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Original: **English**

No.: **ICC-01/04-02/06**
Date: **7 June 2021**

THE APPEALS CHAMBER

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR v. BOSCO NTAGANDA

Public

Appeal Brief of the Common Legal Representative of the Victims of the Attacks against the Reparations Order

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

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

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I. INTRODUCTION

1. Pursuant to regulation 58 of the Regulations of the Court, the Common Legal Representative of the Victims of the Attacks (the "Legal Representative") hereby submits his Appeal Brief against the Reparations Order issued by Trial Chamber VI (the "Trial Chamber") on 8 March 2021 (the "Reparations Order" or the "Impugned Decision"),[1] on the Grounds identified in his Notice of Appeal filed on 8 April 2021.[2]

II. PROCEDURAL BACKGROUND

2. On 8 July 2019, the Trial Chamber found Mr Bosco Ntaganda guilty of 18 counts of war crimes and crimes against humanity.[3]

3. On 25 July 2019, the Trial Chamber issued an order whereby it designated the Single Judge for the purpose of the reparations phase of proceedings.[4]

4. On 5 September 2019, the Registry filed its observations pursuant to the Single Judge's order of 25 July 2019,[5] in which it, *inter alia*, suggested a methodology for the preliminary mapping of potentially eligible beneficiaries for reparations.[6]

[1] See the "Reparations Order" (Trial Chamber VI), No. ICC-01/04-02/06-2659, 8 March 2021 (the "Reparations Order").
[2] See the "Notice of Appeal of the Common Legal Representative of the Victims of the Attacks against the Reparations Order", No. ICC-01/04-02/06-2668, 8 April 2021.
[3] See the "Judgment" (Trial Chamber VI), No. ICC-01/04-02/06-2359, 8 July 2019 (the "Judgment").
[4] See the "Decision notifying the designation of a Single Judge" (Trial Chamber VI), No. ICC-01/04-02/06-2365, 25 July 2019, para. 3.
[5] See the "Registry's observations, pursuant to the Single Judge's 'Order for preliminary information on reparations' of 25 July 2019, ICC-01/04-02/06-2366", No. ICC-01/04-02/06-2391, 5 September 2019.
[6] See Annex I to the "Registry's observations, pursuant to the Single Judge's 'Order for preliminary information on reparations' of 25 July 2019, ICC-01/04-02/06-2366", No. ICC-01/04-02/06-2391, 5 September 2019, No. ICC-01/04-02/06-2391-AnxI, 5 September 2019.

5. On 3 October 2019, the Common Legal Representatives,[7] the Prosecution,[8] the Defence,[9] and the Trust Fund for Victims (the "TFV")[10] filed their respective observations on the Registry's observations of 5 September 2019.

6. On 7 November 2019, Mr Ntaganda was sentenced to 30 years of imprisonment.[11]

7. On 5 December 2019, the Single Judge issued an order providing directions and setting deadlines with respect to the conduct of the reparations proceedings.[12]

8. On 28 February 2020, the Legal Representative filed his submissions on reparations.[13] The Common Legal Representative of the Former Child Soldiers,[14] the

[7] See the "Joint Response of the Legal Representatives of Victims to the Registry's Observations on Reparations", No. ICC-01/04-02/06-2430, 3 October 2019.
[8] See the "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," No. ICC-01/04-02/06-2429, 3 October 2019.
[9] See the "Response on behalf of Mr. Ntaganda to Registry's preliminary observations on reparations", No. ICC-01/04-02/06-2431, 3 October 2019.
[10] See the "Trust Fund for Victims' response to the Registry's Preliminary Observations pursuant to the Order for Preliminary Information on Reparations", No. ICC-01/04-02/06-2428, 3 October 2019.
[11] See the "Sentencing Judgment" (Trial Chamber VI), No. ICC-01/04-02/06-2442, 7 November 2019.
[12] See the "Order setting deadlines in relation to reparations" (Trial Chamber VI, Single Judge), No. ICC-01/04-02/06-2447, 5 December 2019 (the "5 December 2019 Order"), para. 9.
[13] See the "Submissions by the Common Legal Representative of the Victims of the Attacks on Reparations", No. ICC-01/04-02/06-2477-Conf, 28 February 2020. A public redacted version was filed on the same day as No. ICC-01/04-02/06-2477-Red. A corrigendum was filed on 20 November 2020. See the "Corrigendum of the 'Submissions by the Common Legal Representative of the Victims of the Attacks on Reparations'", No. ICC-01/04-02/06-2477-Conf-Corr, 20 November 2020 and the corresponding public redacted version of "Corrigendum of the 'Public redacted version of the 'Submissions by the Common Legal Representative of the Victims of the Attacks on Reparations'", No. ICC-01/04-02/06-2477-Red-Corr, 20 November 2020 (the "CLR2 Reparations Submissions").
[14] See the "Submissions on Reparations on behalf of the Former Child Soldiers", No. ICC-01/04-02/06-2474, 28 February 2020.

Defence,[15] the TFV,[16] the Prosecution[17] and the Registry[18] also filed their respective submissions on reparations.

9. On 3 March 2020, the Registry transmitted the DRC authorities' observations on reparations.[19]

10. On 6 March 2020, in accordance with the Single Judge's decision,[20] the International Organization for Migration filed its *amicus curiae* "Submission of observations on the issues identified under paragraph 9 (c) (i), (ii) and (iii) pursuant to the 'Order setting deadlines in relation to reparations' No. ICC-01/04-02/06".[21]

11. On 9 April 2020, the Single Judge issued an order, whereby the parties and participants were instructed to provide information on the impact of the COVID-19 measures on their ability to carry out their duties in relation to the reparations proceedings by 21 April 2020.[22]

12. On 21 April 2020, the Legal Representative filed the "Submissions […] pursuant to the 'Order to provide information on the impact of COVID-19 measures on

[15] See the "Defence Submissions on Reparations", No. ICC-01/04-02/06-2479-Conf, 28 February 2020. A public redacted version was filed on 6 March 2020 as No. ICC-01/04-02/06-2479-Red (the "Defence Submissions on Reparations").
[16] See the "Trust Fund for Victims' observations relevant to reparations", No. ICC-01/04-02/06-2476, 28 February 2020.
[17] See the "Prosecution's Observations on Reparations", No. ICC-01/04-02/06-2478, 28 February 2020.
[18] See the "Registry's Observations on Reparations", No. ICC-01/04-02/06-2475, with Public Annex 1, No. ICC-01/04-02/06-2475-Anx1, and Confidential *Ex Parte* Annex II, No. ICC-01/04-02/06-2475-Conf-Exp-AnxII, 28 February 2020.
[19] See the "Transmission des observations de la République démocratique du Congo", No. ICC-01/04-02/06-2480, 3 March 2020, with Confidential Annex, No. ICC-01/04-02/06-2480-Conf-Anx.
[20] See the "Decision on request for leave to submit *Amicus Curiae* observations" (Trial Chamber VI, Single Judge), No. ICC-01/04-02/06-2460, 17 January 2020.
[21] See the "Submission of observations on the issues identified under paragraph 9 (c) (i), (ii) and (iii) pursuant to the 'Order setting deadlines in relation to reparations' No. ICC-01/04-02/06", No. ICC-01/04-02/06-2483, 6 March 2020 (the "IOM Submissions").
[22] See the "Order to provide information on the impact of COVID-19 measures on operational capacity" (Trial Chamber VI, Single Judge), No. ICC-01/04-02/06-2507, 9 April 2020, paras. 4-5.

operational capacity'".[23] On the same day, the other parties and participants filed their respective submissions on the impact of the COVID-19 measures.[24]

13. On 14 May 2020, the Trial Chamber issued the "Decision appointing experts on reparations".[25]

14. On 26 June 2020, the Trial Chamber issued the "First Decision on Reparations Process",[26] whereby it provided further instructions to the Registry and set out that the ordinary response deadlines would be applicable to any observations on the Registry's forthcoming 30 September 2020 report.[27] In this Decision, the Trial Chamber further invited the parties and the TFV to include observations on (i) whether any type of harm suffered by the victims of Mr Ntaganda's crimes may be presumed; (ii) whether, as regards the crimes of rape and sexual slavery, children born out of rape should be presumed as having suffered harm as a result of the commission of said crimes, and (iii) whether a lower burden of proof should be retained in cases of sexual violence.[28]

[23] See the "Submissions by the Common Legal Representative of the Victims of the Attacks pursuant to the "Order to provide information on the impact of COVID-19 measures on operational capacity", No. ICC-01/04-02/06-2518-Conf-Exp, 21 April 2020. A public redacted version was filed the same day as No. ICC-01/04-02/06-2518-Red (the "CLR2 COVID-19 Submissions"). A confidential redacted version was filed on 8 July 2020 as No. ICC-01/04-02/06-2518-Conf-Red2.
[24] See the "Defence observations pursuant to 'Order to provide information on the impact of COVID-19 measures on operational capacity'", No. ICC-01/04-02/06-2515, 21 April 2020; the "Observations on the impact of COVID-19 measures on operational capacity on behalf of the former child soldiers", No. ICC-01/04-02/06-2516, 21 April 2020; the "Trust Fund for Victims' observations on the impact of COVID-19 on operational capacity", No. ICC-01/04-02/06-2517, 21 April 2020; the "Registry Submissions pursuant to the 'Order to provide information on the impact of COVID-19 measures on operational capacity', ICC-01/04-02/06-2507", No. ICC-01/04-02/06-2519-Conf, 21 April 2020. A public redacted version was filed the same day as No. ICC-01/04-02/06-2519-Red (the "Registry COVID-19 Submissions").
[25] See the "Public redacted version of the 'Decision appointing experts on reparations'" (Trial Chamber VI), No. ICC-01/04-02/06-2528-Red, 14 May 2020.
[26] See the "First Decision on Reparations Process" (Trial Chamber VI), No. ICC-01/04-02/06-2547, 26 June 2020.
[27] *Idem*, para. 44.
[28] *Idem*, para. 46.

15. On 20 July 2020, the Trial Chamber granted a request from the Experts, whereby they sought an extension of time to file their report, and set the new deadline for 30 October 2020.[29]

16. On 11 September 2020, the Defence filed a "[…] request seeking clarification and/or further guidance following the 'First Decision on Reparations Process' and Request seeking extension of time to submit observations on the Registry 30 September Report".[30]

17. On 24 September 2020, the Common Legal Representatives filed a joint response to the Defence's 11 September 2020 Request, opposing the request for clarification and supporting the request for an extension of time.[31]

18. On 29 September 2020, the Single Judge rejected the Defence's request for clarification and granted the request for extension of time, ordering the Defence and the Common Legal Representatives to file their observations in relation to any key legal and factual issues identified in the Registry's report on reparations by 30 October 2020.[32]

19. On 1 October 2020, the Registry filed its "[…] First Report on Reparations".[33]

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[29] See the "Decision on Request for an Extension of Time for Filing Experts' Report" (Trial Chamber VI), No. ICC-01/04-02/06-2553, 20 July 2020.
[30] See the "Defence request seeking clarification and/or further guidance following the 'First Decision on Reparations Process' and Request seeking extension of time to submit observations on the Registry 30 September Report", No. ICC-01/04-02/06-2578, 11 September 2020.
[31] See the "Joint Response of the Common Legal Representatives of Victims on the 'Defence request seeking clarification and/or further guidance following the 'First Decision on Reparations Process' and Request seeking extension of time to submit observations on the Registry 30 September Report'", No. ICC-01/04-02/06-2600, 24 September 2020.
[32] See the "Decision on the Defence request seeking clarifications and/or further guidance following the 'First Decision on Reparations Process' and Request seeking an extension of time to submit observations on the Registry 30 September Report" (Trial Chamber VI, Single Judge), No. ICC-01/04-02/06-2601, 29 September 2020, para. 8.
[33] See the "Registry's First Report on Reparations", No. ICC-01/04-02/06-2602, 1 October 2020, with Confidential Annex I, No. ICC-01/04-02/06-2602-Conf-AnxI, Confidential Annex II, No. ICC-01/04-02/06-2602-Conf-AnxII, Confidential Annex III, No. ICC-01/04-02/06-2602-Conf-AnxIII, Confidential Annex IV, No. ICC-01/04-02/06-2602-Conf-AnxIV, and Confidential Annex V, No. ICC-01/04-02/06-2602-Conf-AnxV.

20. On 30 October 2020, the parties filed their observations on the Registry's First Report on Reparations.[34]

21. On same day, the Trial Chamber granted the Registry a short adjournment for the filing of the Expert Reports.[35]

22. On 2 November 2020, the Registry filed its "[…] Transmission of Appointed Experts' Reports" with two 'confidential *ex parte* Registry only' Annexes.[36] It also filed confidential redacted versions of the Expert Reports.[37]

23. On 3 November 2020, the Registry filed public redacted versions of the Expert Reports.[38]

24. On 9 November 2020, the Legal Representative filed a request for an order to the Registry to collect information relevant to the reparations proceedings.[39]

25. On 18 and 20 November 2020, respectively, the Registry and the Defence filed their observations in response to the Legal Representative's 9 November request.[40]

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[34] See the "Observations of the Common Legal Representative of the Former Child Soldiers on the "Registry's First Report on Reparations"", No. ICC-01/04-02/06-2620-Conf, 30 October 2020. A public redacted version was filed on 18 November 2020 as No. ICC-01/04-02/06-2620-Red; the "Observations of the Common Legal Representative of the Victims of the Attacks on the Registry's First Report on Reparations", No. ICC-01/04-02/06-2621, 30 October 2020; and the "Defence Observations on the Registry First Report on Reparations", No. ICC-01/04-02/06-2622, 30 October 2020.

[35] See the Email communication from the Trial Chamber to the Registry and the parties, on 30 October 2020 at 15:56.

[36] See the "Registry Transmission of Appointed Experts' Reports", No. ICC-01/04-02/06-2623, 3 October 2020.

[37] See the "Annex 1 to the Registry Transmission of Appointed Experts' Reports", No. ICC-01/04-02/06-2623-Conf-Anx1-Red, 2 November 2020; and the "Annex 2 to the Registry Transmission of Appointed Experts' Reports", No. ICC-01/04-02/06-2623-Conf-Anx2-Red, 2 November 2020.

[38] See the "Annex 1 to the Registry Transmission of the Appointed Experts' Reports", No. ICC-01/04-02/06-2623-Anx1-Red2, 3 November 2020 (the "First Expert Report") and the "Annex 2 to the Registry Transmission of the Appointed Experts' Reports", No. ICC-01/04-02/06-2623-Anx2-Red2, 3 November 2020.

[39] See the "Request of the Common Legal Representative of the Victims of the Attacks for an Order to the Registry to collect information pertaining to reparations", No. ICC-01/04-02/06-2624, 9 November 2020 (the "CLR2 Request for an Order").

[40] See the "Registry's Observations on the "Request of the Common Legal Representative of the Victims of the Attacks for an Order to the Registry to collect information pertaining to reparations" of 9 November 2020, ICC-01/04-02/06-2624", No. ICC-01/04-02/06-2627, 18 November 2020. See also the

26. On 15 December 2020, the Trial Chamber issued the "Decision on issues raised in the Registry's First Report on Reparations" (the "15 December 2020 Decision").[41]

27. On 18 December 2020, the Single Judge issued the "Decision on the Request of the Common Legal Representative of the Victims of the Attacks for an Order to the Registry to collect information pertaining to reparations" (the "18 December 2020 Decision").[42]

28. On the same day, the Legal Representative filed his Final Observations on Reparations.[43] The Common Legal Representative of the Former Child Soldiers,[44] the Defence,[45] and the TFV[46] also filed their final observations on reparations the same day.

29. On 8 March 2021, the Trial Chamber issued the Reparations Order, ordering collective reparations with individualised components to be awarded to direct and indirect victims of the crimes for which Mr Ntaganda has been convicted and setting the total reparations award for which Mr Ntaganda is liable at 30 million USD.[47]

"Defence response to "Request of the Common Legal Representative of the Victims of the Attacks for an Order to the Registry to collect information pertaining to reparations", 9 November 2020, ICC-01/04-02/06-2624", No. ICC-01/04-02/06-2628, 20 November 2020.

[41] See the "Decision on issues raised in the Registry's First Report on Reparation", No. ICC-01/04-02/06-2630, 15 December 2020 (the "15 December 2020 Decision").

[42] See the "Decision on the Request of the Common Legal Representative of the Victims of the Attacks for an Order to the Registry to collect information pertaining to reparations" (Trial Chamber VI, Single Judge), No. ICC-01/04-02/06-2631, 18 December 2020 (the "18 December 2020 Decision").

[43] See the "Final Observations on Reparations of the Common Legal Representative of the Victims of the Attacks", No. ICC-01/04-02/06-2633-Conf, 18 December 2020. A public redacted version was filed on 20 December 2020 as No. ICC-01/04-02/06-2633-Red (the "CLR2 Final Submissions on Reparations").

[44] See the "Observations on the Appointed Experts' Reports and further submissions on reparations on behalf of the Former Child Soldiers", No. ICC-01/04-02/06-2632, 18 December 2020.

[45] See the "Defence Submissions on Reparations", No. ICC-01/04-02/06-2634-Conf, 18 December 2020. A public redacted version was filed on 11 January 2021 as No. ICC-01/04-02/06-2634-Red (the "Defence Final Submissions on Reparations").

[46] See the "Trust Fund for Victims' Final Observations on the reparations proceedings", No. ICC-01/04-02/06-2635-Conf, 18 December 2020. A public redacted version was filed on the same day as No. ICC-01/04-02/06-2635-Red.

[47] See the Reparations Order, *supra* note 1, p. 97.

30. On 16 March 2021, the Presidency assigned the present case to a newly constituted Trial Chamber II.[48] Judge Chang-ho Chung was subsequently elected Presiding Judge of Trial Chamber II.[49]

31. On 30 March 2021, the Appeals Chamber upheld the Judgment[50] and the Sentencing Judgment.[51]

32. On 8 April 2021, the Legal Representative filed the "Notice of Appeal of the Common Legal Representative of the Victims of the Attacks against the Reparations Order".[52] On the same day, the Defence filed the "Defence Notice of Appeal against the Reparations Order".[53]

33. On 9 April 2021, the Appeals Chamber rendered the "Decision on the Presiding Judge of the Appeals Chamber in the appeals against the decision of Trial Chamber VI entitled 'Reparations Order'",[54] whereby it designated Judge Marc Perrin de Brichambaut as the Presiding Judge in said appeals.

III. STANDARDS OF APPELLATE REVIEW

34. The Legal Representative's appeal identifies errors of law, fact and procedure in combination with, or in addition to, errors in the exercise of the Trial Chamber's

[48] See the "Decision assigning judges to divisions and recomposing chambers" (Presidency), No. ICC-01/04-02/06-2663, 16 March 2021, p. 7.
[49] See the "Decision on the Election of the Presiding Judge" (Trial Chamber II), No. ICC-01/04-02/06-2664, 22 March 2021, para. 2.
[50] See the "Public redacted version of Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment'" (Appeals Chamber), No. ICC-01/04-02/06-2666-Red A A2, 30 March 2021 (the "*Ntaganda* Appeals Judgment").
[51] See the "Public redacted version of Judgment on the appeal of Mr Bosco Ntaganda against the decision of Trial Chamber VI of 7 November 2019 entitled 'Sentencing judgment'" (Appeals Chamber), No. ICC-01/04-02/06-2667-Red A3, 30 March 2021.
[52] See the "Notice of Appeal of the Common Legal Representative of the Victims of the Attacks against the Reparations Order", No. ICC-01/04-02/06-2668 A4, 8 April 2021.
[53] See the "Defence Notice of Appeal against the Reparations Order, ICC-01/04-02/06-2659", No. ICC-01/04-02/06-2669 A5, 8 April 2021.
[54] See the "Decision on the Presiding Judge of the Appeals Chamber in the appeals against the decision of Trial Chamber VI entitled 'Reparations Order'" (Appeals Chamber), No. ICC-01/04-02/06-2670 A4 A5, 9 April 2021.

discretion. The Appeals Chamber had previously set out the relevant standards of review in relation to these alleged errors.

Errors of Law

35. With respect to alleged errors of law: The Appeals Chamber will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the impugned decision.[55]

36. An impugned decision is 'materially affected by an error of law' if the Trial Chamber 'would have rendered a decision that is substantially different from the decision that was affected by the error, if it had not made the error'.[56]

Procedural Errors

37. With respect to alleged procedural errors: Such errors may occur in the proceedings leading up to an impugned decision. However, as with errors of law, the Appeals Chamber will only reverse the impugned decision if it is materially affected by the procedural error. In that respect, the appellant needs to demonstrate that, in the absence of the procedural error, the impugned decision would have substantially differed from the one rendered.[57]

Errors of Fact

38. With respect to alleged errors of fact: The Appeals Chamber will not interfere with factual findings of the first-instance Chamber unless it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant

[55] See the "Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable'" (Appeals Chamber), No. ICC-01/04-01/06-3466-Red A7 A8, 18 July 2019 (the "*Lubanga* 2019 Judgment"), para. 28.
[56] *Idem*, para. 28.
[57] *Idem*, para. 29.

facts, or failed to take into account relevant facts. As to the 'misappreciation of facts', the Appeals Chamber 'will not disturb a Pre-Trial or Trial Chamber's evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it'.[58]

Discretionary Decisions

39. The Appeals Chamber has set out the standard for review for a decision involving the exercise of discretion in a judgment in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*[59] and affirmed said standard of review in the Judgment on the appeal of the victims against the 'Reparations Order' in the *Al Mahdi* case[60] and in the appeal against the decision on the size of the reparations award in the *Lubanga* case.[61]

40. In the *Ntaganda* Appeals Judgment, the Appeals Chamber recalled the applicable standard as follows:

> "*The Appeals Chamber* […] *will not interfere with the Chamber's exercise of its discretion merely because the Appeals Chamber, if it had the power, might have made a different ruling. The Appeals Chamber will only disturb the exercise of a Chamber's discretion where it is shown that an error of law, fact or procedure was made. In this context, the Appeals Chamber has held that it will interfere with a discretionary decision only under limited conditions and has referred to standards of other courts to further elaborate that it will correct an exercise of discretion in the following broad circumstances, namely where (i) it is based upon an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abuse of discretion. Furthermore, once it is established that the discretion was erroneously exercised, the Appeals Chamber has to be satisfied that the improper exercise of discretion materially affected the impugned decision*".[62]

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[58] *Idem*, para. 30.
[59] See the "Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute'" (Appeals Chamber), No. 01/09-02/11-1032 OA 5, 19 August 2015, paras. 22-25.
[60] See the "Judgement on the victims' appeal against the 'Reparations Order'" (Appeals Chamber), No. ICC-01/12-01/15-259-Red2 A, 9 March 2018, para. 24.
[61] See the *Lubanga* 2019 Judgment, *supra* note 55, para. 31.
[62] See the *Ntaganda* Appeals Judgment, *supra* note 50, para. 45. (Internal references omitted).

41. The Appeals Chamber further considered that "[w]*ith respect to an exercise of discretion based upon an alleged erroneous interpretation of the law or an alleged incorrect conclusion of fact, the Appeals Chamber will apply the standard of review with respect to errors of law and errors of fact* […]".[63]

42. Where a discretionary decision allegedly amounts to an abuse of discretion, the Appeals Chamber has stated the following:

> "*Even if an error* […] *has not been identified, an abuse of discretion will occur when the decision is so unfair or unreasonable as to 'force the conclusion that the Chamber failed to exercise its discretion judiciously'. The Appeals Chamber will also consider whether the first instance Chamber gave weight to extraneous or irrelevant considerations or failed to give weight or sufficient weight to relevant considerations in exercising its discretion. The degree of discretion afforded to a Chamber may depend upon the nature of the decision in question*".[64]

IV. SUBMISSIONS ON APPEAL

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

Ground 1: The Trial Chamber committed a combination of errors of law, fact and/or procedure in setting the overall cost to repair by failing to inquire into and to obtain an accurate estimate of the number of potential beneficiaries for reparations, and by failing to give a reasoned opinion on the estimates provided by the parties and participants.

Sub-Ground 1.1: The Trial Chamber misinterpreted the applicable law.

44. In the Reparations Order, the Trial Chamber adopted the principles established by different Chambers of the Court in previous cases, adding that it considered them to be of general application.[65] It stated that the elements it had taken into account to determine the amount of Mr Ntaganda's financial liability included the applicable law

[63] *Idem*, para. 46.
[64] *Ibid*.
[65] See the Reparations Order, *supra* note 1, para. 29.

as interpreted by the Appeals Chamber, the estimated number of potentially eligible victims, and the cost to repair the harm they suffered.[66] The Trial Chamber then declared that "[r]*egarding the estimates, the Chamber has considered the detailed information and evidence provided by the Registry, the TFV, the Appointed Experts, and the parties, and has also relied on the figures and assessments made by other chambers of the Court in similar cases*".[67]

45. Under the heading 'Applicable Law' and with reference to the *Katanga* and *Lubanga* Appeals Judgments, the Trial Chamber further stated that it should determine the cost to repair, ultimately, with the goal of setting an amount that is fair and properly reflects the rights of the victims, bearing in mind the rights of the convicted person.[68] It added that "*if the available information does not allow the Chamber to set the amount with precision it may, with caution, rely on estimates, after making every effort to obtain calculations that are as accurate as possible, weighing the need for accuracy of estimates against the goal of awarding reparations without delay*".[69]

46. The Trial Chamber continued in setting out the applicable law by stating that despite the collective nature of the reparations, the number of potentially eligible beneficiaries is an important parameter for determining the scope of the convicted person's liability.[70] It acknowledged that this determination can be made based on a series of factors, including, the number of individual applicants, the number of victims at the time the crimes were committed, and the number of victims likely to come forward to benefit from the reparations programmes during the implementation stage.[71] With reference to the *Lubanga* 2019 Appeal Judgment, the Trial Chamber added that, when the Chamber resorts to estimates as to the number of victims, it must endeavour to obtain an estimate that is as concrete as possible, based on a sufficiently

[66] *Idem*, para. 226.
[67] *Ibid*.
[68] *Idem*, para. 228.
[69] *Ibid*.
[70] *Idem*, para. 230.
[71] *Ibid.*

strong evidentiary basis. Any uncertainties must be resolved in favour of the convicted person.[72] Lastly in this section of the Reparations Order, the Trial Chamber considered that, although relevant for determining the scope of liability, the number of potential beneficiaries is not a precondition to the issuance of the reparations order. In particular, the Trial Chamber stressed that it was noted in the jurisprudence of the Court that in case of uncertainty as to the number of victims, "*the Court should ensure that there is a collective approach that ensures reparations reach those victims who are currently unidentified*".[73]

47. The Legal Representative submits that while generally correctly referring to the relevant applicable law as established by the Appeals Chamber in the *Lubanga* and *Katanga* cases, the Trial Chamber misinterpreted the law it purportedly relied upon.

48. According to the applicable law, the number of victims constitutes an important parameter for determining the scope of a convicted person's liability for reparations.[74] Such determination includes the obligation on the part of a Trial Chamber to determine whether the crimes for which the conviction was entered resulted in the victimisation of one hundred, one thousand or one hundred thousand individuals.[75] If a Trial Chamber resorts to estimates as to the number of victims, such estimates must be based on a sufficiently strong evidential basis,[76] and a Trial Chamber must endeavour to obtain an estimate that is as concrete as possible.[77]

49. The Trial Chamber erred in law by failing to properly apply the above legal standards and to comply with the above obligations incumbent on it as part of its judicial functions under the Statute.

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[72] *Ibid.*
[73] *Idem*, para. 231.
[74] See the *Lubanga* 2019 Judgment, *supra* note 55, para. 89.
[75] *Ibid.*
[76] *Idem*, paras. 3 and 223.
[77] *Idem*, para. 224.

50. First, the Trial Chamber failed to properly address and adjudicate the different estimates of the number of potential beneficiaries of reparations produced before it by the parties and participants.

51. In particular, in paragraphs 232 and 233 of the Reparations Order, the Trial Chamber referenced the highly differing estimates of potential beneficiaries of reparations placed before it. It first referred to the Registry's preliminary mapping exercise according to which the number of new potentially eligible victims was approximately 1,100.[78] It then referred to the figure given by the Appointed Experts, namely the estimate of at least 3,500 direct victims and an unknown number of indirect victims.[79] However, the Trial Chamber failed to address the weight to be accorded to said estimates in light of the circumstances in which they were produced.

52. Indeed, the Registry's approach in the mapping exercise was highly regulated by the Trial Chamber itself and generally dictated and hence limited by the circumstances of having to operate in the framework of limited possibilities in the field due to the COVID-19 pandemic. It was the Trial Chamber that instructed the Registry "*to carry out its preliminary mapping exercise*".[80] This approach suggested that the mapping exercise was indeed 'preliminary' and would have been expanded once the conditions in the field would have allowed it. The conduct of a preliminary exercise could not reasonably have been foreseen to generate the ostensibly decisive estimate the Trial Chamber ultimately relied upon.

53. As regards the Appointed Experts' estimation, there are two fundamental flaws with respect to the figure of 3,500. Firstly, this figure is directly derived from the Registry's estimate and therefore does not constitute an independently verified or independently established number. Secondly, as acknowledged by the Trial Chamber itself, the Appointed Experts indicated that the number of indirect victims 'could not

[78] See the Reparations Order, *supra* note 1, para. 232.
[79] *Ibid*.
[80] See the 5 December 2019 Order, *supra* note 12, para. 9a.

be ascertained'.[81] In this regard, the Trial Chamber failed to give due regard to the fact that the Appointed Experts themselves discussed the various estimates put before the Chamber and concluded that:

> "*The numbers in the preceding paragraphs do not reflect the totality of potential beneficiaries of reparations in the present case. It is clear that there are still as yet unidentified eligible victims, but no precise figures are available. Estimates vary greatly from 'at least approximately 1,000' to 'a maximum of 100,000 across all locations affected by Mr Ntaganda's crimes'. The mapping of potential reparations beneficiaries undertaken by the Registry had provided useful information and the chamber has encouraged the Registry to explore ways to finalise this process as soon as possible. Further indications of the size of the pool of potential new beneficiaries can be expected from the sampling exercise that the Registry is embarking on*".[82]

54. The part of the Appointed Experts' findings the Trial Chamber referenced merely constituted a 'summary', namely that at least approximately 3,500 victims of Mr Ntaganda are potentially eligible for reparations. How many indirect victims may be eligible in addition "*could not be ascertained by the Experts*".[83] The Trial Chamber's other reference to the First Expert Report in this regard was to page 107 of said report, where the Experts concluded the following under the heading 'Eligibility':

> "***At least 3,500*** *victims should be expected to be determined as eligible for reparations in this case.*
> *The number includes a maximum of (but probably less than 2,132 victims of the attacks who participated at trial;* ***a yet unknown number*** *of former child soldier victims; and an estimated* ***minimum*** *1,000 so far unidentified victims of the attacks.*
> […]".[84]

55. After discussing the numbers mentioned by both the Registry and the Appointed Experts, the Trial Chamber turned to the estimates produced by the parties.[85] It referred to the Legal Representative's submissions on the population size in the affected villages and various available figures in this regard and mentioned the fact that the Common Legal Representative of the Former Child Soldiers submitted

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[81] See the Reparations Order, *supra* note 1, para. 232 referring to the First Expert Report, *supra* note 38, para. 29 and p. 107.
[82] See the First Expert Report, *supra* note 38, para. 28.
[83] *Idem*, para. 29. (Emphasis added).
[84] *Idem*, p. 107. (Emphasis added).
[85] See the Reparations Order, *supra* note 1, para. 233.

that a higher number of former child soldiers may come forward in the present case as compared to the *Lubanga* case.[86] However, the Trial Chamber failed to address the weight to be accorded to the estimates provided by the parties.

56. The Trial Chamber then turned to a consideration of the numbers of participating victims still deemed eligible by the Registry,[87] as well as the number of the participating victims in the *Lubanga* case as of Trial Chamber II's decision of December 2020,[88] before moving on to its discussion of the 'cost to repair'.[89]

57. Accordingly, it is submitted that although the Trial Chamber referred to the estimates and corresponding submissions produced before it by the parties and participants, it failed to engage in a - let alone critical or comparative - discussion of the different estimates it referenced. This is *inter alia* apparent from the fact that it never mentioned or considered the Defence submissions on the matter,[90] nor did it indicate which of the estimates before it were deemed most accurate and why. Its preface that "*the available information does not allow the Chamber to set the amount with precision*"[91] and that in such circumstances "*it may rely on estimates*"[92] did in no way relieve it of the obligations to (i) make a determination, and (ii) to make every effort to obtain calculations that are as accurate as possible in light of the estimates produced by the parties and participants. The Trial Chamber did neither.

58. In fact, the Trial Chamber left it entirely unclear whether it relied on the rather low estimate provided by the Registry, which was in turn largely relied on by the Appointed Experts, or whether it accepted that the number of potential beneficiaries

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[86] *Ibid*.
[87] *Idem*, paras. 234-235.
[88] *Ibid*. The Trial Chamber referred to the figure of 933 beneficiaries acknowledged by Trial Chamber II in the "Rectificatif de la Version publique expurgée de la Décision faisant droit à la requête du Fond du profit des victimes du 21 septembre 2020 et approuvant la mise en œuvre des réparations collectives prenant la forme de prestations de services" (Trial Chamber II), No. ICC-01/04-01/06-3495-Red-Corr, 5 March 2020, para. 106. The original decision was rendered on 14 December 2020.
[89] See the Reparations Order, *supra* note 1, p. 86, para. 236 *et seq*.
[90] See the Defence Final Submissions on Reparations, *supra* note 45, para. 115.
[91] See the Reparations Order, *supra* note 1, para. 228.
[92] *Ibid*.

could be closer to that estimated by the Legal Representative or indeed even smaller than the Registry's figure, as suggested by the Defence. The striking and significant difference between these figures could not simply be ignored by the Trial Chamber. The explanation it provided was in no way sufficient in this regard. At the very least, the Trial Chamber had to explain why it did not believe the rather high estimates of the Legal Representative to be accurate. It effectively ended its enquiry after obtaining the results of the Registry's preliminary mapping exercise. Although it would have been open to the Trial Chamber to accept the Registry's figures, it was however not open to the Trial Chamber to (i) leave the parties' submissions unaddressed and (ii) to refrain from making any determination.

59. Second, while omitting to establish an accurate estimate of the number of potentially eligible victims, the Trial Chamber also failed to determine *at least* the range of potential beneficiaries of reparations. Instead, when noting that "[i]*n effect, estimates vary greatly and range from 'at least approximately 1,100' to 'a minimum of 100,000 across all locations* […]'",[93] the Trial Chamber simply stated that it had concluded that there were "*thousands*" of victims that may be eligible for reparations in this case.[94] This conclusion was neither based on any finding it actually reached, nor was it sufficiently precise. Indeed, thousands could mean 2,000 or 60,000. This was a clear error, as the matter remained entirely unresolved. Because of these errors the Trial Chamber committed a further material error by setting Mr Ntaganda's overall liability for reparations without foundation, or at least a discernible foundation.

60. Third, having had before it a very wide range of estimates provided by the parties and participants, the Trial Chamber failed to make any efforts as part of its obligation to endeavour to obtain an estimate as concrete as possible of the number of potentially eligible victims in order to establish a sufficiently strong evidential basis, despite the Legal Representative's submissions on the matter. Indeed, the Legal

[93] *Idem*, para. 246.
[94] *Ibid*.

Representative repeatedly submitted[95] that the Trial Chamber should take steps to obtain more accurate estimates of the local population at the time of the events that could inform the overall estimate of potential beneficiaries for the purposes of ascertaining the extent of Mr Ntaganda's liability.[96]

61. It is submitted that the errors as described above materially affected the Impugned Decision. Had the Trial Chamber established an accurate estimate of potential beneficiaries of reparations or at least an accurate range of potentially eligible victims, the 'cost to repair' could have been more accurately calculated and the overall award set would have been commensurate with the number of persons eligible to receive appropriate and fair reparations, given that "[c]*learly, it makes a difference whether the crimes for which the conviction was entered resulted in the victimisation of one hundred, one thousand or one hundred thousand of individuals*".[97]

62. In the absence of establishing this basic variable in the calculation of the overall award, the Trial Chamber set an award in a vacuum and ultimately one that results in an unforeseeable individual cost to repair, as it is entirely unclear how many beneficiaries will ultimately come forward and be eligible. This in turn has further bearing on the adequacy and extent to which any programmes designed by the TFV can meet the needs of the victims of Mr Ntaganda's crimes. If tens of thousands of victims present themselves as eligible, the set amount will not be sufficient to provide the kind of reparation that would be adequate and fair, in particular when compared to the victims in the *Lubanga* and *Katanga* cases who suffered from crimes committed in the same region during the same time-frame.

63. This inherent uncertainty further negatively impacts the well-being of the victims thus far participating in the proceedings as it deprives them of any legitimate expectation of whether and how their harm will be repaired, which stands in stark

[95] See the CLR2 Reparations Submissions, *supra* note 13, para. 71; the CLR2 COVID-19 Submissions, *supra* note 23, paras. 14-16; the CLR2 Final Submissions on Reparations, *supra* note 43, paras. 96 and 112.
[96] This is addressed in more detail in Ground 1.2. below.
[97] See the *Lubanga* 2019 Judgment, *supra* note 55, para. 89.

contrast with the 'do no harm' principle set by the Trial Chamber in the Reparations Order,[98] as well as with "*the overall purpose of reparations, which is to repair the harm caused and to achieve, to the extent possible,* restitutio in integrum".[99]

Sub-Ground 1.2: The Trial Chamber erred in fact by failing to take into account relevant information, facts and evidence and/or by misappreciating the relevant facts.

64. The Legal Representative has repeatedly submitted that the number of potential beneficiaries of reparations is extremely high as entire villages were affected by the crimes for which Mr Ntaganda was convicted.[100] He referred for instance to publicly available figures on the number of inhabitants at the time of the events in some villages (e.g. Mongbwalu)[101] and further pointed to the UN estimates of the number of victims affected by the *shika na mukono* operation that were taken from evidence on the record of the case.[102] The Defence strongly opposed the Legal Representative's submissions in this regard.[103] The Registry in turn provided figures on the number of inhabitants at the time of the events in some other affected villages (e.g. Kobu and Bambu).[104] These figures provided a strong basis to believe that the number of potential beneficiaries of reparations who were *direct victims* of the crimes committed in these three locations only could be several tens of thousands.

65. The Legal Representative also pointed to the need to take into account a likely very high number of potentially eligible *indirect victims*, and argued that given that the traditional family composition in the DRC includes both close and remote relatives,

[98] See the Reparations Order, *supra* note 1, paras. 50-52.
[99] See the *Lubanga* 2019 Judgment, *supra* note 55, para. 107. See also the Reparations Order, *supra* note 1, para. 228.
[100] See the CLR2 Reparations Submissions, *supra* note 13, para. 72; the CLR2 COVID-19 Submissions, *supra* note 23, para. 15; and the CLR2 Final Submissions on Reparations, *supra* note 43, para. 112.
[101] See the CLR2 Reparations Submissions, *supra* note 13, para. 71.
[102] *Ibid*.
[103] See the Defence Submissions on Reparations, *supra* note 15, para. 116.
[104] See Annex II to the "Registry's Observations on Reparations", No. ICC-01/04-02/06-2475-Conf-AnxII-Red, 28 February 2020, pp. 12-13.

the total number of beneficiaries of reparations could easily triple the number of direct victims.[105]

66. Finally, the Legal Representative pointed to the need to also take into account a likely very high number of an additional category of potentially eligible *direct victims*, acknowledged by the Trial Chamber in its 15 December 2020 Decision[106] and endorsed in the Reparations Order,[107] namely the victims originating from any other location, provided they suffered harm in the forest or bush surrounding the affected locations at the time of the events.[108]

67. The Legal Representative submits that the Trial Chamber erred in fact by failing to give due regard to the above relevant facts and evidence brought before it which were crucial for the purpose of the determination of the number of beneficiaries and hence the scope of Mr Ntaganda's liability for reparations, namely the overall cost to repair.

68. Alternatively, the Trial Chamber misappreciated the above relevant facts and evidence that provided a sufficiently strong basis to believe that the number of potential beneficiaries of reparations may be at least several tens of thousands and in any event much higher than the estimate provided by the Registry.

69. The Trial Chamber in particular erred in the exercise of its discretion when it had continuously been disregarding the Legal Representative's repeated submissions on the need to inquire into the size of the population in the affected villages at the time of the events, and when it ultimately denied the Legal Representative's corresponding request for the discovery of said figures on the basis that the information was not necessary at the stage prior to a decision on the types and modalities of the reparations being issued.

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[105] See the CLR2 Final Submissions on Reparations, *supra* note 43, para. 91.
[106] See the 15 December 2020 Decision, *supra* note 41, para. 19(f).
[107] See the Reparations Order, *supra* note 1, para. 107.
[108] See the CLR2 Final Submissions on Reparations, *supra* note 43, para. 107.

70. In fact, from the early stages of the reparations proceedings onwards, the Legal Representative argued that in order to estimate the number of potential beneficiaries in light of the particular circumstances of the present case – a case involving *inter alia* mass-crimes such as intentionally directing attacks, forcible transfer, displacement and persecution of the population in several towns and villages – it was necessary to consider the population size of these locations at the time of the events.[109] At that point, the Trial Chamber took no steps towards the discovery of information with respect to the population census in the affected areas of Ituri. It opted to solely rely on the Registry to continue carrying out a preliminary mapping exercise of 'potential beneficiaries' it had already proposed to the Chamber[110] pursuant to the Single Judge's "Order for preliminary information on reparations"[111] and continued to carry out pursuant to the Single Judge's endorsement.[112]

71. When the Legal Representative submitted information on the impact of the COVID-19 pandemic on his field operations, he again reiterated that "*the number of persons residing or otherwise present in the affected communities at the time of the events should serve as appropriate reference*" to estimate the number of potential beneficiaries.[113] He further argued that because of the victimisation of entire communities, an important step in the Registry's mapping exercise should be the collection of information and figures on the number of persons residing at the relevant locations at the time of the events for which Mr Ntaganda has been found guilty.[114] He further pointed out that the administrative structures of the affected communities needed to be established for the purposes of the comprehensive mapping exercise and that the local authorities should be contacted in this regard.[115]

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[109] See the CLR2 Reparations Submissions, *supra* note 13, paras. 71-72.
[110] See the "Registry's observations, pursuant to the Single Judge's 'Order for preliminary information on reparations' of 25 July 2019, ICC-01/04-02/06-2366", No. ICC-01/04-02/06-2391, 5 September 2019.
[111] See the "Order for preliminary information on reparations" (Trial Chamber VI, Single Judge), No. ICC-01/04-02/06-2366, 25 July 2019.
[112] See the 5 December 2019 Order, *supra* note 12, para. 9.
[113] See the CLR2 COVID-19 Submissions, *supra* note 23, para. 13.
[114] *Idem*, para. 15.
[115] *Idem*, paras. 17-19.

72. The Registry, for its part, submitted that the COVID-19 pandemic and measures taken in the field would likely have a significant impact on its ability to travel to the relevant areas and register potential new applicants.[116]

73. On 9 November 2020, the Legal Representative filed a formal request that the Trial Chamber issue an order instructing the Registry to obtain information pertaining to the reparations proceedings, in particular on the official census of persons residing in the affected areas at the time of the events.[117]

74. The Single Judge issued his decision on the matter on 18 December 2020, the same day the parties' final submissions on reparations were to be filed. In said decision, the Single Judge held that "*the Chamber has yet to decide on the type and modalities of reparations to be awarded to the victims in the present case*", and considered that "[t]*he number of victims at the time when the crimes were committed may be a starting point, but other parameters for determining what reparations are appropriate include considerations about the reparation measures envisaged and the number of victims that are likely to be smaller in the current reality than the overall number of victims of the crimes at the time they were committed*".[118] The Single Judge finally rejected the request, stating that the information sought by the Legal Representative was "*not necessary at this stage of the proceedings*"[119] for the Trial Chamber in order "*to decide on the types and modalities of reparations to be awarded*".[120] This formulation suggested that the Trial Chamber would *first* decide on the types and modalities of reparations, and leave the determination of the cost to repair to an ulterior stage, or in any event *another* stage. The Single Judge thus suggested and raised the legitimate and reasonable expectation that there would be another *stage* of the proceedings when the issue could be raised again, namely after a decision on the types and modalities of reparations would have been taken. Accordingly, the Legal Representative did not seek leave to appeal the 18 December

[116] See the Registry COVID-19 Submissions, *supra* note 24, para. 15.
[117] See the CLR2 Request for an Order, *supra* note 39, para. 1.
[118] See the 18 December 2020 Decision, *supra* note 42, para. 17. (Emphasis added).
[119] *Idem*, para. 18. (Emphasis added).
[120] *Ibid*.

2020 Decision since the matter seemed to have been postponed by the Trial Chamber, rather than rejected as meritless as such. The wording of the 18 December 2020 Decision indicated that a reparations order would be issued after the parties would have had the opportunity to provide additional submissions; that there would be at least one subsequent *stage* at which the issue would be addressed by the Trial Chamber or the Single Judge. Had the Legal Representative's request been denied on the basis that the information sought was irrelevant or unnecessary for the purpose of the determination of the cost to repair, the Legal Representative would have sought leave to appeal the Decision on this particular point, namely the Trial Chamber's failure to make all reasonable effort to obtain an accurate estimate of the number of potential beneficiaries of reparations. The formulation of the Single Judge's decision precluded this opportunity.

75. Despite the expectations in terms of next procedural steps raised by the 18 December 2020 Decision, the Trial Chamber, rather than issuing first a decision on the types and modalities of reparations, rendered its Reparations Order containing *inter alia* its determination of the cost to repair. The Legal Representative submits that the manner in which the Trial Chamber addressed the matter at hand constitutes in itself an error in the exercise of judicial discretion, as being inconsistent with the requirements of the coherence and predictability of judicial proceedings.

76. In essence, it has become apparent that it was the Trial Chamber's choice not to engage into the establishment of an accurate estimate of potentially eligible victims *at any stage*, but instead to leave the matter vague and uncertain in simply concluding that "*thousands*" of victims may be eligible for reparations in the present case.[121] In fact, by declining to ascertain the number of victims at the time the crimes were committed, the Trial Chamber failed to establish the extent of the victimisation, being the crucial component of its determination of Mr Ntaganda's liability for reparations.[122]

[121] See the Reparations Order, *supra* note 1, para. 245.
[122] *Idem*, paras. 98 and 224.

77. The Legal Representative contends that relying on the size of the population in the affected villages at the time the crimes were committed was the easiest way open to the Trial Chamber to estimate the number of potential beneficiaries of reparations at least as direct victims, which was apparent from the facts and evidence before it demonstrating that the victimisation in the present case extended to the entire village communities. In particular, the Trial Chamber failed to give due regard to its own findings that Mr Ntaganda was, *inter alia*, convicted for mass-crimes affecting entire communities, in particular intentionally directing attacks against civilians in Mongbwalu, Sayo, Bambu Jitchu and Buli,[123] persecution in Mongbwalu, Nzebi, Sayo, Kilo, Nyangaray, Lipri, Tsili, Bambu, Kobu, Sangi, Gola, Jitchu and Buli,[124] forcible transfer of population in Mongbwalu, Lipri, Tsili, Kobu and Bambu,[125] ordering the displacement of civilians from Mongbwalu, Lipri, Tsili, Kobu and Bambu.[126] The Trial Chamber also failed to give due regard to its own findings that the crimes were committed in the context of a widespread and systematic campaign of violence with a predetermined aim "*to drive out all the Lendu from the localities targeted*"[127] and to prevent their return.[128] Finally, it failed to give due regard to its own findings that prior to November 2002, the Lendu constituted the majority of the population in Mongbwalu and the surrounding villages, including Sayo,[129] and that at the time of the events the inhabitants of the villages in the Walendu-Djatsi *collectivité*, notably Kobu, Bambu, Lipri, Tsili, Jitchu, Dhekpa and Nyangaray, were predominantly Lendu.[130]

78. Thus, having had before it the relevant facts and evidence demonstrating the extent of the victimisation affecting entire village communities, the Trial Chamber erred by failing to ascertain the essential component thereof, namely the number of the victims. Although the number of the victims at the time the crimes were committed

[123] See the Judgment, *supra* note 3, pp. 535-536.
[124] *Idem*, p. 537.
[125] *Ibid*.
[126] *Idem*, p. 538.
[127] *Idem*, para. 1177.
[128] *Idem*, para. 803.
[129] *Idem*, para. 470.
[130] *Idem*, para. 549.

may be only a starting point for the purpose of the determination of the scope of the convicted person's liability,[131] the Trial Chamber completely omitted this starting point which, in light of the circumstances of the present case, was essential to estimate the number of potential beneficiaries of reparations. It is submitted that the error as described above materially affected the Impugned Decision. Had the Trial Chamber ascertained the extent of the victimisation, it would have rendered a decision reflecting a properly estimated number of potentially eligible victims and the final award would have been based on a proper foundation.

Sub-Ground 1.3: The Trial Chamber erred in fact and/or procedure by failing to give a reasoned opinion in relation to the estimated numbers of potentially eligible victims submitted by the parties and the participants.

79. While referring to the different and highly varying estimates advanced by the parties and participants,[132] the Trial Chamber failed to give a reasoned opinion as to which estimates it accepted, rejected or otherwise used for its determination of Mr Ntaganda's overall liability for reparations. Accordingly, it erred in the exercise of its discretion on the matter.

80. As already touched upon in Sub-Grounds 1 and 2 above, the Trial Chamber failed to effectively adjudicate the matter of the varying estimates. It further failed to explain why it had never requested the Registry to proceed with a comprehensive mapping exercise but instead opted to render its Reparations Order based on limited data obtained during the course of the Registry's preliminary mapping. As the Appeals Chamber has previously held, "*the Trial Chamber has an obligation to provide a reasoned opinion, it is not required to individually set out each and every factor that was before it provided that it indicates with sufficient clarity the basis of the decision*".[133] It is submitted

[131] See the *Lubanga* 2019 Judgment, *supra* note 55, para. 89.
[132] See the Reparations Order, *supra* note 1, para. 246.
[133] See the "Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala and Mr Narcisse Arido against the Decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute" (Appeals Chamber), No. ICC-01//05-01/13-2275-Red A A2 A3 A4 A5, 8 March 2018, para. 1049.

that the Trial Chamber failed to indicate with sufficient clarity what the basis of its decision was.

81. The fact that the Legal Representative, in contrast to the Registry, produced an estimate of a rather large amount of potential beneficiaries, placed the Trial Chamber in a position where it was required as part of its judicial functions to weigh the highly differing figures before it and to provide a reasoned opinion about which of the estimates it would follow and why. Evidently, an estimate of 60,000 persons displaced in the *shika na mukono* operation, according to evidence on the record,[134] did not easily reconcile with a combined grand total of estimated beneficiaries of 3,500 as provided by the Registry and discussed by the Appointed Experts,[135] even with the caveat that the 60,000 might have related to more villages than those delimited in the charging document and ultimately forming the basis of Mr Ntaganda's conviction.

82. The same holds true for the figure found in evidence on the record as to the population size of Mongbwalu, namely 80,000 inhabitants.[136] While the Trial Chamber had not made findings on the sizes of the towns and villages attacked for which convictions were entered, it did make findings as to the ethnic make-up of these locations and concluded that these were inhabited mainly by the Lendu.[137] Therefore, the fact that the Trial Chamber did not provide any kind of analysis or reasons for disregarding the Legal Representative's estimates constitutes an error of fact and/or procedure, given in particular that the Legal Representative repeatedly made submissions that the reliability of the Registry's figures were doubtful,[138] and the matter was highly disputed between the parties. The Trial Chamber was required to

[134] See the CLR2 Reparations Submissions, *supra* note 13, para. 71 referring to DRC-OTP-0074-0422, para. 70.
[135] See the First Expert Report, *supra* note 38, para. 29.
[136] See the CLR2 Reparations Submissions, *supra* note 13, para. 71 referring to DRC-OTP-0074-0422, the *Special Report on the events in Ituri, January 2002-December 2003*, 16 July 2004, S/2004/573, para. 98.
[137] See e.g. the Judgment, *supra* note 3, paras. 470 and 549.
[138] See the CLR2 Final Submissions on Reparations, *supra* note 43, paras. 95-97. See also the CLR2 Reparations Submissions, *supra* note 13, para. 68.

take a position and explain why it disregarded the suggested numbers or preferred the Registry's numbers, if that was indeed what it did.[139]

83. It is submitted that the error of not conducting a discernible weighing exercise in relation to the figures at its disposal ultimately tarnished the final outcome, as it appears that the Legal Representative's submissions have been entirely disregarded, which constitutes a failure to take relevant facts into consideration combined with an error in the exercise of judicial discretion. Moreover, the Reparations Order does not provide any determination of the number of potential beneficiaries and hence relies on an unknown number of potential beneficiaries for the purposes of the setting of the final award, the adequacy of which can – because of the lack of estimated beneficiaries – not be assessed. It cannot be established whether the award will have to cover the cost of reparation to a few thousands or tens of thousands of victims, which further affects the practicability of designing programmes for the ultimate benefit of these victims. There is hence a great risk that ultimately only a fraction of victims will be able to actually benefit from reparations in the present case.

Ground 2: The Trial Chamber committed a combination of errors of law, fact and procedure in determining the cost to repair by failing to establish a proper basis for its approach, and by failing to give a reasoned opinion on the principles it relied upon.

Sub-Ground 2.1: The Trial Chamber erred in law and/or fact by failing to establish a proper basis for its approach.

84. For the purpose of its determination of the cost to repair, the Trial Chamber stated that it was guided by the goal of setting an amount that is fair and appropriate, and properly reflects the rights of the victims, bearing in mind the rights of the convicted person.[140] While acknowledging the similarities of the present case with the

[139] See Ground 1.1 above. Since the Trial Chamber made no findings at all, it is entirely unclear whether and to which extent it retained the Registry's figure.
[140] See the Reparations Order, *supra* note 1, paras. 228 and 247.

Lubanga and *Katanga* cases,[141] and referring to figures and assessments made by Trial Chamber II in said cases,[142] deemed highly relevant to its assessment,[143] it however opted not to proceed with an individual assessment of harm as in the *Katanga* case, nor did it identify an average *per capita* cost to repair as in the *Lubanga* case. Accordingly, the Trial Chamber misinterpreted the law it purportedly relied upon. By failing to establish a proper basis for its approach as part of its judicial functions, the Trial Chamber erred in the exercise of its discretion.

85. The Trial Chamber, after mentioning different estimates of the number of potential beneficiaries before it, but without making any determination in this regard,[144] proceeded to discussing 'preliminary estimates' of costs to repair some specific harm provided by the TFV.[145] It then moved to a discussion of estimates provided by the Appointed Experts in their reports, including the compensation awards set by the Congolese courts in cases of war crimes and crimes against humanity.[146] The Congolese awards, as noted by the Trial Chamber, were standard awards of 5,000 USD and around 3,300 victims had been awarded a total of 28 million USD.[147] The Trial Chamber further considered that, according to the Experts, rape victims had also been awarded higher compensation awards that ranged from the standard 5,000 USD up to 50,000 USD.[148] In addition, it referred to the figures provided by the TFV in relation to ten projects it was already running in Ituri,[149] and proceeded to discussing the reparations awarded in the *Katanga* and *Lubanga* cases.[150] It specifically listed the individual heads of harm identified by Trial Chamber II in the *Katanga* case.[151] In relation to the *Lubanga* case, the Trial Chamber noted that "*having*

[141] *Idem*, para. 247.
[142] *Idem*, paras. 243-244.
[143] *Idem*, para. 245.
[144] See Ground 1 above.
[145] See the Reparations Order, *supra* note 1, para. 236.
[146] *Idem*, para. 237.
[147] *Ibid*.
[148] *Idem*, para. 238.
[149] *Idem*, para. 241.
[150] *Idem*, paras. 243-244.
[151] *Idem*, para. 243.

had regard to the submissions of the parties, Congolese decisions with comparable values, the findings in the Katanga case, and the results of a sample of 473 potentially eligible victims, Trial Chamber II calculated ex aequo et bono *the harm suffered by each victim, direct or indirect, at USD 8,000*".[152] It then noted the submissions of the Common Legal Representative of the Former Child Soldiers who represents victims that may also be eligible beneficiaries in the *Lubanga* case, as well as the TFV's submissions in this regard,[153] before concluding that the present case was of a large scope and that there was "*potentially a large number of victims* […] *eligible to receive reparations*".[154]

86. The Trial Chamber declared that it "*had carefully considered the information provided by the Registry, the TFV, the Appointed Experts, and the parties*" and specifically noted the figures and assessments made by Trial Chamber II in the *Lubanga* and *Katanga* cases, as "*related to crimes committed in Ituri during the same time-frame*" which it considered "*highly relevant*" to its assessment of the cost to repair the harm caused by the crimes for which Mr Ntaganda was convicted.[155] It is submitted that contrary to said cases, the Trial Chamber, however, failed to calculate or determine either compensation amounts for specific heads of harm or an average *per capita* cost to repair. It simply stated that it had concluded that there were "*thousands*" of victims that may be eligible for reparations in the present case.[156] This conclusion was neither based on any finding it actually reached, nor was it sufficiently precise.

87. In the middle of its overall conclusion on Mr Ntaganda's financial liability, the Trial Chamber held that "[i]*n effect, estimates vary greatly and range from 'at least approximately 1,000' to 'a minimum of 100,000 across all locations* […]'".[157] It did not seem concerned by the fact that its ensuing calculation of the overall monetary liability was

[152] *Idem*, para. 244.
[153] *Ibid*.
[154] *Idem*, para. 245.
[155] *Ibid*.
[156] *Idem*, para. 246. It is disputed that the Trial Chamber had reached any valid conclusion in this regard. See Ground 1 above.
[157] See the Reparations Order, *supra* note 1, para. 246.

not based on a more concrete figure of potentially eligible persons.[158] The Trial Chamber's failure to establish an approximate number of beneficiaries has already been sufficiently addressed in Ground 1 above; however, this failure to determine the number of potential beneficiaries combined with the Trial Chamber's failure to determine a *cost factor* of any kind are intertwined. Without knowing approximately how many victims would ultimately benefit from reparations in the present case, the determination of a cost was by definition impossible and furthermore ignored the jurisprudence of the Court.

88. It is irrelevant in this regard that the Trial Chamber considered at length the cost breakdown for different heads of harm provided by the TFV and the Appointed Experts.[159] These figures are not ultimately reflected in the Trial Chamber's conclusion, and thus it is unclear whether and to which extent said figures were taken into account. Moreover, the consideration of such individual costs only makes sense where a concrete and relatively small number of beneficiaries are concerned. This approach, as taken in the *Katanga* case, where Trial Chamber II scrutinised individual applications of a rather small number of victims, was even criticised by the Appeals Chamber. It stated that "[t]*he Appeals Chamber has concerns as to the Trial Chamber's approach in identifying the 'monetary value' of the harm in the way it did. This approach required it to analyse all individual applications in detail, only to then put a monetary value to the harm which did not reflect the reparations eventually awarded to the victims.* […] *The approach taken was time consuming, resource intensive and, in the end, disproportionate to what was achieved*".[160] In the present case, where the number of potentially eligible victims might be in the tens of thousands, the individual assessment of harm is impractical. In the same vein, putting a specific monetary value on different types of multi-dimensional

[158] This point has generally been sufficiently addressed under Ground 1 above. However, the issues are intertwined and therefore, the matter is again mentioned under Ground 2.
[159] See the Reparations Order, *supra* note 1, paras. 236-237.
[160] See the "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'" (Appals Chamber), No. ICC-01/04-01/07-3778-Red A3 A4 A5, 9 March 2018 (the "*Katanga* 2018 Judgment"), para. 4.

harm suffered by the victims in the present case is unnecessary, given the collective nature of the reparations as awarded. The fact that the Trial Chamber conducted a purported *assessment*, but then set an overall sum in the abstract (as the number of persons who will benefit in the end was unknown), casts serious doubt on the decision-making process. Since the Trial Chamber neither defined an approximate number of potential beneficiaries nor set out a calculation of the cost to repair that led it to arrive at the sum total, demonstrates that the decision was issued without taking relevant facts into account.

89. It is submitted that the fact that the Trial Chamber failed to establish the significant parameters of the cost to repair, namely the number of potentially eligible victims and the cost factor, materially impacted the Impugned Decision in that the overall amount set in the end was fully arbitrary. There is no discernible basis for the specific amount of 30 million USD. The impact of this error is essentially the same as that identified above in Ground 1, namely: since the overall amount of Mr Ntganda's liability is set in the abstract and since it will entirely depend on the number of *actual* beneficiaries coming forward and ultimately being eligible, it cannot be discerned whether the overall award will be adequate and fair in the circumstances of the present case.

90. As mentioned under Ground 1 above,[161] this situation creates anxiety amongst the victims who do not know whether in the end the expected reparations will be able to repair the harm they suffered at the hands of Mr Ntaganda.

[161] See *supra* para. 63.

Sub-Ground 2.2: The Trial Chamber erred in fact and/or procedure by failing to give a reasoned opinion on what constituted the 'fairness', 'appropriateness' and the 'conservative approach' it purportedly relied upon for the purpose of its determination of the cost to repair.

91. The Trial Chamber, for the purpose of its determination of the cost to repair, purportedly also resorted to the principles of 'fairness' and 'appropriateness', and further referred to having applied a 'conservative approach'.[162] However, the Trial Chamber erred by failing to give a reasoned opinion on what exactly said principles and approach constituted for the purpose of its determination of the cost to repair in light of the particular circumstances of the present case and *how* they influenced its determination bearing in mind the rights of the victims and the overall goal of reparations. Accordingly, the Trial Chamber erred in the exercise of its discretion.

92. In the Reparations Order, the Trial Chamber referred to considerations of fairness and appropriateness. It for instance "*acknowledge*[d] *that the meaning of justice and fairness for victims, and the extent to which they may be achieved, depend on a multitude of factors, including* inter alia*, age, gender, social context, and victims' needs and expectations*".[163] Referring to the Appeals Chamber's findings in the *Lubanga* case, the Trial Chamber also stated that "[a]*ll victims are to be treated fairly and equally during the reparations process, irrespective of whether they participated in the trial proceedings*".[164] The Trial Chamber reiterated that all victims were to be treated fairly and equally, when it established the prioritisation process for particularly vulnerable victims.[165] In this respect, it further specified that "*the Court may adopt measures in order to guarantee equal, effective, and safe access to reparations for particularly vulnerable victims*".[166] In Part V(D) of the Reparations Order, it recalled under the heading 'Applicable Law' that "[t]*he Chamber should determine the cost to repair, ultimately with the goal of setting an amount that*

[162] See the Reparations Order, *supra* note 1, para. 247.
[163] *Idem*, para. 4.
[164] *Idem*, para. 41.
[165] *Idem*, para. 92.
[166] *Ibid*.

is fair and properly reflects the rights of the victims, bearing in mind the rights of the convicted person".[167]

93. It is submitted that nothing in Part V(D) of the Reparations Order evidences that the Trial Chamber had conducted any analysis or consideration of *what* was fair in the concrete circumstances of the present case and *how* its final determination was based on, or otherwise guided by, any of its previous findings relevant to the concept of fairness. Indeed, the fact that the Trial Chamber failed to provide a proper basis for its determination of the cost to repair and further failed to estimate the number of potential beneficiaries of reparations, makes it entirely impossible to compare and ascertain whether the sum total set by the Trial Chamber is indeed fair in particular when compared to the awards set in the *Lubanga* and *Katanga* cases. Since said cases relate to crimes committed in the same region and time-frame and some potential beneficiaries of reparations in the present case are also eligible to receive reparations in the *Lubanga* case, a direct comparison would have been required in order to meaningfully address the question of fairness. Especially since the Trial Chamber underscored that all victims are to be treated fairly and equally, it was incumbent upon it to discuss its considerations in this regard beyond the fleeting mention of the relevancy of the *Lubanga* and *Katanga* cases to the present case. This acknowledgment alone is far from being sufficient to show that the Trial Chamber gave substantive consideration to the fairness of the award in its decision.

94. The Trial Chamber took the same erroneous approach in relation to the concept of 'appropriateness' of the award. After having determined that collective reparations with individualised components were the most *appropriate* in the present case because of, *inter alia*, the "*potentially large number of unidentified eligible victims*",[168] the Trial Chamber did, however, not make an assessment of the *appropriateness* of the award it

[167] *Idem*, para. 228.
[168] See the Reparations Order, *supra* note 1, paras. 7-9 and 194. The Legal Representative agrees with the finding that collective reparations with individualised components are the most feasible form of reparations in this case. This finding is therefore not disputed.

set. Such assessment would have involved in particular a consideration of *what* could be achieved with the money to ultimately repair and address the harm of all potentially eligible victims.

95. Even though the Trial Chamber correctly recalled that in specifying appropriate reparations to or in respect of victims, it has to determine the scope and extent of any damage, loss and injury to, or in respect of victims,[169] and further recalled that it is "*appropriate for the Chamber to focus on the cost to repair, depending on the circumstances of the case and bearing in mind the overall purpose of reparations*",[170] it did not conduct any such analysis, nor did it compare the cost to repair identified in the *Lubanga* and *Katanga* cases with the present case. It did not do so, because it could not. Having failed to establish an approximate number of potentially eligible victims, the Trial Chamber had deprived itself of the most basic parameter for conducting an analysis of what was appropriate in terms of overall cost to repair. It therefore conducted its purported assessment of what was 'appropriate' in the present case without any basis and determined a figure in the abstract. This was erroneous. The appropriateness of the award depended on the Trial Chamber's determination of the number of eligible beneficiaries[171] and the concrete cost to repair the extensive and multi-dimensional harm suffered by the estimated number of potentially eligible beneficiaries.[172] By concluding that the award of 30 million USD was appropriate,[173] the Trial Chamber erred in the exercise of its discretion.

96. Likewise, the Trial Chamber's final conclusion refers to the application of a 'conservative approach';[174] a concept not defined or explained in the preceding discussion. Without setting out in relation to which figures presented by the parties and participants in the present case it took a 'conservative approach', it remains

[169] See the Reparations Order, *supra* note 1, para. 227.
[170] *Idem*, para. 228, referring to the *Katanga* 2018 Judgment, *supra* note 160, para. 72.
[171] See the *Lubanga* 2019 Judgment, *supra* note 55, para. 224.
[172] *Idem*, para. 120.
[173] See the Reparations Order, *supra* note 1, para. 247.
[174] *Ibid*.

unclear whether the Trial Chamber's approach relates to the undefined number of potential beneficiaries or the unspecified individual cost to repair, as the Trial Chamber only mentions the 'conservative estimates' provided by the TFV and the Appointed Experts in relation to cost to repair in its conclusion. Whether the Trial Chamber also relied on the rather low number of potential beneficiaries estimated in the Registry's respective submissions and/or the Experts' Reports, is not discernible. Even if this were indeed so, this would be erroneous, as the Trial Chamber was under an obligation to consider the relevant estimates of the parties. Indeed, the Appeals Chamber previously underscored that the Trial Chamber *shall* take into account the submissions of the parties and only *may* appoint experts in this regard.[175]

97. Apart from its references to the conservative estimates of the TFV and the Appointed Experts, the Trial Chamber also refers to having weighed the (undefined) 'conservative estimates' when it came to its overall conclusion – "*taking a conservative approach*" – of 30 million USD.[176]

98. While a Trial Chamber is not required to recite each and every factor that was before it, and the level of reasoning to be provided depends on the circumstances of the case, it is submitted that the Trial Chamber is required to identify which factors it found relevant in coming to its overall conclusion,[177] the conclusion must be discernible. The Trial Chamber's decision as regards the overall amount of Mr Ntaganda's liability is not discernible, and neither is what it termed the 'conservative approach'. The word 'conservative' in its ordinary meaning in the context of estimates

[175] See the "Judgment on the appeal of the victims against the 'Reparations Order'" (Appeals Chamber), No. ICC-01/12-01/15-259-Red2 A, 8 March 2018, para. 34.
[176] See the Reparations Order, *supra* note 1, para. 247.
[177] See the "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute" (Appeals Chamber), No. ICC-01/05-01/08-3636-Red A, 8 June 2018, para. 51. See also the "Judgment on the appeal of Mr Jean-Jacques Mangenda Kabongo against the decision of Pre-Trial Chamber IT of 17 March 2014 entitled 'Decision on the 'Requête de mise en liberté' submitted by the Defence for Jean-Jacques Mangenda'" (Appeals Chamber), No. ICC-01/05-01/13-560 OA4, 11 July 2014, para. 116, referring to "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81'" (Appeals Chamber), 14 December 2006, No. ICC-01/04-01/06-773 OA 5, para. 20.

denotes something that is "[c]*haracterized by caution or moderation; (esp. of an estimate) purposely low for the sake of caution*".[178] Thus, while 'taking a conservative approach' would on its face indicate that the Trial Chamber took purposely low estimates into account, the Trial Chamber did not explain *which* estimates. Again departing from a plain reading, it would further appear that the Trial Chamber took the lowest estimated number of the potentially eligible beneficiaries and multiplied it with the lowest estimated cost to repair. This approach would equally be erroneous as it would disregard and be irreconcilable with the principles of 'fairness' and 'appropriateness' of the award, thus rendering the entire reasoning unsound.

99. The Legal Representative contends that as a matter of common sense a cost to repair cannot be appropriate if it corresponds to the lowest possible figure. A fair award cannot be such when the absolutely lowest number of potentially eligible persons is taken as basis for an estimation, very likely reducing the overall resources for the actual number of beneficiaries.

100. Since the Trial Chamber did not explain what constituted its 'conservative approach', it is also impossible to discern whether its final award was indeed fair or appropriate.

101. The Trial Chamber's failure to reason its approach materially affects the overall reparations award because of the uncertainty it creates in relation to the adequacy of the monetary award to repair the harm caused. This negatively impacts on the well-being of victims who are concerned about the risk of not receiving adequate and fair reparation of the harm they suffered at the hands of Mr Ntaganda. Had the Trial Chamber been genuinely driven by the goal to set a cost to repair which is both 'fair' and 'appropriate' to properly reflect the rights of the victims, and in compliance with the principles of reparations it identified, the overall award set would have been

[178] See the Oxford English Dictionary entry for 'conservative' (adj).

commensurate with the extent of the victimisation in terms of the number of victims and the harm suffered.

Ground 3: The Trial Chamber committed a combination of errors of law, fact and procedure by failing to obtain estimates that are as accurate as possible on the number of victims likely to come forward for reparations, and by failing to give a reasoned opinion on its conclusions on the matter.

102. The errors identified under the present Ground are complementary to, and to a large extent result from the errors identified under Ground 1 above, as they were all committed because of the Trial Chamber's failure to inquire into and to obtain an accurate estimate of the number of the potentially eligible victims. The distinction between the errors identified in the respective Grounds of Appeal lies in the fact that Ground 1 pertains to *all potential beneficiaries of reparations*, while the present Ground pertains to *victims likely to come forward for reparations*, namely *actual beneficiaries* out of the total number of all potentially eligible victims.

103. Similarly to the error of law identified under Ground 1, the Trial Chamber misinterpreted the applicable law by failing to give due regard to its duty to make every effort to obtain estimates as accurate as possible in the circumstances of the case[179] in relation to the number of victims likely to come forward for reparations. While correctly referring to the *dicta* set out by the Appeals Chamber in the *Lubanga* case that not all eligible victims might come forward for reparations,[180] the Trial Chamber erred when it failed to apply the main principle of making every effort to ascertain this number.[181]

104. Accordingly, the Trial Chamber's failure to ascertain the number of victims likely to come forward for reparations was a result of its failure to obtain an accurate estimate of the number of all potentially eligible victims. As a matter of logic, the Trial

[179] See the *Lubanga* 2019 Judgment, *supra* note 55, para. 108.
[180] See the Reparations Order, *supra* note 1, para. 230, referring to the *Lubanga* 2019 Judgment, *supra* note 55, para. 89.
[181] See Ground 1 above.

Chamber could not ascertain an estimate of persons likely to come forward without first estimating the number of all potentially eligible victims. Otherwise, the Trial Chamber's estimates would have been entirely speculative as not being based on any information at its disposal.

105. The Trial Chamber further erred in fact and/or procedure by failing to provide a reasoned opinion as regards the basis for its conclusion that not all victims would come forward to benefit from reparations in the present case,[182] and why it found it impossible to predict that number in advance.[183]

106. Indeed, the Trial Chamber, without basis or discussion of the matter, concluded that "*cognisant of the impossibility to predict in advance how many victims may ultimately come forward to benefit from collective reparations with individualised components during the implementation stage, particularly considering the widespread, systematic, and large-scale nature of the crimes for which Mr Ntaganda was convicted*".[184]

107. In the Reparations Order, the Trial Chamber had merely discussed the likelihood of victims not coming forward in the context of its consideration pertaining to the modalities of the reparations in a way that would not discourage victims of sexual and gender-based violence to present themselves as eligible victims.[185] This contemplation was therefore part of the considerations that influenced the Trial Chamber's determination of the modalities of the reparations.[186] It is submitted that this discussion, however, could not directly be transposed to the distinct question of the number of victims likely to come forward for reparations. Firstly, there was no discussion of any concrete projected numbers or percentages of persons who are unlikely to come forward in any of the submissions, and secondly, the discussion on victims of sexual and gender-based crimes being reluctant to come forward in certain

[182] See the Reparations Order, *supra* note 1, paras. 230 and 246.
[183] *Idem*, para. 246.
[184] *Ibid*.
[185] *Idem*, paras. 65 and 195.
[186] The Legal Representative does not take issue with the determination of the modalities of reparations in the present case.

circumstances exclusively focused on the design and make-up of reparations programmes and modalities.

108. Accordingly, the Legal Representative contends that the Trial Chamber failed to inquire into and to give a reasoned opinion on possible reasons for which potentially eligible victims would not come forward for reparations. In particular, the Trial Chamber erred in fact and/or procedure by disregarding relevant facts and its own findings. The Trial Chamber found that the victims in the present case have not benefited from any sort of support and assistance since the events,[187] and in light of this factor combined with the prevailing poverty in the region,[188] it seems doubtful that any potentially eligible victim would voluntarily opt not to present him or herself for reparations unless because of unawareness about his or her entitlements, the latter being a matter of the outreach campaign to be carried out by the Court on a widespread manner in order to reach as many eligible victims as possible.[189] Assuming that the prevailing insecurity in the region may be a factor preventing some eligible victims from accessing reparations programmes, this falls with the TFV's responsibility to address security matters when designing and implementing relevant reparations programmes in cooperation with the DRC authorities if necessary. Further assuming that some eligible victims die before receiving reparations, the Trial Chamber acknowledged that in such a case the victims' descendants or successors will be equally entitled to reparations.[190] By simply concluding that not all eligible victims would come forward for reparations, the Trial Chamber failed to consider any of the above relevant factors. Therefore, it erred in fact and/or procedure because it cannot be discerned how said conclusion has reasonably been reached from the facts and evidence before the Trial Chamber.

[187] See the Reparations Order, *supra* note 1, para. 5.
[188] See the First Expert Report, *supra* note 38, para 79. See also *idem*, footnote 224.
[189] See the Reparations Order, *supra* note 1, para. 47. *Cf* the CLR2 Final Submissions on Reparations, *supra* note 43, para. 96. See also the IOM Submissions, *supra* note 21, para. 29.
[190] See the Reparations Order, *supra* note 1, para. 40.

109. It is submitted that the above errors materially affected the Impugned Decision. Had the Trial Chamber correctly ascertained the number of victims likely to come forward for reparations, it would have rendered a decision reflecting a properly estimated number of potentially eligible victims and the final award would have been based on a solid foundation.

Ground 4: The Trial Chamber committed an error of law and/or fact by failing to give a reasoned opinion in relation to the way it purportedly 'resolved uncertainties in favour of the convicted person'.[191]

110. The Trial Chamber, while correctly identifying the legal principle set by the Appeals Chamber in the *Lubanga* case that requires a chamber to resolve uncertainties in the numbers of potential beneficiaries in favour of the convicted person (for instance, by assuming a lower number of victims, or by discontinuing the amount of liability),[192] erred in law and/or fact by failing to give a reasoned opinion as to how it applied this requirement in the circumstances of the present case.

111. The Trial Chamber found that Mr Ntaganda was "*liable to repair the full extent of the harm caused to direct and indirect victims of all crimes for which he was convicted, regardless of the different modes of liability relied on in the conviction and regardless of whether others may have also contributed to the harm*".[193] In the overall conclusion in which it set out the amount of Mr Ntaganda's financial liability, it, *inter alia*, asserted that it had "*resolv*[ed] *uncertainties in favour of the convicted person*".[194]

112. The Legal Representative submits, first, that the Trial Chamber failed to specify which 'uncertainties' it was specifically referring to; nor is this fact apparent from its preceding analysis. To the contrary, in the preceding paragraph it referred to the

[191] *Idem*, para. 247.
[192] See the *Lubanga* 2019 Judgment, *supra* note 55, para. 90.
[193] See the Reparations Order, *supra* note 1, para. 218.
[194] *Idem*, para. 247.

greatly varying estimates of potentially eligible beneficiaries[195] – a matter it had not resolved.

113. Second, whichever 'uncertainties' the Trial Chamber was indeed referring to, it failed to indicate how it resolved them, or what that concretely meant. In 'favour of the convicted person' is an extremely vague and undefined concept. Did it mean that the Trial Chamber used a restrictive approach as regards the number of potential beneficiaries? Or did it mean the Trial Chamber used a restrictive approach as regards the cost to repair so as to keep the convicted person's liability to a minimum? The Trial Chamber failed to provide a reasoned opinion on the approach it used.

114. Furthermore, while as argued under Ground 2 above, the Trial Chamber did not explain what the 'fairness', 'appropriateness' and 'conservative approach' meant for the purpose of its determination of the scope of Mr Ntaganda's liability for reparations, it was required as part of its judicial functions to properly weigh the rights of the convicted persons against other competing interests, namely the interests of the victims, the fairness of the proceedings and the overall goal of reparations, which is not to punish the convicted person,[196] but to strive, to the extent possible, to redress the harm caused to the victims,[197] the objective of reparation proceedings being remedial and not punitive.[198] The Trial Chamber failed to conduct any weighing exercise.

115. It is submitted that by simply stating that it 'resolved uncertainties in favour of the convicted person' without providing a reasoned opinion on *which* uncertainties it specifically referred to and *how* the different competing interests at stake were weighed, the Trial Chamber erred in the exercise of its discretion. The errors as described above materially affected the Impugned Decision. Had the Trial Chamber not committed said errors, it would have been apparent from the decision how the various competing interests were weighed and whether and to which extent they were

[195] *Idem*, para. 246.
[196] *Idem*, para. 224.
[197] *Idem*, para. 83.
[198] *Idem*, para. 224.

taken into consideration for the purpose of the determination of the scope of Mr Ntaganda's liability for reparations. Thus, had the Trial Chamber established with clarity how it weighed the different factors, the victims would have been provided with the necessary clarity about what harm Mr Ntaganda is liable to repair and how their own interests were resolved in relation to the interests of Mr Ntaganda. This would have avoided leaving the victims wondering and speculating that Mr Ntaganda might have ultimately been 'favoured' by excessively limiting his liability. Leaving room for speculation negatively affects the well-being of victims who have already been waiting for many years to see reparation for the harm they suffered materialise.

Ground 5: The Trial Chamber erred in procedure in setting the overall cost to repair jointly for both groups of victims by failing to give due regard to the overlap with the* Lubanga *reparations proceedings.

116. The Trial Chamber erred in procedure in setting the overall cost to repair jointly for both groups of victims without providing any indication how the overlap with the *Lubanga* reparations proceedings should be dealt with by the TFV at the implementation stage. It further failed to give due regard to risks of potential unequal treatment of the former child soldiers on the one hand and the victims of the attacks on the other, while addressing harm of both categories of victims without distinction for the purposes of its assessment of Mr Ntaganda's financial liability. In particular, the Trial Chamber failed to consider the distinct nature of the harm occasioned to the two groups of victims and the fact that they are situated in different circumstances, which required different approaches of addressing the harm. In contrast to the victims of the attacks, the harm suffered by the former child soldiers has been primarily addressed in the *Lubanga* case based on an average *per capita* cost to repair, with all of them being placed under a prioritised category of beneficiaries in the present case.[199]

[199] *Idem*, para. 214.

117. In the Reparations Order, the Trial Chamber stressed that all victims are to be treated fairly and equally during the reparations process,[200] reparations awards must avoid creating tensions, jealousy, or animosity among affected communities and between cohabitating groups,[201] and to be in strict compliance with the 'do no harm' principle.[202] Victims should receive equal reparations so as to avoid creating perceptions of hierarchy between victims and of placing a higher value on some forms of harm.[203]

118. In accordance with the plain reading of said principles, the two groups of victims in the present case, namely the former child soldiers and the victims of the attacks, must be treated fairly and equally *vis-à-vis* each other.

119. The Trial Chamber decided to "*adopt, for the purposes of reparation in this case, the reparation programmes ordered by Trial Chamber II in the Lubanga case, in relation to the overlapping victims and harms of both cases*".[204] It further held that as to the additional harm suffered by the victims of rape and sexual slavery within the UPC/FPLC and victims of recruitment beyond the temporal scope of the *Lubanga* case, for which Mr Ntaganda bears sole responsibility, additional reparation measures should be implemented.[205]

120. In the *Lubanga* case, Trial Chamber II determined that an average *per capita* cost to repair the harm suffered by the former child soldiers was 8,000 USD.[206] The requirement of fair and equal treatment of victims within the same group implies that the former child soldiers in the present case are meant to be treated in the same way as those in the *Lubanga* case, namely based on an average *per capita* cost to repair of

[200] *Idem*, para. 41.
[201] *Idem*, para. 44.
[202] *Idem*, paras. 50-52.
[203] *Idem*, para. 194.
[204] *Idem*, para. 220.
[205] *Idem*, para. 222.
[206] See the "Public Redacted Corrected version of the 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable" (Trial Chamber II), No. ICC-01/04-01/06-3379-Red-Corr-tENG, 21 December 2017, paras. 258 and 279.

8,000 USD. They must, at a minimum, receive the same reparations than the victims in the *Lubanga* case, with some of them entitled to further and additional reparation for the sexual and gender-based crimes they have been victims of. The requirement of fair and equal treatment of victims within the same case divided in two separate groups in turn implies an obligation on the Trial Chamber in the present case to establish a reparations regime whereby the victims of the attacks are treated equally *vis-à-vis* the former child soldiers. If the Trial Chamber had indeed been guided by the requirement of fair and equal treatment of all the victims in the present case, it would have equally established an average *per capita* cost to repair for the victims of the attacks, not only in order to genuinely comply with the above requirement but also to ensure the certainty and predictability of the overall reparations regime established.

121. However, and as argued in Ground 2 above, the Trial Chamber failed to determine an average *per capita* cost to repair for the victims of the attacks. It also failed to at least give an opinion as to whether the average *per capita* cost to repair the harm suffered by the victims of the attacks should be assessed at a similar, comparable, higher or lesser cost compared to that established for the former child soldiers in the *Lubanga* case. As a consequence, while an average *per capita* cost to repair has been secured for all former child soldiers, no such a cost has been established, or otherwise addressed, for the victims of the attacks. In practical terms, the *per capita* cost to repair the harm suffered by the victims of the attacks will *de facto* be fully dependent on the amount taken out of the 30 million USD dedicated to the victims of the attacks and the currently unknown number of the eligible victims likely to come forward for reparations.

122. Furthermore, the Trial Chamber failed to indicate how the overall cost to repair is meant to be distributed between the victims of the attacks and the former child soldiers. The extent of the cost to be borne by Mr Ntaganda in relation to the former child soldiers still remains unknown as the Trial Chamber ordered that the reparation programmes implemented in the *Lubanga* case, which comprehensively repair the harm caused to the overlapping direct and indirect victims in both cases, should be

understood to repair the victims' harm on behalf of both Mr Lubanga and Mr Ntaganda.[207] If, as argued by the Common Legal Representative of the Former Child Soldiers, beyond 284 victims in the present case, an estimated total number of 3,000 former child soldiers will eventually be eligible for reparations, based on the estimates in the *Lubanga* case,[208] with all of them being equally assessed on an average *per capita* cost to repair of 8,000 USD, the amount out of the overall cost to repair to be dedicated to the victims of the attacks will further be significantly reduced. As the Trial Chamber failed to determine how the overall cost to repair is meant to be distributed between the two groups of the victims, and absent any directions from the Chamber, the TFV will have full discretion in the matter.

123. Since the number of potentially eligible victims of the attacks remains unknown and not even estimated, but since it is likely to reach tens of thousands, the overall cost to repair set by the Trial Chamber would not be adequate to treat the victims of the attacks on an equal footing, *vis-à-vis* the former child soldiers whose harm is meant to be assessed on an average *per capita* cost to repair of 8,000 USD. This will be in clear contrast with the Trial Chamber's finding that ordering collective reparations with individualised components "*addresse*[d] *the concerns that victims should receive equal reparations to avoid awards being a source of jealousy, animosity, or stigmatisation among the affected communities*".[209] Because of an overlap with the *Lubanga* case, all the former child soldiers in the present case will be included in more generously designed programmes than will ultimately be possible for tens of thousands of victims of the attacks, given the financial limitations in this regard. As a result, the former child soldiers, although provided with comprehensive reparations, would appear *de facto* over-compensated *vis-à-vis* the victims of the attacks.

[207] See the Reparations Order, *supra* note 1, para. 220.
[208] See the "Observations on the Appointed Experts' Reports and further submissions on reparations on behalf of the Former Child Soldiers", No. ICC-01/04-02/06-2632, 18 December 2020, para. 35. See also the "Filing on Reparations and Draft Implementation Plan", No. ICC-01/04-01/06-3177-Red, 3 November 2015, para. 253.
[209] See the Reparations Order, *supra* note 1, para. 194.

124. The Trial Chamber aimed to "*avoid perceptions of hierarchy between victims and of placing a higher value on some harms*".[210] However, by placing under the same collective umbrella the former child soldiers whose average *per capita* cost to repair has been established together with the victims of the attacks whose average harm has not been addressed at all, the Trial Chamber created exactly such hierarchy between the two groups of the victims with a more beneficial treatment of the former child soldiers. This constitutes a clear error in the exercise of the Trial Chamber's judicial discretion.

125. The Trial Chamber further erred in placing all victims in the present case under the same umbrella, implying that their individualised needs are meant to be addressed in the same way and through the same collective approach. However, the former child soldiers and the victims of the attacks cannot be provided with joint socio-economic rehabilitation programmes for instance. The two groups of victims have distinct needs and interests. In particular, the victims of the attacks cannot be expected to take part in the same rehabilitation activity when the former child soldiers are closely associated with the perpetrators of the crimes of which the other beneficiaries have been victims. This practical consideration alone would have mandated a differentiated approach for the two groups of victims in terms of reparation and ultimately the cost to repair. The Trial Chamber, however, failed to make any distinction when it calculated, or rather, set an award in Part V(D) of the Reparations Order. It did not direct its mind to either the different needs and hence cost of different programmes, nor did it properly resolve the matter of the extent of the overlap of victims between the *Lubanga* and the present case and the financial implications thereof. It disregarded this difference when it proceeded to its conclusion on the overall reparations award and failed to specify how the allocation of the money would be resolved between the different and distinct groups of victims in the present case.

126. Furthermore, the Trial Chamber, through its failure to apply a more nuanced and tailored approach, created more sources for unequal treatment when it put all of

[210] *Ibid*.

the former child soldiers in the 'prioritised' category, a category into which it placed only a number of the victims of the attacks. Thus, in the absence of a finding on the allocation of money between the former child soldier group and the group of the victims of the attacks and in the absence of a finding on which amount should be allocated to cover additional harm suffered by the former child soldiers, a very significant amount out of the overall cost to repair will already be dedicated to the former child soldiers only, especially when the estimated total number of 3,000 former child soldiers will come forward for reparations on a priority basis.

127. Finally, this failure to determine the above parameters ultimately places an unreasonable amount of discretion into the hands of the TFV that will, in practice, be the body determining the allocation of funds between the two groups of victims.

128. Accordingly, the Trial Chamber's procedural error materially affects the way the victims will receive reparation of the harm they suffered and when. Without proper guidance on the way in which the overall reparations award is to be split or divided between these different groups of victims, the prioritisation of the former child soldiers, as well as the fact that they are to receive the same reparations as those eligible in the *Lubanga* case (set at 8,000 USD *per capita*) will reduce the funds available to the significantly larger group of victims of the attacks and therefore create unequal treatment. Had the Trial Chamber properly taken into account the different needs of victims, as well as the overlap between the two cases, it would have established a more equitable distribution of funds between the two groups of victims and created certainty for the victims of the attacks that their harm will be addressed in a fair and equal manner *vis-à-vis* the former child soldiers in the present case.

Ground 6: The Trial Chamber erred in fact and/or procedure in reaching conflicting findings which impacted on the internal coherence of the Reparations Order, thus undermining the fairness and legal certainty of the overall reparations regime as adopted.

129. The Trial Chamber made a number of findings in that it held that (i) the victims suffered multi-faceted harm; (ii) an individual assessment of harm was not necessary; (iii) victims should be provided with sustainable and long-term livelihood means; and (iv) victims should receive equal reparations so as to avoid creating perceptions of hierarchy between victims and of placing a higher value on some forms of harm.[211] Nevertheless, the Trial Chamber ultimately held that the cost to repair the harm for each victim may substantially differ from one to another.[212] It is submitted that the Trial Chamber erred in fact and/or procedure in reaching a conclusion that was inconsistent with its own findings. As a result, it *de facto* provided the TFV with the discretion to distribute the reparations award as it sees fit among the beneficiaries ultimately eligible. This, in turn, results in the TFV being given unfettered discretion as to the allocation of resources between the different groups of victims, as well as the amount that would be earmarked for additional reparations of the former child soldiers who also suffered from victimisation through sexual and gender-based crimes.

130. The Trial Chamber further erred in procedure by failing to set out the applicable criteria to be followed by the TFV in implementing the Reparations Order. While the Appeals Chamber has previously held that the TFV may, for instance, carry out the administrative screening of potentially eligible beneficiaries,[213] and that the TFV may *assist* the Trial Chamber in such limited and defined tasks,[214] these rulings cannot equally apply to the delegation of a significant aspect of the reparations order itself, namely the *de facto* determination of the size of the reparation award to different

[211] *Ibid*.
[212] *Idem*, para. 247.
[213] See the "Judgment on the appeal of the victims against the 'Reparations Order'" (Appeals Chamber), No. ICC-01/12-01/15-259-Red2 A, 8 March 2018, para. 58.
[214] *Idem*, paras. 59-60.

groups of eligible victims.[215] Since the Trial Chamber failed to make any determinations on the most basic parameters, such as the number of potential beneficiaries or the individual cost to repair, the TFV is put into a position where it can design an implementation plan as it sees fit or practicable, when these determinations should have been made by the Trial Chamber as part of its judicial functions in determining reparations in the present case. Moreover, since the TFV is being given unfettered discretion on how to divide or allocate resources, it will be nearly impossible for the parties to challenge any such proposals as the guiding principles and the legal framework are missing.

131. The fact that the TFV may consult the Trial Chamber should it encounter any difficulty in interpreting the Impugned Decision pursuant to regulation 57 of the Regulations of the TFV, which requires that the TFV consult the relevant Chamber on any questions that arise in connection with the implementation of the award,[216] is an insufficient and impractical guarantee in the circumstances of the Reparations Order. The extent to which the Reparations Order leaves open questions surrounding the most basic parameters already at the current stage, concretely foreshadows delays and litigation that could and should have been avoided by the Trial Chamber setting out a clear framework for the TFV to operate in.

132. The fact that the Trial Chamber set out in some detail the cost estimates produced by the TFV and the Appointed Experts without making itself any kind of finding on a *per capita* cost to repair, ultimately invites the TFV to apply and implement its own estimations at its own discretion. Not only is the TFV not the body that is mandated by the Statute to issue reparations orders, in other words to determine who receives reparations and how much, but furthermore, this approach indirectly dismissed and ignored the submissions of the parties. It is submitted that conferring upon the TFV these essential decision making powers constitutes an error and must

[215] See Ground 5 above.
[216] See the "Judgment on the appeal of the victims against the 'Reparations Order'" (Appeals Chamber), No. ICC-01/12-01/15-259-Red2 A, 8 March 2018, para. 71.

be rectified. Judicial oversight and the necessity to have any implementation plan approved by the Trial Chamber does not counter or remedy this error in any meaningful way. In this regard, the prioritisation of the former child soldiers and some other specified groups of victims necessarily implies expenditure prior to the implementation of reparation programmes for the remainder of the eligible beneficiaries. This, since the amount of such expenditure remains entirely unregulated by the Trial Chamber, results in unfettered and unchallengeable discretion being conferred upon the TFV, a non-judicial body.

133. Thus, the Trial Chamber ultimately created a system in which (i) a non-judicial body will assess the individual cost to repair at its own discretion and (ii) victims will ultimately be treated unequally because of the staggering of implementation phase. This directly contravenes the 'do no harm' principle,[217] in that victims are not being treated equally and unnecessary anxiety in victims is being created over the question whether and/or when they will receive reparations.

134. The Trial Chamber's endeavour to ensure that victims receive equal reparations to avoid awards being a source of jealousy, animosity, or stigmatisation amongst the affected communities[218] is defeated by its own indecisiveness in terms of setting concrete awards or calculating an overall award on a sound and clear basis.

135. The Legal Representative contends that the Trial Chamber's errors directly and materially affect the implementation of the reparations programmes in that the Chamber failed to provide guidance to the non-judicial implementing agency, the TFV, on how to determine the amount of money to be dedicated to the reparation programmes for priority victims, how to determine the amount of money to be expended on programmes for the remainder of eligible beneficiaries and how to ensure that during the entire process of the design and implementation of the reparations all victims are treated fairly and equally. This not only creates uncertainty

[217] See the Reparations Order, *supra* note 1, paras. 50-52.
[218] *Idem*, para. 194.

and ultimately anxiety on the part of the victims, but it foreshadows unnecessary litigation and delays during the ensuing reparation stages. Had the Trial Chamber clearly set out the cost to repair and how the overall amount was to be split between the different groups and categories of the victims, the roadmap for the implementation of reparations in the present case would have been settled, which would have significantly expedited the process and ensured fair and equal treatment of the victims of Mr Ntaganda's crimes.

Ground 7: The Trial Chamber erred in fact and/or procedure by taking into account extraneous factors and unduly prioritising the expeditiousness over the fairness of the determination of the scope of Mr Ntaganda's liability for reparations.

136. The Trial Chamber erred in fact and/or procedure by taking into account extraneous factors that led it unduly expediting the reparations process with prejudice to the fairness of its determination of the scope of Mr Ntaganda's liability for reparations, in particular the overall cost to repair. Indeed, in issuing the Reparations Order, the Trial Chamber took into consideration (i) that the judicial mandate of two of the Trial Chamber's Judges came to an end on 10 March 2021; and (ii) the fact that the mandate of the Judge who presided over the trial came to an end on that day.[219] The Trial Chamber erred in the exercise of its discretion. There is no bar in the Statute to the extension of judicial mandates; to the contrary, the Presidency has the responsibility to ensure the proper administration of justice, which bestows upon it the power to extent judicial mandates.[220]

137. In the introductory part of the Reparations Order, the Trial Chamber specifically stated that "[c]*onsidering that the mandate of two of the Chamber's Judges comes to an end on 10 March 2021, including that of the Judge who presided over the trial, the Chamber has decided to issue this order prior to the issuance of the appeals judgment on the*

[219] *Idem*, para. 5.
[220] See article 38(3)(a) of the Statute.

conviction and sentence".[221] Since the parties had, from the earliest opportunity, argued that no reparations order should be ordered or any steps undertaken towards reparation prior to the confirmation or not of Mr Ntaganda's conviction, the Trial Chamber took the decision to ignore the parties' submissions in this regard and prioritised expediency of its decision over the considerations of unduly raising expectations and the rights of the person convicted at first instance. While, ultimately, the conviction was confirmed and no detrimental consequences ensued in this regard, it is, however, also clear that the Trial Chamber prioritised other considerations in rendering its decision at the time it did and the latter did materially affect the Impugned Decision.

138. Concretely, the Trial Chamber was driven by the perceived restraint of the end of the regular judicial mandate of two of its Judges. It thus issued a Reparations Order that is missing some of the very basic necessary determinations, as argued in Grounds 1 and 2 above. First, the information before the Trial Chamber was far from being complete; this is illustrated by the extent of the Registry's mapping exercise being a 'preliminary' one – further limited by COVID-19 restrictions. Second, the Trial Chamber rejected the Legal Representative's request to collect further and more concrete information on the population census[222] and instead operated on the basis of incomplete information. This, coupled with the fact that the Trial Chamber explicitly pointed to the end of the judicial mandates of two of its Judges as one of the reasons for the specific timing of the decision, and in particular that of the Judge presiding over the case, indicates that the Trial Chamber rushed in its decision and issued the Reparations Order at the time being motivated by the end of the Judges' mandates, rather than considerations connected with the soundness and comprehensiveness of the reparations order. It is submitted that the reliance on this factor, and moreover, the decisive role this factor played in the issuance of the Reparations Order, constitutes a grave error in the exercise of judicial discretion that amounts to an abuse of discretion.

[221] See the Reparations Order, *supra* note 1, para. 5.
[222] See Ground 1 above.

139. The Trial Chamber should have been guided by nothing other than considerations of fairness to the victims and the convicted person in issuing its order. Considerations of expediency – though relevant – are only relevant insofar as they relate to the expeditiousness of the process of providing reparations to the victims on this ground. This very aim was actually directly undermined by the Trial Chamber rendering a Reparations Order that leaves many of the fundamental parameters undefined.

140. The Legal Representative contends that the ending judicial mandates was an irrelevant factor and taking this fact into consideration constituted an error. First, there is nothing in the Statute, Rules, or the jurisprudence of the Court that requires the bench that heard the merits of a case to finalise the reparations order in its original composition. Not only was the bench no longer of its original composition in the present case – Judge Ozaki having been replaced by Judge Herrera Carbuccia at the beginning of the reparations proceedings,[223] but there generally does not exist any obligation for Judges of the trial bench to issue the reparations order.

141. Article 36(10) of the Statute allows for an extension of judicial mandates in situations where a Judge has been assigned to a Trial or Appeals Chamber and has not finished the case before the end of his or her mandate. Indeed, "[p]*aragraph 10 allows judges who have part heard a case to continue in office until the termination of the proceedings in which they have been involved*".[224]

142. In the *Katanga* case, the Presidency determined that: "[h]*aving considered the governing texts, jurisprudence, Court practice and the difference in kind between criminal proceedings and reparations, there is no requirement for reparations proceedings to constitute a stage of the 'trial'* stricto sensu. *As such, reparations need not be addressed by the Trial Chamber that issued the conviction and sentence. Consequently, article 36(10) does not apply*

[223] See the "Decision re-composing Trial Chamber VI" (Presidency), No. ICC-01/04-02/06-2444, 20 November 2019.
[224] See TRIFFTERER (O.) and AMBOS (K.), The Statute of the International Criminal Court: A Commentary, 3rd edition, Nomos Verlagsgesellschaft mbH & Co. KG., Baden Baden (2015), p. 1125.

to reparations proceedings".[225] It thus granted the requests of two Judges of the bench to end their judicial mandate with the conclusion of the sentencing and prior to the reparations stage.[226] Moreover, the Appeals Chamber itself had previously underlined that reparations proceedings are a distinct stage of the proceedings.[227]

143. There was therefore no requirement for the Judges who heard the evidence in the case on the merits and the sentencing to be part of the bench issuing the reparations order and the consideration that one of the Judges whose mandate was coming to an end was the Presiding Judge in the case was not a relevant consideration in the discretionary decision of the Trial Chamber to issue the Reparations Order at the time it did and contrary to the submissions of all parties involved.

144. Conversely, the above implies that if this had been a valid consideration, there was no bar in the Statute or the jurisprudence that would have prevented the Judges' mandates to be extended until the issuance of the Reparations Order. While there are no defined 'stages' of reparations proceedings in the statutory framework of the Court, there is prior practice according to which the reparations process is understood to consist of such distinct stages.

145. In the *Lubanga* case, for instance, the composition of the relevant Chamber changed during the reparations phase of that case, namely after the issuance of the reparations order.[228] Likewise, the Presidency's decision in the *Bemba* case in which it

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[225] See the "Decision on conclusion of term of office of Judges Bruno Cotte and Fatoumata Dembele Diarra" (Presidency), No. ICC-01/04-01/07-3468-AnxI, 16 April 2014, para. 8.
[226] *Idem*, paras. 1 and 12-13.
[227] See the "Decision on the admissibility of the appeals against Trial Chamber I's 'Decision establishing the principles and procedures to be applied to reparations' and directions on the further conduct of proceedings" (Appeals Chamber), No. ICC-01/04-01/06-2953 A A2 A3 OA 21, 14 December 2012, para. 64.
[228] See the "Decision referring the case of *The Prosecutor v. Thomas Lubanga Dyilo* to Trial Chamber II" (Presidency), No. ICC-01/04-01/06-3131, 17 March 2015. See also "Decision establishing the principles and procedures to be applied to reparations" (Trial Chamber 1), No. ICC-01/04-01/06-2904, 7 August 2012, paras. 260-262. See also "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" (Appeals Chamber), No. ICC-01/04-01/06-3129 A A2 A3, 3 March 2015, paras. 232-236.

considered that "*a judge serving on an extended mandate completes his or her service following the rendering of the decision on sentencing under article 76 of the Statute and may be authorized to leave the Court immediately thereafter, before the issuance of the reparations order or before the completion of its implementation*".[229] This further indicates that there are several junctions at which a Judge may end his or her mandate during the reparations phase. Conversely, this implies that where the mandate of a Judge comes to an end before the issuance of a reparations order, the Presidency has the power to extend the mandate of that Judge to ensure the proper administration of justice in that instance. It is submitted that where a Chamber is not in the possession of all relevant information as in the present case, and therefore not in the position to render the reparations order, the consideration must be whether it is necessary to extend the mandate of the Judges for the period necessary to issue the reparations order, rather than – which is what happened in the present case – issuing the order in accordance with the 'deadline' imposed by the end of the Judges' mandates without giving due consideration to resolving the most basic questions relevant to the order.

146. It is the established practice before the Court that where it is required for the completion of a specific stage of a trial or appeal, the Judges concerned request that their judicial mandate be extended for this purpose and that the Presidency grant such request exercising its powers and function pursuant to article 38(8)(a) of the Statute.[230] Hence, there was no necessity, nor was there any reasonable ground for the Trial Chamber to act as if the impending end of the mandate of two of its Judges imposed a certain deadline for the issuance of the Reparations Order. Yet, this is how it proceeded when it used the end of the judicial mandates as a reason to issue the Reparations Order at this time, even before the issuance of the Appeals Chamber's judgment in the present case. The Trial Chamber could not have had any expectation or certainty that

[229] See the "Decision on conclusion of term of office of Judge Sylvia Steiner" (Presidency), No. ICC-01/05-01/08-3403-AnxI, 13 May 2016, paras. 5-7.
[230] See the "Notification concerning extension of mandate of judges in the Appeals Chamber" (Presidency), No. ICC-02/11-01/15-1396, 23 February 2021. See also "Notification concerning extension of mandate of judges in the Appeals Chamber" (Presidency), No. ICC-01/04-02/06-2653, 23 February 2021.

the appeal of Mr Ntaganda would be unsuccessful. Yet, it conceded to this risk because it felt constrained by the judicial terms of office of two of its members. As mentioned above, it is true that the Appeals Chamber judgment did not change the position of the victims in the present case and that therefore this aspect did in no way affect the rights of the victims. However, the error is a different one. The error lies in the fact that this erroneous reliance on the perceived constraint of the judicial mandates impacted the decision making, namely led the Trial Chamber to issue the Reparations Order before it had the necessary information before it and before it had decided the most basic parameters of the reparations award, including the issuance of guidance and framework to the TFV.

147. The Trial Chamber misdirected itself as, being guided by the need to issue the reparations order prior to 10 March 2021, it failed to give appropriate consideration to several factors that were highly relevant to the fair determination of the scope of Mr Ntaganda's liability for reparations, in particular the overall cost to repair, as set out in the previous Grounds of the present appeal.

148. It is submitted that this error materially affected the Impugned Decision in that it influenced the decision making process to the detriment of legal certainty. The Reparations Order leaves a number of key matters unresolved, including the basis for the cost to repair, the allocation of funds between the different groups of victims, the allocation of funds for the prioritisation of reparations to specific different groups of victims, and general implementation criteria to be followed by the TFV. Had the Trial Chamber not been guided by this perceived urgency of issuing the order prior to 10 March 2021 and extended the judicial mandates in question for the time necessary to finish resolving the above matters, it would have rendered a substantially different decision in which the question of the number of potential beneficiaries and the basis for the cost to repair would have been settled in a way that would have allowed for the TFV to set up an implementation plan in accordance with clear directions of the Trial Chamber. Since the Trial Chamber failed to do so, it left these matters unresolved and conferred undue discretion upon the TFV.

V. CONCLUSION

149. Each of the errors described above either separately or taken together, materially affected the Impugned Decision. The impact of the particular errors on the Impugned Decision has been explained under each Ground. To sum up, the errors lie at the heart of the Trial Chamber's determination of the scope of Mr Ntaganda's liability for reparations *vis-à-vis* the victims of the crimes for which he was convicted. The scope of Mr Ntaganda's liability is the key finding of the Reparations Order and ultimately dictates the extent to which the harm can be repaired. In light of the foregoing, the errors committed warrant the intervention of the Appeals Chamber.

150. In particular, and as described above, the manner in which the Trial Chamber has set the scope of Mr Ntaganda's liability for reparations is fraught with errors. The Trial Chamber misinterpreted the applicable law, and/or failed to set a relevant legal basis and/or failed to take into account relevant factual circumstances and evidence and/or failed to give a reasoned opinion on key matters. Moreover, the Trial Chamber's numerous errors in the exercise of judicial discretion have given rise to the risk of unequal treatment of different categories of victims, and perceptions of hierarchy between victims by differentiating and placing a higher value on some types of harm. These errors invalidate as such the Trial Chamber's findings and conclusions on these matters.

151. By failing to ascertain the most accurate estimates possible as regards the number of potential beneficiaries, failing to provide an average *per capita* cost to repair and, instead, by establishing the overall cost to repair *in abstracto* rather than in a comprehensive manner, the Trial Chamber has created uncertainty as to whether and to which extent the overall cost to repair will be able to address the harm suffered by the victims of the attacks in an effective and meaningful way, since this will entirely depend on an unforeseen number of potentially eligible victims who will ultimately come forward.

VI. RELIEF SOUGHT

152. Pursuant to article 82(4) of the Statute and rule 153(1) of the Rules, the overall relief sought by the Legal Representative is the reversal of the Trial Chamber's findings and conclusions pertaining to the determination of the scope of Mr Ntaganda's liability for reparations as contained in Part V(D) of the Reparations Order, and remanding these matters to the newly constituted Trial Chamber II for a new determination.

RESPECTFULLY SUBMITTED

Dmytro Suprun
Common Legal Representative of the Victims of the Attacks

Dated this 7th Day of June 2021
At The Hague, The Netherlands