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Date: **28 February 2020**

**TRIAL CHAMBER VI**

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

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

***THE PROSECUTOR v. BOSCO NTAGANDA***

**Public**

**Trust Fund for Victims' observations relevant to reparations**

**Source: The Trust Fund for Victims**

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## I. PROCEDURAL HISTORY

1. On 8 July 2019, Trial Chamber VI (“Trial Chamber”) convicted Mr Ntaganda for 18 counts of war crimes and crimes against humanity committed in Ituri, Democratic Republic of the Congo (“DRC”), between 2002 and 2003.<sup>1</sup> On 7 November 2019, he was sentenced to a total of 30 years imprisonment.<sup>2</sup>
2. On 25 July 2019, the Single Judge acting on behalf of the Trial Chamber issued an “Order for preliminary information on reparations”<sup>3</sup> wherein he requested the Registry to submit preliminary observations on discrete issues concerning the identification of victims not yet participating in the case, the appointment of experts, and an update on the security situation in the DRC.
3. On 5 September 2019, the Registry filed its submissions, attaching its preliminary observations as an annex (“Registry’s Preliminary Observations”).<sup>4</sup> On 3 October 2019, the legal representatives of victims (“LRVs”), the Defence of Mr Ntaganda, the Office of the Prosecutor, and the Trust Fund for Victims (“Trust Fund”) submitted their respective responses to the Registry’s Preliminary Observations.<sup>5</sup>
4. On 5 December 2019, the Single Judge issued an order setting deadlines in relation to reparations (“Order Setting Deadlines”)<sup>6</sup> in which he, *inter alia*, invited interested organisations to request leave to make submissions pursuant to article 75 (3) of the Statute and rule 103 of the Rules of Procedure and Evidence (“RPE”) by 10 January 2020. The order also invited the Registry to submit a proposed list of experts by 14 February 2020.

<sup>1</sup> Judgment with public Annexes A, B, and C, 8 July 2019, [ICC-01/04-02/06-2359](#) (“Judgment”).

<sup>2</sup> Sentencing judgment, 7 November 2019, [ICC-01/04-02/06-2442](#) (“Sentencing Judgment”), para. 87.

<sup>3</sup> Order for preliminary information on reparations, 25 July 2019, [ICC-01/04-02/06-2366](#), with Public Annex I and Confidential Annex II.

<sup>4</sup> Registry’s observations, pursuant to the Single Judge’s “Order for preliminary information on reparations” of 25 July 2019, ICC-01/04-02/06-2366, with Public Annex I and Confidential Annex II”, 5 September 2019, [ICC-01/04-02/06-2391](#).

<sup>5</sup> Joint Response of the Legal Representatives of Victims to the Registry’s Observations on Reparations, 3 October 2019, [ICC-01/04-02/06-2430](#) (“Joint Response to Registry’s Observations”); Response on behalf of Mr. Ntaganda to Registry’s preliminary observations on reparations, 3 October 2019, [ICC-01/04-02/06-2431](#); (“Mr Ntaganda’s Response to Registry’s Observations”); Prosecution’s response to the Registry’s observations, pursuant to the Single Judge’s “Order for preliminary information on reparations” (ICC-01/04-02/06-2391-Anx1), 3 October 2019, [ICC-01/04-02/06-2429](#); Trust Fund for Victims’ response to the Registry’s Preliminary Observations pursuant to the Order for Preliminary Information on Reparations, 3 October 2019, [ICC-01/04-02/06-2428](#) (“Response to Registry’s Observations”).

<sup>6</sup> Order setting deadlines in relation to reparations, 5 December 2019, [ICC-01/04-02/06-2447](#).

5. On 10 January 2020, the International Organization for Migration (“IOM”) filed a request for leave to submit observations on the issues set out under paragraph 9 (c) of the Order Setting Deadlines.<sup>7</sup> On 16 January 2020, the Common Legal Representative for the Victims of the Attacks responded to the request.<sup>8</sup>

6. On 17 January 2020, the Single Judge granted IOM leave to submit observations on the issues identified under paragraph 9 (c) (i), (ii), and (iii) of the Order Setting Deadlines.<sup>9</sup>

7. On 29 January 2020, upon the Registry’s request,<sup>10</sup> the Trial Chamber granted an extension of time to submit a list of proposed experts on reparations by 19 February 2020.<sup>11</sup>

8. On 19 February 2020, the Registry submitted a proposed list of experts in the sense of rule 97 (2) RPE and regulation 44 of the Regulations of the Court.<sup>12</sup>

9. The Trust Fund hereby submits its observations relevant to reparations in the *Ntaganda* case.

## II. INTRODUCTION

10. At the outset, the Trust Fund would like to explain how it understands its role in reparations proceedings, as the observations that follow are shaped by this understanding.

11. The Court’s legal framework establishes the relationship of the Trust Fund with the Court in reparations proceedings as a partnership covering three different dimensions – (i) as an independent expert body; (ii) as the implementing agency; and (iii) as the (potential) funding agency, depending on the financial situation of the

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<sup>7</sup> Request for Leave to Submit Observations on the issues set out under point 9 (c) of the Order ICC-01/04-02/06-2447, 10 January 2020, [ICC-01/04-02/06-2455](#).

<sup>8</sup> Response of the Common Legal Representative for the Victims of the Attacks to the Request of the International Organization for Migration to provide observations pursuant to Rule 103 of the Rules of Procedure and Evidence, 16 January 2020, [ICC-01/04-02/06-2459](#).

<sup>9</sup> Decision on request for leave to submit *Amicus Curiae* observations, 17 January 2020, [ICC-01/04-02/06-2460](#).

<sup>10</sup> Email from Registry to the Trial Chamber on 27 January 2020 at 18.05.

<sup>11</sup> Email from the Single Judge to Registry on 29 January 2020 at 15.55.

<sup>12</sup> Registry List of Proposed Experts on Reparations Pursuant to Trial Chamber VI’s Order of 5 December 2019, With 35 Confidential Annexes, available only to the Defence and the Legal Representatives of Victim, 19 February 2020, [ICC-01/04-02/06-2472](#).

convicted person, and upon a request from the relevant trial chamber to the Trust Fund's Board of Directors.

12. In past reparations proceedings, the Trust Fund has been recognised as possessing the operational experience, networks, multidisciplinary expertise and relevant competency to fulfil the role of an independent and neutral advisory body to the Court on matters related to the principles, procedures and implementation modalities of reparations, so as to assist in ensuring that victims benefit from timely, meaningful and adequate reparations.<sup>13</sup>

13. The Trust Fund would like to underline the advisory nature of its role at this present stage of the proceedings, taking into account its expertise and experience acquired from past and ongoing activities under its reparation and assistance mandates, most notably in the DRC.

14. The Trust Fund and the Court have a common interest to ensure that reparations are established in a manner that allows for an efficient, operationally and financially feasible implementation process.

15. The present submission seeks to respond to several issues listed in the Order Setting Deadlines, namely, the criteria and the methodology to be applied in the determination and the assessment of: (i) the eligibility of victims; (ii) the relevant types and scope of harm; (iii) the types and modalities of reparations appropriate to address the types of harm relevant in the circumstances of the case, including factors relating to the appropriateness of awarding reparations on an individual basis, a collective basis, or both; and (iv) the scope of liability of a convicted person. The present submission will also address whether the principles on reparations established by the Appeals Chamber in *Lubanga* may be amended or supplemented considering the circumstances of the *Ntaganda* case.

16. The Trust Fund respectfully requests the Trial Chamber to be allowed to make final submissions along with the parties by 30 October 2020. This would allow the Trust Fund to take into account the information submitted by the parties, the Registry, the Government of the DRC and IOM in response to the Order Setting Deadlines, in order to gather additional relevant information in the field. Specifically, it would enable the

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<sup>13</sup> Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision establishing the principles and procedures to be applied to reparations, 7 August 2012, [ICC-01/04-01/06-2904](#), para. 266.

Trust Fund to provide the Trial Chamber with an updated and comprehensive market analysis of appropriate services available in the area, additional input on the possible types and modalities of reparation awards and related procedural issues, as well as further information relevant for establishing the precise extent of Mr Ntaganda's monetary obligations for reparations.

### III. NEW PROPOSED REPARATIONS PRINCIPLES

17. Principles are instrumental to the development of the Court's legal and substantive framework on reparations. They are of institutional interest to the Court and to the Trust Fund in that they serve as parameters to the Trial Chamber when developing the order for reparations, and as guidelines to the Trust Fund in the design and implementation of the subsequent implementation plan.

18. From the Trust Fund's perspective, principles are particularly useful during the implementation phase because they permit conveying the spirit of reparation programmes to potential beneficiaries during outreach activities, to eventual implementing partners and intermediaries, and other important stakeholders, including governments. Reparations principles function as a vehicle which allows these audiences to quickly grasp the direction of reparation measures despite any degree of unfamiliarity with the Court and its procedures.

19. The fact that these values are framed as legal principles adopted by the Court vests them with a heightened authority, enabling the Trust Fund to render clear that their application - when appropriate - is not a matter of negotiation. For instance, guided by the principles concerning gender-inclusiveness and the need to actively address any underlying injustices,<sup>14</sup> the Trust Fund made sure in the *Al Mahdi* reparations that women are part of the category of beneficiaries known as "direct descendants" from saints buried in the case mausoleums<sup>15</sup> even though, in northern Mali, this concept is traditionally reserved to male lines of descent.

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<sup>14</sup> Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, Annex A to "Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012 with Amended order for reparations (Annex A) and public annexes 1 and 2", 3 March 2015, [ICC-01/04-01/06-3129-AnxA](#) ("Lubanga Reparations Principles"), paras 17-18.

<sup>15</sup> Trust Fund, *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Public redacted version of "Trust Fund for Victims' submission of draft application form" ICC-01/12-01/15-289-Conf submitted on 26 October 2018, 30 October 2018, [ICC-01/12-01/15-289-Red](#), paras 38-39.

20. In light of the above, the Trust Fund respectfully requests the Trial Chamber to consider the following principles on reparations, in addition to those established by the Appeals Chamber in *Lubanga*: one on the procedure for identification and verification of victims, that is, an “eligibility screening principle”; a principle concerning the treatment of victims of sexual and gender-based violence (SGBV); a “do no harm” principle to inform the conduct of reparations proceedings, including eligibility screening, the choice of types and modalities of reparations and the advisability of their practical implementation; and a “restorative agency” principle to guide memorialisation initiatives.

21. The Trust Fund further notes that, subject to this matter being resolved in the current appeal proceedings,<sup>16</sup> the *Ntaganda* case may warrant the inclusion of a fifth principle concerning the treatment of protected buildings within the scope of articles 8 (2) (b) (ix) and 8 (2) (e) (iv) of the Statute.

**a. Principle on victim identification and verification (“eligibility screening”)**

22. The Trust Fund observes that the success of the Rome Statute system of reparations is in no small measure informed by choices made in relation to victim identification and verification (eligibility screening), as they directly relate to the right of victims to receive prompt, adequate and appropriate reparations. The Appeals Chamber has affirmed that “[t]he reparation scheme provided for in the Statute is not only one of the Statute’s unique features. It is also a key feature. The success of the Court is, to some extent, linked to the success of its system of reparations.”<sup>17</sup> This motivates the Trust Fund to respectfully propose the Trial Chamber to consider and adopt a reparations principle in relation to victim identification and verification.

23. Given the differences among reparations cases at the Court, their scope of victimisation and related harms, no one-size-fits-all victim identification and verification method exists. As the Appeals Chamber has indicated, the choice of an appropriate methodology falls within the discretion of the trial chamber at hand, based

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<sup>16</sup> See Prosecution Appeal Brief, with Public Annex A, 7 October 2019, [ICC-01/04-02/06-2432](#), paras 2-10.

<sup>17</sup> [Lubanga Reparations Principles](#), para. 3.

on the circumstances of the case.<sup>18</sup> The experience to date of the design and implementation of screening methodologies induces the Trust Fund, in the interest of the well-being of victims, fairness, viability and efficiency to suggest four non-exhaustive general parameters which it respectfully submits for consideration, as contributing to the articulation of a principle on victim identification and verification methodologies:

- a. *Reparations related contact with victims should be as proximate in time as possible to the actual delivery of awards:* the right of victims to appropriate, adequate and prompt reparations requires that a procedurally necessary victim identification and verification process should take place as close in time as possible to the beneficiaries' receipt of the awards.<sup>19</sup> Dissociation in time between an application for reparations and their delivery is a recipe for awards to become obsolete by the time they reach the victim.
- b. *Recurring interviews should be avoided to favour minimal and meaningful encounters with victims:* reparations related contacts with victims with the Court necessarily involve questions aimed at determining the existence of harm and the link with the crime. This requires individuals to recount distressing memories and to articulate the ongoing impact on their lives. Any contact taking place with a victim before relief of their harm takes place may lead to re-traumatisation, a risk that grows incrementally with every new encounter. Furthermore, the Court is often required to operate in fragile security contexts, such as the eastern DRC. Subjecting individuals to more contacts with the Court than what is absolutely necessary may expose them to heightened personal safety risks.

There are further considerations related to procedural fairness.<sup>20</sup> A screening process designed in such a way that may lead to multiple interviews increases the chance of involuntary disparities on the accounts of potential beneficiaries,

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<sup>18</sup> Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable', 18 July 2019, [ICC-01/04-01/06-3466-Red](#) ("Lubanga Appeals Judgment on Reparations"), para. 142.

<sup>19</sup> [Lubanga Reparations Principles](#), para. 44.

<sup>20</sup> *Ibid.* paras 12 and 13.

thereby negatively affecting their credibility and, ultimately, their opportunity to obtain redress.

- c. *Screening must be resource efficient, proportionate and appropriate in relation to the type and scope of awarded reparations:* from a systemic perspective, it will be advisable to strive for a reasonable cost-correlation between the victim identification and screening procedure, and the type and scope of the related awarded reparations measures. Resources spent on screening should be functional, and not be disproportionate, to those spent on the reparations measures, including in relation to their type and scope.
- d. *The process needs to respect the rights of the convicted person:* the design of a victim identification and verification procedure must be done bearing in mind the importance of safeguarding equality of arms, that is, upholding the rights of the convicted person and fairly balancing these rights against the rights of victims to receive appropriate and timely reparations.

24. The Trust Fund submits that, while the details of screening methodologies will vary amongst – and even inside - cases, the choice and design of a victim identification and verification process by the Court does not need to be done in a vacuum. Adopting the four general parameters above as part of a reparations principle on victim identification and verification would serve to consolidate and promote best practices at the Court, in consideration of the systemic viability, fairness and effectiveness of the Rome Statute’s reparations system.

25. The Trust Fund is cognisant that parameters other than the ones listed above may deserve similar consideration, such as related to accessibility, gender, evidentiary standards, confidentiality and outreach to victims. The Trust Fund stands ready to submit, should the Trial Chamber so desire, more detailed observations in relation to the proposed principle.

#### **b. Principle on treatment of SGBV victims**

26. The *Ntaganda* case is the first in which reparation awards may be ordered for victims of sexual violence. The Trust Fund respectfully submits that the Trial Chamber may wish to consider adopting one or more principles in this regard to ensure that the

particular needs of victims of such crimes, whose situation is in important aspects distinct from that of other victims,<sup>21</sup> are adequately considered at the reparations stage.

27. Crimes of a sexual nature inherently strike at the core of human dignity and physical integrity of victims. SGBV victims suffer complex and long-lasting multi-dimensional harm of physical, psychological, social and economic nature. Social stigma, the experience of trauma and, in many cases, the persistent feeling of personal and social shame, often lead victims to not acknowledge that they have suffered from a sexual crime, even if this may negatively affect their ability to access reparation measures. Shame experienced by victims is usually reinforced by the communities in which they live, including within their own families. Rape may also result in pregnancy and childbirth. These children and their mothers are particularly vulnerable to stigma and social exclusion and may have distinct reparative needs.

28. Consequently, reparation awards should be designed so as to respond to the multi-layered nature of the harm suffered by SGBV victims, and to be implemented in a manner that addresses their need for discretion. The operational experience of the Trust Fund, including in the eastern DRC, suggests that reparation awards for such victims should encompass - as appropriate - transformative, preventive and symbolic measures, including initiatives aimed at diminishing any existing stigmatisation of victims within their community.

29. The Trust Fund respectfully submits that the Court should take all necessary measures to ensure that victims are not subject to secondary victimisation resulting from the reparation proceedings themselves. In developing both the reparations procedure and the awards, the Court should take into account the gendered nature<sup>22</sup> and

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<sup>21</sup> The [Lubanga Reparations Principles](#) under the heading of “child victims” in paragraphs 23-28 contain specific provisions on child victims, and in particular elaborate on reparations orders and programmes in favour of child soldiers. This shows that the Appeals Chamber found it necessary to provide detailed guidance on a specific category of victims. Because of the specific characteristics of victimisation as a result of SGBV crimes, the Court may wish to elaborate further as to what principles apply to this category of victims. Indeed, a need for dedicated guidance on reparations for victims of sexual violence has also been recognized in other contexts, In particular, the United Nations in June 2014 issued a “[Secretary General’s Guidance Note on “Reparations for Conflict-Related Sexual Violence”](#)”.

<sup>22</sup> The Trust Fund, based on its experience of working with victims of sexual and gender-based crimes, submits that the consequences of such crimes may greatly differ depending on who is affected: women, men, boys or girls.

consequences of the harm suffered, including with a view to neither replicating nor reinforcing any existing structural discrimination.<sup>23</sup>

**c. “Do no harm” principle**

30. Reparations proceedings should be characterised by a scrupulous sensitivity to the wellbeing of victims. No victim should experience additional trauma as a result of their association with the different phases of said proceedings, ranging from outreach and consultation, identification and eligibility screening, through to receipt of the awards.<sup>24</sup> The Trust Fund proposes the “do no harm” principle to inform the choice of the types and modalities of reparations, as well as the advisability of their practical implementation throughout reparations proceedings.

31. The “do no harm” principle may find application at three different stages of the implementation of reparations: when conducting victim identification and eligibility screening, when developing reparations orders and plans, and when carrying out the approved reparation measures. The key relevance of the “do no harm” principle to the victim identification and eligibility screening process is addressed in detail in Part IV of the present submission.

32. At the development stage of reparations orders and implementation plans, the “do no harm” principle would imply amending or discarding a reparation measure under consideration when there is a strong basis to believe that its execution would have a negative impact that would outweigh the positive outcome initially foreseen. For example, the Trust Fund is often seized to operate in impoverished areas where communities are tightly-knit together and social dynamics function on the basis of strong ties among individuals and families. This means that concepts of community and sharing often prevail over those of individualism and privacy. In such contexts, the consequences of awarding individual reparations in the form of monetary compensation need to be carefully studied. A risk may ensue for individuals receiving monetary awards of being perceived as privileged, which may lead to their alienation from the

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<sup>23</sup> In contexts where women suffer from structural discrimination and have limited access to education and productive resources, loss of family support can result in destitution. Homophobia and the concept of emasculation or feminisation of victims can result in stigma and discrimination against men and boys who are survivors of sexual violence. See [Secretary General’s Guidance Note on “Reparations for Conflict-Related Sexual Violence”](#).

<sup>24</sup> See also Trust Fund, *Prosecutor v. Jean-Pierre Bemba Gombo*, Observations relevant to reparations, 31 October 2016, [ICC-01/05-01/08-3457](#), paras 23, 124-132.

community as a result of jealousy. In some cases, potential beneficiaries may also be reluctant to apply for individual monetary compensation given that, in their local culture, this could be perceived as an act of begging. All of this indicates that the act of applying for reparations may become a counterproductive activity inasmuch as it would generate personal feelings of shame and social stigma. Another example of the “do no harm” principle may apply is when, in an area of persisting conflict, agro-pastoral kits are handed out. Such kits cannot include sharp tools which could be converted into weapons and, without such tools, the kits are likely to be of little use.

33. At the implementation stage, the “do no harm” principle would provide a basis to amend, suspend or terminate an approved reparative measure when field observation offers strong indications that its effects may be ultimately detrimental for victims. In the *Katanga* case, for instance, a reparations award had to be changed at the implementation stage once it became clear that, due to a series of circumstances, the benefits sought in the abstract plan were not viable in practice. The adoption of a “do no harm” principle would also offer a clear legal basis for closely monitoring, modifying, suspending or terminating a project when circumstances so require.

#### **d. Restorative agency in memorialisation measures**

34. Memorialisation measures are a form of symbolic reparations that normally assumes a collective character. Symbolic and memorialisation measures are particularly on point when the harm caused to victims escapes the confines of modification.<sup>25</sup> Because of their unique intangible element, this type of measure has been entertained in all active reparations cases before the Court.<sup>26</sup> When given the choice, victims may favour forgetting and rupturing from their traumatic past, thereby agreeing to a form of

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<sup>25</sup> See generally F. Megret, ‘The International Criminal Court and the Failure to Mention Symbolic Reparations’, 16(2) *International Review of Victimology* (2009), p. 127, at p. 133.

<sup>26</sup> Trust Fund, *Prosecutor v. Thomas Lubanga Dyilo*, Information regarding Collective Reparations, with three public annexes, one confidential annex, and one confidential ex-parte annex available to Trial Chamber II only, 13 February 2017, [ICC-01/04-01/06-3273](#), para. 132; Trial Chamber VIII, *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Decision on the Updated Implementation Plan from the Trust Fund for Victims, 4 March 2019, [ICC-01/12-01/15-324-Red](#), para. 97 (“Decision on TFV Updated Implementation Plan”); Trial Chamber III, *Prosecutor v. Jean-Pierre Bemba Gombo*, Public Redacted Version of “Annex, 28 November 2017, ICC-01/05-01/08-3575-Conf-Exp-Anx-Corr2”, 30 November 2017, [ICC-01/05-01/08-3575-Anx-Corr2-Red](#), para. 207; Queen's University Belfast's Human Rights Centre (HRC) and University of Ulster's Transitional Justice Institute (TJI), *Prosecutor v. Germain Katanga*, Queen's University Belfast's Human Rights Centre (HRC) and University of Ulster's Transitional Justice Institute (TJI) Submission on Reparations Issues pursuant to Article 75 of the Statute, 14 May 2015, [ICC-01/04-01/07-3551](#), para. 40.

“shared silence” by not adopting any specific form of memorialisation. Alternatively, they may opt for some form of public remembrance through performances or other vehicles to express how events impacted their lives.<sup>27</sup>

35. The Trust Fund acknowledges that both putting in place memorialisation measures and choosing not to are equally forms of action.<sup>28</sup> Each of these choices succeeds in carrying the message of how victims wish to convey their experience of a traumatic event. As a result, the reparative value does not lie primarily in the tangible outcome it may lead to -if any- but in the process whereby victims reflect and share their perception of harm and discuss whether to translate it into a symbol. Since this type of dialogue addresses events that happened *to them*, this process should be understood as being under the exclusive ownership of victims. External actors should not be involved in the core of such discussions as this may lead to hijacking their narrative of the past, which can subject victims to alienation, feelings of humiliation and fuel further conflict.<sup>29</sup>

36. From the above, it follows that memorialisation measures should be based on the will of the victims concerned for these to fulfil a reparative value. In the Trust Fund’s view, the adoption of a “restorative agency” principle can play out at three consecutive levels of implementation.<sup>30</sup> First, it is for the victims to choose “whether” to memorialise since, as indicated above, voluntary amnesia or public remembrance are both valid forms of conveying a message. Second, if victims have decided to pursue a specific form of remembrance, it is for them to decide “what” they wish to memorialise. For example, in the *Ntaganda* context, memorialising the conscription of child soldiers as opposed to their demobilisation may carry a drastically different message: one of despair and harm, as opposed to another of hope and relief. Third and last, once the content of the message has been determined, it is for the victims to opt for “how” to memorialise, that is, to choose the specific form of remembrance that suits their needs.

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<sup>27</sup> See D. Viejo-Rose, ‘Cultural heritage and memory: untangling the ties that bind’, 4(2) *Culture & History Digital Journal*, (2015), p. 1, at p. 6.

<sup>28</sup> *Ibid.*

<sup>29</sup> See D. Viejo-Rose, ‘Reconstructing Heritage in the Aftermath of Civil War: Re-Visioning the Nation and the Implications of International Involvement’, *Journal of Intervention and Statebuilding*, 2013, p. 1, at p. 9.

<sup>30</sup> Trust Fund, *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Lesser public redacted version of “Updated Implementation Plan” submitted on 2 November 2018 ICC-01/12-01/15-291-Conf-Exp, 14 October 2019, [ICC-01/12-01/15-291-Red3 \(“Lesser Public Redacted Version of UIP”\)](#) para. 7; [Decision on TFV Updated Implementation Plan](#), paras 97 and 113.

Here, the options are manifold and can adopt tangible (for example, monuments, centres, street names, paintings, plaques) or intangible (for example, performances, days of commemoration, reconciliation) forms.

#### IV. ELIGIBILITY OF VICTIMS: HOW, WHEN, WHETHER OR NOT TO SCREEN

##### a. Preliminary remarks

37. The Trust Fund wishes to remark that the Order Setting Deadlines requested observations concerning both the criteria and methodology relevant for the assessment and determination of the eligibility of victims. The Trust Fund understands that the “criteria” (for example, but/for and proximate cause tests) to be applied are a legal issue primarily for the parties to discuss, whereas the “methodology” to administer such criteria is a practical matter with which the Trust Fund has extensive and direct experience. Accordingly, the Trust Fund confines its observations to the latter question. The Trust Fund would like to highlight that its regulatory framework,<sup>31</sup> its unique nature as the Court’s implementing agency in reparations, and its experience accumulated in the *Lubanga*, *Katanga* and *Al Mahdi* cases, situate it in an unparalleled position to render advice on the appropriate methodology to determine the eligibility of victims.

38. Some terminological clarifications are in order. The methodology to verify the eligibility of victims is alternatively referred to as the “screening process”, the purpose of which is to establish whether a person or organisation in the sense of rule 85 RPE qualifies to benefit from a given reparations award. In the time between the issuance of the conviction and the outcome of the screening process, such persons and organisations -regardless of their previous participating status- should be referred to as “potential beneficiaries”, in particular for purposes of outreach communications so as to avoid creating the impression that, due to their victim denomination, they have a default entitlement to reparations.

39. The Trust Fund recalls that participation at trial and in reparations proceedings are not readily comparable because these two sets of procedures are distinctly different in terms of standard of proof required, rights afforded to the participant and different purposes of participation.

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<sup>31</sup> See Regulations of the Trust Fund for Victims, in particular, regulations 59-65.

## **b. Screening methodology in the *Ntaganda* case**

40. In the Order Setting Deadlines, the Single Judge requested the parties, the Registry and the Trust Fund to provide observations on the methodology to be applied in the assessment and determination of the eligibility of victims.<sup>32</sup> Earlier, the Registry's Victim Participation and Reparations Section ("VPRS") had proposed a particular screening methodology and recommended its adoption to the Trial Chamber.<sup>33</sup> This proposal has, thus far, shaped the discussion around the screening methodology in the present case.

41. The Trust Fund, having provided initial observations concerning the screening methodology to the Trial Chamber,<sup>34</sup> responds to the instruction in the Order Setting Deadlines with the following remarks in relation to the proposal by VPRS before making further observations on the screening methodology to be applied in the *Ntaganda* case.

### **i. Remarks related to VPRS' proposal**

42. The Trust Fund notes that an application-based and pre-order for reparations screening envisaged by the Registry is an option available to the Trial Chamber pursuant to rule 94 RPE. Such a procedure is consistent with the option that trial chambers have in the reparations order of either identifying the victims eligible to benefit from reparation awards, or setting out the eligibility criteria to identify them.<sup>35</sup> The decision between one alternative or the other falls "within the Trial Chamber's discretion to conduct the proceedings before it, based on the circumstances of the case."<sup>36</sup>

43. The *Katanga* Trial Chamber deemed this screening methodology appropriate to the facts of its case where Mr Katanga had been convicted for an "attack on a definite place throughout the course of one day",<sup>37</sup> leading to the determination of 297 victims

<sup>32</sup> [Order Setting Deadlines](#).

<sup>33</sup> [Registry's Preliminary Observations](#), para. 43 (a).

<sup>34</sup> [Response to Registry's Observations](#), paras 6-10.

<sup>35</sup> Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012, with AMENDED order for reparations (Annex A) and public annexes 1 and 2, 3 March 2015, [ICC-01/04-01/06-3129 \("Lubanga Judgment on the Appeals"\)](#), para. 32.

<sup>36</sup> [Lubanga Appeals Judgment on Reparations](#), para. 142.

<sup>37</sup> Trial Chamber II, *Prosecutor v. Germain Katanga*, Order for Reparations pursuant to Article 75 of the Statute, with one public annex (Annex I) and one confidential annex *ex parte*, Common Legal

entitled to reparations.<sup>38</sup> Cognisant of this specific circumstance, the *Katanga* Trial Chamber cautioned that:

“The modus operandi adopted in the case at bar will not necessarily apply to other cases, in particular where the number of potential victims is very high and/or where the acts of which the person was convicted encompass a considerable stretch of time and/or their geographical reach is much greater than it is here.”<sup>39</sup>

44. The Appeals Chamber later affirmed in its judgment on the *Katanga* reparations order that it was “not persuaded that the approach chosen [...] based on an individual assessment of each application by the Trial Chamber, was the most appropriate in this regard as it has led to unnecessary delays.”<sup>40</sup> Recently, in the context of the *Lubanga* case, the Appeals Chamber further elaborated that:

“in cases with more than a few victims, proceeding in this manner [i.e. contemplating an award for reparations that is *not* based on an individual assessment of the harm alleged in the requests filed] may prove to be more efficient than awarding, or deciding on the eligibility for, reparations on an individual basis, precisely because it is not necessary for the trial chamber to consider individual requests for reparations.”<sup>41</sup>

45. The Trust Fund observes that the *Ntaganda* case concerns a significant number of potentially eligible victims, and that the acts for which Mr Ntaganda was convicted encompass a considerable passage of time and geographical reach. Against this background, and based on its experience with the implementation of reparation awards, including beneficiary eligibility screening, the Trust Fund is apprehensive about the screening methodology proposed by VPRS. In their 3 October preliminary observations,

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Representative of the Victims, Office of Public Counsel for Victims and Defence team for Germain Katanga (Annex II), 24 March 2017, [ICC-01/04-01/07-3728-tENG](#) (“Katanga Reparations Order”), para. 32.

<sup>38</sup> [Katanga Reparations Order](#), para. 168.

<sup>39</sup> *Ibid.* fn. 71.

<sup>40</sup> Appeals Chamber, *Prosecutor v. Germain Katanga*, Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled “Order for Reparations pursuant to Article 75 of the Statute”, 8 March 2018, [ICC-01/04-01/07-3778-Red](#) (“Judgment on appeals against Katanga Reparations Order”), para. 1.

<sup>41</sup> [Lubanga Appeals Judgment on Reparations](#), para. 88. This is also consistent with the intention of some delegations during the drafting of Article 75 of Statute according to which “[t]his provision intends that where there are only a few victims the Trial Chamber may make findings about their damage, loss and injury. Where there are more than a few victims, however, the Trial Chamber will not attempt to take evidence from or enter orders identifying separate victims or concerning their individual claims for reparations. Instead, the Trial Chamber may make findings as to whether reparations are due because of the crimes and will not undertake to consider and decide claims of individual victims” See Report of the Working Group on Procedural Matters, UN Doc. A/CONF.183/C.1/WGPM/L.2/Add.7, p. 5, fn. 6, endorsed by the [Lubanga Judgment on the Appeals](#), para. 150.

the LRVs and the Defence advanced their reservations to the VPRS' proposed methodology.<sup>42</sup> The Trust Fund would like to highlight three circumstances of the case that illustrate how an application-based and pre-order methodology may compromise the practical feasibility of the screening, its fairness to victims, its expeditiousness, as well as its proportionality and cost-effectiveness.

### 1. First circumstance: case magnitude and complexity

46. The VPRS' proposal purports that the "victim identification process would be initiated at the start of the reparations proceedings and finalised before the Trial Chamber issues its reparations order."<sup>43</sup> The Trust Fund recalls its earlier submission where it stated that *identification* of new non-participating victims is a matter distinct from any potential *eligibility screening* process.<sup>44</sup>

47. In the Trust Fund's view, the unprecedented scope of the *Ntaganda* case in terms of multiplicity of different crimes that occurred in diverse locations and over an extended period of time, leading to a wide range of serious manifestations of harm, affect the viability of the proposed methodology and its timeline. The VPRS' submission presents the ability to finalise the screening *in advance* of the reparations order as the strength of its proposal.<sup>45</sup> By contrast, the LRVs have referred to this proposed undertaking as "not practically feasible".<sup>46</sup> Given its relevant field-based experience, the Trust Fund wishes to illustrate some practical implications of this methodology *in concreto*.

48. In the Trust Fund's understanding, the 2,132 victims who have participated in trial may represent a fraction of the potential beneficiaries involved in this case. The actual number of potential beneficiaries could turn out to be higher. In the *Lubanga* reparation proceedings, one person may manage to interview approximately five to six potential beneficiaries per day, requiring up to ten working hours per day consisting of interviews and related tasks. The *Lubanga* case concerns one crime. In *Ntaganda*, the

<sup>42</sup> [Joint Response to Registry's Observations](#), paras 12-25; [Mr Ntaganda's Response to Registry's Observations](#), paras 6, 22-29.

<sup>43</sup> [Registry's Preliminary Observations](#), para. 11. In footnote 19, VPRS concedes that some screening may need to take place after the issuance of the reparations order, but refers to this as a "residual" process.

<sup>44</sup> [Response to Registry's Observations](#), para. 6.

<sup>45</sup> [Registry's Preliminary Observations](#), paras 2-11. In footnote 19, it nevertheless concedes that the screening may extend to the time following the reparations order, and characterises this possibility as residual.

<sup>46</sup> [Joint Response to Registry's Observations](#), para. 16.

multiple crimes and probably more complex application form to be used will lengthen the time needed for each interview. Furthermore, there may be recurring interruptions of the interview process because of security threats, Ebola outbreaks and other health risks, to which one must add the time needed for processing such applications into the VPRS' database, their legal analysis, notifications, and the rights of applicants to litigate screening outcomes.<sup>47</sup> Therefore, in the Trust Fund's view, completing the screening process ahead of the order for reparations constitutes a challenge not to be underestimated.

49. Regarding the suggestion that a pre-order and application-based system favours efficiency, the Trust Fund recalls that, in accordance with the Appeals Chamber:

“Requiring that, barring exceptional circumstances, the reparations order may only be based on requests for reparations already received would also have a negative impact on the efficiency of the reparations process. This would mean that, for example in cases where there are large numbers of victims, in order to avoid prejudice to those victims, and in order to provide them with a sufficient opportunity to submit requests for reparations, the trial chamber would need to set generous time limits for their submissions.”<sup>48</sup>

50. Potentially subordinating the issuance of the reparations order to having dealt with all (or almost all) individual applications may effectively delay the implementation of reparations awards. As expressed by the Appeals Chamber:

“The implementation process, however, could not begin until the reparations order was actually issued and the trial chamber had determined the status of all of those who had at that point applied for reparations. The result would be that valuable time would be lost during which victims would have to wait for reparations – even though they may have already submitted their requests for reparations early on during the trial proceedings.”<sup>49</sup>

51. Moreover, the *Lubanga* reparations principles assert that “[r]eparations are entirely voluntary and the *informed consent* of the recipient is necessary prior to any award of reparations.”<sup>50</sup> Yet, the types and modalities of reparations would be unknown at the pre-order stage and requesting informed consent would then be an untenable proposition to potentially eligible victims. Moreover, eligible victims would need to be

<sup>47</sup> See e.g. [Registry's Preliminary Observations](#), para. 18 (2) (ii) and (iii).

<sup>48</sup> [Lubanga Appeals Judgment on Reparations](#), para. 81.

<sup>49</sup> *Ibid.*

<sup>50</sup> [Lubanga Reparations Principles](#), para. 30 (emphasis added).

interviewed in depth anew by the Trust Fund to ensure that their harm is properly addressed and that the award is tailored to their unique and current needs.

## 2. Second circumstance: pending appeal of conviction

52. The Trust Fund respectfully submits that any screening of victims prior to a reparations order would risk compromising the fairness owed to victims and the diligent use of the Court's resources, in consideration of the uncertain outcome of the pending appeal against the conviction.<sup>51</sup> If any part of his conviction is overturned, various pools of the potential beneficiaries that VPRS proposes to screen may end up no longer falling within the remit of the case. Finding themselves outside of the boundaries of eligibility after having been requested to recall the harm suffered during a screening process will likely lead victims to experience frustration and re-traumatisation.

53. It is important to note that the different pools of victims who potentially would no longer be able to benefit from reparations following the Appeals Chamber's judgment may include former child soldiers and victims of sexual violence. Here, a ramification of the "do no harm principle" applies. In this regard, the Trust Fund notes that rule 86 RPE lays down a general principle according to which "[a] Chamber in making any direction or order [...] shall take into account the needs of all victims [...] in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence", and that these needs specifically include victims' "safety, physical and psychological well-being".<sup>52</sup>

54. The Trust Fund recalls that, in similar circumstances, the *Bemba* Trial Chamber specifically instructed the Registry *not* to take any steps in relation to the collection of applications for reparations.<sup>53</sup> Even with this cautionary approach, the Trust Fund observed that the acquittal of Mr Bemba was met with resentment, disappointment and anger within the victims' communities. A similar outcome is expected to arise in case of a (partially) successful appeal in the *Ntaganda* case.

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<sup>51</sup> Prosecution Notice of Appeal, 9 September 2019, [ICC-01/04-02/06-2395](#) ("Prosecution Notice of Appeal"); Mr. Ntaganda's Notice of Appeal against the Judgment pursuant to Article 74 of the Statute, ICC-01/04-02/06-2359, 9 September 2019, [ICC-01/04-02/06-2396](#).

<sup>52</sup> Article 68 (1) of the Statute.

<sup>53</sup> Trial Chamber III, *Prosecutor v. Jean-Pierre Bemba Gombo*, Order requesting submissions relevant to reparations, 22 July 2016, [ICC-01/05-01/08-3410](#), para. 10 (emphasis in the original).

55. From a resource perspective, in the Trust Fund’s view, the proposed screening methodology is not advisable in light of the pending appeal: if one or more crimes are overturned and the scope of victims is consequently reduced, the Court would have used human resources, time and money in developing application forms, missions, interviews, and processing results which would become redundant. By the same token, should the appeal lodged by the Office of the Prosecutor succeed in reversing the acquittal of Mr Ntaganda in relation to two charges,<sup>54</sup> the increase in the pool of victims and geographical scope of the conviction would require the duplication of work through *ad hoc* missions, amendment of the application forms, new interviews, more time to process information and new opportunities for litigation.

### **3. Third circumstance: uncertainty over the type of reparations awards**

56. The screening methodology proposed by VPRS asserts that the use of individualised reparations forms “is appropriate and necessary *independent* of the Chamber’s determination on whether to pursue a collective or individual reparations procedure.”<sup>55</sup> The jurisprudence of the Appeals Chamber points otherwise:

“the Appeals Chamber considers that the Court’s legal texts *provide for two distinct procedures* for award for reparations. The first, which relates to individual reparations, is primarily application (“request”) based [...]. The second relates to collective reparation awards.”<sup>56</sup>

57. On the second type, the Appeals Chamber has consistently stated that requiring collective reparations to only be awarded on the basis of individual applications would contravene the principle according to which reparations are intrinsically linked to the individual whose criminal liability is established in a conviction, since such a decision is based on the evidence and factual findings of the entire proceedings.<sup>57</sup>

58. While the Court’s practice in the *Lubanga*, *Katanga* and *Al Mahdi* reparations proceedings confirm that individual reparations are application-driven, this is not necessarily the case for collective reparations. Instead, the Trial Chamber may adopt the screening methodology for collective reparations that it deems most suitable to the case

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<sup>54</sup> [Prosecution Notice of Appeal](#).

<sup>55</sup> [Registry’s Preliminary Observations](#), para. 10 (emphasis added).

<sup>56</sup> [Lubanga Judgment on the Appeals](#), para. 149 (emphasis added).

<sup>57</sup> *Ibid.* para. 151; *see also* [Lubanga Appeals Judgment on Reparations](#), para. 83.

at hand. Indeed, the Appeals Chamber has indicated that there are forms of collective reparations (such as those of symbolic character) which do not require any victim screening whatsoever and where individual applications would serve no purpose.<sup>58</sup> In *Al Mahdi*, Trial Chamber VIII did not institute an application-based screening process for victims who will benefit from collective economic and psychological measures.<sup>59</sup> This is so despite the fact that some collective economic reparation measures in *Al Mahdi* will translate into individualised benefits, such as income-generating activities or psychological support.<sup>60</sup>

59. For reasons of proportionality, efficiency and cost-effectiveness, even when collective awards entail individual applications, the application forms and related victim engagement process can be simplified in consideration of the specific nature of a collective award. By contrast, in applications based on rule 94 RPE, potential beneficiaries provide as much information and documentation as feasible “to bolster their applications.”<sup>61</sup>

60. Should the Trial Chamber decide to primarily order individual awards pursuant to rule 98 (2) RPE, it is the Trust Fund that appears to be the natural entity for screening or obtaining any missing information to determine the eligibility of victims. The Trust Fund recalls the jurisprudence of the Appeals Chamber according to which the Regulations of the Trust Fund (“TFV Regulations”) “are an instrument to the Rome Statute for purposes of interpreting provisions related to reparations awarded through the Trust Fund.”<sup>62</sup> The TFV Regulations further elaborate on rule 98 (2) RPE awards in regulations 59-64. The relevant provisions distinguish between the scenario where the Court identifies each beneficiary and the scenario where it does not, in both cases tasking the Trust Fund with developing methodology and obtaining missing information to identify any unknown beneficiaries.

<sup>58</sup> [Lubanga Appeals Judgment on Reparations](#), para. 82.

<sup>59</sup> Trial Chamber VIII, *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Reparations Order, 17 August 2017, [ICC-01/12-01/15-236 \(“Al Mahdi Reparations Order”\)](#), para. 145.

<sup>60</sup> [Lesser Public Redacted Version of UIP](#), paras 120-125, approved by the Trial Chamber in [Decision on TFV Updated Implementation Plan](#), para. 84.

<sup>61</sup> [Katanga Reparations Order](#), para. 60.

<sup>62</sup> [Lubanga Judgment on the Appeals](#), para. 148 (a).

**ii. Trust Fund’s observations on the methodology to determine victims’ eligibility**

61. The Trust Fund considers, as held in its Response to Registry’s Observations, that “there remain outstanding issues that need to be clarified by the Trial Chamber before making an informed decision on the model of the screening process that would be most effective and fair to the victims in the current case”.<sup>63</sup> The Trust Fund maintains that the Trial Chamber would be in a better position to design a screening process that is fair, expeditious and cost-effective when more information exists on the current experiences of harm, the needs and wishes of victims, and appropriate types and modalities of reparations. Therefore, the Trust Fund reiterates its position that making a decision on a screening model is premature at this stage of proceedings.

62. The Trust Fund respectfully suggests the application of the valuable expertise and capacities of VPRS in a modified way, namely by combining its mapping exercise with a representative sample of potential beneficiaries at the pre-reparations order stage. As argued below, this approach maximises the efficient use of the Court’s resources and expertise while, at the same time, enabling the Trial Chamber to obtain comprehensive and updated information on parameters relevant to the reparations order. In the post-order reparations stage, the Trial Chamber would then be able to rely on the Trust Fund for any necessary eligibility screening procedure. This approach serves the purposes of safeguarding a fair and expeditious process, preserving consistency in the activities of the Court in the area, and making use of the Trust Fund’s expertise of the implementation of reparations.

**1. First stage (pre-reparations order): mapping & sampling**

63. VPRS submitted, in its preliminary observations, that it has already carried out a preliminary mapping of potential new beneficiaries of reparations which still needs to be completed.<sup>64</sup> Given VPRS’ valuable expertise and relevant experience in the area of the *Ntaganda* case, the Trust Fund fully endorses VPRS’ continuing efforts in identifying new potential beneficiaries, and wishes to add that this exercise could be reinforced at two levels: first, by resorting -as appropriate- to the assistance of both the

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<sup>63</sup> [Response to Registry’s Observations](#), para. 28.

<sup>64</sup> [Registry’s Preliminary Observations](#), para. 22.

LRVs and the Trust Fund in light of their respective long-lasting relationship with potential beneficiaries and victimised communities, as well as their established presence and networks in the field. Second, and most importantly, by accompanying the mapping exercise with the elaboration of a sample of the potentially eligible victims. The sample would concern a limited but representative pool of potential beneficiaries,<sup>65</sup> thereby considerably reducing the risks outlined above in Part IV. The Trust Fund notes that this approach appears to be in accordance with the preference set out by the LRVs in their joint submission of 3 October 2019.<sup>66</sup>

64. In the Trust Fund's view, the engagement with a sampled group of potentially eligible victims would serve three goals:

- a. Provide accurate and updated information on how they experience the harm inflicted by Mr Ntaganda's crime at present, what their needs and wishes are, and what type and modalities of reparations would bring reparative value to their lives. The sampling would provide specific and up-to-date empirical data to the Trial Chamber in addition to the information furnished by the LRVs, IOM, experts, and the Government of DRC.
- b. Ensure that the sampling includes data on the harm and preferences of victims who have not participated at trial, as the extent to which participating victims are representative of the overall pool of potential beneficiaries is unknown. Combining the mapping of new potential beneficiaries with the sampling exercise would ensure that the Trial Chamber is in possession of representative information reflecting harm and needs that may not entirely be part of the case record.
- c. Assist the Trial Chamber in determining the type of documentation and means of proof that potential beneficiaries would need to produce to establish eligibility and inform on harm arising from Mr Ntaganda's crime(s). This would provide a solid basis for the Trial Chamber to determine the standard of proof

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<sup>65</sup> VPRS has already mapped and collected applications forms from participating victims. For this reason the Trust Fund understands that there is a wealth of preliminary information on the record stemming from such participation forms, some of which have been supplemented by the LRVs. A representative sample can therefore already be extracted from the existing information, and later be complemented as appropriate with, for example, non-participating victims and additional questioning for reparation purposes of selected participating ones.

<sup>66</sup> [Joint Response to Registry's Observations](#), paras 2 and 26.

required in this case as well as the type of evidence needed to meet its threshold. This is of a particularly sensitive nature in the *Ntaganda* case in light of the almost two decades elapsed since the first incidence of harms.

65. If the sampling of potential beneficiaries was to proceed on the basis of individual forms, the Trust Fund submits that the risks outlined above could be mitigated if such forms could be given an ulterior purpose: not only sampling *but also* their preliminary consideration for eligibility screening purposes. Not only could the forms assist the Trial Chamber in gathering useful information for the reparations order, but they could also be stored for their eventual individual eligibility assessment, once the reparation awards and their respective eligibility criteria would be known. While it cannot be discarded that some individuals would have to be recontacted for eventual clarifications, not adding this additional screening function may lead to the need of retracing applicants and interviewing them *ex novo* in bigger proportions.

66. In short, the Trust Fund submits that a VPRS-led mapping & sampling would imply the timely and efficient use of the Court' expertise and resources, and would supply the Trial Chamber with valuable information for the reparations order. Given its presence and experience in the DRC, the Trust Fund stands ready to assist VPRS in such an undertaking.

## **2. Second stage (post-reparation order): proposed screening methodology**

67. The Trust Fund respectfully proposes the Trial Chamber avails itself of the option -provided for in the legal framework and already put in practice- of delegating the design of the screening methodology to the Trust Fund's eventual draft implementation plan. This option would carry the advantage of having a fit-for-purpose screening methodology, that is, one designed in clear and unequivocal correspondence to the eligibility criteria and type of awards set out by the Trial Chamber in the reparations order. This approach would increase the efficient management of the Court's resources and result in a screening methodology drafted in consultation with relevant actors of the Court (e.g. VPRS, LRVs) before subjecting it to the Trial Chamber's approval. As explained below, it will also entail an appropriate mitigation of the risks of re-traumatisation and overly invasive scrutiny.

68. The Trust Fund recalls that an order for reparations does not need to *a priori* identify victims or determine their eligibility in a judicially-based process. The Trial Chamber has a choice to either identify the victims eligible for reparations, or set out the criteria of their eligibility for reparations.<sup>67</sup> This requirement does not distinguish between individual and collective awards. Moreover, the five essential elements of an order for reparations do not include the need to specify the actual methodology for eligibility screening of potential beneficiaries.<sup>68</sup> In accordance with the jurisprudence of the Appeals Chamber, the procedure to assess the eligibility of victims depends on the type of award(s) at hand;<sup>69</sup> in turn, the types of awards and -where appropriate- the eligibility criteria, are essential elements of an order for reparations. Consequently, the Trust Fund understands that the natural time to determine a screening methodology appropriate to the type of awards is *after* the order for reparations.

69. In accordance with the applicable legal framework,<sup>70</sup> when a trial chamber orders the award of reparations to be made through the Trust Fund, the latter has an obligation to “prepare a draft plan to implement the order of the Court.”<sup>71</sup> The *Al Mahdi* case is similar to *Ntaganda* inasmuch as the number of victims was unknown, and illustrative of a scenario where the trial chamber decided to award a varied arrangement of reparations: individual, collective with individualised benefits, collective with group benefits (e.g. rehabilitation of protected buildings) and symbolic.<sup>72</sup> Trial Chamber VIII laid down the eligibility criteria and related screening parameters, as far as required, in relation to each type of award and delegated the determination of their full details to the implementation plan of the Trust Fund. For individual reparations, Trial Chamber VIII noted that “that the impracticability of identifying all those meeting its individual reparations parameters justifie[d] an eligibility screening during the implementation phase [...] on the basis of an administrative screening by the TFV.”<sup>73</sup> For collective

<sup>67</sup> [Lubanga Judgment on the Appeals](#), para. 32.

<sup>68</sup> *Ibid.*

<sup>69</sup> See e.g. [Lubanga Judgment on the Appeals](#), para. 149.

<sup>70</sup> See article 75 (2) of the Statute; rules 98 (2) and (3) RPE; and regulations 50 (b), 54, 57, 58, 60-65 and 69-72 of the TFV Regulations.

<sup>71</sup> Regulation 54 of the TFV Regulations.

<sup>72</sup> [Al Mahdi Reparations Order](#), paras 56, 67, 71, 83, 90, 106-107.

<sup>73</sup> [Al Mahdi Reparations Order](#), para. 144; After setting out the general parameters of such screening, it delegated the determination of its full details to the Trust Fund. This way of proceeding was endorsed by the Appeals Chamber, with the caveat that the trial chamber would provide judicial oversight over the process. See [Al Mahdi Reparations Order](#), para. 146; [Judgment on appeals against Katanga Reparations Order](#), paras 69- 72.

reparations, no specific screening methodology was devised,<sup>74</sup> which entails that the Trust Fund will carry out a lighter screening process as appropriate for each type of award, in accordance with regulation 72 of its Regulations.

70. Beneficiary screening determined by the eligibility criteria and the type of award ensures that applicants are engaged mostly during the implementation phase and thus, as closely as possible in time to the actual delivery of reparations. Second, it allows making meaningful yet minimal contact with potential beneficiaries prior to their receipt of awards. In *Al Mahdi*, newly identified applicants of individual reparations have been interviewed only once, with their full knowledge and consent as to what they are requesting, and on the basis of an application form, jointly developed by the Trust Fund and VPRS, which contains questions strictly tailored to the eligibility criteria set out in the reparations order for the type of award at hand. Third, the screening methodology has due regard to the rights of the Defence, which is given three types of opportunities to make representations: (i) by making observations before the trial chamber on the draft implementation plan submitted by the Trust Fund, including on the devised screening process; (ii) by being given the opportunity to make representations when the preliminary administrative recommendation on the eligibility of individual applications is positive;<sup>75</sup> and (iii) by having the option of seizing the trial chamber at any time during the implementation phase “on an exceptional basis and with specific relief sought.”<sup>76</sup>

71. The Trust Fund wishes to recall that it has been tasked with the screening process in both cases where a determination of victims’ eligibility has been done post-reparations order, namely in *Lubanga* and *Al Mahdi*. This has allowed the Trust Fund to develop a singular experience of eligibility screening at the implementation stage of reparations, including on the required legal tests pertinent to the specific legal and operational framework of reparations. Moreover, the Trust Fund is conducting the screening of potential beneficiaries in *Lubanga*, where it is expected that some pools of victims will overlap with *Ntaganda*, which would make endowing the Trust Fund with the design and implementation of the screening process in the *Ntaganda* case a logical

<sup>74</sup> [Al Mahdi Reparations Order](#), para. 145.

<sup>75</sup> Trial Chamber VIII, *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Public redacted version of ‘Decision on Trust Fund for Victims’ Draft Implementation Plan for Reparations’, 12 July 2018, [ICC-01/12-01/15-273-Red](#), paras 40-42.

<sup>76</sup> [Decision on TFV Updated Implementation Plan](#), para. 106.

proposition. This is so in light of the value, recognised by the Appeals Chamber, of conducting the screening in “a consistent and equal manner.”<sup>77</sup> While the screening procedures would pertain to two distinct cases, having parallel eligibility processes administered by the same entity may avoid or better mitigate any confusion among victims and their communities, for example, if the applicants in the *Ntaganda* case would erroneously assume that their applications have been unsuccessful when *Lubanga* victims start benefiting from reparations measures.<sup>78</sup>

72. The Trust Fund would like to highlight to the Trial Chamber that, in carrying out its role in the administration of screening processes, the professional and collaborative support of the Registry and the LRVs has been paramount. Mindful of their respective expertise and availability, the Trust Fund would like to reiterate its interest in fully cooperating with VPRS and the LRVs to work jointly -as it has been doing in both *Lubanga* and *Al Mahdi*- in order to bring to fruition a fair and expeditious implementation of reparation awards.

## V. RELEVANT TYPES AND SCOPE OF HARM

73. The Trust Fund turns to the request in the Order Setting Deadlines to explore relevant types and scope of harm. It notes that, since the Trust Fund has only become involved in the *Ntaganda* case at the current reparations stage of proceedings, it defers to the parties and those actors who have primary information and are well placed to discuss this issue. Nevertheless, the Trust Fund considers it to be of interest to share relevant insights and information at its disposition at this stage and stands ready to submit information in more detail, if invited by the Trial Chamber to do so, by October 2020.

74. The Trust Fund notes that, in its Sentencing Judgment,<sup>79</sup> the Trial Chamber comprehensively discussed a wide range of issues directly relevant to the identification

<sup>77</sup> [Judgment on appeals against Katanga Reparations Order](#), para. 56.

<sup>78</sup> The Trust Fund notes that the administrative screening decisions in *Lubanga* have commenced, *see* Addendum au Huitième rapport sur le progrès de la mise en œuvre des réparations collectives conformément aux ordonnances de la Chambre de première instance II des 21 octobre 2016 (ICC-01/04-01/06-3251) et 6 avril 2017 (ICC-01/04-01/06-3289) et la Décision du 7 février 2019 (ICC-01/04-01/06-3440-Red), avec une annexe confidentiel *ex parte* uniquement accessible aux Représentants légaux du groupe de victimes V01, la SPVR et le Fonds au profit des victims, 25 February 2020, [ICC-01/04-01/06-3473](#).

<sup>79</sup> [Sentencing Judgment](#).

of types of harm that may give rise to reparations. Using these findings as its starting point, the Trust Fund has sought to further explore what useful input on the question of harm it can provide in this submission.

75. In January 2020, the Trust Fund organised a two-day workshop in Bunia (Ituri, DRC) which was attended by former implementing partners and other local stakeholders who have extensive experience working with victims of comparable crimes. The purpose of this workshop was to gather preliminary information of relevance to the present reparation proceedings.

76. The Sentencing Judgment adjoins counts that result in similar manifestations of harm, for instance it jointly discusses counts 4, 5, 6, 7, 8 and 9 on rape and sexual slavery. The following overview, containing the reflections of participants of the workshop on manifestations of harm in the *Ntaganda* case, also adopts this structure.

**a. Murder and attempted murder (Counts 1 and 2)**

77. The Trial Chamber convicted Mr Ntaganda of the murder of at least 74 individuals and the attempted murder of five more, in addition to making broader findings of an unquantified number of persons. The same conduct underlies Mr Ntaganda's convictions for both murder as a crime against humanity (Count 1) and murder as a war crime (Count 2).<sup>80</sup>

78. The Trial Chamber has established that, for the direct victim of murder, harm is the deprivation of life, which constitutes the ultimate harm.<sup>81</sup> Relatives and dependents left behind are also victims in that they are deprived of a family member, and thereby of love and care and, depending on the situation, of support be it financial, physical, emotional, moral or otherwise. They hence experience psychological, physical and also material manifestations of harm. Moreover, the Sentencing Judgment has established that individuals who survived attempted murders or witnessed murders still bear permanent scars,<sup>82</sup> causing the victims to suffer from a distorted self-image. Other injuries with long-term serious health consequences include traumatic head injuries, long-term memory loss, and neurological disturbances.

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<sup>80</sup> *Ibid.* para. 86.

<sup>81</sup> *Ibid.* para. 44.

<sup>82</sup> *Ibid.* para. 49. The Trial Chamber also established that finding mutilated bodies after the massacre in the Kobu banana field left survivors traumatised and caused long-lasting psychological harm, *see Judgment*, paras 633-634.

79. In the Trust Fund’s understanding, the crime of murder affects different groups of victims, including survivors of attempted murders, family members and relatives of those who died, and witnesses traumatised by what they have experienced. Moreover, the murders also had a deep impact on society as a whole, not least because they were carried out with the intent to persecute Lendus as the opposing ethnic group in an interethnic conflict. In particular, the murder of *Abbé* Bwanalunga, for which Mr Nataganda was convicted as the direct perpetrator, had a deep psychological impact on the community in general, as well as on the witnesses of the crime. As the Trial Chamber noted, it “became notorious amongst the clergy and the population”.<sup>83</sup> In general, the murders were carried out with discriminatory intent, pursuant to a common plan to drive out the Lendu population from localities targeted during the UPC/FPLC’s military campaign against the RDC-K/ML.<sup>84</sup>

80. The Trust Fund, based on information gathered in its January 2020 workshop, further submits that the psychological harm experienced by these various groups of victims resulted in a range of long-lasting behavioural disorders, in most cases still persisting today and seriously affecting those concerned. They consist of trauma and severe depression, in some instances leading to suicidal tendencies and/or to feelings of hatred. Some severely traumatised victims may have reacted by withdrawing themselves from community life, preferring to live in isolation. The childhood of children affected by murders -be it because their parent died, because they were themselves victims of an attempted murder, or because they witnessed atrocious murders- is almost always severely disrupted.

81. All victims, no matter whether children or adults, who suffered from behavioural disorders as a result of psychological harm have, in turn, suffered from and in many cases continue to suffer from a loss of productive capacity and reduced socio-economic opportunities, which were further aggravated by their, in most cases, limited access to basic social services such as schooling and health care. Behavioural disorders caused by the trauma have also, in some cases, led to the stigmatisation and rejection of the affected victims by their communities and families.

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<sup>83</sup> [Sentencing Judgment](#), para. 46.

<sup>84</sup> [Judgment](#), para. 1013.

### **b. Intentionally attacking civilians (Count 3)**

82. Mr Ntaganda was convicted of intentionally directing attacks against civilians as a war crime (article 8 (2) (e) (i) of the Statute), as an indirect co-perpetrator, in a total of five locations.<sup>85</sup> The prohibition of attacks directed against civilians aims to protect lives and avoid unnecessary suffering of individuals not taking direct part in hostilities. The harm resulting from intentionally attacking civilians at the level of individual victims corresponds to the harm covered by other crimes, in particular killings, attempted killings and various forms of sexual violence which are discussed under separate headings below.

### **c. Rape and sexual slavery (Counts 4, 5, 6, 7, 8 and 9)**

83. The Trust Fund recalls that the Trial Chamber convicted Mr Ntaganda for the rape of an unquantified number of victims, with specific reference to 21 persons, and the sexual slavery of two victims.<sup>86</sup> Mr Ntaganda was also convicted of rape and sexual slavery committed against female UPC/FOKC members under the age of 15.<sup>87</sup>

84. The Trial Chamber relied on the jurisprudence of the ICTY to state that “rape is one of the worst sufferings a human being can inflict upon another” and found “the rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity.”<sup>88</sup> These victims suffer from a wide range of physical harm, including injuries, loss of fertility, sexually transmitted diseases and even death. This, in turn, also affected the community as a whole over both the short and long term. It contributed to the rejection of victims by their communities and social circles, causing suffering for the individuals concerned and, at the same time, led to a weakening of the social fabric of families and communities.

85. According to the experience of the Trust Fund and its partners, it must be assumed that all SGBV victims suffer from profound psychological harm. This may manifest itself in behavioural disorders: some victims have shown suicidal tendencies and loss of self-respect and identity, including at present. The Trust Fund would like to highlight the cultural dimensions and implications of the stigma associated with rape

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<sup>85</sup> [Sentencing Judgment](#), para. 43

<sup>86</sup> *Ibid.* paras 98-101.

<sup>87</sup> *Ibid.* para. 93.

<sup>88</sup> *Ibid.* para. 96.

and sexual assault in the context of eastern DRC: not only the victims, but also the families suffered from often severe feelings of shame and isolation,<sup>89</sup> resulting in secondary trauma, loss of productive capacity and, if the victims were children at the time, in disrupted childhoods.

86. A number of female victims of repeated rapes became pregnant with no knowledge of the identity of the father of their child. This, in turn, led often to severe stigmatisation of these children and their mothers, the presence of orphans, abandoned and unaccompanied children, and children without identity in the communities.

87. The Trust Fund, based on its consultations and experience working with SGBV victims in eastern DRC, would also like to highlight the long-lasting socio-economic implications caused by crimes of a sexual nature. The stigma experienced and the psychological harm affect many victims so severely that they are no longer able to undertake income generating activities in the same way that they would have been able to otherwise. This creates a loss of opportunities and income not only for direct victims, but also for their immediate family.

**d. Pillage, attacking protected objects, and destroying the adversary's property (Counts 11, 17, 18)**

88. The Trial Chamber found that the scale of the pillage and destruction of valuable property committed by Mr Ntaganda is considered to be significant, particularly due to the considerable geographical spread and the number of victims affected.<sup>90</sup> Mr Ntaganda was also found responsible for the attack against the health centre in Sayo.<sup>91</sup>

89. Based on its consultations, the Trust Fund submits that, in addition to material harm, property crimes caused psychological harm when the loss of material assets had a significant effect on the victim's daily life, either through the destruction of their dwelling, or of their means of securing an income, such as livestock or agricultural production.

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

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<sup>89</sup> *Ibid.* fn. 288.

<sup>90</sup> *Ibid.* paras 140-145.

<sup>91</sup> *Ibid.* para. 134.

which left it at least partly destroyed.<sup>92</sup> Another consequence of property crimes identified at the Trust Fund's workshop is the loss of important documents, such as diplomas, identity cards, or land ownership titles. This is something that the Trial Chamber may wish to bear in mind when considering the appropriate standard required to prove harm resulting from this crime, as well as the possible cooperation of the Government of the DRC, in connection to the implementation of reparations awards.

91. The Trust Fund's assessment based on the information it has gathered in relation to pillage is that the harm suffered by victims was extensive and significant. Often, the items looted represented the bulk, if not all, of the victims' possessions, and played an important role in the victims' day-to-day lives and/or their business.<sup>93</sup> Extensive pillaging caused livelihood stress due to the lack of food resulting from the destruction of crops and the inability to generate income. The obliteration of houses and the widespread pillaging also had a long-lasting negative effect on the socio-economic and cultural infrastructure, and resulted in a weakening of social values.

**e. Forcible displacement of populations (Counts 12 and 13)**

92. The Trial Chamber found Mr Ntaganda responsible for the forcible transfer of populations in Mongbwalu, Lipri, Tsili, Kobu and Bambu. Mr Ntaganda was also found responsible for ordering the displacement of the civilian population in the same locations.<sup>94</sup> This not only heightened negative economic impacts, but also further contributed to the psycho-social harm because individuals lost their homes and means of life, as well as documents, cultural infrastructure and valuable social and community-related symbols such as churches, markets, cemeteries or monuments, along with their sense of identity which for some was directly linked to these values. Occasionally, victims had to endure harsh living conditions: they did not have adequate shelter and, for periods of time, had insufficient access to food or water. Victims included elderly persons and children who were lost or abandoned, and who remained unaccompanied with no help or means of making a living.

93. The Trust Fund finds that the harm resulting from the displacement of populations is highly nuanced and diverse, and that both individuals and communities

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<sup>92</sup> *Ibid.* para. 144.

<sup>93</sup> *Ibid.* para. 139.

<sup>94</sup> *Ibid.* paras 160-165.

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

**f. Conscripting and enlisting children under the age of 15 into the armed forces or groups and using them to participate actively in hostilities (Counts 14, 15 and 16)**

94. The Trial Chamber found Mr Ntaganda responsible for conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities or as bodyguards for soldiers and commanders, as well as using them to gather information about the opposing forces and personnel.<sup>95</sup> Based on observations in the Sentencing and Conviction Judgments, as well as the Trust Fund's findings in the field, the recruitment of child soldiers resulted in significant psychological, social, economic and extensive physical harm. Physical manifestations of harm affecting child soldiers include disabilities, fistulas, wounds or ulcerations, mutilation and even death.

95. In the Trust Fund's view, the extent of the psychological and social harm caused by child soldier crimes is extensive and goes beyond the affected individuals. Field findings point to behavioural disorders, such as self-sought isolation, family and community rejection, loss of childhood, suicidal and vengeful thoughts, rejection, and stigmatisation. Occasionally, children suffered from life-long psychological and psychiatric disorders, which, in turn, led to further harm, such as a loss of social values and identity, economic harm caused by lack of education and the inability to participate in the economic activities of their communities.

96. The Trust Fund fully recalls that P-083 described that if she found a partner, they would abandon her upon finding out that she had been a child soldier, and she felt that because of this, her future had been compromised and her life had been ruined.<sup>96</sup> In the Trust Fund's view, this account is illustrative of the inability of many former child

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<sup>95</sup> *Ibid.* para. 178.

<sup>96</sup> *Ibid.* para. 184.

soldiers to develop normal “civilian life skills” which, correspondingly, results in victims being at a disadvantage, particularly as regards employment.

97. The Trust Fund further refers to the detailed findings of the Appeals Chamber on harm in the *Lubanga* case.<sup>97</sup>

**g. Persecution (Count 10)**

98. The Chamber found Mr Ntaganda responsible for persecution as a direct perpetrator for the killing of *Abbé* Bwanalunga in Mongbwalu in the context of the First Operation. It also found him responsible for persecution as an indirect co-perpetrator in Mongbwalu, Nzebi, Sayo, and Kilo in the context of the First Operation, and in Nyangaray, Lipri, Tsili, Kobu, Bambu, Sangi, Gola, Jitchu, and Buli in the context of the Second Operation.<sup>98</sup>

99. The Trust Fund recalls the Trial Chamber’s finding that what differentiates persecution from other offences is the discriminatory nature of the crime. However, this discriminatory intent also characterises Counts 1 to 5, 7 to 8, 11 to 13, and 17 to 18. The conviction for the crime of persecution was therefore not separately considered in the context of sentencing.

100. In the Trust Fund’s view, the particular nature of the crime of persecution may warrant -if the victims so wish- the consideration of symbolic reparations since, as explained above, they carry a significant intangible meaning.

**VI. TYPES & MODALITIES OF REPARATIONS APPROPRIATE TO ADDRESS THE TYPES OF HARM**

101. The Trust Fund recalls that “the appropriateness of a modality of reparations can only be determined by reference to the harms that were caused and which the reparations seek to remedy.”<sup>99</sup> In the present case, the type of harms caused by the crimes committed by Mr Ntaganda as described above can be grouped under four categories: (i) psychological, psychiatric and psycho-social disorders; (ii) socio-economic harm; (iii) physical harm; and (iv) other type of harms, including at the community level, such as inter-ethnic tensions. The Trust Fund has previously worked

<sup>97</sup> [Lubanga Judgment on the Appeals](#), para. 191.

<sup>98</sup> [Sentencing Judgment](#), para. 174.

<sup>99</sup> [Lubanga Judgment on the Appeals](#), para. 200.

with local partners capable of addressing all these types of harms across Ituri. It is, however, worth noting that certain types of services may not be readily accessible in certain territories and that beneficiaries would need to be enrolled in programmes in locations other than their homes, for instance in relation to receiving specialised medical and psychological treatment.

102. The Trial Chamber requested observations on “the types and modalities of reparations appropriate to address the types of harm relevant in the circumstances of the *Ntaganda* case.”<sup>100</sup> The Trust Fund understands the concept of “appropriateness” to encompass an operational dimension, that is, the feasibility of reparations measures to be carried out in a local context conditioned by the specific scope of its service providers, social dynamics and security situation.

103. The Trust Fund’s past engagement in the affected area through its assistance mandate enables it to provide an account of the modalities of reparations that would be operationally feasible in this case. It nevertheless wishes to caution that its overview of the types and scope of harm is, at the present stage, in large part based on the case record, enriched with insights from its implementing partners gathered at the January 2020 workshop in Bunia. For this reason, it understands the following discussion to be preliminary in character and wishes to respectfully request the Trial Chamber to be allowed to provide a more definite description of the types and modalities of reparations appropriate in this case by 30 October 2020, once it has had an opportunity to examine the submissions of the parties and other actors, and gather additional relevant information from the field.

104. Article 75 of the Statute provides a non-exhaustive list of modalities of reparations, including restitution, compensation or rehabilitation. As almost 20 years have elapsed since the commission of the crimes, in most cases, restitution will not prove feasible since the loss caused by the crime will either have been already replaced, or a coping mechanism found. For instance, many of those who lost a house in 2002 or 2003 would have already rebuilt their houses or found a new one.

105. While compensation should not be discarded altogether from the outset, the Trust Fund cautions against a predominantly compensation-based approach towards

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<sup>100</sup> [Order Setting Deadlines](#), para. 9 (c) (iii).

repairing harm in the present case. As explained above, in Ituri, the concepts of community and sharing prevail over those of individualism and privacy. A personal safety risk may ensue for individuals receiving monetary awards due to them being perceived as privileged and ultimately alienated from their community. Besides, in light of the expected high number of victims, awarding compensation on a large scale could destabilise the fragile local economy.

106. In the context of the implementation of its assistance and reparations mandates, the Trust Fund and its local partners have accumulated direct relevant experience in terms of addressing various types of harms suffered by people across the Ituri region through rehabilitation. At the Bunia workshop in January 2020, participants identified possible actors and service providers present in eastern DRC which could implement reparations if and when ordered by the Court. The Trust Fund commits to completing a comprehensive analysis of the case-relevant local services market at a later stage in the proceedings, including the possibility of the Trial Chamber availing itself of awarding reparations through an organisation according to rule 98 (4) RPE.

107. The Trust Fund wishes to point out two circumstances that could have an impact on the modalities of reparations ordered. First, the security situation in Ituri remains unstable with certain locations, such as Bule or Fataki, being barely accessible. This speaks in favour of the implementation through local partners whose access is better than that of the Court's staff. Second, while all harms identified so far can be properly addressed in the region (in Ituri, or in North Kivu), it is necessary to keep in mind that not all forms of redress may be accessible in all locations (for example, specialised medical and psychological services). Bearing this in mind, the Trust Fund is confident nonetheless that a reparative response can be offered to the victims of this case, if the requisite costs of enabling comprehensive accessibility are proportionate and may be accommodated.

**a. Factors relating to the appropriateness of awarding reparations on an individual basis, a collective basis, or both**

108. As a preliminary remark, the Trust Fund recalls that International Law does not provide a definition of collective reparations.<sup>101</sup> However, the collective dimension of awards is not to the detriment of their individual component. Collective awards may also result in individualised benefits. The Appeals Chamber clarified:

“in awarding collective reparations to victims, this can include reparations which are individualised; in this respect, collective reparations can include the payment of sums of money to individuals to repair harm suffered and the possibility for individuals to participate in particular programmes that address the specific harm that those individuals have suffered. The Appeals Chamber recalls that it has held that, ‘[w]hen collective reparations are awarded, these should address the harm the victims suffered on an individual and collective basis’.”<sup>102</sup>

109. The Trust Fund puts forward four factors which may guide the Trial Chamber in determining what type of reparations would be appropriate in the present case: (i) the nature of the harm Mr Ntaganda is accountable for; (ii) the wishes of victims coupled with the cultural context in Ituri; (iii) procedural fairness and efficiency; and (iv) the viability of obtaining funding in light of Mr Ntaganda’s prospective indigence. The Trust Fund’s analysis of these four factors indicates that, in the case at hand, reparations should be predominantly collective in character.

**i. Nature of the harm**

110. The Trust Fund recalls the consistent appeals jurisprudence according to which, when determining the appropriate types of reparations, “a trial chamber should [...] establish the types or categories of harm caused by the crimes for which the convicted person was convicted.”<sup>103</sup> This entails that the nature of harm occasioned constitutes a guiding factor in the process of opting for individual, collective or both types of reparations.

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<sup>101</sup> There have been different attempts to establish criteria to determine when reparations are “collective”, *see e.g.* Pablo de Greiff, United Nations Report by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Doc. A/69/518, 8 October 2014, paras 38-42, referring to the types of goods distributed or the method of distributing them, as well as to the groups of people who receive them as possible criteria.

<sup>102</sup> [Lubanga Appeals Judgment on Reparations](#), para. 40; [Lubanga Reparations Principles](#), para. 33.

<sup>103</sup> [Judgment on appeals against Katanga Reparations Order](#), para. 70; [Lubanga Appeals Judgment on Reparations](#), para. 78.

111. The Trust Fund submits that all harm caused to victims in the sense of rule 85 (a) RPE is personal and thus individual. However, more often than not, the inherent features of the crimes falling within the jurisdiction of the Court also result in mass victimisation.<sup>104</sup> Mass victimisation shapes and transcends individual damage by integrating a layer of harm that makes the complete pattern of harm become greater than the sum of individual harms. This would occur when, for example, the victims are bound by a shared identity which predates the commission of the crime, and/or when they become victims of the same crime and thus bound by the experience of shared harm.<sup>105</sup> In the case at hand, both aspects of collective harm are on point: the victims of the attacks are connected through a common identity since it has been established that Mr Ntaganda's conduct was "targeted against the Lendu population as such."<sup>106</sup> On their part, child soldiers are connected by harm arising from having been recruited into the UPC/FPLC and used in their hostilities. What is more, as expressed by Judge Ibáñez Carranza in the context of the *Lubanga* case, the harm caused to children who were conscripted and enlisted "transcends to impact the relatives of those children as well as the social fabric, cohesion and future of their communities. Indeed, by harming children, who represent a community's youngest generation, the crimes may harm those expected to be in charge of the community in the future."<sup>107</sup>

112. The Trust Fund therefore submits that the occurrence of group victimisation beyond individual levels of harm is a relevant feature of the nature of harm in this case, requiring reparations collective in character. Labelling reparations as "collective" would already fulfil an expressive function: that of conveying that the harm in the *Ntaganda* case goes beyond the sum of individual experiences of victimisation and includes group and/or communal features of harm.

113. Once the Trial Chamber has received all relevant information concerning the specific types of harm, it will be in a position to fully assess the appropriate modalities of collective reparations. Depending on the determination by the Trial Chamber, such

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<sup>104</sup> For example, according to article 8 (1) of the Statute, the "Court shall have jurisdiction in respect of war crimes in particular when committed *as part of a plan or policy or as part of a large-scale commission of such crimes*" (emphasis added).

<sup>105</sup> [Katanga Reparations Order](#), paras 274-275.

<sup>106</sup> [Sentencing Judgment](#), para. 34.

<sup>107</sup> Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, Separate Opinion of Judge Luz del Carmen Ibáñez Carranza, 16 September 2019, [ICC-01/04-01/06-3466-AnxII](#), para. 141, annexed to [Lubanga Appeals Judgment on Reparations](#).

appropriate collective awards could entail “community-based” awards which aim to benefit the community as a whole and may involve measures such as memorialisation, construction and rehabilitation of public and/or communal buildings. They could also entail awards collectively providing individualised responses to harm experienced by a group of individuals (for instance, “service-based” collective reparations).

114. The Trial Chamber may consider awarding individual reparations in limited instances. In addition to making general findings and establishing patterns of crime and harm, the case has also involved incidents concerning a small number of individually identified victims. One such case, which *prima facie* may lend itself to an individual award, is the killing of *Abbé* Bwanalunga.<sup>108</sup> The Trial Chamber has established Mr Ntaganda’s responsibility as the direct perpetrator of murder and persecution in connection with this killing, a fact that further strengthens the personal link between the victim’s harm and Mr Ntaganda. In the Trust Fund’s view, however, any potential individual reparation in this instance should not be to the exclusion of a collective award given the symbolic weight that this murder carried:<sup>109</sup> the *Abbé* was a highly respected Lendu priest whose killing sent a clear message to others belonging to the same ethnic group.

115. The other two categories of crime and ensuing harm which may lend itself to individual reparations concern cases of sexual slavery and that of conscripting and enlisting children under the age of 15. As to the former category, this is because the Judgment on Conviction and the Sentencing Judgment only point to a very small number of individually identified victims,<sup>110</sup> subject to the observations concerning the risk of stigmatisation explained below. For those victims of the crime of conscripting children who would be already benefitting from service-based awards in *Lubanga*, the Trial Chamber may want to consider conferring them a symbolic compensation to recognise their harm arising from Mr Ntaganda’s crime.

116. In sum, the Trust Fund submits that the nature of the harm occasioned by Mr Ntaganda has a clear and identifiable group dimension that appears to make the awarding of collective reparations appropriate to the circumstances of the case. The Trust Fund wishes to reiterate that awarding collective reparations is fully compatible

<sup>108</sup> [Judgment](#), paras 529-535; [Sentencing Judgment](#), para. 83.

<sup>109</sup> His “death became notorious among the clergy and the population”, [Sentencing Judgment](#), para. 46.

<sup>110</sup> [Judgment](#), paras 954-974; [Sentencing Judgment](#), paras 90-113.

with offering individualised responses to the harm suffered. Lastly, the existence of individual types of harm closely linked to Mr Ntaganda's personal action may warrant conferring individual reparations on an exceptional basis.

## ii. Wishes of victims and cultural context

117. The preferences expressed by victims are a key factor in determining the type of reparations and ensuring that these are meaningful and responsive to their needs. Wishes of victims are informed by their social context, that is, victims would seldom articulate needs and aspirations that sit outside their own cultural compass. Psychological trauma may be one example. While psychological trauma is a constant feature of harm in Mr Ntaganda's victims (for example, child soldiers, relatives of murdered victims, those subjected to rape and/or sexual slavery), acknowledging the existence of such trauma and the need to address it may raise social concerns. In order to avoid exposing individuals to undue social pressure, it is the experience of the Trust fund that addressing individual psychological harm will prove to be more effective when embedded in measures collectively addressing their group or community.

118. An important caveat results from the particular experience of victims of rape and/or sexual slavery. Such victims would have suffered physical and psychological harm, as well as material losses as a result of, for example, dropping out of school or losing the social support structures by way of ostracisation. For instance, P-0365 "testified that throughout communities, a raped person would be considered to be 'of lesser status' and that victims would hide their rape in order to avoid social consequences".<sup>111</sup> "P-0018 believed that her husband would abandon her if he were to find out, and was terrified of the response of her community if she disclosed that she had been raped."<sup>112</sup>

119. Accordingly, SGBV victims may decide not to come forward in identification or screening processes that involve a direct engagement with them through, for example, interviews and collection of individual application forms. The possible reluctance of SGBV victims to publicly speak out may create a blind spot in the mosaic of victims' wishes. Given that the conviction for rape and sexual slavery is a central -and unprecedented- factor in the *Ntaganda* case, this aspect of the reparation awards will

<sup>111</sup> [Sentencing Judgment](#), fn. 288.

<sup>112</sup> *Ibid.* para. 107.

require special consideration. Conceiving reparations measures as collective in character and, as far as possible, branding them generically (that is, not specifically targeted to SGBV victims but, at the same time, ensuring that they can access the services that they need) may increase the chances of reaching this important subset of *Ntaganda*'s victims.

### **iii. Procedural fairness and efficiency**

120. The Trust Fund respectfully submits that collective reparations may be organised in such a way that ensures that, if eligibility screening is deemed appropriate, individuals are screened simultaneously -or very close in time- to the actual delivery of the awards. Outreach activities can be arranged immediately after the reparations order and/or approval of the ensuing implementation plan to inform the community at large of the upcoming programmes. Individual and personalised contact with beneficiaries would take place once the infrastructure to implement the collective award (for example, through an implementing partner) is ready to function. For instance, victims of the *Al Mahdi* case were first informed of the approved collective programme to enhance their income-generating capacity through outreach campaigns. Then, only once a suitable implementing partner is chosen through procurement procedures, would potential beneficiaries engage with the partner in order to assess their eligibility and request services, thereby providing victims with a degree of immediacy between their actual request and the receipt of relief.

121. Moreover, the Trust Fund would like to recall that rule 98 (4) RPE and regulations 73-75 of its Regulations allow for awards made through the Trust Fund to specific organisations (that is, organisational awards). This alternative can be used in collective reparations to streamline the selection of an implementing partner, when appropriate. If the Trial Chamber sees reasons to directly appoint one such organisation because, for example, of its already established expertise in the area where the programme will be carried out, the implementation of reparations can be spared of time-consuming procurement procedures, thereby allowing for prompter receipt of awards. If invited by the Trial Chamber to make final submissions, the Trust Fund would welcome making observations on the possible organisations that could be considered under rule 98 (4) RPE by preparing a summary of their relevant expertise, and a list of specific functions that the organisation would be able to undertake in the relevant localities.

122. The Trust Fund recalls the Appeals Chamber’s jurisprudence according to which reparations “must be as expeditious and cost effective as possible and thus avoid unnecessarily protracted, complex and expensive litigation,”<sup>113</sup> especially when a considerable amount of years has elapsed since the commission of the crime(s). The Trust Fund notes that collective reparations open the possibility of reducing delays caused by litigation. This is because the Trial Chamber may decide to design the collective reparations in a way that does not require judicial screening of applications and instead relies on the administrative monitoring of the Trust Fund, as explained above in paragraphs 56-58.

#### **iv. Funding viability**

123. It seems highly likely that Mr Ntaganda will be considered indigent for the purpose of reparations, and that the funding of the reparation awards will depend on the Trust Fund’s determination whether to complement the payment of awards, as per regulation 56 of the TFV Regulations.

124. The Trust Fund wishes to note that conceiving awards as collective and/or organisational – as opposed to individual – has a direct bearing on the Trust Fund’s ability to complement the payments of awards as per its regulation 56. Regulation 56 makes express mention to the need of providing resources for collective and organisational awards (that is, rules 98 (3) and 98 (4) RPE), but omits any reference to individual awards (rule 98 (2) RPE). The Board of Directors has interpreted this omission as establishing a clear prioritisation of the Trust Fund’s resources in favour of its assistance mandate (regulation 50 (a) TFV Regulations), as well as collective and organisational awards. Regulation 56 also renders clear that the Trust Fund should not be managed as if reparations cases were self-contained units. This means that the financing of any eventual individual awards ordered in the *Ntaganda* case would also be contemplated in relation to ongoing funding needs in *Lubanga* and *Al Mahdi*, as well as possible future reparations proceedings.

125. The Trust Fund has held that complementing the payment of individual awards for reparations

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<sup>113</sup> [Judgment on appeals against Katanga Reparations Order](#), para. 64.

“must not prejudice the Trust Fund’s ability to fund its assistance mandate activities and should only be done after the TFV Board has determined that the Trust Fund has adequate resources to first complement any collective or organisational awards ordered in the same case and in regard to ongoing cases where a collective or organisational award may be ordered.”<sup>114</sup>

126. Present the capacity to complement, there are three additional *numerus apertus* policy considerations which the Trust Fund would contemplate to decide whether to fund individual awards: (i) the explicit wishes of the victims; (ii) the likelihood of identifying a donor willing to make an earmarked contribution for the payment of the individual awards in question; and (iii) the proportionality between the administrative costs to implement the individual measure and its value and benefit to victims.<sup>115</sup>

127. Following from the operational appropriateness discussed above, the Trust Fund will note that, bearing in mind Mr Ntaganda’s indigence, the capacity of the Trust Fund to raise financial resources commensurate with the amount of liability imposed on him is an important factor to take into account to ensure that reparations measures would reach victims in a prompt manner. In this line, the Trust Fund would like to make the Trial Chamber aware that conceiving and branding reparations as “collective” in character has proven to encourage the solicitation of voluntary contributions earmarked to the implementation of specific reparations awards.

128. In conclusion, the Trust Fund respectfully submits that, in the circumstances of the present case, collective reparations seem the primary suitable form of reparations. The Trial Chamber may nevertheless deem it appropriate to combine collective awards with individual ones in relation to victims who have expressed this as their clear preference, in particular with regard to certain crimes underlying the conviction of Mr Ntaganda that concern only a small number of individually identified victims. The Trust Fund respectfully requests the Trial Chamber to take note of its remarks concerning the repercussions that opting for individual or collective awards has for the potential complementary funding by the Trust Fund under regulation 56 of its Regulations.

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<sup>114</sup> Trust Fund, *Prosecutor v. Germain Katanga*, Notification pursuant to regulation 56 of the TFV Regulations regarding the Trust Fund Board of Director’s decision relevant to complementing the payment of the individual and collective reparations awards as requested by Trial Chamber II in its 24 March 2017 order for reparations”, [ICC-01/04-01/07-3740](#), 17 May 2017, para. 33.

<sup>115</sup> *Ibid.* paras 34-38.

## VII. THE CRITERIA & METHODOLOGY TO BE APPLIED WITH REGARD TO THE SCOPE OF LIABILITY OF MR NTAGANDA, INCLUDING PRECISE EXTENT OF MONETARY OBLIGATIONS

129. As established by the Appeals Chamber in the context of the *Katanga* case, the

“primary consideration in establishing the amount of liability is the extent of the harm and cost it takes to repair that harm. Criteria such as the gravity of the crimes or mitigating factors such as characteristics personal to the convicted person are not relevant to this question. The goal of reparations is not to punish the person but indeed to repair the harm caused to others.”<sup>116</sup>

The goal is to set an amount that is fair and properly reflects the rights of victims and those of the convicted person. In the context of *Lubanga*, the Appeals Chamber also found that, when determining the amount of liability, it is “appropriate for the Trial Chamber to focus on the cost of repair”<sup>117</sup> which will depend on the circumstances of the case. However, it also held that the failure to focus on the cost of repair does not necessarily constitute an error.

130. In that regard, the Trust Fund recalls that the Appeals Chamber has clarified that, when the precise costs of a specific reparation programme cannot be obtained, the Trial Chamber can rely on estimates as to the cost of reparation programmes when establishing the amount of financial liability. Estimates must be as precise as possible in the circumstances of the case<sup>118</sup> whilst also adhering to the imperative of expediency. Against this backdrop, the Trust Fund wishes to provide the following preliminary estimations on the cost of repair:

### a. Physical rehabilitation

- Costs for medical treatment for severe physical injury: 3000 USD per victim.
- Cost to treat infectious and chronic diseases, including HIV infection, loss of fertility etc.: 450 USD per victim including medical costs, transport, costs for stay and food while at hospital.

<sup>116</sup> [Judgment on appeals against Katanga Reparations Order](#), para. 184; *see also*, [Lubanga Appeals Judgment on Reparations](#), para. 314.

<sup>117</sup> *Ibid.* para. 107.

<sup>118</sup> *Ibid.* para. 108.

**b. Psychological rehabilitation**

- Rehabilitation for severe mental trauma, including behavioural disorders, isolation, suicidal tendencies, loss of childhood etc.: 2000 USD per year.

**c. Individual socio-economic reintegration**

- About 3000 USD per person, consisting of 2000 USD for a reinsertion kit, 500 USD for vocational training, and 500 USD for one year of coaching per person.
- Programmes such as microcredit schemes with individual coaching: 500 USD per person per year. These programmes should last for two to three years to yield expected results.
- Recovery of important documents lost or destroyed during the conflict: 300 USD in fees to obtain newly issued documents.

**d. Programmes to address the loss of physical infrastructure**

- Building a school or a health centre – 50,000 USD
- Building a market – 100,000 USD
- Establishing a source of drinking water - 6000 USD

**e. Programme support costs**

131. The Trust Fund wishes to use this opportunity to address the matter of programme support costs, in relation to the notion of “cost of repair”. In the Court’s reparations orders to date, the establishment of liability of the convicted person, as well as the correlated value of reparations awards, have been decided by reference to the *direct benefits* of reparations as received by victims.

132. The Trust Fund recalls that the question of how to account for administrative or “programme support costs”, that is, costs associated with the implementation of the awards and incurred by the Trust Fund’s implementing partners, became subject of discussion following the submission of the Trust Fund’s draft implementation plan in the *Katanga* case.<sup>119</sup> In its decision approving the draft implementation plan, the

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<sup>119</sup> Trust Fund, *Prosecutor v. Germain Katanga*, Public redacted version of Draft implementation plan relevant to Trial Chamber II’s order for reparations of 24 March 2017 (ICC-01/04-01/07-3728), 25 July 2017, [ICC-01/04-01/07-3751-Red](#). See also Legal Representative of Victims, *Prosecutor v. Germain Katanga*, *Observations relatives au projet de plan de mise en œuvre déposé par le Fonds au profit des*

*Katanga* Trial Chamber acknowledged that direct costs of the implementing partners, as well as administrative costs, are inherent to the implementation of reparations awards. Yet, it also posited that the Trust Fund’s practice in the assistance mandate, which was the foundation for the inclusion of administrative costs in the implementation budget, may not automatically apply to the Trust Fund’s mandate to implement reparations.<sup>120</sup>

133. In previous reparations cases, the Trust Fund has had to decide to separate programme support costs incurred by implementing partners from the financial scope and value of awarded reparations, which has the effect of increasing the administrative burden and of inhibiting transparency.

134. The “cost of repair” related to the implementation of Court-ordered reparations awards consists of the following elements:

- *Direct costs*: incurred by a partner organisation, or by the Trust Fund and the Court internally, to implement those activities identified in the approved implementation plan of the reparation awards.
- *Indirect costs*: administration and management costs incurred by a partner organisation in support of project implementation. These costs concern staff activities (including appropriate overhead allocations) in management and support areas, including human resources management, procurement, finance and administration and IT services, as well as costs relating to bank charges, audit fees, utilities and similar administrative expenses. It is the Trust Fund’s policy that the total indirect costs of a project should not exceed 15% of the total direct project costs. They are a necessary functional part of the total implementation costs of a project.
- *Monitoring & Evaluation, Reporting costs*: costs incurred by a partner organisation in relation to performance of the monitoring, evaluation and reporting of project activities and results. Such activities, including the use of staff resources, must be documented and reported separately from the direct project costs. It is the Trust Fund’s policy that the cost of

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*victimes en exécution de l’Ordonnance de réparation en vertu de l’article 75 du Statut (ICC-01/04-01/07-3751-Red)*, 12 September 2017, [ICC-01/04-01/07-3763-Red](#), paras 46-55.

<sup>120</sup> Trial Chamber II, *Prosecutor v. Germain Katanga*, Decision approving the Implementation of Individual Reparations and instructing the Trust Fund for Victims to Transmit to it Additional Information on the Implementation of Collective Reparations, 12 October 2018, ICC-01/04-01/07-3768-Conf-tENG, para 50.

monitoring, evaluation and reporting should not exceed 3% of total direct project costs.

135. Costs incurred by the Trust Fund’s Secretariat and the Registry are accounted for in the Court’s programme budget and are therefore excluded from the “cost of repair”.

136. The Trust Fund invites the Trial Chamber to deem such programme support costs as a necessary component of reparations measures to be fully accounted for in the value of the “cost of repair”, and consequently to be considered an integral element of the liability of the convicted person. This approach has been applied to the above indicative estimations on the foreseeable cost of repair.

### VIII. OBSERVATIONS ON EXPERTS

137. The Trust Fund first recalls its earlier observations on the potential role of experts in this case.<sup>121</sup> The list of eligible experts consolidated by VPRS<sup>122</sup> is extensive and offers a wealth of expertise in different areas. The Trust Fund is of the opinion that, in the interest of efficiency and diligence in the management of the Court’s resources, appointing individuals whose domain of expertise overlaps with that already available in-house should be avoided.

138. The Trust Fund can produce reports mapping existing service-providers and, due to its long-term presence in the field, advise the Court on what type of services would be sound in the local context. This information, coupled with the preferences of victims as expressed by the LRVs, can already provide a solid starting point for the Trial Chamber to decide on the appropriate types and modalities of reparations.

139. As to the scope of liability, the Trust Fund can continue honing the data on the costs of repair, and complementing this information with an overview of applicable international and domestic legislation and case-law, as it has done in other cases when proposing amounts for specific awards.<sup>123</sup>

<sup>121</sup> [Response to Registry’s Observations](#), para. 13.

<sup>122</sup> Registry List of Proposed Experts on Reparations Pursuant to Trial Chamber VI’s Order of 5 December 2019, With 35 Confidential Annexes, available only to the Defence and the Legal Representatives of Victim, 19 February 2020, [ICC-01/04-02/06-2472](#).

<sup>123</sup> [Lesser Public Redacted Version of UIP](#), paras 45-56.

140. The Trust Fund sees that experts could be of added value to existing in-house expertise in relation to the type and scope of harm resulting from SGBV crimes given that these are unprecedented in the context of reparations. Experts could offer advice on the adoption of reparations principles concerning SGBV victims, the consequences of such crimes to direct and indirect victims, how to ensure that they receive relief despite their potential reluctance to come forward, and how to do so in the utmost discretion. Likewise, in light of the relevance that the chosen screening methodology has for the well-being of victims and for the Court’s procedural and operational efficacy, the Trust Fund suggests to seek expert advice in regard of such a reparations principle and its vital components.

141. Consequently, the Trust Fund recommends, should the Trial Chamber proceed with the appointment of experts, that their terms of reference relate to the principles and modalities of engagement concerning harm resulting from SGBV crimes, as well as to victims’ identification and verification procedures.

142. In this regard, the Trust Fund respectfully requests the Trial Chamber to be consulted on the terms of reference of any eventually appointed expert in order to ensure that their contribution is as meaningful as possible, as well as complementary to the Trust Fund’s expertise and operational knowledge and insights.

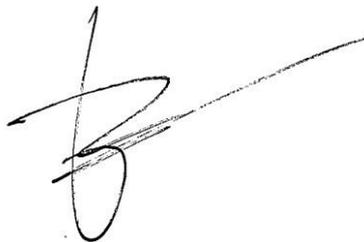
## IX. CONCLUSION

143. The Trust Fund respectfully requests the Single Judge to:

- Supplement the *Lubanga* reparations principles in relation to victim identification and verification (eligibility screening) procedures, victims of sexual and gender based crimes, “do no harm” and restorative agency in respect of memorialisation;
- Opt for a mapping & sampling exercise of potential beneficiaries to be carried out by VPRS, with the support of the Trust Fund and the LRVs, in lieu of conducting a complete victim identification and verification procedure prior to the reparations order;
- Delegate the development of the eligibility screening methodology to the Trust Fund’s draft implementation plan, once all relevant parameters are established in the reparations order;

- Take note of the Trust Fund’s observations on the operational feasibility of reparations programmes in Ituri and their estimated cost;
- Take note of the Trust Fund’s observations concerning the appropriateness of awarding mostly collective reparations in the present case;
- Consider programme support costs as an integral component of the “costs of repair” and thus, of the liability amount;
- Take into account the Court’s in-house expertise, particularly that of the Trust Fund, when deciding whether experts are needed, and for which issues;
- Invite the Trust Fund to submit final observations on reparations by 30 October 2020 in order to provide more comprehensive and up-to-date information on the questions posed in the Order Setting Deadlines.

This submission has been made after due consultation and approval of the Board of Directors of the Trust Fund for Victims.



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Pieter W.I. de Baan  
Executive Director of the Trust Fund for Victims,  
on behalf of the Board of Directors of the Trust Fund for Victims

Dated this 28 February 2020  
At The Hague, The Netherlands