as a result of its mathematical projection is irrelevant information.

82. In turn, the Appointed Experts' figure of 3,500 of direct victims was based on the Registry's estimates obtained during its preliminary mapping exercise and therefore does not constitute an independently verified number.<sup>147</sup> In addition, the

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<sup>144</sup> *Idem*, para. 285. See also the Registry's 30 January 2023 Submissions, *supra* note 95, para. 18.

<sup>145</sup> See the Impugned Decision, *supra* note 1, para. 285. See also the Registry's 30 January 2023 Submissions, *supra* note 95 para. 18.

<sup>146</sup> See the Registry's 30 January 2023 Submissions, *supra* note 95, para. 20.

<sup>147</sup> See the "Annex 1 to the Registry Transmission of the Appointed Experts' Reports", [No. ICC-01/04-02/06-2623-Anx1-Red2](#), 3 November 2020, para. 28 and p. 107.

Appointed Experts were unable to ascertain the number of potential indirect victims.<sup>148</sup>

83. The Chamber assessed the weight of the Legal Representative's and the Registry's information, but ultimately rejected them as being unreliable, contradictory and/or not based on concrete sources.<sup>149</sup> However, this is difficult to reconcile with the Chamber's reliance on the TFV's "*imprecise*" calculations and "*very conservative approach*",<sup>150</sup> in combination with the "*widespread, systematic, and large-scale*" crimes for which Mr Ntaganda was convicted.<sup>151</sup> The fact that the crimes for which Mr Ntaganda was convicted affected 13 entire villages, coupled with the UPC/FPLC's predetermined aim to drive out all the Lendu from the localities targeted and resulting in large-scale victimisation,<sup>152</sup> provided sufficient objective reasons for the Chamber to rely on the population sizes of the affected localities for the purpose of estimating the number of potential beneficiaries of reparations.

84. In any event, the information and evidence provided by the Legal Representative and the Registry which were obtained from independent and identifiable sources, collectively offered the Chamber a stronger evidential basis for an estimate of the potential beneficiaries of reparations amongst the victims of attacks than the speculative figures the Chamber ultimately relied upon.

85. Accordingly, the Chamber erred in fact and/or in the exercise of its discretion amounting to an abuse of discretion by relying on unsubstantiated estimates projected by the TFV and the figure obtained as a result of a specious mathematical projection, and thus irrelevant information, while failing to take into account relevant information, facts and evidence provided by the Legal Representative and the

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<sup>148</sup> *Idem*, para. 29.

<sup>149</sup> See the Impugned Decision, paras. 299-307.

<sup>150</sup> *Idem*, paras. 310-311.

<sup>151</sup> *Idem*, para. 322.

<sup>152</sup> See *supra* para. 46

Registry which were obtained from identifiable sources and were corroborative.<sup>153</sup> Alternatively, the Chamber mis-appreciated these relevant facts, information and evidence that provided a sufficiently strong basis to believe that the number of potential beneficiaries of reparations is at least tens of thousands, and in any event a number much higher than the figures relied upon by the Chamber.

86. It is submitted that the errors as described above materially affected the Impugned Decision. Had the Chamber ascertained the real extent of the victimisation with respect to the victims of the attacks from the start through ordering a timely and comprehensive mapping exercise under its preferred parameters – or taken the next best approach, which would be relying on independent and corroborative figures submitted by both the Legal Representative and the Registry – it would have rendered a decision reflecting a properly estimated number of potentially eligible victims and the final award would have been based on a proper foundation.

**2. Ground 2: The Chamber committed a combination of errors of law, fact and procedure in determining the cost to repair for the victims of the attacks**

*a) Sub-Ground 2.1: The Chamber erred in law and/or fact and procedure by failing to establish a proper basis for its approach to the cost to repair for the victims of the attacks*

87. The errors under Ground 2 are closely linked to, and result from the Chamber's errors identified under Ground 1 above. In determining the cost to repair for the victims of the attacks, the Chamber relied on a speculative total estimate of 7,500 direct *and* indirect potentially eligible victims of the attacks,<sup>154</sup> rather than on estimates "*as concrete as possible and based upon a sufficiently strong evidential basis*", as required by the Appeals Chamber.<sup>155</sup> By failing to properly establish the fundamental parameter of the number of potentially eligible beneficiaries based on a sufficiently strong evidential

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<sup>153</sup> See the Impugned Decision, *supra* note 1, paras. 274-276 and 286.

<sup>154</sup> *Idem*, para. 343.

<sup>155</sup> See the *Ntaganda* Appeals Judgment, *supra* note 12, paras. 168-169 and 172.

basis, the Chamber was in no position to determine a fair, equitable, and appropriate cost to repair with respect to the victims of the attacks.

88. The Chamber considered it “*fair and appropriate to use the Lubanga estimations based on the actual costs of implementation as the basis to calculate the approximate costs of repair[ing] the harms suffered by the victims of the attacks in the Ntaganda case*”.<sup>156</sup> For the purpose of determining the cost to repair for the victims of the attacks, the Chamber chose to proceed with a *per capita* calculation by multiplying the figure of 7,500 with the average cost allocated for each type of mental care, physical care, and socio-economic support in the *Lubanga* case.<sup>157</sup> As a result, the Chamber obtained the total direct and indirect costs of rehabilitative measures for all the victims of the attacks – in particular USD 5,032,898 for mental care,<sup>158</sup> USD 2,780,922 for physical care,<sup>159</sup> and USD 11,189,765 for socio-economic support.<sup>160</sup> It also awarded USD 130,000 to repair the harm caused as a consequence of the attack on the Sayo Health Centre.<sup>161</sup>

89. In effect, the Chamber determined the maximum possible amount<sup>162</sup> of the cost to address the harms suffered by all the victims of the attacks in the present case. At the outset, the Legal Representative submits that the Chamber’s projection of the cost to repair for the victims of the attacks in the present case based on the actual costs of rehabilitative measures in the *Lubanga* case is inappropriate, and is another appealable issue which will be discussed in Sub-Ground 2.2 below.

90. Under the present Sub-Ground, the fundamental issue is that the allocated maximum possible amount of the cost to repair will only be capable of comprehensively addressing the harms suffered by the maximum of 7,500 victims of

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<sup>156</sup> See the Impugned Decision, *supra* note 1, para. 342.

<sup>157</sup> *Idem*, paras. 346, 349 and 355.

<sup>158</sup> *Idem*, para. 346.

<sup>159</sup> *Idem*, para. 349.

<sup>160</sup> *Idem*, para. 355.

<sup>161</sup> *Idem*, para. 356.

<sup>162</sup> *Idem*, para. 314.

the attacks, being as previously submitted, a purely speculative figure which does not properly reflect the realistic number of potentially eligible victims of the attacks who are likely to come forward to benefit from reparations at the implementation phase. If more than 7,500 eligible victims of the attacks will come forward to obtain reparations, this will inevitably reduce the average *per capita* amount for the victims of the attacks, leading to the unfair and unequal treatment of the victims of the attacks *vis-à-vis* the former child soldier victims who have been accounted for with the sufficient degree of precision in the context of the *Lubanga* case. A significantly greater number than the currently estimated 7,500 eligible victims of the attacks who are likely to come forward to benefit from reparations will only dilute the meaningfulness of the reparations to be provided to them, rendering any such reparations to be purely symbolic and against the very objective of the reparations in the present case which is “*supporting sustainable and long-term livelihood and well-being [of the victims]*”.<sup>163</sup>

91. Furthermore, notwithstanding the fact that the Reparations Order, whose integral part is the Impugned Decision,<sup>164</sup> is issued against Mr Ntaganda as a convicted person regardless of his indigence, the Chamber’s unfortunate choice of words in holding that it is primarily the Convicted Person who is to pay for the reparations and that the TFV is not obliged to complement the award,<sup>165</sup> does not assist the current situation. Even if the Convicted Person’s financial situation and any potential resources available to the TFV are irrelevant to the determination of the scope of the Convicted Person’s liability for reparations,<sup>166</sup> rather than emphasising the funding related issues, a more constructive approach from the Chamber’s side would be to proactively encourage the TFV to diversify its funding sources and develop its fundraising capacity by enhancing its communications capacity to become a more visible and well-known institution, and to ensure effective synergies and strategies

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<sup>163</sup> See the Reparations Order, *supra* note 6, para. 9.

<sup>164</sup> See the Impugned Decision, *supra* note 1, para. 361.

<sup>165</sup> *Idem*, para. 314.

<sup>166</sup> See the Reparations Order, *supra* note 6, para. 97.

amongst relevant actors.<sup>167</sup> Such judicial persuasion could have included calling on the States Parties to the Statute to collaborate, in accordance with the concept of reparative complementarity,<sup>168</sup> towards financial, institutional and operational solutions to enhance the impact and reach of the TFV's programmes that realize the rights of victims affected by the crimes under the jurisdiction of the Court to be awarded reparations.

92. It is submitted that the fact that the Chamber failed to establish on a sufficiently strong evidential basis the crucial parameter of the cost to repair, namely the number of potentially eligible victims, materially affected the Impugned Decision in that the overall amount set at the end was very inaccurate. The impact of this error is essentially the same as that identified above in Ground 1 — since the overall amount of Mr Ntaganda's liability is set inaccurately, it cannot be discerned whether the overall award will be sufficiently adequate and fair to comprehensively address the harm suffered by all eligible victims should the very realistic scenario in which a significantly higher number of the low estimate of 7,500 victims will come forward and be deemed eligible for reparations. These identified errors further affect the practicability of designing programmes for the ultimate benefit of the victims of the attacks. There is a great risk that ultimately only a fraction of the victims of the attacks will be able to actually benefit from reparations in the present case under the Chamber's current estimate and approach towards reparations.

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<sup>167</sup> See the REDRESS Trust Report "[No Time to Wait: Realising Reparations for Victims before the International Criminal Court](#)", pp. 34-35.

<sup>168</sup> See MOFFETT (L.) and SANDOVAL (C.), [Tilting at windmills: Reparations and the International Criminal Court](#), *Leiden Journal of International Law*, 2021, 34, pp. 749-769, where the authors argue in particular that "*reparations at the ICC cannot be seen in isolation from other reparation practices in the states where the Court operates*" and "[a] possible response to the lack of voluntary contributions could be that the Assembly of State Parties consider creating a dedicated budget line for reparations in future budgets of the Court, creating more certainty and sustainable funding, rather than the TFV having to go around cap-in-hand seeking funding each year" (pp. 749 and 768). See also, MOFFETT (L.), [Reparative complementarity: ensuring an effective remedy for victims in the reparation regime of the International Criminal Court](#), *The International Journal of Human Rights*, 2013, Vol. 17, No. 3, pp. 379-384.

***b) Sub-Ground 2.2: The Chamber erred in fact and procedure by establishing the cost to repair for the victims of the attacks based on the TFV's projections related to former child soldiers***

93. The Chamber committed an error of fact and procedure by determining the cost to repair for the victims of the attacks based on the TFV's projections for the former child soldier victims in the *Lubanga* case. As a starting point, the Chamber referred to the results of the first year of implementation of the reparations programme in the *Lubanga* case. The reparations approach in the *Lubanga* case was to provide 100% of the beneficiaries with mental care, and 41.77% of them with physical care.<sup>169</sup> The Chamber then noted that amongst the victims of the attacks included in the Sample in the present case, 100% of them suffered psychological harm, and 43.9% suffered physical harm.<sup>170</sup> The Chamber further noted that both groups of victims are from the same region and were affected by the same armed conflict,<sup>171</sup> and *assumed* that the victims of the attacks will need the same type of mental and physical care as the former child soldier victims.<sup>172</sup> The Chamber justified its approach by reference to its previous decision that all victims should be treated equally and should receive equivalent services as part of collective reparations with individualized components, even if they are implemented by different partners.<sup>173</sup>

94. The Legal Representative recalls that the reparations awarded in the present case should be aimed at addressing both the harm and the needs of the victims.<sup>174</sup> He fully agrees that the two groups of victims in the present case shall be treated equally.<sup>175</sup> However, treating the two groups of victims equally is not the equivalent as providing to all victims – simply by analogy – assistance and services they may not need or find helpful. In particular, the two groups of victims in the present case, the

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<sup>169</sup> See the Impugned Decision, *supra* note 1, paras. 344 and 347.

<sup>170</sup> *Ibid.*

<sup>171</sup> *Idem*, para. 342.

<sup>172</sup> *Idem*, paras. 344 and 347.

<sup>173</sup> *Idem*, para. 342.

<sup>174</sup> See the Reparations Order, *supra* note 6, para. 194.

<sup>175</sup> See the Impugned Decision, *supra* note 1, para. 342.

former child soldiers on the one hand, and the victims of the attacks on the other, suffered different types of short and long term harm, even if their harm was the result from the same conflict. This can result in significant differences regarding the form of support and assistance in addressing the harm suffered by the two groups of victims.

95. For example, eligible former child soldier victims in the *Lubanga* case had their mental and physical harm recognized, and accordingly, they were provided with mental and physical care. However, this does not simply translate to the equivalent presumption that eligible victims of the attacks would also *all* need both mental and physical care as a form of reparations, due to the diversity of pain and suffering experienced by each individual within each group of victims. Following continuous consultations with his clients, the Legal Representative submits that today – twenty years after the events – only a number of the victims of the attacks who suffered mental and physical harm would need mental support and physical care. Instead, a better and more effective way to address the multi-dimensional harm the majority of the victims of the attacks have suffered is to address this harm through socio-economic rehabilitative measures in order to ensure their sustainable well-being and livelihood, as recognized by the Reparations Order.<sup>176</sup>

96. If the Chamber was of the opinion that statistical projections were useful, as part of its discretion, the projections for the victims of the attacks should have been based on the results of the reparations programme in the *Katanga* case, and not the *Lubanga* case. Not only did the victims of the attacks in the present case and the victims in the *Katanga* case suffer from the conflict within the same temporal and territorial scope, they also both suffered crimes that were similar in nature – which makes the *Katanga* case a better comparison.

97. In the *Katanga* case, Trial Chamber II rendered an Order awarding individual and collective reparations to the 297 victims of crimes committed by Mr Germain

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<sup>176</sup> See the Reparations Order, *supra* note 6, paras. 9 and 194.



Katanga on 24 February 2003 during an attack on the village of Bogoro in the Ituri district of the DRC.<sup>177</sup> The eligible victims were awarded with a symbolic compensation of USD 250 per victim, in addition to collective reparations in the form of support for housing, income-generating activities, education aid and psychological assistance after Mr Katanga was found guilty as an accessory on one count of a crime against humanity (murder) and four counts of war crimes (murder, attacking a civilian population, destruction of property and pillaging).<sup>178</sup>

98. Similarly, in the same Situation in the DRC and in the conflict within the same temporal and territorial scope, the Appeals Chamber confirmed by majority the decision of Trial Chamber VI of 8 July 2019, which found Mr Ntaganda guilty of 18 counts of war crimes and crimes against humanity committed in the Ituri district of the DRC in 2002-2003.<sup>179</sup> Likewise, there were multiple assaults on a number of villages in which the civilian population was attacked, such that these civilian victims suffered crimes that were of a more similar nature to the victims in the *Katanga* case, than the crimes suffered by the former child soldier victims in the *Lubanga* case. The crimes against humanity perpetrated by Mr Ntaganda against the victims of attacks included murder and attempted murder, rape, sexual slavery, persecution, forcible transfer and deportation; and the war crimes included murder and attempted murder, intentionally directing attacks against civilians, rape, sexual slavery, ordering the displacement of the civilian population, intentionally directing attacks against protected objects, and destroying the adversary's property.<sup>180</sup>

99. Given the greater similarities between the victims of attacks in the present case and those in the *Katanga* case, where the nature of the crimes suffered by the victims

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<sup>177</sup> See the « Ordonnance de réparation en vertu de l'article 75 du Statut » (Trial Chamber II), 24 March 2017, [No. ICC-01/04-01/07-3728](#), with the English translation available on 17 August 2017, [No. ICC-01/04-01/07-3728-tENG](#).

<sup>178</sup> *Idem*, para. 306.

<sup>179</sup> See the Appeals Judgment, *supra* note 8.

<sup>180</sup> *Ibid.*

in both groups involved intentionally directing attacks against the civilian population, murder, pillage, and the destruction of property – in the conflict within the same temporal and territorial scope, – it is unclear why the *Katanga* reparations programme was not used by the Chamber as a benchmark for comparison instead.

100. Accordingly, the Legal Representative submits that the Chamber committed an error of fact and in the exercise of its discretion in establishing the cost to repair for the victims of the attacks based on the TFV's projections related to former child soldiers in the *Lubanga* case, when the *Katanga* reparations programme was a more accurate point of reference. The errors as described above materially affected the Impugned Decision. Indeed, had the Chamber used relevant projections related to the victims in the *Katanga* case, its calculations of the cost to repair for the victims of the attacks in the present case would have been more accurate, as the victims in both cases suffered from similar crimes during the conflict within the same temporal and territorial scope.

*c) Sub-Ground 2.3: The Chamber erred in law, fact and/or procedure by failing to explain how and to what extent the costs to repair for the victims of the attacks are 'fair' and 'appropriate'*

101. In the Impugned Decision, the Chamber held that the “TFV does not have discretion to limit reparations to available resources”, but it is “indeed for the Chamber to determine the total amount that it considers fair and appropriate to repair the harm caused to the victims of the crimes for which Mr Ntaganda has been convicted”.<sup>181</sup> The Chamber's endeavour to ensure that the cost to repair is “fair and appropriate” in the circumstances of the case to repair the harms suffered by the victims and bearing in mind the rights of the convicted person is continuously reiterated in the Impugned Decision.<sup>182</sup> The

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<sup>181</sup> See the Impugned Decision, *supra* note 1, para. 313.

<sup>182</sup> *Idem*, paras. 313, 323 and 342.

Chamber concluded that “*setting the amount of Mr Ntaganda’s liability for reparations at the total of USD 31,300,000 is fair, equitable, and appropriate*”.<sup>183</sup>

102. However, as argued under Sub-Ground 2.1 above, the Chamber set the maximum possible amount of the cost to repair for the victims of the attacks, *i.e.* USD 19,003,585, which in effect will only be capable of comprehensively addressing the harms suffered by a maximum of 7,500 victims of the attacks, being a purely speculative figure which does not properly reflect the realistic number of potentially eligible victims of the attacks who might come forward to benefit from reparations at the implementation phase.

103. It is submitted that a cost to repair cannot be ‘*appropriate*’ if it corresponds to the lowest possible number of potential beneficiaries of reparations. An award cannot be ‘*fair*’ when the lowest number of potentially eligible victims is taken as a basis for its estimation, thereby reducing the overall resources at disposal.

104. Although the established cost to repair may be deemed “*fair and appropriate*” for 7,500 victims of the attacks when compared to the cost to repair for the former child soldiers, it cannot be so if a more significant number of eligible victims of the attacks will come forward to benefit from reparations.

105. When the Chamber acknowledged that its “*estimated number of victims is based on projections with an uncertain basis*”,<sup>184</sup> it did not explain whether and to what extent the maximum cost to repair it established will be “*fair and appropriate*” in the scenario where more than 7,500 eligible victims of the attacks will come forward. It did not so because it could not. This is because, as argued under Sub-Ground 2.1 above, if more than 7,500 eligible victims of the attacks will come forward to obtain reparations, this will inevitably reduce the average *per capita* amount for the victims of the attacks, and as a consequence will lead to the unfair and unequal treatment of the victims of the

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<sup>183</sup> *Idem*, para. 360.

<sup>184</sup> *Ibid.*

attacks *vis-à-vis* the former child soldier victims, who have been ascertained to the sufficient degree of precision in the context of the *Lubanga* case. By confining the established cost to repair to a maximum of 7,500 victims of the attacks, the Chamber deprived itself of any capacity to ensure “*fair and appropriate*” reparations to a very likely larger number of eligible victims of the attacks.

106. The Chamber’s failure to anticipate, account and budget for the very likely situation in which more than the currently estimated figure of 7,500 direct and indirect potential beneficiaries of reparations will come forward during the implementation phase of the proceedings is demonstrative of the Chamber’s error in failing to provide reasons for its approach to “*fair and appropriate*” reparations, which materially affected the Impugned Decision. Such an approach materially affects the overall reparations award because of the uncertainty it creates in relation to the adequacy of the monetary award to repair the harm caused to all eligible victims of the attacks. This negatively impacts on the well-being of victims who are concerned about the risk of not receiving adequate and fair reparations of the harm they suffered as a result of the crimes for which Mr Ntaganda was convicted. Had the Chamber been genuinely driven by the goal to set a cost to repair which is both “*fair*” and “*appropriate*” to properly reflect the rights of the victims, and in compliance with its identified principles of reparations, the overall award set would have been commensurate with the extent of the victimisation in terms of the number of victims and the nature of the harm suffered.

### **3. Ground 3: The Chamber erred in law and in the exercise of its discretion by disregarding or misapplying its previous findings on the territorial scope of the reparations**

107. The Chamber committed an error of law and in the exercise of its discretion by disregarding or misapplying Trial Chamber VI’s and its own previous findings regarding the territorial scope of the reparations in the present case.<sup>185</sup> In particular,

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<sup>185</sup> See the Decision of 15 December 2020, *supra* note 82, para. 19(f). See also, the Reparations Order, *supra* note 6, para. 107; and the “Decision on the TFV’s Fourth Update Report on the Implementation

the Chamber disregarded or failed to properly apply the eligibility requirement for reparations to the victims who suffered harm in the forest or bush surrounding the villages for which positive findings were entered in the Judgment.

108. Indeed, in its Decision of 15 December 2020, Trial Chamber VI found that *“victims alleging to have suffered harm in the forest or bush surrounding locations for which positive findings were included in the Judgment may be eligible for reparations for any of the crimes for which the Chamber entered convictions on the basis of the relevant corresponding conduct having occurred in the forest or bush surrounding those locations”*.<sup>186</sup> The same findings were reiterated by Trial Chamber VI in the Reparations Order,<sup>187</sup> and by the Chamber in its Decision of 27 June 2022.<sup>188</sup> In the Reparations Order, Trial Chamber VI further clarified that *“the eligibility criteria for victims to receive reparations is unrelated to their official place of residence at the time the crimes were committed, as long they can demonstrate that they suffered harm as a result of a crime for which Mr Ntaganda was convicted”*.<sup>189</sup> In making this additional finding, Trial Chamber VI referred to the Legal Representative’s submissions, and appeared to concur with them that *“as a result of the UPC/FPLC taking control over the area, civilians massively fled throughout the Banyali-Kilo and Walendu-Djatsi collectivities, taking refuge in surrounding villages, hills, forests and bushes and that although originating from villages outside the scope of the conviction, they may have nonetheless suffered harm in the forest or bush surrounding locations for which the Judgment made findings”*.<sup>190</sup>

109. The Legal Representative understood Trial Chamber VI’s and the Chamber’s above findings to be reflective of the nature of the crimes committed, which resulted in the local population’s mass escape and the subsequent harm suffered by the victims

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of the Initial Draft Implementation Plan” (Trial Chamber II), [No. ICC-01/04-02/06-2761](#), 12 May 2022 (the “Fourth Decision on the IDIP”), para. 25.

<sup>186</sup> See the Decision of 15 December 2020, *supra* note 82, para. 19(f).

<sup>187</sup> See the Reparations Order, *supra* note 6, para. 107.

<sup>188</sup> See the Fourth Decision on the IDIP, *supra* note 185, para. 25.

<sup>189</sup> See the Reparations Order, *supra* note 6, para. 107 (emphasis added).

<sup>190</sup> *Idem*, para. 107, footnote 283 (emphasis added).

not only in their respective localities but also in the forest or bush when hiding and/or fleeing the violence. The Legal Representative's said understanding of the above findings was conveyed to his clients accordingly.

110. His understanding of the above findings is that victims alleging to have suffered harm in the forest or bush surrounding the localities for which positive findings were made in the Judgment on account of the crimes of persecution, forcible transfer, deportation, and/or displacement (namely Mongbwalu, Nzebi, Sayo, Kilo, Kobu, Sangi, Bambu, Jitchu, Buli, Nyangaray, Lipri, Tsili and Gola), may be eligible for reparations on the basis of the relevant corresponding conduct having occurred in the forest or bush surrounding those locations. It was further understood that victims who originated *from any village*, and not just the ones from the villages for which positive findings were made in the Judgment, may be eligible for reparations under the above conditions. This is because at no point when making and subsequently reiterating its respective findings, did Trial Chamber VI and the Chamber, confine the likelihood of the eligibility for reparations of victims who have suffered harm in the forest or bush *only* to the victims who originated from the villages for which positive findings were entered. In this regard, it is submitted that it would be unfair and unreasonable to deem ineligible for reparations, for instance, victims who originated from Bunde or Sindani or from the villages in the Banyali-Kilo *collectivité* who took refuge in the Walendu-Djatsi *collectivité*, and suffered harm and/or stayed in difficult conditions in the hills, forest or bush surrounding Lipri or Nyangaray or Kobu, together with the victims who originated from the latter locations, while hiding and/or fleeing the violence, on account of the UPC/FPLC taking control over the affected areas.

111. Trial Chamber VI's and the Chamber's above findings were incorporated in the TFV's Established Eligibility Criteria<sup>191</sup> as approved by the Chamber,<sup>192</sup> and served as

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<sup>191</sup> See the Established Eligibility Criteria, *supra* note 84, para. 31.

<sup>192</sup> See the Fourth Decision on the IDIP, *supra* note 185, paras. 20-27.

the basis for the TFV's eligibility assessment of the victims admitted to the IDIP. These findings were understood by the TFV in the same manner as the Legal Representative, in which its plain meaning reflected the nature of the crimes committed which resulted in the local population's mass escape, and the ensuing harm suffered by the victims in their respective localities *and* also in the forest or bush when hiding and/or fleeing the violence. Indeed, in the TFV's Established Eligibility Criteria, it was specified that [REDACTED].<sup>193</sup>

112. However, when determining on the dossiers of the victims included in the Sample, the Chamber disregarded or did not properly apply Trial Chamber VI's and its own abovementioned findings incorporated in the TFV's Established Eligibility Criteria in its assessment of the territorial scope of the reparations. Contrary to its previous findings, the Chamber applied a restrictive approach to the territorial scope of the reparations. It found that several victims who suffered harm when fleeing and/or hiding in the forest or bush surrounding the villages for which positive findings were entered, are not eligible for reparations. The Chamber did not provide any reason as to why it applied a restrictive approach to the territorial scope of the reparations, nor did it explain why it departed from its previous findings regarding the territorial scope of the reparations for the victims of attacks. As a result, a total of 31 victims of the attacks were found ineligible for reparations,<sup>194</sup> including victims a/01636/13, a/00212/13, a/00199/13 and a/00215/13 – who are *already* participating in the IDIP, as they were previously assessed by the TFV on the basis of the Established Eligibility Criteria approved by the Chamber.

113. With respect to the following victims:

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<sup>193</sup> See the Established Eligibility Criteria, *supra* note 84, para. 31, which *refers* to the Decision of 15 December 2020, *supra* note 82, para. 19(f).

<sup>194</sup> The concerned victims are a/00072/13, a/00412/13, a/00653/13, a/00973/13, a/01116/13, a/01128/13, a/20109/14, a/20127/14, a/20194/14, a/30309/15, a/00115/13, a/00136/13, a/01013/13, a/01193/13, a/01224/13, a/20029/14, a/30087/15, a/30433/15, a/01250/13, a/01585/13, a/01677/13, a/00215/13, a/00486/13, a/00494/13, a/00914/13, a/30285/15, a/01469/13, a/01605/13, a/00199/13, a/00212/13 and a/01636/13. See Annex I, *supra* note 1.

- (a) a/00072/13, a/00412/13, a/00653/13, a/00973/13, a/01116/13, a/01128/13, a/20109/14, a/20127/14, a/20194/14 and a/30309/15, the Chamber indicated that [REDACTED].<sup>195</sup>
- (b) a/00115/13, a/00136/13, a/01013/13, a/01193/13, a/01224/13, a/20029/14, a/30087/15 and a/30433/15, the Chamber indicated that [REDACTED].<sup>196</sup>
- (c) a/00136/13, a/01250/13, a/01585/13, a/01677/13 and a/00215/13, the Chamber indicated that [REDACTED].<sup>197</sup>
- (d) a/00412/13, while recalling that [REDACTED].<sup>198</sup>
- (e) a/00486/13 and a/00494/13 while recalling that [REDACTED].<sup>199</sup>
- (f) a/00914/13 and a/30285/15, while recalling that [REDACTED].<sup>200</sup>
- (g) a/01469/13, in relation to the victim's fleeing and hiding in the forest [REDACTED].<sup>201</sup>
- (h) a/01605/13, while recalling that [REDACTED].<sup>202</sup>
- (i) a/00199/13, while recalling that [REDACTED].<sup>203</sup>
- (j) a/00212/13, while recalling that [REDACTED].<sup>204</sup>
- (k) a/01636/13, in relation to the victim's escape and hiding in [REDACTED].<sup>205</sup>

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<sup>195</sup> See Annex I, *supra* note 1, paras. 30, 104, 158, 249, 290, 299, 584, 601, 632 and 774.

<sup>196</sup> *Idem*, paras. 38, 65, 257, 314, 342, 529, 734 and 818.

<sup>197</sup> *Idem*, paras. 65, 350, 430, 483 and 1060.

<sup>198</sup> *Idem*, para. 104.

<sup>199</sup> *Idem*, paras. 112 and 119.

<sup>200</sup> *Idem*, paras. 220 and 766.

<sup>201</sup> *Idem*, para. 386.

<sup>202</sup> *Idem*, para. 449.

<sup>203</sup> *Idem*, para. 1046.

<sup>204</sup> *Idem*, para. 1053.

<sup>205</sup> *Idem*, para. 1241.



114. The Chamber's above decisions are contrary to the plain meaning of its own findings on the eligibility of victims who suffered harm in the forest or bush, and also inconsistent with the nature of the crimes committed. In fact, the committed crimes resulted in the local population's mass escape throughout the Banyali-Kilo and Walendu-Djatsi *collectivités*, and the ensuing harm suffered by the victims in their respective localities and in the forest or bush when hiding and/or fleeing the violence, which is consistent with Trial Chamber VI's factual findings contained in the Judgment.

115. First, the crimes of forcible transfer, deportation, displacement and persecution for which Mr Ntaganda was convicted, caused harm to the victims of a continuous nature. The harm suffered by the victims include being forced to flee their respective villages in order to escape the violence and conflict, but also the harm suffered by the victims when in the forest or bush, while the victims continued to be persecuted and/or stayed in difficult conditions.

116. Second, the Judgment contains numerous factual findings about the victims' fleeing, hiding and suffering in the forest or bush surrounding the villages for which positive findings were made. In particular (i) many people present in Mongbwalu fled the town during the assault, to the bush and to other places such as Sayo and Kilo;<sup>206</sup> (ii) inhabitants of Sayo often fled to the bush;<sup>207</sup> (iii) a great number of people who fled Mongbwalu arrived in the Walendu-Djatsi *collectivité* and they were concentrated in Lipri, Kobu and Bambu;<sup>208</sup> (iv) the population of Djuba, Katho and Dyalo took refuge on hills nearby Lipri;<sup>209</sup> (v) prior to the assault on Kobu, following violence in the region, members of the Lendu population had sought refuge in Kobu;<sup>210</sup> (vi) during the assault on Kobu, people who managed to flee were hiding on the hills and in the

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<sup>206</sup> See the Judgment, *supra* note 4, paras. 497 and 537.

<sup>207</sup> *Idem*, para. 505.

<sup>208</sup> *Idem*, para. 549.

<sup>209</sup> *Idem*, para. 586.

<sup>210</sup> *Idem*, para. 571.

bushes in the area surrounding Kobu, including Buli;<sup>211</sup> (vii) following the assaults on Kobu and Bambu, a large number of individuals fled to Buli;<sup>212</sup> (viii) during the assault on Buli, people were chased into the surrounding bush;<sup>213</sup> and the UPC/FPLC subsequently searched the bush;<sup>214</sup> (ix) part of the population of Bambu, Kobu and Camp PM fled towards Mpetsi and Gola, where they were forced to endure harsh living conditions in the bush without adequate food or shelter;<sup>215</sup> (x) following assaults on Kobu and Bambu, a number of people fled to Gutsi,<sup>216</sup> where they stayed in the bush in difficult conditions;<sup>217</sup> (xi) following the assaults on Kobu and Bambu, people fled, *inter alia*, to Jitchu and hid in the bush;<sup>218</sup> and (xii) after the pacification meeting, people again fled to Jitchu;<sup>219</sup> on account of the UPC/FPLC taking control over Nyangaray, the population fled and hid in the bush where they stayed in difficult conditions.<sup>220</sup> Furthermore, it should be recalled that, as submitted above, given the UPC/FPLC's *modus operandi*, civilians who were escaping from the violence and hiding in the Walendu-Djatsi *collectivité*, could not simply leave the area as they were encircled,<sup>221</sup> and thus they could only move from one village to another, from one bush, forest or hill to another – in order to escape the violence.

117. More specifically, regarding the eligibility of the victims referred to in paragraph 113(a) above, it is unclear what the Chamber meant by stating that [REDACTED]. If the Chamber meant that victims can only be eligible for reparations when they have suffered harm when physically in the village, this is inconsistent with the nature of the crime of persecution and the underlying act of this crime as

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<sup>211</sup> *Idem*, para. 573.

<sup>212</sup> *Idem*, para. 603.

<sup>213</sup> *Idem*, para. 604.

<sup>214</sup> *Idem*, para. 605.

<sup>215</sup> *Idem*, para. 612.

<sup>216</sup> *Idem*, para. 615.

<sup>217</sup> *Idem*, para. 616.

<sup>218</sup> *Idem*, para. 617.

<sup>219</sup> *Ibid.*

<sup>220</sup> *Idem*, para. 640.

<sup>221</sup> See *supra* para. 60.

established by Trial Chamber VI and reiterated by the Chamber – “because of the UPC/FPLC taking control over Nyangaray resulted in individuals fleeing and hiding in the bush, where they stayed in difficult conditions”.<sup>222</sup> If the Chamber meant that only inhabitants of [REDACTED] may be eligible for reparations on account of persecution, given the local population’s mass escape throughout the Banyali-Kilo and Walendu-Djatsi *collectivités*,<sup>223</sup> it would be unfair and unreasonable to deem ineligible for reparations, for instance, victims who originated from Bunde or Sindani or from the villages in the Banyali-Kilo *collectivité* who took refuge in the Walendu-Djatsi *collectivité*, and suffered harm and/or stayed in difficult conditions in the forest or bush surrounding [REDACTED], together with the inhabitants of [REDACTED], while they were all hiding and/or escaping violence, on account of the UPC/FPLC taking control over the affected area.

118. As regards the eligibility of the victims referred to in paragraph 113(b) and (g) above, here the Chamber seems to have confined the eligibility for reparations on account of the crime of persecution to the inhabitants of [REDACTED] only. Similarly as in relation to [REDACTED], it would be unfair and unreasonable to deem ineligible for reparations, for instance, victims who originated from Bunde or Sindani or from the villages in the Banyali-Kilo *collectivité* who took refuge in the Walendu-Djatsi *collectivité*, and suffered harm and/or stayed in difficult conditions in the forest or bush surrounding [REDACTED], together with the inhabitants of [REDACTED], while hiding and/or fleeing violence, on account of the UPC/FPLC taking control over the affected area. In this regard, Trial Chamber VI found that a great number of people who fled Mongbwalu arrived in the Walendu-Djatsi *collectivité* and they were concentrated in Lipri, Kobu and Bambu.<sup>224</sup>

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<sup>222</sup> See the Judgment, *supra* note 4, paras. 640 and 1000.

<sup>223</sup> See *supra* paras. 60 and 115.

<sup>224</sup> See the Judgment, *supra* note 4, para. 549.

119. The same considerations as described above apply to the eligibility of the victims referred to in paragraph 113(d), (e), (h), (i), (j) and (k) above who have suffered harm in the forest or bush surrounding [REDACTED] respectively.

120. Regarding the eligibility of the victims referred to in paragraph 113(c) and (f) above, contrary to the Chamber's findings, the underlying acts of persecution in Kobu were not limited to the burning down of houses within a 5km radius around Kobu, but also included, like the persecution of inhabitants in Bambu, the local population's escape and hiding in the surrounding forest or bush where they were persecuted and/or stayed in difficult conditions. In this regard, Trial Chamber VI found that: (i) during the assault on Kobu, people who managed to flee were hiding on the hills and in the bushes in the area surrounding Kobu, including Buli;<sup>225</sup> (ii) following the assaults on Kobu and Bambu, a large number of individuals fled to Buli;<sup>226</sup> (iii) during the assault on Buli, people were chased into the surrounding bush,<sup>227</sup> and the UPC/FPLC subsequently searched the bush;<sup>228</sup> (iv) part of population of Bambu, Kobu and Camp PM fled towards Mpetsi and Gola, they were forced to endure harsh living conditions, in the bush without adequate food or shelter;<sup>229</sup> (v) following the assaults on Kobu and Bambu, a number of people fled to Gutsi,<sup>230</sup> and stayed in the bush in difficult conditions;<sup>231</sup> (vi) following the assaults on Kobu and Bambu, people fled *inter alia* to Jitchu and hid in the bush;<sup>232</sup> after the pacification meeting, people again fled to Jitchu.<sup>233</sup>

121. The Chamber committed a combination of an error of law and in the exercise of its discretion by failing to properly apply or disregarding its own findings

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<sup>225</sup> *Idem*, para. 573.

<sup>226</sup> *Idem*, para. 603.

<sup>227</sup> *Idem*, para. 604.

<sup>228</sup> *Idem*, para. 605.

<sup>229</sup> *Idem*, para. 612.

<sup>230</sup> *Idem*, para. 615.

<sup>231</sup> *Idem*, para. 616.

<sup>232</sup> *Idem*, para. 617.

<sup>233</sup> *Ibid.*

regarding the territorial scope of the reparations as consistent with Trial Chamber VI's factual findings contained in the Judgment, and by failing to provide a reasoned opinion on this matter. As demonstrated above with reference to Trial Chamber VI's factual findings against the Chamber's decisions on the eligibility for reparations on certain victims, since the outcome is so unfair or unreasonable, the only conclusion that can be reached is that the Chamber failed to exercise its discretion judiciously. The Chamber's sudden restrictive approach to the territorial scope of the reparations, if not corrected by the Appeals Chamber, will result in the right to reparations being denied to a significant number of the victims of the attacks who suffered harm in the forest or bush when they fled the violence on account of the UPC/FPLC taking control over the affected areas.

122. The Chamber's departure from its previous findings on the territorial scope of the reparations is very likely to cause stress, anxiety and concern to the victims of the attacks who suffered harm in the forest or bush surrounding the villages for which positive findings were made – particularly as the concerned victims were informed about their likely eligibility for reparations based on the plain meaning of the abovementioned findings, which formed the basis of the Established Eligibility Criteria as applied by the TFV. This course of events has a significant impact on the legitimate expectations of the victims of the attacks regarding their entitlement to reparations, and it is in the interests of the victims to have the territorial scope of reparations clarified.

123. The errors identified above materially affected the Impugned Decision, as the Chamber would have rendered a decision that is substantially different from the decision that was affected by the errors, had the errors not been made. In particular, the Chamber would have assessed as eligible for reparations all victims included in the Sample who suffered harm in the forest or bush surrounding the villages for which positive findings were made, with an important impact on the eligibility of all other victims who suffered harm in the similar circumstances.

#### **4. The errors identified under the Three Grounds of Appeal materially affected the Impugned Decision**

124. The errors identified under the Three Grounds of Appeal, either separately or taken together, materially affected the Impugned Decision. The errors lie at the heart of the Chamber's determination of the scope of Mr Ntaganda's liability for reparations *vis-à-vis* the victims of the crimes for which he was convicted. The scope of Mr Ntaganda's liability is key to the Impugned Decision, and ultimately dictates the extent to which the harm can be repaired. In light of the foregoing, the errors committed warrant the intervention of the Appeals Chamber.

125. In particular, and as described above, the manner in which the Chamber has estimated the number of potential beneficiaries of reparations amongst the victims of the attacks and calculated the cost to repair is fraught with errors.

126. First, the Chamber committed an error of law, fact and in the exercise of its discretion when it took into account irrelevant information, failed to take into account relevant information, facts and evidence, and to give a reasoned opinion on the weight given to the sources of information it relied upon when estimating the number of potentially eligible victims of the attacks, such that no reasonable trier of fact could have come to the conclusion that only 7,500 direct and indirect victims of attacks are eligible for reparations in light of the particular set of circumstances in the present case. Said errors of law, fact and in the exercise of discretion materially affected the Impugned Decision such that had these errors not been committed, the Impugned Decision would have substantially differed from the one rendered.

127. Second, by failing to provide estimates as concrete as possible on the number of potential beneficiaries of reparations amongst the victims of the attacks and by setting the cost to repair based on a purely speculative figure, the Chamber has created uncertainty as to whether and to what extent the overall cost to repair is sufficient to address the harm suffered by the victims of the attacks in a meaningful way. The

sufficiency of the set overall cost to repair would be entirely dependent on the unpredictable number of eligible victims who will come forward as the reparations programme progresses, which would have an impact on the adequacy of any programmes designed by the TFV to meet the needs of the victims of the crimes committed by Mr Ntaganda.

128. Third and finally, in a discretionary error, the Chamber arbitrarily departed from Trial Chamber VI's and its own previous findings on the territorial scope of the reparations as incorporated in the Established Eligibility Criteria – which the Legal Representative understood as based on its plain meaning and conveyed to his clients. The Chamber has created legal uncertainty as to the eligibility of the victims who suffered harm in the forest or bush surrounding the villages for which positive findings were entered. In fact, victims a/01636/13, a/00212/13, a/00199/13 and a/00215/13 were found eligible based on the Established Eligibility Criteria and admitted to the IDIP. Under the Chamber's current arbitrary departure from the previously stated principles, these victims would have to be excluded from the programme while *already* being provided with relevant assistance – which stands in stark contrast with the “*do no harm*” principle and produces an irreconcilable result in terms of these victims' right to reparations. Other concerned victims who had legitimate expectations to benefit from reparations in the present case on account of harm they suffered in the forest or bush based on the Chamber's initial findings on the territorial scope of the reparations, will now be informed the contrary – which will certainly have a negative impact on their wellbeing and their trust in the overall reparations programme.

129. The Legal Representative respectfully submits that it is imperative for the Appeals Chamber to correct the Impugned Decision in which the Chamber failed to exercise its discretion judiciously, such that an unfair and unreasonable outcome materialised – otherwise certain victims who suffered from the crimes committed by Mr Ntaganda will not fall within the parameters of the reparations award.

**VI. RELIEF SOUGHT**

130. Pursuant to article 82(4) of the Statute and rule 153(1) of the Rules, the Legal Representative respectfully requests the Appeals Chamber to:

- **VACATE** the Chamber's findings contained in the Impugned Decision and Annex II thereto regarding its estimation of the number of potential beneficiaries of reparations amongst the victims of attacks, the cost to repair for the victims of the attacks, and the eligibility for reparations of the victims who have suffered harm in the forest or bush surrounding the villages for which positive findings were made in the Judgment;
- **CORRECT** the errors identified under the Three Grounds of Appeal above; and
- **AMEND** the Impugned Decision without remanding the matters to the Chamber in order to expedite the proceedings and avoid any further delay.

**RESPECTFULLY SUBMITTED,**



Dmytro Suprun  
Common Legal Representative of the Victims of the Attacks

Dated this 31<sup>st</sup> day of October 2023  
At The Hague, The Netherlands