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THE APPEALS CHAMBER

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR V. BOSCO NTAGANDA

Public

Defence Appellant Brief against the 8 March Reparations Order

Source: **Defence Team of Mr Bosco Ntaganda**

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On 8 March 2021, Trial Chamber VI issued a reparations order against Mr Ntaganda pursuant to article 75 of the Rome Statute ("Statute" and "8 March Reparations Order" or "Impugned Decision").[1] This Appeal Brief is filed pursuant to rule 150(1) of the Rules of Procedure and Evidence ("Rules"), which provides that an appeal against a reparations order issued under article 75 may be filed no later than 90 days from the date the party filing the appeal was notified of the said decision.

Defence Appellant Brief against the 8 March Reparations Order

("Defence Appellant Brief")

INTRODUCTION AND OVERVIEW

1. From the beginning of the reparations phase, Bosco Ntaganda, the Convicted Person in this case, manifested an intent to play a meaningful role in the determination of the appropriate reparations to be awarded. Unfortunately, Mr Ntaganda's willingness to engage in the reparations process was not echoed in Trial Chamber VI's supervision and control of the reparation proceedings, which led to the hastily issued 8 March Reparations Order.

2. Four trial chambers of the International Criminal Court ("Court" or "ICC"), have previously had the opportunity to address the reparations process envisaged in the Court's legal framework and to award reparations to eligible victims.[2] In three instances, the Appeals Chamber was called upon to review the reparations orders and related decisions issued by these trial chambers as well as to further pronounce

[1] Reparations Order, 8 March 2021, ICC-01/04-02/06-2659 ("8 March Reparations Order" or "Impugned Decision").

[2] *Prosecutor v. Thomas Lubanga Dyilo*, Decision establishing the principles and procedures to be applied to reparations, 7 August 2012, ICC-01/04-01/06-2904 ("First Lubanga Decision on Reparations"); *Prosecutor v. Thomas Lubanga Dyilo*, Corrected version of the "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable", 21 December 2017, ICC-01/04-01/06-3379-Red-Corr-tENG ("Second Lubanga Decision on Reparations"); *Prosecutor v. Germain Katanga*, Order for Reparations pursuant to Article 75 of the Statute, 24 March 2017, ICC-01/04-01/07-3728-tENG ("Katanga Order for Reparations"); *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Reparations Order, 17 August 2017, ICC-01/12-01/15-236 ("Al Mahdi Reparations Order"); *Prosecutor v. Jean-Pierre Bemba Gombo*, Final decision on the reparations proceedings, 3 August 2018, ICC-01/05-01/08-3653.

on the ICC reparations system, including on the rights of the convicted persons and the rights of victims.[3]

3. As such, although the implementation of the ICC reparations process is case-driven and accordingly tailored to the specific circumstances of each case,[4] many governing principles are now well established.[5] It is also undisputed that "the assessment of reparation pursuant to article 75 of the Statute is a judicial process,"[6] which implies full respect for due process rights.[7] Case by case, the Court is thus moving towards the development of an efficient *sui generis* reparations procedure,[8] which recognizes and protects the rights of victims and convicted persons alike.[9]

4. Regrettably, Trial Chamber VI missed the opportunity to further contribute to the development of a coherent and responsive ICC reparations process and the 8 March Reparations Order represents a significant regression in this regard.

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[3] *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, 3 March 2015, ICC-01/04-01/06-3129; *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable', 18 July 2019, ICC-01/04-01/06-3466-Red; *Prosecutor v. Germain Katanga*, Public redacted Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute", 9 March 2018, ICC-01/04-01/07-3778-Red ("First Katanga Appeals Judgment on Reparations"); *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Public redacted Judgment on the appeal of the victims against the "Reparations Order", 08 March 2018, ICC-01/12-01/15-259-Red2, ("Al Mahdi Appeal Judgment on Reparations").

[4] *See,* for example, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable', 18 July 2019, ICC-01/04-01/06-3466-Red, para.248 ("Second Lubanga Appeals Judgment on Reparations").

[5] *See,* for example, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, 3 March 2015, ICC-01/04-01/06-3129 ("First Lubanga Appeals Judgment on Reparations").

[6] Impugned Decision, para.24; First Lubanga Appeals Judgment on Reparations, para.34; Katanga Order for Reparations, para.18; Separate Opinion of Judge Eboe-Osuji, para.10; Judge Ibáñez Carranza Separate Opinion, para.89.

[7] Second Lubanga Appeals Judgment on Reparations, para.248.

[8] Second Lubanga Appeals Judgment on Reparations, para.248.

[9] Rule 97(3) Rules; *see also*, Impugned Decision, para.228 and Second Lubanga Appeals Judgment on Reparations, para.248.

5. Trial Chamber VI issued the 8 March Reparations Order prematurely. In doing so, it failed to pronounce on important issues raised by the parties and participants, in particular by the Defence, regarding its access to potential beneficiaries' applications and its involvement in the process. Significantly, the evidence required to determine the number of potential beneficiaries with any degree of certainty was simply not yet available to it. Clearly, Trial Chamber VI prioritized expeditiousness over the fairness of the proceedings.

6. Moreover, by failing to provide a reasoned opinion and/or to provide sufficient justification in respect of many of its legal and factual findings, Trial Chamber VI failed to establish and inform Mr Ntaganda of his liability with respect to the reparations awarded in the order, as was required.

7. More importantly, from the beginning of the reparations process, Trial Chamber VI overlooked many of Mr Ntaganda's submissions and failed to ensure respect for his due process rights. Contrary to Trial Chamber VI's view, it is *not* sufficient that "Mr Ntaganda was given the opportunity to make submissions, *inter alia*, on the scope of reparations, the scope of victimhood to be repaired, and the types of reparations to be awarded."[10] Rule 97(3) of the Rules protects "the right of a convicted person to have reasonable opportunity to know and confront the allegations levelled against him by potential victims."[11] Mr Ntaganda was deprived of this opportunity.

8. What is more, drawing from previous reparations orders and related judgments issued by the Appeals Chamber, Trial Chamber VI repeated pronouncements in these decisions *à la carte*, without due regard for the specific circumstances of the relevant cases. Trial Chamber VI also failed to ensure the cohesion between findings drawn from various decisions, thereby impacting the internal consistency of the Impugned Decision.

[10] Impugned Decision, para.187.
[11] Separate Opinion of Judge Eboe-Osuji, para.4.

9. Trial Chamber VI erred in law by applying a wrong standard of evidentiary proof and misinterpreting various concepts and principles including transgenerational harm, children born out of rape, direct vs. indirect victims, presumptions of harm, causal link and breaks in the chain of causality.

10. Notably, Trial Chamber VI erred finding that as a result of its decision to award collective reparations *with individual components*, there was no need to rule on the merits of individual applications for reparations. Trial Chamber VI also failed to provide clear criteria to determine the eligibility of victims or to put in place an appropriate system to monitor the implementation of the reparations process.

11. Furthermore, Trial Chamber VI: erred by delegating judicial functions to the Trust Fund for Victims ("TFV"), an administrative body, without setting out guidelines regarding the exercise of these functions; erred by failing to provide sufficient justification and details as to how the individual components of the collective reparations are to be determined; and erred in ruling on the number of potential beneficiaries by referring to an unreasonably wide range and relying on inaccurate estimates and information to do so.

12. Lastly, Trial Chamber VI erred by arbitrarily determining Mr Ntaganda's liability for the purpose of reparations at USD 30,000.000 in the absence of sufficient justification and without providing any reasoning or explaining the proportionality of this amount to Mr Ntaganda's responsibility.

13. Rushing to issue the Impugned Decision before the end of the judicial mandate of two of its members, Trial Chamber VI significantly departed from the developing reparations practice in previous cases and arbitrarily pronounced on Mr Ntaganda's liability, thereby inappropriately raising the expectations of the potential beneficiaries of reparations.

14. Mr Ntaganda's Appellant Brief is divided in three parts. Part I (Grounds 1 to 3) address the reparations process as such including Trial Chamber VI's errors in

issuing the 8 March Reparations Order prematurely; failing to provide a reasoned opinion; and erroneously applying the *do no harm* principle. Part II (Grounds 4 to 9) address Trial Chamber VI's misunderstanding and application of certain governing principles related in particular to the applicable standard of evidentiary proof. In this regard, the Defence hereby provides notice that it no longer intends to pursue Ground 5 included in its Notice of Appeal. Part III (Grounds 10 to 15) then addresses Trial Chamber VI's errors in the implementation of the reparations process leading to its arbitrary determination of Mr Ntaganda's liability at USD 30,000,000.

15. Considered individually or cumulatively, the arguments set out in Mr Ntaganda's Appellant Brief demonstrate and lead to the conclusion that the 8 March Reparations Order cannot be salvaged. A *new* or *significantly amended* reparations order is required.

16. In light of the foregoing, the Defence respectfully requests suspension of the implementation of the 8 March Reparations Order.[12]

PROCEDURAL BACKGROUND

17. On 8 July 2019, Trial Chamber VI found Mr Ntaganda guilty of eighteen counts of crimes against humanity and war crimes in its Trial Judgement issued pursuant to article 74 of the Statute.[13]

18. On 25 July 2019, the Single Judge acting on behalf of Trial Chamber VI ("Single Judge") issued the Order for preliminary information on reparations ("Preliminary Order") instructing the Registry to file preliminary observations on reparations by 5 September 2019, and the parties and the Trust Fund for Victims

[12] *See* REQUEST FOR SUSPENSIVE EFFECT, paras.262-264.
[13] Judgment, 8 July 2019, ICC-01/04-02/06-2359 ("Trial Judgement").

("TFV") to submit their responses to the Registry's observations by 19 September 2019.[14]

19. On 5 September 2019, the Registry filed its observations as instructed by the Single Judge in the Preliminary Order ("Registry Preliminary Observations").[15]

20. On 3 October 2019, the parties and participants filed their responses to the Registry Preliminary Observations.[16]

21. On 5 December 2019, the Single Judge issued the Order setting deadlines in relation to reparations ("Order Setting Deadline").[17]

22. On 28 February 2020, the Registry,[18] the Defence,[19] the Legal Representatives of Victims ("LRVs"),[20] the Prosecution[21] and the TFV[22] respectively submitted observations on the reparations process following the Order Setting Deadlines.

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[14] Order for preliminary information on reparations, 25 July 2019, ICC-01/04-02/06-2366 ("Preliminary Order").

[15] Registry's observations, pursuant to the Single Judge's "Order for preliminary information on reparation" of 25 July 2019, ICC-01/04-02/06-2366, 5 September 2019, ICC-01/04-02/06-2391-Anx1 ("Registry Preliminary Observations").
Joint Response of the Legal Representatives of Victims to the Registry's Observations on Reparations, 3 October 2019, ICC-01/04-02/06-2430; Response on behalf of Mr. Ntaganda to Registry's preliminary observations on reparations, 3 October 2019, ICC-01/04-02/06-2431 ("3 October 2019 Defence Observations''); Prosecution Response to the Registry's Observations, pursuant to the Single Judge's "Order for Preliminary Observations on reparations" (ICC-01/04-02/06-2391-Anx1), 3 October 2019, ICC-01/04-02/06-2429; Trust Fund for Victims' response to the Registry's Preliminary Observations pursuant to the Order for Preliminary Information on Reparations, 3 October 2019, ICC-01/04-02/06-2428.

[17] Order setting deadlines in relation to reparations, 5 December 2019, ICC-01/04-02/06-2447,("Order Setting Deadlines").

[18] Registry's Observations on Reparations, 28 February 2020, ICC-01/04-02/06-2475, with Public Annex 1, ICC-01/04 02/06-2475-Anx1 ("28 February 2020 Registry Submissions").

[19] Defence submissions on reparations, 28 February 2020, ICC-01/04-02/06-2479-Red, ("28 February 2020 Defence Submissions").

[20] Submissions on Reparations on behalf of the Former Child Soldiers, 28 February 2020, ICC-01/04-02/06-2474 with one public annex, ("28 February 2020 LRV1 Submissions"); Submissions by the Common Legal Representative of the Victims of the Attacks on Reparations, 28 February 2020, ICC-01/04-02/06-2477-Conf ("28 February 2020 LRV2 Submissions"). A corrigendum version was filed on 20 November 2020, ICC-01/04-02/06-2477-Conf-Corr with Conf. Annex 1, ICC-01/04-02/06-2477-Conf-Corr-Anx1.

[21] Prosecution's Observations on Reparations, 28 February 2020, ICC-01/04-02/06-2478.

23. On 14 May 2020, Trial Chamber VI issued the Decision appointing experts on reparations.[23]

24. On 26 June 2020, Trial Chamber VI handed down the First Decision on Reparations Process ("First Decision on Reparations"). It instructed the Registry to submit a report on reparations on 30 September 2020 and every three months thereafter. The Trial Chamber also invited the parties, including the Defence, to submit their observations on any key legal and factual issues identified by the Registry.[24]

25. On 11 September 2020, pursuant to the First Decision on Reparations, the Defence submitted a request seeking clarification and/or further guidance on five identified issues arising from the proceedings on reparations, together with a request for an extension of the applicable time limit to submit observations on the Registry 30 September Report ("Defence Request for Clarifications").[25]

26. On 29 September 2020, Trial Chamber VI issued its Decision on the Defence Request for Clarifications, rejecting the request on the merits but granting the request to extend the time limit for the filing of the Defence and the LRVs observations to 30 October 2020.[26]

27. On 1 October, the Registry filed its First Report on Reparations.[27]

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[22] Trust Fund for Victims' observations relevant to reparations, 28 February 2020, ICC-01/04-02/06-2476, ("TFV Observations").
[23] Decision appointing experts on reparations, 14 May 2020, ICC-01/04-02/06-2528-Conf.
[24] First Decision on Reparations Process, 26 June 2020, ICC-01/04-02/06-2547 ('First Decision on Reparations').
[25] 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, 11 September 2020, ICC-01/04-02/06-2578 ("Defence Request for Clarifications").
[26] 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, 29 September 2020, ICC-01/04-02/06-2601 ("Decision on the Defence request for clarifications").
[27] Registry First Report on Reparations, 1 October 2020, ICC-01/04-02/06-2602-Anx1 ("Registry First Report").

28. On 30 October 2020, the Defence[28] and the LRVs[29] submitted observations on the Registry First Report.

29. On 2 and 3 November 2020, the Registry filed confidential redacted versions of the Experts' Reports.[30]

30. On 9 November 2020, the Legal Representative for the Victims of the Attacks ("LRV2") filed a request for an order to the Registry to collect information pertaining to reparations seeking for the Registry to be instructed to collect data on the number of inhabitants of designated locations during an identified period of time ("LRV2 Request for an Order").[31]

31. On 18 and 20 November 2020, the Registry[32] and the Defence[33] filed observations opposing the LRV2 Request for an Order.

32. On 15 December 2020, Trial Chamber VI issued its Decision on issues raised in the Registry's First Report on Reparations ("15 December Decision").[34]

33. On 18 December 2020, the Single Judge rejected the LRV2 Request for an Order.[35]

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[28] Defence Observations on the Registry First Report on Reparations, 30 October 2020, ICC-01/04-02/06-2622-Conf ("30 October Defence Observations").
[29] Observations of the Common Legal Representative of the Former Child Soldiers on the "Registry's First Report on Reparations", 30 October 2020, ICC-01/04-02/06-2620-Conf; Observations of the Common Legal Representative of the Victims of the Attacks on the Registry's First Report on Reparations, 30 October 2020, ICC-01/04-02/06-2621.
[30] Registry Transmission of Appointed Experts' Reports, 30 October 2020, ICC-01/04-02/06-2623 and Annex 1 submitted on 2 November 2020 ("Joint Experts Report") and Annex II submitted on 3 November 2020 ("Dr Gilmore Report").
[31] 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 ("LRV2 Request for an Order").
[32] 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, 18 November 2020, ICC-01/04-02/06-2627.
[33] 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, 20 November 2020, ICC-01/04-02/06-2628.
[34] Decision on issues raised in the Registry's First Report on Reparations, 15 December 2020, ICC-01/04-02/06-2630 ("15 December Decision").

34. On the same day, the LRVs,[36] the TFV[37] and the Defence[38] submitted their final observations on reparations.

35. On 29 December 2020, the Defence filed a Request seeking the lifting of redactions applied to the Appointed Experts' reports.[39]

36. On 15 January 2021, the Registry filed its Registry's Second Report on Reparations ("Registry Second Report").[40]

37. On 28 January 2021, the LRV2[41] and the Defence[42] submitted their observations on the Registry Second Report.

38. On 8 March 2021, Trial Chamber VI issued the Impugned Decision.

39. On 30 March 2021, the Appeals Chamber delivered the Judgement on the appeals of Mr Ntaganda and the Prosecution.[43]

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[35] 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, 18 December 2021, ICC-01/04-02/06-2631 ("Decision Rejecting LRV2 Request for an Order").
[36] Observations on the Appointed Experts' Reports and further submissions on reparations on behalf of the Former Child Soldiers, 18 December 2020, ICC-01/04-02/06-2632 ("LRV1 Final Submissions"); Final Observations on Reparations of the Common Legal Representative of the Victims of the Attacks, 18 December 2020, ICC-01/04-02/06-2633-Conf ("LRV2 Final Submissions").
[37] Trust Fund for Victims' Final Observations on the reparations proceedings, 18 December 2020, ICC-01/04-02/06-2635-Conf ("TFV Final Observations").
[38] Public redacted version of "Defence Submissions on Reparations", 18 December 2020, ICC-01/04-02/06-2634-Conf, 11 January 2021, ICC-01/04-02/06-2634-Red ("Defence Final Submissions").
[39] Request on behalf of Mr Ntaganda seeking the lifting of redactions applied to the Appointed Experts' reports, 29 December 2020, ICC-01/04-02/06-2636-Conf ("Defence Request for Lifting of Redactions").
[40] Registry's Second Report on Reparations, 15 January 2021, ICC-01/04-02/06-2639, with the public-redacted version of the report contained in Annex I to the Registry's Second Report on Reparations, 10 February 2021, ICC-01/04-02/06-2639-AnxI-Red ("Registry Second Report").
[41] Observations of the Common Legal Representative of the Victims of the Attacks on the "Registry's Second Report on Reparations", 28 January 2021, ICC-01/04-02/06-2642-Conf.
[42] Defence Observations on the Registry's Second Report on Reparations, 28 January 2021, ICC-01/04-02/06-2643-Red ("28 January Defence Observations").
[43] 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', 30 March 2021, ICC-01/04-02/06-2666-Red ("Appeals Judgment").

40. On 8 April 2021, the LRV2[44] and the Defence[45] filed their respective notices of appeal against the 8 March Reparations Order.

PART I: GROUNDS 1 TO 3

GROUND 1. Trial Chamber VI committed an error of law and procedure by issuing the 8 March Reparations Order prematurely

41. Both the Defence and the LRV2 are united in their view that the 8 March Reparations Order was issued prematurely.

42. According to the LRV2, Trial Chamber VI unduly expedited the reparations process with prejudice to the fairness of its determination of the scope of Mr Ntaganda's liability for reparations;[46] erred by taking into account extraneous factors that led it unduly expediting the reparations process with prejudice to the fairness of its determination […]";[47] and failed "to ascertain the most accurate estimates possible as regards the number of potential beneficiaries […]",[48] thereby "establishing the overall cost to repair *in abstracto* rather than in a comprehensive manner […]".[49]

43. Mr Ntaganda raises similar arguments in support of its claim that the Impugned Decision was premature. In addition, the Defence submits that it was incumbent on Trial Chamber VI, before issuing the 8 March Reparations Order, to: (i) consider and adjudicate certain issues raised by the Defence, including in particular access to the *dossiers* of participating victims; (ii) take into consideration the ongoing COVID-19 pandemic and the difficulties encountered by the VPRS, *inter alia*, in collecting sufficient information; (iii) establish the potential number of beneficiaries of reparations with a sufficient degree of precision; (iv) set out clearly

[44] Notice of Appeal of the Common Legal Representative of the Victims of the Attacks against the Reparations Order, 8 April 2021, ICC-01/04-02/06-2668 ("LRV2 Notice of Appeal").
[45] Defence Notice of Appeal against the Reparations Order, ICC-01/04-02/06-2659, 8 April 2021, ICC-01/04-02/06-2669 ("Defence Notice of Appeal").
[46] LRV2 Notice of Appeal, Ground 7, para.35.
[47] LRV2 Notice of Appeal, Ground 7, para.35.
[48] LRV2 Notice of Appeal, Ground 7, para.39.
[49] LRV2 Notice of Appeal, Ground 7, para.39.

the eligibility criteria and the parameters of any administrative screening process to be conducted by the TFV and/or engage the parties and the VPRS in this regard; (v) take into consideration the current security situation in Ituri and the consequences thereon of issuing a reparations order at this stage; and (vi) design an implementation calendar protecting the right of appeal of the parties.

44. Issuing the 8 March Reparations Order before addressing the above issues impacted the fairness of Trial Chamber VI's determination of Mr Ntaganda's liability for reparations in this case. It also inappropriately raised the expectations of the potential beneficiaries of reparations and prejudiced the implementation of the reparations process, which is likely to be delayed as a result.

45. During the period from the Preliminary Order issued by the Single Judge on 25 July 2019[50] until the 8 March Reparations Order, a period of approximately 19 months, the Defence had the opportunity to file submissions before Trial Chamber VI on nine occasions.[51] From the beginning, the Defence underscored issues of paramount importance to the reparations process including: (i) the need to assess the number of victims authorized to participate in the proceedings who remained eligible to receive reparations further to the Trial Judgment, in particular victims of the attacks, as their status appeared "to have been significantly impacted with the removal of specific crimes and village locations in the Judgement";[52] (ii) the need to put in place an effective mechanism allowing to the identification of new potential reparations beneficiaries who fulfill the minimum criteria and are entitled to reparations, *while fully respecting the rights of the convicted person and fairness*

[50] Preliminary Order.
[51] 3 October Defence Observations; 28 February 2020 Defence Submissions; Defence observations pursuant to 'Order to provide information on the impact of COVID-19 measures on operational capacity', 21 April 2020, ICC-01/04-02/06-2515; Defence Response to the CLRs, the Registry and the TFV's additional arguments submitted pursuant to the 'Order to provide information on the impact of COVID-19 measures on operational capacity', 4 May 2020, ICC-01/04-02/06-2523; Defence Request for Clarifications ; 30 October Defence Observations ; Defence Final Submissions; 28 January Defence Observations; *See also* Request on behalf of Mr. Ntaganda seeking reclassification of Annex II and III to the "Registry's Observations on Reparations", 23 March 2020, ICC-01/04-02/06-2493.
[52] 3 October Defence Observations, paras.14-15; Registry Preliminary Observations, para.6.

considerations;[53] (iii) the necessity for the VPRS to meet the 2,094 participating victims who had not yet submitted a request for reparations, for the purpose of determining whether they intended to request reparations and if so, to collect their requests;[54] (iv) the inapplicability of the process to authorizing participation in the proceedings in the trial phase to determining eligible beneficiaries, of awarded reparations;[55] (v) that involving the Defence in the assessment of requests for reparations from the beginning, in respect of participating victims in particular, would contribute to expediting the reparations process;[56] and (vi) that legally speaking, the perspective of issuing a reparations order ascribing liability to Mr Ntaganda for reparations awarded to certified beneficiaries, without having had the opportunity to assess and offer submissions on individual applications for reparations, was a non-starter.

46. It is evident from the Impugned Decision that Trial Chamber VI overlooked these early Defence submissions in many respects.

47. Regarding the first issue, Trial Chamber VI rejected the Defence requests to be involved in the VPRS assessment of the number of victims authorized to participate in the proceedings who remained eligible to receive reparations further to the Trial Judgment (putting the Defence on equal footing with the LRVs who are also parties to the reparations proceedings)[57] or at least that VPRS disclose the results of its assessment to the Defence.[58] It is significant that one year later, the required VPRS assessment still had not been performed, although the Registry submitted its First Report on Reparations, on 1 October 2020.

48. Notably, in its report, the Registry identified a series of key legal and factual issues relevant to the assessment of potential beneficiaries of reparations, which Trial Chamber VI had failed to address in its First Decision on Reparations issued three

[53] 3 October Defence Observations, para.16.
[54] 3 October Defence Observations, para.18.
[55] 3 October Defence Observations, para.26.
[56] 3 October Defence Observations, para.28.
[57] Decision on the Defence request for clarifications, para.8.
[58] 3 October Defence Observations, para.50.

months earlier, on 26 June 2020.[59] Moreover, it was only on 15 December 2020, three days before the deadline for the Defence to submit its final observations, that Trial Chamber VI pronounced on the key legal and factual issues raised by the Registry in its First Report on Reparations, significantly hampering the ability of the Defence to take stock of and address the guidelines set therein.[60]

49. Significantly, even before the Registry submitted its First Report on Reparations, on 11 September 2020, the Defence had already sought clarification and/or further guidance from Trial Chamber VI in relation to its First Decision on Reparations.[61] Specifically, the Defence sought clarification and further guidance in respect of its role as a party to the reparation proceedings including, *inter alia*, its role in the process of assessing whether participating victims were also potentially eligible for reparations (considering the reduced scope of the Judgment); the need for the Defence to have access to the application forms of all participating victims; the need to include additional information in the matrix prepared by the VPRS for the preparation of the sample requested in the First Decision on Reparations;[62] the requirement that the Defence, in order to play a meaningful role in the preparation of the sample should have access, at a minimum, to the application forms of the three categories of victims included in the sample; the process of transmission by the Registry of the application forms of newly identified potential beneficiaries of reparations; and the necessity for Trial Chamber VI to pronounce on VPRS' proposed "three group system" to assess the eligibility of potential beneficiaries put forward more than a year earlier, in its 5 September 2019 initial observations.[63]

50. Adopting the LRVs submissions in response, Trial Chamber VI rejected the Defence request in its entirety and refused to provide any clarification or guidance. Significantly, Trial Chamber VI recalled its finding in the First Decision on

[59] First Decision on Reparations.
[60] 15 December Decision.
[61] Defence Request for Clarifications.
[62] Defence Request for Clarifications, para.6.
[63] Defence Request for Clarifications, paras.21, 23.

Reparations – apparently in response to the Defence requests regarding access to application forms and guidance as to the Trial Chamber's views on the VPRS proposed "three group system" – that since it had not yet determined the types and modalities of reparations, it would not individually assess any application forms at this time. Trial Chamber VI misunderstood that Defence access to application forms is a matter of due process unrelated to its determination of the types and modalities of reparations in the 8 March Reparations Order.

51. Following the dismissal of the Defence request, the Registry then submitted the Registry Second Report on 15 January 2021, which comprises the bulk of the information that was available to Trial Chamber VI when issuing the 8 March Reparations Order.

52. In its Second Report, the Registry provided: (i) its finalized assessment on the number of participating victims that may potentially be eligible for reparations given the scope of the Judgment; (ii) an updated report on the sample of potential beneficiaries of reparations requested by Trial Chamber VI, containing also its finalized assessment of the number of victims potentially eligible for reparations in *Lubanga* that may also be eligible in *Ntaganda*; and (iii) an updated report on the mapping of potential new beneficiaries of reparations.

53. Notably, the information contained in the Registry Second Report was compiled in consultation with the LRVs, but without any input by the Defence. The Defence was never given access to the potential beneficiaries' application forms, whether from participating victims, potential beneficiaries from *Lubanga* or from potential new beneficiaries in *Ntaganda*. At no time was the Defence consulted in the process. Moreover, leaving aside for a moment its erroneous pronouncement that "[it] sees no need to rule on the merits of individual applications for reparations pursuant to rule 94 of the Rules",[64] Trial Chamber VI did not pronounce on whether

[64] Impugned Decision, para.196; *See* Part III, Section II on the Trial Chamber's error in finding that it sees no need to rule on the merits of individual applications for reparations.

due process rights of the convicted person entailed access to application forms and/or the possibility to challenge the same. What is more, even though Trial Chamber VI held that participating victims – who had not submitted application forms[65] – would not need to file another form to be considered as potential beneficiaries, it nonetheless held that their consent would still need to be sought. Whether the process of seeking the consent of the participating victims had started, and whether any had declined to be part of the reparations process, is not information that was available to Trial Chamber VI when it issued the 8 March Reparations Order.

54. In light of the above circumstances, considering in particular the paucity of information available concerning the potential beneficiaries – participating victims and new potential beneficiaries alike – it was not possible, as argued *infra*, for Trial Chamber VI to determine either the number of potential beneficiaries or accurate estimates thereof with any degree of certainty.

55. Notably, Trial Chamber VI did refer to the ongoing COVID-19 pandemic and its potential impact on the reparations process. Trial Chamber VI even asked the parties, the Registry and the TFV to submit observations on the consequences of the COVID-19 related measures and restrictions put in place. Nonetheless, Trial Chamber VI failed to draw the inevitable conclusion, *i.e.* that the COVID-19 pandemic delayed and prevented the VPRS from collecting sufficient information in the field for the purpose of issuing a reparations order at this stage.

56. The same applies to the determination of the quantum of reparations. The above-mentioned circumstances made it impossible for Trial Chamber VI to assess and determine Mr Ntaganda's liability for reparations at this stage. Consequently, Trial Chamber VI arbitrarily setting the total reparations award for which Mr Ntaganda is liable at USD 30,000,000 in the absence of sufficient evidence and/or information, was premature and unfair to the Convicted Person.

[65] First Decision on Reparations, para.19.

57. Trial Chamber VI's justification for issuing the Impugned Decision at this time, *i.e.* the end of the mandate of two of its members, including the mandate of the Judge who presided over the trial, does not withstand scrutiny. First, one of the two departing Judges had been a member of Trial Chamber VI only since 20 November 2019, after the delivery of the Sentencing Judgement.[66] Second, Trial Chamber VI has since been dissolved and the proceedings against Mr Ntaganda have been reassigned to Trial Chamber II.[67] Third, one of the Judges assigned to Trial Chamber II is actually the Judge who presided over the reparations process from the beginning. Fourth, if the involvement of one of the two departing Judges was considered crucial for the delivery of the reparations order, which has not been established, it was certainly possible to secure an extension of the mandate of that Judge.

58. More importantly, there can be no doubt that issuing the 8 March Reparations Order before the end of the judicial mandate of two Judges from Trial Chamber VI was much less important than ensuring the fairness of the reparations proceedings, by issuing a reparations order at the appropriate time. Trial Chamber VI erred when balancing these competing interests.

59. Significantly, Trial Chamber VI set "the deadlines for the TFV to submit its general draft implementation plan to 8 September 2021, and the deadline for the TFV to submit an urgent plan for the priority victims to 8 June 2021, at the latest."[68] Given that the LRV2 and the Convicted Person have exercised their rights to appeal the Impugned Decision, also taking into consideration Trial Chamber VI's far-reaching delegation of functions to the TFV in the 8 March Reparations Order, argued *infra*,[69] having issued the Impugned Decision prematurely is also very likely to impact the

[66] Decision re-composing Trial Chamber VI, 20 November 2019, ICC-01/04-02/06-2444.
[67] Decision assigning judges to divisions and recomposing Chambers, 16 March 2021, ICC-01/04-02/06-2663.
[68] Impugned Decision, p.97.
[69] *See* Part III, Section III on the Trial Chamber's error of having delegated judicial functions to an administrative body, *i.e.* the Trust Fund for Victims.

activities of the TFV and the reparations process, to the detriment of the potential beneficiaries until the Appeals Chamber pronounces on this appeal.

GROUND 2. Trial Chamber VI erred in failing to provide a reasoned opinion

60. Referring to the First Lubanga Appeals Judgment on Reparations, Trial Chamber VI correctly identified the five minimum essential elements, which must be included in a reparations order.[70]

61. Trial Chamber VI also recalled, on the basis of the same *Lubanga* judgment, that the inclusion of these five elements in an reparations order is vital to its proper implementation, as it ensures that the critical elements of the order are subject to judicial control, in light of rule 97(3) of the Rules, and is also of significance with respect to the right to appeal provided for in article 82(4) of the Statute.[71] For judicial control to be exercised over a reparations order, and for the person convicted to exercise his right to appeal, it is imperative that a Trial Chamber issues a reasoned opinion.

I. The right to a reasoned opinion and the right to be heard

62. Article 74 of the Statute codifies the obligation of ICC trial chambers to issue a decision that is "in writing and [contains] a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions."[72] In the framework of the ICC, as was the case before other international criminal courts and tribunals, the obligation of trial chambers to issue a reasoned opinion is not limited to trial or sentencing judgments,[73] as this right is widely accepted as one of the guarantees included within the right to fair trial, and more broadly the right to fair and impartial proceedings.

[70] Impugned Decision, para.23; First Lubanga Appeals Judgment on Reparations, para.32.
[71] Impugned Decision, para.24.
[72] Rome Statute, article 74.
[73] Second Lubanga Appeals Judgment on Reparations, para.248.

63. Indeed, the right to fair proceedings, which includes the obligation for a Trial Chamber to issue a reasoned opinion, exists whenever the legal status and interests of the parties are affected.

64. As previously held by the Appeals Chamber in *Lubanga*, the right to fair proceedings exists throughout the reparations phase:

> As the trial of the person has concluded, in the context of reparations, [the right to a fair and impartial trial] is understood to be the right to fair and impartial reparations proceedings. In its interpretation of the applicable provisions, the Appeals Chamber will be guided by human rights jurisprudence in order to ensure that its interpretation is consistent with internationally recognised human rights.[74]

65. A reparations order falls within the category of decisions that greatly impact the interests of the convicted person, given that it establishes his liability towards the victims and sets the corresponding amount. A reparations order also defines the form and scope of reparations, which also affects the convicted person's interests. The importance these findings, and rulings on the liability of the convicted person, is reflected in article 82(4) of the Statute providing for an appeal as of right from a reparations order.[75]

66. The right to fair proceedings contains various guarantees including the right to a reasoned decision and the right to be heard. Both those guarantees are standalone guarantees but are tightly interlinked. In *Lubanga*, the Appeals Chamber endorsed the finding of the ICTY Appeals Chamber that "the right to a reasoned decision is an element of the right to a fair trial and that only on the basis of a reasoned decision will proper appellate review be possible."[76] The ICTY explained that a reasoned opinion is key to the exercise of the right of appeal:

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[74] Second Lubanga Appeals Judgment on Reparations, para.248.
[75] Rome Statute, article 82(4).
[76] *Prosecutor v. Thomas Lubanga Dyilo*, 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, ICC-01/04-01/06-773, para.20.

> This element, inter alia, enables a useful exercise of the right of appeal available to the person convicted. Additionally, only a reasoned opinion allows the Appeals Chamber to understand and review the findings of the Trial Chamber as well as its evaluation of evidence.[77]

67. Following the same rationale, the European Court of Human Rights ("ECtHR") found that courts must "indicate with sufficient clarity the grounds on which they based their decision. […] which makes it possible for the accused to exercise usefully the rights of appeal available to him."[78]

68. The Inter-American Court of Human Rights ("IACtHR") has confirmed that "the obligation to provide the reasoning for decisions is a guarantee related to the conscientious administration of justice that guarantees the individual the right to be tried for the reasons established by law" and that "[the reasoning] should show that the arguments of the parties have been duly taken into account and that all the evidence has been analyzed."[79] This is well settled in the jurisprudence of the IACtHR.[80]

69. The right to a reasoned opinion is closely related to the right to be heard, *audi alteram partem*. Article 75(3) of the Statute, which pertains to the reparation phase, provides that the Chamber "shall take account of representations from or on behalf of the convicted person […]". While these are standalone guarantees, they at tightly interlinked. In *Katanga*, Appeals Chamber's Judge Erkki Kourula and Judge Ekaterina Trendafilova, in a Dissenting Opinion, referred to the African Commission on Human and Peoples' Rights ("ACHPR"), the ECtHR and the IACtHR, to underline the importance of the right of a convicted person to be heard, restating that

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[77] ICTY, *Prosecutor v. Kunarac et al.*, Judgement, IT-96-23 & IT-96-23/1-A, 12 June 2002, para.41; *Prosecutor v. Momir Nikolić*, Judgement, 8 March 2006, IT-02-60/1-A, para.96.
[78] ECtHR, *Hadjianastassiou v. Greece*, Judgement, 16 December 1992, para.32.
[79] IACtHR, *J. v. Peru*, Judgement, 27 November 2013, para.224.
[80] *See inter alia* IACtHR, *López Mendoza. v. Venezuela*, Judgement, 1 September 2011, para.141; IACtHR, *Chinchilla Sandoval et al. v. Guatemala*, Judgment, 29 February 2016, para.248; IACtHR, *J. v. Peru*, Judgement, 27 November 2013, para.224.

"this right can only be seen to be effective if the observations are actually 'heard', that is duly considered by the trial court."[81]

II. Trial Chamber VI failed to provide a reasoned opinion and/or to consider Defence submissions on behalf of the Convicted Person

a) Introduction

70. In this case, both the LRV2 and the Defence are of the view that Trial Chamber VI erred in law by issuing the 8 March Reparations Order without providing a reasoned opinion.

71. The LRV2 expressed grave concerns with respect to the manner in which the Trial Chamber established the scope of Mr Ntaganda's liability for reparations: failing "[…] 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";[82] 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 […]";[83] failing "to provide a reasoned opinion on possible reasons for which potentially eligible victims would not come forward for reparations";[84] failing "to give a reasoned opinion as to how it applied this requirement [to resolve uncertainties in favour of the convicted person] in the circumstances of the present case";[85] and failing "to give a reasoned opinion on key matters".[86]

72. While not necessarily aligning with the entirety of the LRV2 submissions on this issue, the Defence nonetheless agrees that Trial Chamber VI failed to provide a reasoned opinion in respect of many of its findings. In addition, Trial Chamber VI

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[81] *Prosecutor v. Germain Katanga*, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings" Dissenting Opinion of Judge Erkki Kourula and Judge Ekaterina Trendafilova, 30 July 2018, ICC-01/04-01/07-2297, para.56; ECtHR, *Perez v. France*, Judgment, 12 February 2004, 47287/99, para.80.
[82] LRV2 Notice of Appeal, para.24.
[83] LRV2 Notice of Appeal, para.26.
[84] LRV2 Notice of Appeal, para.29.
[85] LRV2 Notice of Appeal, para.30.
[86] LRV2 Notice of Appeal, para.38.

failed to consider many submissions made on behalf of the Convicted Person, thereby violating the right of the Convicted Person to be heard. Significantly, putting the "Procedural History" section to one side,[87] in the 8 March Reparations Order's 649 footnotes, Trial Chamber VI referred to Defence submissions 13 times.[88] The Trial Chamber's failure to provide a reasoned opinion and failing to respect the Convicted Person's right to be heard, impacts all five essential components of the Impugned Decision, as set out further below.

b) Errors arising from the treatment of potential beneficiaries' application forms

73. Trial Chamber VI's error in finding that it "[…] sees no need to rule on the merits of individual applications for reparations, pursuant to rule 94 of the Rules" addressed *infra*[89] is compounded by Trial Chamber VI's failure to justify such a marked departure from the practice before other trial chambers.

74. Relying on a contextual finding of very limited application by the Appeals Chamber in *Lubanga*,[90] Trial Chamber VI failed to even explain how the 'collective reparations with individual components' could equate to 'collective reparations only', the sole basis for its far-reaching pronouncement not to rule on individual applications.[91] What is more, Trial Chamber VI neither addressed nor tried to explain or put in context the Appeals Chamber's rationale for its *obiter* statement in *Lubanga*.[92] Trial Chamber VI also failed to justify or explain on what legal basis it could decide *not* to rule the merits of any individual applications in the light of the practice before other trial chambers.

[87] Impugned Decision, paras.10-22, fns.23-63.
[88] Impugned Decision, para.30, fn.81; para.33, fn.85; para.73, fn.188; para.122, fn.326; para.124, fn.331; para.125, fn.338; para.134, fn.347; para.187, fn.504; para.191, fn.520; para.193, fn.529; para.218. fns.580-581; para.222, fn.588.
[89] *See* Part III, Section II on the Trial Chamber's error in finding that it sees no need to rule on the merits of individual applications for reparations.
[90] First Lubanga Appeals Judgment on Reparations, para.152.
[91] Impugned Decision, paras.7, 9.
[92] First Lubanga Appeals Judgment on Reparations, para.152.

75. The impact of Trial Chamber VI's failure to provide a reasoned opinion is significant. From the beginning of the reparations phase, the Defence repeatedly asked Trial Chamber VI for access to the *dossiers* of the participating victims,[93] to the application forms of potential new beneficiaries,[94] as well as to the *dossiers*, at a minimum, of the potential beneficiaries included in the sample prepared by the VPRS at the Trial Chamber's request.[95]

76. On numerous occasions, the Defence underscored that it took issue with the VPRS's proposed 'three group system' to determine the eligibility of potential beneficiaries[96] and requested Trial Chamber VI to rule on the same.[97] The Defence also asked to be involved in the process of determining whether participating victims were also potentially eligible for reparations, and in the determination of the eligibility of potential new beneficiaries.[98] Other than rejecting a Defence request for clarification and further guidance – on the basis *inter alia* that it had not yet decided on the type of reparations that would be awarded and therefore would not rule on any individual applications at that time[99] – Trial Chamber VI systematically refrained from addressing and/or ruling on the Defence submissions.[100]

c) Error in the determination of the number of potential eligible victims

77. Trial Chamber VI's error in failing to determine the total number of potential beneficiaries for reparations with any degree of precision addressed *infra*,[101] is

[93] 28 February 2020 Defence Submissions, para.32; Defence Request for Clarifications,paras.11, 15-23, 26; Defence Final Submissions, paras.144,146.
[94] 28 February 2020 Defence Submissions, paras.103, 105; 3 October Defence Observations, paras. 20-23; Defence Request for Clarifications, paras.11, 17, 19; Defence Final Submissions, para.144; 28 January Defence Observations, paras.29-34.
[95] Defence Final Submissions, para.34.
[96] 28 February 2020 Defence Submissions, paras.85-86.
[97] Defence Request for Clarifications, paras.27-28, Defence Final Submissions, para.34.
[98] 28 February 2020 Defence Submissions, para.25.
[99] Decision on the Defence request for clarifications, para.5.
[100] *See* First Decision on Reparations; 15 December Decision and Impugned Decision.
[101] *See* Part III, Section V on the Trial Chamber's error in the determination of the number of potential new beneficiaries; *See also* LRV1 Final Submissions, paras.34, 37; LRV2 Final Submissions, paras.91-98 to be read in conjunction with LRV2 Request for an Order; TFV Final Observations, para.20.

compounded by its failure to provide a reasoned opinion and to take into account submissions on behalf of the Convicted Person.

78. Referring to the Appeals Chamber's pronouncements in the Second Lubanga Appeals Judgment on Reparations,[102] Trial Chamber VI correctly held that "[d]espite the collective nature of the reparations ordered above, the number of potentially eligible beneficiaries is an important parameter for determining the scope of the convicted person's liability"[103] and that "[…] when the Chamber resorts to estimates as to the number of victims, it must endeavour to obtain an estimate that is as concrete as possible, based on a sufficiently strong evidential analysis".[104] Yet, Trial Chamber VI proceeded to set a very wide range based, on its own admission, on unreliable figures, without justifying or explaining its *démarche* or why it proceeded this way:

> It is clear that there is still a significant number of as yet unidentified potentially eligible victims, **for which no reliable figures are available**. In effect, **estimates vary greatly** and range from 'at least approximately 1,100' to 'a **minimum** of 100,000 across all locations affected by Mr Ntaganda's crimes.'[105]

79. In addition, Trial Chamber VI failed to address and/or consider Defence submissions on behalf of the Convicted Person regarding the number of potential eligible victims. On various occasions, the Defence offered submissions, *inter alia*: (i) opposing the use of the figures submitted by the LRV2; [106] (ii) that the number of potential eligible victims had to be established for the purpose of evaluating the final amount of liability of the Convicted Person;[107] (iii) on the unlikelihood that the total number of victims for the purpose of reparations would vary significantly from the number of participating victims;[108] (iv) on the importance of setting an accurate

[102] Second Lubanga Appeals Judgment on Reparations, paras.89 and 90, 223-224 respectively.
[103] Impugned Decision, para.5.
[104] Impugned Decision, para.230.
[105] Impugned Decision, para.246.
[106] Defence Final Submissions, para.116.
[107] Defence Final Submissions, para.115.
[108] 28 February 2020 Defence Submissions, paras.100, 104.

number of potential beneficiaries;[109] and (v) requesting Trial Chamber VI to order VPRS to disclose its estimates regarding the number of potential additional reparations beneficiaries, who have not yet been identified.[110] None of these submissions were addressed by Trial Chamber VI in the Impugned Decision. This systematic failure to engage with submissions made on behalf of the Convicted Person was an error.

d) Financial liability of the Convicted Person

80. Trial Chamber VI's error in determining arbitrarily the financial liability of Mr Ntaganda in the absence of the minimum evidence required, addressed *infra*,[111] is compounded by its failure to give a reasoned opinion and to take into consideration Defence submissions on behalf of the Convicted Person.[112]

81. Referring to the Second Lubanga Appeals Judgment on Reparations, Trial Chamber VI correctly held that "[t]he Chamber should determine the cost to repair, ultimately, with the goal of setting an amount that is fair and properly reflects" and "[i]f 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".[113]

82. However, in its attempt to apply the above standards, Trial Chamber VI: (i) noted the *preliminary estimates* set forth in the TFV February Observations;[114] (ii) referenced certain figures submitted by the Appointed Experts, including figures drawn from studies or other cases that do not relate to the case at hand; (iii) acknowledged that the Appointed Experts were "not in a position to assess

[109] 28 February 2020 Defence Submissions, para.126.
[110] 3 October Defence Observations, para.50.
[111] *See* Part III, Section VI on the Trial Chamber error and abuse of discretion in assessing Mr Ntaganda's liability at US$ 30,000,000.
[112] Defence Final Submissions, paras.108-111, 115, 117; 28 February 2020 Defence Submissions, paras.62, 126.
[113] Impugned Decision, para.228.
[114] Impugned Decision, para.236.

themselves the costs of the collective reparations";[115] (iv) referenced figures provided by the TFV in relation to *10 other projects* implemented by the TFV pursuant to its assistance mandate;[116] (v) repeated figures provided by the Dr Gilmore Report in relation to the health center in Sayo;[117] (vi) referenced figures drawn from financial calculations in *Katanga*;[118] and (vii) referenced the amount for the harm of each individual victims in *Lubanga*.[119]

83. In doing so, Trial Chamber VI merely listed figures that, for the most part, do not relate to the quantum of reparations in the case at hand, without setting out the relevance of these figures or explaining how it calculated the final amount imposed on the Convicted Person. This does not accord with the right to a reasoned decision, and impairs the Convicted Person's right of appeal.

84. Moreover, from the amount of USD 30,000,000 ordered, it is still unknown how much has been earmarked for participating victims, or for new potential beneficiaries yet to be identified. Also unclear is how much has been earmarked for former child soldiers as opposed to victims of attacks. In fact, the manner in which the sum of USD 30,000,000 is expected to be employed, is not known. Yet, it was incumbent on Trial Chamber VI to provide, at a minimum, a breakdown of the costs to repair.

85. Moreover, Trial Chamber VI failed to consider Defence submissions on behalf of the Convicted Person regarding the determination of his liability for reparations. Despite Trial Chamber VI's statement that in order to determine the liability of the convicted person, it considered the "information and evidence provided by […] the parties", it then failed to address Defence submissions on behalf of the Convicted Person[120] that, *inter alia*: (i) the costs relied upon and the arguments put forward by

[115] Impugned Decision, paras.237-240.
[116] Impugned Decision, para.241.
[117] Impugned Decision, para.242.
[118] Impugned Decision, para.243.
[119] Impugned Decision, para.244.
[120] Impugned Decision, fn.600-682.

the Appointed Experts were unsupported and inadequate;[121] (ii) the final amount of liability of the Convicted Person could not be evaluated in the absence of a clear number of potential beneficiaries;[122] (iii) the costs of repair and scope of liability should take into account the degree of participation of the Convicted Person;[123] and (iv) the liability of Mr Ntaganda must be shared with Mr Lubanga, *i.e.* that the reparations award of USD 10,000,000.000 be shared between Mr Lubanga and Mr Ntaganda.[124]

e) Errors in the interpretation and application of various concepts and principles

86. Further errors committed by Trial Chamber VI when pronouncing on various other concepts and principles relevant to reparations[125] are also compounded by its failure to provide a reasoned opinion and to take into consideration submissions on behalf of the Convicted Person.

87. Trial Chamber VI's errors in this regard include its pronouncements on: (i) children born out of rape as direct victims whereas none of the parties or participants made representations to that effect;[126] (ii) creation of a new category of indirect victims including persons who did not have a close personal relationship with the victim, who was nevertheless a person of significant importance in their lives;[127] (iii) resort to presumptions of fact to establish certain types of harm suffered by categories of victims;[128] and (iv) lowering the applicable standard of evidentiary proof for certain categories of victims.[129]

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[121] Defence Final Submissions, paras.108-111.
[122] Defence Final Submissions, paras.115, 117; 28 February 2020 Defence Submissions, para.126.
[123] Defence Final Submissions, paras.152-154. The Defence notes that the Impugned Decision, para.218, rules on the issue and notes the Defence Final Submissions, but does not address their content.
[124] 28 February 2020 Defence Submissions, para.62.
[125] *See* Part II, Grounds of Appeal 4 to 9.
[126] *See* Impugned Decision, para.182.
[127] Impugned Decision, para.127.
[128] Impugned Decision, paras.145-147.
[129] Impugned Decision, paras.136-142.

III. Conclusion

88. In the 8 March Reparations Order, Trial Chamber VI systematically referred to findings and rulings of other trial chambers or the Appeals Chamber rendered in other reparations proceedings. Despite this, Trial Chamber VI systematically reached conclusions and made findings that departed from the Court's prior practice without explaining or providing justification for doing so. In some cases, Trial Chamber VI reached conclusions different from the position adopted by all parties and participants, again without providing any justification or explaining why.[130]

89. Moreover, while the Trial Chamber does not have a duty to give written reasons in response to each and every argument put forward by the parties, it is noteworthy that Defence submissions on behalf of the Convicted Person were systematically ignored. More importantly, considering that many Defence submissions on behalf of the Convicted Person were directed at core issues in the reparations process on which the Trial Chamber VI was expected to pronounce, the Trial Chamber had a duty to set out whether these defence submissions were accepted or rejected and to explain why. Over and over again, Trial Chamber VI failed to do so.

90. Trial Chamber VI failed to give a reasoned opinion and to consider Defence submissions on behalf of the Convicted Person which vitiates the 8 March Reparations Order, warranting the intervention of the Appeals Chamber. As a result, a *new* or a *significantly amended* reparations order must be issued.

GROUND 3. Trial Chamber VI committed a mixed error of law and fact by adopting a new principle, *i.e. 'do no harm'*, without taking into consideration the current security situation and the rising tensions among communities in Ituri

91. Pursuant to article 75(1) of the Statute, Trial Chamber VI adopted the principles established by different chambers of the Court in previous cases,

[130] *See inter alia* Impugned Decision, para.122.

considering then to be of general application.[131] Trial Chamber VI also "adapted and expanded them, identifying additional principles, and has rearranged them as necessary in light of the specific circumstances of the present case".[132]

92. One of the new principles adopted by Trial Chamber VI – at the suggestion of the TFV[133] – is known as the '*do no harm*' principle.[134] According to Trial Chamber VI, '*do no harm*' "is an internationally recognized principle that complements the humanitarian principles of humanity, impartiality, neutrality and independence"[135], which requires "humanitarian actors to anticipate, monitor, and address the potential or unintended negative effects of their actions".[136]

93. Pursuant to the '*do no harm*' principle, Trial Chamber VI held that "[w]hen deciding on the types and modalities of reparations, the Court shall ensure that reparation measures themselves do no harm" and "do not create or exacerbate security concerns or tensions among communities".[137]

94. When submitting observations on the Registry Second Report,[138] the Defence requested Trial Chamber VI to take into consideration, when issuing its Reparations Order, the current security situation in Ituri, including in particular, "[…] the ongoing and continued intercommunal tensions between the Lendu and Hema communities, the creation of new community-affiliated armed groups and the ensuing violence".[139]

95. Trial Chamber VI's failure to do so was an error.

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[131] Impugned Decision, para.29; First Lubanga Decision on Reparations, para.21; Amended Order 3 March 2015, paras.1-49; Al Mahdi Reparations Order, paras.26-50; Katanga Order for Reparations paras.29-30.
[132] Impugned Decision, para.29 [footnotes omitted].
[133] TFV Observations, paras.30-33.
[134] Impugned Decision, para.50.
[135] Impugned Decision, para.50.
[136] Impugned Decision, para.50.
[137] Impugned Decision, para.51.
[138] Registry Second Report.
[139] 28 January Defence Observations, paras.52-55.

96. The security situation in Ituri referred to by the Defence was described in the Registry's Report on Security and Political Dynamics enclosed as Confidential Annex III to the Registry's Second Report on Reparations. Therein, the Registry underscored that "[i]nter communal tensions remained a serious driver of tensions and related violence, as the United Nations and local authorities have repeatedly warned"[140]; that "[…] developments over the reporting period suggest that tensions and clashes between communities have been continuously increasing'; and that "[i]n this context, the risk of a full-blown community conflict remains strong'.[141]

97. The situation described in the Registry Security Report addresses *inter alia*, the creation and activities of the '*Coopérative pour le Développement du Congo*' ("CODECO") militia, an armed group composed of members of the Lendu community, which has been spreading terror and committing crimes against the Hema community for years.[142] Notably, members of the CODECO militia are present in many villages where potential beneficiaries of reparations in this case are located.[143] More recently, as a result of this ongoing violence, the DRC Central Government has had to deploy FARDC troops for the purpose of putting an end to the activities of the CODECO and restoring, yet again, peace and security in Ituri.[144]

98. This situation is not new. In its 18 December 2020 Defence Final Submissions addressing *inter alia*, the Experts' reports submitted at the request of Trial Chamber VI,[145] the Defence underscored that for many years now, the region of Iruri has been

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[140] Registry Second Report - Confidential Annex III, 15 January 2021, ICC-01/04-02/06-2639, para.22(ii) ("Registry's Report on Security and Political Dynamics").
[141] Registry's Report on Security and Political Dynamics, para.22(ii).
[142] Registry's Report on Security and Political Dynamics, para.10; Bureau Conjoint Des Nations Unies Aux Droits De l'Homme HCDH- MONUSCO, Rapport public sur les conflits en territoire de Djugu, province de l'Ituri Décembre 2017 à septembre 2019, Janvier 2020, paras.77-79, https://www.ohchr.org/Documents/Countries/RDC/RDCRapportpublicDjugu.pdf, last accessed 6 June 2021; UNHRC, Human rights situation and the activities of the United Nations Joint Human Rights Office in the Democratic Republic of the Congo, Report of the United Nations High Commissioner for Human Rights, 24 august 2020, A/HRC/45/49, para.36.
[143] Registry Second Report, para.10; Midterm report of the Group of Experts on the Democratic Republic of the Congo, S/2020/1283, 23 December 2020, pp.84-85.
[144] Registry's Report on Security and Political Dynamics, para.11.
[145] Defence Final Submissions, paras.2-3.

torn apart by armed conflicts. In fact, to this day, since the beginning of the ethnic conflict in 1996 that developed into protracted armed conflicts involving many armed groups, numerous Ituri inhabitants, from various ethnic groups including the Hema and the Lendu, were displaced on more than one occasion from several villages they lived in, including villages where crimes for which Mr Ntaganda was found guilty were committed.[146] In these circumstances, attempting to establish in 2021, harm suffered by victims during the period from 6 August 2002 to 31 December 2003, that years later continues to affect the victims without interruption, is an almost impossible endeavour, which cannot take place in the abstract. The ongoing movements of the population of Ituri as a result of the never-ending armed conflicts must be taken into consideration.

99. The ICC reparations scheme is ill-designed to address this situation as it focusses on the harm suffered by victims who belong to one side of a protracted armed conflict, during which crimes were committed by members belonging to all sides; instead of addressing the harm suffered by all victims of this protracted armed conflict, belonging to all sides. Taking into consideration that the harm suffered by more than half of the victims is ignored because, *inter alia*, the Prosecutor did not bring charges against members of the other sides, it certainly cannot be said that the ICC reparations scheme is driven by the humanitarian principles of humanity, impartiality, neutrality and independence.

100. This is where the '*do no harm*' principle can find application. The implementation of reparations addressing the harm suffered by victims belonging to one side only – unless the circumstances of the protracted armed conflict that started

[146] See for example: T-89, 25 April 2016, ICC-01/04-02/06, p.12, ll.20-25; Defence Closing Brief, 2 July 2018, ICC-01/04-02/06-2298, paras. 52, 240, 356-358; OHCHR, Rapport du Projet Mapping concernant les violations les plus graves des droits de l'homme et du droit international humanitaire commises entre mars 1993 et juin 2003 sur le territoire de la République démocratique du Congo, Août 2010, paras.369, 370, 405, 410, 422, consulted on 7 June 2021 https://www.ohchr.org/Documents/Countries/CD/DRC_MAPPING_REPORT_FINAL_FR.pdf; Human Rights Watch, Ituri : Covered in blood, p.23, last consulted https://www.hrw.org/reports/2003/ituri0703/DRC0703.pdf.

as early as 1996 are fully taken into consideration – is likely to exacerbate security concerns and tensions among communities, possibly leading to yet another full-blown community conflict.

101. When the TFV proposed the '*do no harm*' principle, its aim was "[…] to inform the choice of the types and modalities of reparations, as well as the advisability of their practical implementation throughout reparations proceedings".[147] The TFV also stated that "[a]t the development stage of reparations orders and implementation plans, the 'do no harm' principle would imply amending or discarding a reparation measure under consideration when there is a strong basis to believe that its execution would have a negative impact that would outweigh the positive outcome initially foreseen".[148]

102. One of the ways in which the '*do no harm*' principle can meaningfully inform the reparations process is to ensure that the identification of the extent of the harm suffered by victims in this case – and the determination of the cost to repair the same – take into consideration the circumstances of the ongoing protracted armed conflict in Ituri. This will be most important when determining whether there was a break in the chain of causality that would end the Convicted Person's liability for harm suffered in the 2002-2003 period.

103. The application of the '*do no harm*' principle also militates in favour of engaging victims belonging to the *other sides* of the ongoing protracted armed conflict, and, more importantly, the implementation of programs by the TFV, pursuant to its assistance mandate, directed at all victims who suffered during the relevant period.

104. Trial Chamber VI's error impacted the Impugned Decision by failing to consider Defence submissions based on the '*do no harm*' principle, warranting the intervention of the Appeals Chamber. Issuance of a *new* or *significantly amended*

[147] TFV Observations, para.30.
[148] TFV Observations, para.32.

reparations order, taking into consideration the ongoing protracted armed conflict in Ituri and the current security situation, is required.

PART II: GROUNDS 4 TO 9

105. Part II of Mr Ntaganda's Appeal, namely Grounds 4 to 9, addresses Trial Chamber VI's approach to identifying the beneficiaries, and the type of harm they have suffered. The arguments therein, which are presented by topics and issues in a sequential approach,[149] highlight the reasons why, in the Impugned Decision, Trial Chamber VI erred in relations to the status of victims, transgenerational harm, the evidentiary criteria to be applied in this case, the adoption of presumptions and the causal nexus.

106. Trial Chamber VI's legal errors, compounded by errors in the methodology adopted to assess the eligible victims outlined in Part III, result in a reparations regime that is unburdened by potential beneficiaries needing to meet recognised burden of proof or provide meaningful support for their applications. While extremely efficient, this approach is detrimental to the rights of the Convicted Person, and risks undermining the legitimacy of the reparations process in the *Ntaganda* case. Given the far-reaching consequences of the Trial Chamber's errors, the only appropriate remedy is for the Impugned Decision to be quashed, and replaced with a regime that aligns with the prior practice of the Court, and the rights of victims and the Convicted Person.

I. <u>Trial Chamber VI erred in law when ruling on the status of certain victims[150]</u>

a) Trial Chamber VI erred in law by holding that children born out of rape are direct victims

107. Trial Chamber VI held that "children born out of rape and sexual slavery may qualify as direct victims, as the harm they suffered is a direct result of the

[149] In relation to Ground 5, the Defence will not submit arguments concerning the definition of direct victims of persecution.
[150] Ground 6 and Ground 7.

commission of the crimes of rape and sexual slavery".[151] While no precise definition of "direct victim" appears in the jurisprudence of the Court, Trial Chamber VI held that "a causal link must exist between the harm suffered and the crimes of which an accused is found guilty".[152]

108. Drawing from other international jurisdictions, direct victims can be properly considered as individuals "against whom the illegal conduct of the State agent is directed immediately, explicitly and deliberately". In turn, an indirect victim is a person "who does not suffer this illegal conduct in the same way-immediately, directly and deliberately-but who also see his own rights affected or violated from the impact on the so-called direct victim".[153] Trial Chamber I in *Lubanga* also held that the harm suffered by indirect victims "must arise out of the harm suffered by direct victims, brought about by the commission of the crimes charged".[154]

109. It stems from this, that to be considered as a direct victim, the applicant must be the direct object of the crime which forms part of the conviction, and there must be a causal link to the harm alleged. For this reason, the parties in this case were unanimous in their view that children born out of rape could not properly be considered as direct victims, but fell within the category of indirect victims.[155] Trial Chamber VI has declined to follow the parties' submissions, without sufficient justification.

110. Furthermore, Trial Chamber VI erred in finding that classifying children born out of rape as direct victims was a means of acknowledging "the particular harm they suffered" and the fact that it "may constitute an adequate measure of

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[151] Impugned Decision, para.122.
[152] Impugned Decision, para.121.
[153] IACtHR, *Ituango Massacres v Colombia*, Separate Concurring Opinion of Judge S. García Ramírez, 29 June 2006, para.11.
[154] *Prosecutor v. Thomas Lubanga Dyilo*, Redacted version of "Decision on 'indirect victims'", 8 April 2009, ICC-01/04-01/06-1813, para.49.
[155] LRV1 Final Submissions, para.44; LRV2 Final Submissions, paras.31-33; Defence Final Submissions, para.107; TFV Final Observations, paras.32-36.

satisfaction".[156] The determination of the status of a victim as direct or indirect is a legal finding; it should not be considered as a symbolic act or as an acknowledgment of harm suffered. Victims' satisfaction is not a criterion that can be considered in the process of determining whether a victim is a direct or indirect victim of a crime.

111. Qualifying children born out of rape as direct victims not only constitutes an error of law, but also materially impacts the reparations process. Trial Chamber VI held that direct victims of sexual violence beneficiate from a presumption of harm. Thus, as direct victims of sexual violence, children born out of rape would also appear to benefit from the same presumptions of psychological, physical and material harm, as well as being subject to a lower burden of evidentiary proof.[157] While Trial Chamber VI did not pronounce on this explicitly, it appears to be the logical corollary to its own reasoning.

112. However, children born out of rape, although they may share certain categories of harm with direct victims of sexual crimes, also experience harms of a completely different nature. For example, the victims of sexual violence might experience multiple physical harms, such as damage to the reproductive system, sexually transmitted diseases including HIV, unwanted pregnancy and abortion.[158] As for the children born out of rape, they might be rejected by their birth mother, have no legal status, experience frustration, marginalization, possible transmission of HIV or suffer from poor health due to malnutrition.[159] As such, packaging them into the same category as direct victims and affording them the same presumptions of physical harm is an unsound approach, which may preclude an accurate characterisation of the harm suffered.

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[156] Impugned Decision, para.123.
[157] Impugned Decision, paras.67, 139.
[158] *Prosecutor v. Jean Pierre Bemba Gombo*, Annex A - Mental Health Outcomes of Rape, Mass Rape, and other Forms of Sexual Violence, Produced by the Human Rights in Trauma Mental Health Laboratory, Department of Psychiatry and Behavioral Sciences, Stanford University School of Medicine, 22 September 2016, ICC-01/05-01/08-3417-AnxA-Red, pp.5-6, 15, 23; *Prosecutor v. Jean Pierre Bemba Gombo*, Decision on Sentence pursuant to Article 76 of the Statute, 21 June 2016, ICC-01/05-01/08-3399, paras.36-38; Dr Gilmore Report, paras.28-31, 32, 35-37.
[159] Dr Gilmore Report, paras.33, 54, 55, 57, 62, 119; Impugned Decision, paras.174, 176.

113. This error of law materially impacts the Impugned Decision, as it will necessarily lead to an inaccurate number of direct victims, with the resultant presumptions of harms artificially enlarging the financial liability of the Convicted Person.

b) Trial Chamber VI erred in law in finding that indirect victims include "a person with whom [the victim] did not have a close personal relationship, but which nevertheless was of significant importance in their lives"

114. In *Lubanga*, the Appeals Chamber held that "close personal relationships, such as those between parents and children, are a precondition of participation by indirect victims."[160] The Trial Chamber's finding that indirect victims can establish the harm suffered in relation to a person of "significant importance in their lives"[161] departs from this standard, without any justification, constituting an error of law.

115. This error is then compounded by Trial Chamber VI's failure to adequately define this new legal standard, which will undoubtedly lead to confusion. This is demonstrated, for example, in relation to Count 1 and the death of the *Abbé* Bwanalonga in Mongbwalu. While it is clear that the disappearance of the priest may well be a great loss for the community, this will not necessarily cause deep emotional distress to everyone within his extended congregation, such as warranted by an international regime for reparations.[162]

116. Moreover, in reaching this finding Trial Chamber VI misconstrued the Sentencing Judgment, by alleging that the Trial Chamber "noted in the Sentencing Judgment the deep psychological impact that the death of the *Abbé* Bwanalonga […]

[160] First Lubanga Appeals Judgment on Reparations, paras.190-191 [emphasis added].
[161] Impugned Decision, para.127.
[162] See for example, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 16 December 2015, U.N. Doc. A/RES/60/147, para.8: "Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization."

had on those who witnessed the crime".[163] First, the case record does not contain any reference to anyone witnessing the murder. Second, while the Sentencing Judgement refers to the death of the *Abbé* being "badly received by the Lendu/Ngiti community",[164] there is no basis for a conclusion that it resulted in the level of traumatisation alleged by the Prosecution, given that the witnesses whose testimony rose to this level "were not called as experts nor qualify as such on this matter, [could not] be relied on to make findings on these alleged psychological or social consequences."[165]

117. Moreover, a ruling that indirect victims only need to establish the "significant importance of a direct victim in their lives" introduces a level of subjectivity into the process of the assessment of indirect victims. Whereas previously indirect victims would need to demonstrate a familial link or "close personal relationship" to the victim, under Trial Chamber VI's new standard, they would only need to state that the victim was subjectively of significant importance to them. Not only would this be nearly impossible to assess, it would expand the definition of "indirect victim" far beyond that established by the Appeals Chamber in *Lubanga*, and introduces a level of uncertainty that is incompatible with existing burdens of proof.

II. Trial Chamber VI erred in law by erroneously interpreting the concepts of transgenerational harm[166]

118. The concept of transgenerational harm in the context of massive human rights violations is an evolving concept in scientific, medical and legal literature and scholarship. Although it has been discussed in previous cases before this Court,[167] it

[163] Impugned Decision, para.179.
[164] Sentencing Judgment, fn.130.
[165] Sentencing Judgment, fn.132.
[166] Ground 4.
[167] *Prosecutor v. Thomas Lubanga Dyilo*, T-166, 7 April 2009, ICC-01/04-01/06, p.30, ll.14-19; *Prosecutor v. Jean-Pierre Bemba Gombo*, T-368, 16 May 2016, ICC-01/05-01/08, p.99, l.11 to p.100, l.13; *Prosecutor v. Dominic Ongwen*, T-177, 23 May 2018, ICC-02/04-01/15, p.30, l.11 to p.31, l.7; *See also Prosecutor v. Germain Katanga*, Decision on the Matter of the Transgenerational Harm Alleged by Some Applicants for Reparations Remanded by the Appeals Chamber in its Judgment of 8 March 2018, 19 July 2018, ICC-01/04-01/07-3804-Red-tENG ("Katanga Decision on Transgenerational Harm").

did not form part of the reparations award in *Lubanga*,[168] and victims alleging transgenerational harm were rejected in *Katanga*.[169] Hence, this concept remains undefined and novel at the ICC.

119. Despite this, the Trial Chamber's citation to the *Katanga* definition of "transgenerational harm" gives the impression that it is an established and uncontested concept within the ICC's reparations practice.[170] By failing to acknowledge its novelty, Trial Chamber VI also failed to consider the limitations and shortcomings of this category of harm, which was an error. Trial Chamber VI made no reference to the scientific uncertainty and the ongoing debate around the idea of transgenerational harm,[171] nor did it refer to the different schools of scientific thought which have developed around the impact of transgenerational trauma, being epigenetic transmission and the social transmission.[172] This scientific uncertainty as to how harm is transmitted between generations necessarily impacts the establishment of the causal nexus between the psychological harm and the crimes for which Mr Ntaganda was convicted.

120. Instead, Trial Chamber VI relied on the submissions from the LRVs, the Appointed Experts Reports and the IACtHR's jurisprudence,[173] but failed to even refer to the limits of the concepts cited therein. In these circumstances, the Trial Chamber's reliance on the concept of transgenerational harm is unsound, undermining its ultimate findings which incorporate this harm into the Reparations Order.

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[168] First Lubanga Decision on Reparations; First Lubanga Appeals Judgment on Reparations.
[169] Katanga Order for Reparations; First Katanga Appeals Judgment on Reparations; Katanga Decision on Transgenerational Harm.
[170] Impugned Decision, para.73 [footnotes omitted].
[171] Katanga Decision on Transgenerational Harm, paras.11, 12, 14, 28; *Prosecutor v. Thomas Lubanga Dyilo,* T-166, 07 April 2009, ICC-01/04-01/06, p.30, ll.14-19.
[172] Impugned Decision, para.73.
[173] Impugned Decision, para.73, fns.188-193.

III. Trial Chamber VI erred by establishing the wrong standard of proof and evidentiary criteria[174]

121. In setting the standard of proof and evidentiary criteria, the Trial Chamber erred in two ways. First, Trial Chamber VI erroneously lowered the burden of proof for certain type of harms to such an extent that the burden is lower at the reparations phase than at the trial phase of the case. [175]Second, Trial Chamber VI failed to provide sufficient details as to what type of evidence or documents are required to meet the burden of proof with respect to certain types of harms.

a) The Trial Chamber erred in lowering the burden of proof in accepting that a coherent and credible account is sufficient in relation to victims of sexual violence

122. Trial Chamber VI considered that, in relation to the standard of proof for victims of sexual violence, "the victim's coherent and credible account shall be accepted as sufficient evidence to establish their eligibility as victims on a balance of probabilities".[176]

123. While this is the established standard,[177] the Trial Chamber erred in adopting a lower burden of proof by simultaneously adopting a presumption of harm for the same victims, discussed further below,[178] while also precluding the Defence from challenging eligibility.[179] In practical terms, therefore, potential beneficiaries alleging a claim to reparations on the basis of sexual violence, need only provide a coherent and credible account of harm, which will then entitle them to a presumption of harm.

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[174] Ground 4.

[175] *Prosecutor v. Germain Katanga*, Decision on the Applications for Participation in the Proceedings of Applicants a/0327/07 to a/0337/07 and a/0001/08, 3 April 2008, ICC-01/04-01/07-357, pp.8-9; Second Lubanga Appeals Judgment on Reparations, para.155; Al Mahdi Reparations Order, fn.66; *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Public redacted version of 'Decision on Victim Participation at Trial and on Common Legal Representation of Victims', 8 June 2016, ICC-01/12-01/15-97-Red, paras.17, 23; Decision on victims' participation in trial proceedings, 6 February 2015, ICC-01/04-02/06-449.

[176] Impugned Decision, paras.67, 139.

[177] Second Lubanga Appeals Decision on Reparations, para.181; First Katanga Appeals Decision, para.42; Second Lubanga Appeals Judgment on Reparations, para.181; First Katanga Appeals Judgment on Reparations, para.42; Al Mahdi Reparations Order, para.44.

[178] See Part II, Section V on the Trial Chamber's error in resorting to presumptions.

[179] See Part II, Section II c) on the Trial Chamber's error of impeding the right of the Convicted Person to challenge the eligibility of victims to benefit from reparations.

Concurrently, their eligibility is then unchallenged; the Defence has been cut out of the process and the Trial Chamber is not looking at individual forms. These factors, existing in combination, lower the burden of proof beyond that set in other cases, further undermining the regime in place.

b) The Trial Chamber erred by failing to envisaged the need to provide documents in support of the victim's application for reparations

124. Trial Chamber VI then failed to identify the type of documents that would be sufficient to meet the burden of proof, instead simply finding that "[v]ictims eligible for reparations must provide sufficient proof of identity, of the harm suffered, and of the causal link between the crime and the harm" but that "[i]n the absence of acceptable documentation, a statement signed by two credible witnesses establishing the identity of the victim and describing the relationship between the victim and any individual acting on their behalf is acceptable."[180]

125. Trial Chamber VI should have provided guidance as to which documents could be provided, as has been done by other trial chambers.[181] Failing to expand on this issue, especially in light of the low burden of proof established by Trial Chamber VI in the present case, the Impugned Decision appears as a reparations order that renders optional the substantiation of an application for reparations.

126. This lower documentation burden was then combined with Trial Chamber VI's decision, discussed further in Part III, not to rule on individual victim

[180] Impugned Decision, para.77.

[181] *See*, for example, Katanga Order for Reparations, para.55: "the Applicants finalized their applications for reparations with statements from witnesses, certificates of residence, habitation, family relationship and death, medical certificates and declarations of livestock ownership", para.138 "Where, in support of their allegations, the Applicants tender a refugee family certificate and/or a refugee card, the Chamber will make the finding that they had to flee the DRC". *See also* Second Lubanga Appeals Judgment on Reparations, paras.182-184, referring to Second Lubanga Decision on Reparations, paras.44, 61,62; Al Mahdi Appeal Judgment on Reparations, para.86, referring to *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Version Publique Expurgée du «Dépôt de pièces additionnelles en appui aux demandes en réparation déposées par le Greffe en date du 16 décembre 2016 (ICC-01/12-01/15-200) » déposé de manière confidentielle le 24 mars 2017 (ICC-01/12-01/15-210-Conf) avec 126 annexes Confidentielles Ex Parte accessibles seulement par la Chambre de première instance VIII, le Greffe et le Représentant légal des victimes, 28 Avril 2017, ICC-01/12-01/15-210-Red.

applications.[182] This is significant; having lowered the burden, Trial Chamber VI then extricated itself from the process of reviewing victims' applications in order to ensure that they are sufficiently substantiated as per the new standard.

127. In *Lubanga*, Trial Chamber II reviewed a sample of application forms and the Defence had the opportunity to make observations.[183] As such, there was a process in place to ensure that the burden of proof was met, and that the documents provided supported the alleged harm and corroborated the narrative put forward in the application itself.[184]

128. This makes sense; applicants must substantiate their claims in order to fulfil the burden of proof.[185]

129. Furthermore, the impossibility of providing documents should not have been presumed. On this question, the Appeals Chamber held in *Lubanga* that:

> The Appeals Chamber considers that a trial chamber is also not prevented from finding a person eligible for reparations in circumstances where he or she did not give reasons for his or her inability to provide supporting documentation. **However, to allow the trial chamber to properly reach a conclusion, it is in the interest of the person who is unable to supply any documentation to explain his or her reasons for this inability.** At any rate, the trial chamber's enquiry is whether the relevant facts have been established to the applicable standard of proof. Such was the Trial Chamber's enquiry in the present case. The Appeals Chamber also notes the Trial Chamber's finding that, 'in most cases the potentially eligible victims were not in a position to submit supporting documentation to prove their allegations', and its reference to 'the circumstances in the DRC and the many years that have elapsed since the material events'.[186]

130. By contrast, Trial Chamber VI only went as far as to find that potential victims may experience difficulties in providing relevant documents. It did not foresee any

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[182] Impugned Decision, para.196.
[183] *Prosecutor v. Thomas Lubanga Dyilo,* Order instructing the Trust Fund for Victims to supplement the draft implementation plan, ICC-01/04-01/06-3198-tENG, para.14.
[184] Second Lubanga Appeals Judgment on Reparations, paras.270, 273.
[185] Second Lubanga Appeals Judgment on Reparations, para.198; First Katanga Appeals Judgment on Reparations, para.49; Al Mahdi Reparations Order, para.146(ii).
[186] Second Lubanga Appeals Judgment on Reparations, para.204 [footnote omitted] [emphasis added].

mechanism, or put in place any similar requirements, circumventing the need for the kind of substantiation of applications that was a minimum condition in other cases. This was an error, and provides further justification for the quashing of the Impugned Decision in this case.

c) The Trial Chamber erred in relation to the evidentiary criteria for transgenerational harm

131. With regard to the evidentiary criteria for claims of transgenerational harm, the Defence's prior submissions underlined the need for strong guidelines on the burden of proof,[187] in light of the Court's prior practice. For example, in the context of *Katanga*, victims who alleged suffering from transgenerational harm from being born after the attack on Bogoro provided psychiatric expertise in support of their applications.[188] In *Lubanga*, Dr Elisabeth Schauer – who has an expertise in public mental health, psychotrauma and consequences of war or enlistment on individuals and children[189] – testified about the way that PTSD can be transmitted to children. However, she was clear that that PTSD must be demonstrated by way of medical examination.[190] In the same vein, Dr Reicherter – who has an expertise in the area of cross-cultural trauma psychiatry and mental health outcomes of rape, mass rape, and other forms of sexual violence[191] – testified in the context of the sentencing hearings in *Bemba*, that PTSD must be established by way of psychological expertise. More importantly, Dr Reicherter said a clinical diagnosis must be recent, given that this type of diagnosis is evolving, even in cases where the chronical outcome had been confirmed.[192]

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[187] Defence Final Submissions, paras.82-85.
[188] Katanga Decision on Transgenerational Harm, paras.28-29; *See Prosecutor v. Germain Katanga*, Transmission du « Rapport d'expertise sur l'évaluation de l'état psychique des enfants victimes de l'attaque de Bogoro du 24 février 2003 », 31 May 2016, ICC-01/04-01/07-3692-Red2.
[189] *Prosecutor v. Thomas Lubanga Dyilo*, T-166, 07 April 2009, ICC-01/04-01/06, p.80, l.12 to p.81, l.5.
[190] *Prosecutor v. Thomas Lubanga Dyilo*, T-166, 07 April 2009, ICC-01/04-01/06, p.50, ll.1-8.
[191] *Prosecutor v. Dominic Ongwen*, T-175, 23 May 2018, ICC-02/04-01/15, p.16, l.24 to p.17, l.10 ; *Prosecutor v. Jean-Pierre Bemba Gombo*, T-368, 16 May 2016, ICC-01/05-01/08, p.75, l.7 to p.76, l.8.
[192] *Prosecutor v. Jean-Pierre Bemba Gombo*, T-369, 17 May 2016, ICC-01/05-01/08, p.6, ll.8-13.

132. In *Ntaganda*, the Appointed Experts did not directly examine victims from the conflict.[193] While Dr Gilmore relies on medical and scientific literature, the Joint Experts relied in large part on the Dr Gilmore Report, non scientific documents and the Court record.[194] Trial Chamber VI erred in law by failing to specify certain element of this harm that need to be established by the potential beneficiary, namely the date of birth of the child.

133. Indeed, the jurisprudence in *Katanga* underlined the importance of establishing the date of birth of a child born out of rape in assessing their eligibility and their harm:

> In this regard, the Chamber considers in general that, with respect to the transgenerational harm, the closer the date of birth of the Applicant to the date of the Attack, the more likely it is that the Attack had an impact on the Applicant Concerned, especially if no other potentially traumatic events occurred between 24 February 2003 and the date of the Applicant's birth.[195]

d) The Trial Chamber erred by relying on unreliable evidence to meet the burden of proof in relation to the damage to the Sayo health centre

134. The error committed in relation to the Sayo health centre and the burden of proof is slightly different, given that it does not concern individual victim applications. Rather, it relates to the absence of evidence available on the record to meet the burden of proof.

135. Indeed, when assessing the damage caused to the Sayo health centre, the Trial Chamber relies only on the views of the Appointed Experts. Notably, the Trial Chamber was not in a position to establish, on the basis of the evidence presented at trial, the extent of the damage caused to the health centre during the

[193] Dr Gilmore Report, para.2; Joint Experts Report, para.10.
[194] Joint Experts Report, for references to Dr Gilmore Report, see fns.90,129,146, for references to the Court Records see fns.40, 41, 98, 147, 148, 149, 150, 152, 153, 154, 155, and for references to non-scientific literature see fns.152, 154, 292.
[195] Katanga Decision on Transgenerational Harm, para.29.

First Operation by the UPC/FPLC.[196] Now, in the reparations phase, and having heard no new evidence.

136. The Trial Chamber has concluded not only that the structure of the centre was affected, but also the services that the health center provides. In doing so, the Trial Chamber has relied only on the Dr Gilmore Report.[197]

137. Dr Gilmore Report's conclusion on the damage caused to the Sayo health centre is based on interviews the Expert conducted; a submission from the TFV that refers to the Sentencing Judgment;[198] information from intermediaries;[199] interviews[200] (without more context); a MSF document dated June 2020;[201] and information collected from VPRS in 2005.[202] The information contained in these interviews has not been tested, and was not made available to the Defence. The probative value of the information relied on in Dr Gilmore Report's is so low that it cannot sustain a finding that meets the burden of proof or the causal nexus that the damage to the centre was extensive, and was caused by the UPC/FPLC. Notably, the only information from a witness in this case, is that staff from the Mongbwalu hospital fled to Sayo to help, and that the doors of the Sayo health centre were damaged.[203]

138. What is more, Dr Gilmore Report stated that, although the Sayo health centre stopped its activities following the attack, it was able to resume shortly after, although with reduced activities, which undermines its own conclusions on damage.[204] Importantly, the Trial Chamber's finding that the attack on the Sayo health centre exacerbated the vulnerabilities of the civilian population, again relies only on Dr Gilmore Report. This report's claims about the vulnerability of the

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196 Sentencing Judgment, para.153.
197 Impugned Decision, fn.422; Dr Gilmore Report, paras.161, 168.
198 Dr Gilmore Report, fns.665-666.
199 Dr Gilmore Report, fns.667-668.
200 Dr Gilmore Report, fns.636, 669.
201 Dr Gilmore Report, fn.634.
202 Dr Gilmore Report, fn.663.
203 Dr Gilmore Report, fn.638-639.
204 Dr Gilmore Report, para.169.

population via the destruction of healthcare facilities,[205] are based on modern-day examples, rather than being related to alleged damage in 2002. The evidence relied upon is unclear, unreliable, and lacks any causal nexus to any damage caused to the Sayo health centre by the UPC/FPLC.

139. As a result, the Trial Chamber erred in considering the cost of repair as suggested by Dr Gilmore in her Report,[206] which was not based on reliable evidence that meets the burden of proof on the balance of probability. This error has a material impact on the Impugned Decision, as Mr Ntaganda's liability is undoubtedly impacted by an erroneous assessment of Sayo health center damage and need for its repair.

IV. Trial Chamber VI erred in law in applying a wrong standard for the establishment of the causal link, with regard to the possible breaks in the chain of causation[207]

140. Trial Chamber VI correctly held that "causation between an act and its result *may be broken* by a subsequent event which the person who committed the initial act could not have reasonably foreseen."[208] However, Trial Chamber VI went out of its way to then erroneously find that "as long as the relevant victims fall within the scope of the conviction and meet the applicable evidentiary standard, the issue [of possible breaks in the chain of causation] does not arise."[209] This is incorrect. It is not enough for victims to fall within the scope of the conviction and meet the applicable evidentiary standard, if the harm suffered is not attributable to the Convicted Person. The Trial Chamber failed to consider that, particularly in the context of a protracted armed conflict, the causal link may be broken by other incidents, which may impact the extent and type of harm suffered by the victims, or the extent and scope of damage to property.

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[205] Impugned Decision, fn.423; Dr Gilmore Report, para.160.
[206] Impugned Decision, para.242.
[207] Ground 9.
[208] Impugned Decision, para.133.
[209] Impugned Decision, para.134.

141. The Trial Chamber failed to establish the appropriate standard for the assessment of a causal link. By simply stating that the applicant must establish the causal nexus between the harm and the crime,[210] Trial Chamber VI made no reference to the necessity of meeting the standard of proximate cause;[211] and then failed to even consider whether the chain of causation between an act and its result had been broken by a subsequent unforeseeable event.[212]

142. By way of a concrete example, in relation to transgenerational harm, the Trial Chamber was required to at least consider that other traumatic events, unrelated to the crimes for which Mr Ntaganda was convicted, could have broken the causal chain, as was done in *Katanga*.[213] Transgenerational harm is, by its nature, a harm that arises over a long period of time, and is continuous. As such, to establish the cause of transgenerational harm and to connect it to the charged crimes, it is essential at least consider whether the crimes for which the accused has been convicted are the only possible cause.[214] Doing otherwise would result in Mr Ntaganda being personally liable for all traumatic events that victims may have suffered and were purportedly passed transgenerationally.

143. In *Katanga*, Trial Chamber II carefully considered the chain of causation when ruling on the ineligibility of the five applicants for transgenerational harm:

> 30. Conversely, the Chamber considers that the farther the date of birth of the Applicant Concerned from the date of the attack on Bogoro, the more likely it is that other factors/events may have contributed to the suffering of the Applicants Concerned. In the light of this, the Chamber notes that, during the medical examination of one of the Applicants Concerned, **the neuropsychiatrist found that a multifactorial etiology of the Applicant's emotional disorder could not be ruled out**. In other words, all of the causes of the pathology in question involve several factors. The Chamber also notes that the Legal Representative concedes that **the parents'**

[210] Impugned Decision, para.75.
[211] Katanga Decision on Transgenerational Harm, para.16.
[212] Katanga Decision on Transgenerational Harm, para.17.
[213] Katanga Decision on Transgenerational Harm, para.30.
[214] Katanga Decision on Transgenerational Harm, para.31. The Trial Chamber considers, furthermore, that it is possible that factors/events predating the attack on Bogoro may also have contributed to the suffering of the Applicants Concerned.

> **suffering "is combined with other anxieties such as those triggered by insecurity in the region as well as other contextual factors".** In that regard, the Chamber recalls the principles applicable to causal nexus, in particular the proximate cause standard, which is that the crime must be sufficiently related to the harm to be considered the cause of that harm.
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> 31. The Chamber considers, furthermore, that it is possible that factors/events predating the attack on Bogoro may also have contributed to the suffering of the Applicants Concerned. The Chamber reiterates its finding in this connection that "the tension between the Hema and Lendu escalated in 2001," emphasizing that "[a]ll the militias which were present in the district of Ituri between 2002 and 2003 and launched attacks assaulted unarmed civilians".[215]

144. The circumstances of Mr Ntaganda's case do not differ in any meaningful way from those of Mr Katanga. The crimes are of a similar nature, they concern the same specific region and are part of the same protracted armed conflict that has been going on for the decades. It is significant that, although the *Katanga* Trial Chamber was willing to recognise the existence of transgenerational harm, it still was extremely cautious when it came to whether a causal nexus to the charged crimes had been established:

> 134. Even where those Applicants are, in all likelihood, suffering from transgenerational psychological harm, the point must be made, as the Defence has, that no evidence is laid before the Chamber to establish on a balance of probabilities the causal nexus between the trauma suffered and the attack on Bogoro.[216]

145. Trial Chamber VI, again, showed no such caution or care. It again departed from the Court's reparations practice without any justification being offered. This, was an error of law.

146. Trial Chamber VI again erred by finding that the date of birth of the applicant was not a relevant factor.[217] As held in *Katanga*, the date of birth of the child in question is important in order to establish the causal link, or a possible break therein:

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[215] Katanga Decision on Transgenerational Harm, paras.30-31 [footnote omitted] [emphasis added].
[216] Katanga Order for Reparations, para.134.
[217] Impugned Decision, para.182.

> 29. In this regard, the Chamber considers in general that, with respect to the transgenerational harm, the closer the date of birth of the Applicant to the date of the Attack, the more likely it is that the Attack had an impact on the Applicant Concerned, especially if no other potentially traumatic events occurred between 24 February 2003 and the date of the Applicant's birth. In the light of this, the Chamber notes that the mental health certificates issued by the neuropsychiatrists who examined the Applicants Concerned provide details of their "pre-, peri- and postnatal medical history" or report that this history is unknown. In this connection, the Chamber will also examine the discrepancies between the dates of birth on the different documents provided by the Applicants Concerned.[218]

147. The Trial Chamber's approach to the establishment of the causal link between the damage caused to the Sayo health centre and the UPC/FPLC is another good example of its error. Relying only on the Joint Experts, who in their turn relied on information received from VPRS field staff that some rehabilitation of the Sayo health centre had been carried out since the event (for which no evidence was provided)[219] the Joint Experts recommended that Mr Ntaganda should be liable to pay for the "full remaining rehabilitation of the health centre".[220] However, in the context of a protracted conflict in Ituri, it is impossible to establish on the basis of the proximate cause standard that any damage to the Sayo health centre was caused by the UPC/FPLC in 2002. This is particularly so in light on the Trial Chamber's finding that the extent of the damage caused by Mr Ntaganda's armed forces is impossible to identify.[221]

148. Trial Chamber VI did not rule on the quantum to be paid, referencing only the TFV submission about the cost of a brand new health centre and the estimated cost suggested by Dr Gilmore to rebuild it.[222] What is missing, is any attempted justification as to how a new health centre or "large equipment […], transport […], maintenance […], equipment and essential medication […] and the costs for one

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[218] Katanga Decision on Transgenerational Harm, para.29.
[219] Joint Experts Report, para.200.
[220] Joint Experts Report, para.201.
[221] Sentencing Judgment, para.153.
[222] Impugned Decision, para.242.

doctor and two nurses for five years […]"[223] could be linked to any damage caused by the UPC/FPLC in 2002. The Trial Chamber failed to identify the causal link between the attack of the UPC/PFLC on the health centre and the damage that it caused. Nor did the Trial Chamber even attempt to exclude the possibility that subsequent attacks by other groups had also caused damage to the same structure. In the context of Ituri, this failure to again engage with the concept of causal link, undermines the Trial Chamber's subsequent findings.

V. Trial Chamber VI erred in law when resorting to presumptions of specific harms in relation to certain categories of victims, thereby unjustifiably departing from the relevant jurisprudence[224]

149. In the Impugned Decision, the Trial Chamber adopted and relied on significant presumptions in determining the harm arising from the crimes. Significantly, the Trial Chamber held that: (i) it presumes physical and psychological harm for direct victims of the crimes committed during the attacks who personally experienced the attacks;[225] and (ii) it presumes psychological harm for victims who lost their home or material assets with a significant effect on their daily lives.[226] The adoption and reliance on these presumptions materially impacted the Impugned Decision by impermissibly lowering the burden of proof.

a) Trial Chamber VI erred in its approach to presumptions

150. Whether or not presumptions can be applied in relation to particular categories of harm is a question that falls within the Trial Chamber's discretion. However, the Appeals Chamber has held that "this discretion is not unlimited and a trial chamber must respect the rights of victims as well as the convicted person".[227] A balancing exercise must be carried out.

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[223] Impugned Decision, para.242.
[224] Ground 8.
[225] Impugned Decision, para.146 [footnote omitted].
[226] Impugned Decision, para.147.
[227] First Katanga Appeals Judgment on Reparations, paras.4, 75.

151. Presumptions have previously been adopted in the context of reparations in order to counterbalance the difficulties victims experience in trying to meet the required standard of proof, while at the same time respecting the right of due process of the convicted person.[228]

152. Trial Chamber VI failed entirely to conduct this balancing exercise. There was no assessment of alleged evidentiary difficulties arising for specific types of harm, let alone any assessment of the impact this reversal of proof would have on the rights of Mr Ntaganda as the Convicted Person. This assessment is, however, central to whether a Trial Chamber can presume harm. The Trial Chamber must first engage with the question of whether the applicants' difficulty in providing documentation or supporting evidence warrant the drawing of a presumption, in circumstances in which the presumption is reasonable and takes the rights of the Convicted Person into account.[229]

153. Trial Chamber VI offers only broad and general statements *in lieu* of any meaningful analysis of the harm alleged by the victims and the potential hurdles in proving it. These general statements include that "direct victims that personally experienced the crimes committed during the attacks **endured physical suffering in connection with the very nature of the context of armed conflict** and the attack against the civilian population within which the crimes were committed"[230] and that "[s]imilarly, 'it is inherent to human nature that all those subjected to brutal acts […] experience intense suffering, anguish, terror and insecurity'."[231] Amazingly, in the latter statement, certain words from an IACtHR judgement cited have been deliberately omitted. The full quote reads:

[228] Katanga Order for Reparations, paras.57-61.
[229] Katanga Order for Reparations, paras.84,90,98; First Katanga Appeals Judgment on Reparations, para.66.
[230] Impugned Decision, para.146.
[231] Impugned Decision, para.146.

> it is inherent to human nature that all those subjected to brutal acts **in the context of this case** experienced intense suffering, anguish, terror and insecurity, so that this damage does not have to be proved.[232]

154. The words skipped over by the Trial Chamber – "*in the context of this case*" – demonstrate that the IACtHR ruling is limited to its facts, and did not formulate a presumption of general applicability in other cases. The Trial Chamber's failure to perform any assessment weighing the needs of the victims and the evidentiary difficulty they face, against the due process rights of the Convicted Person is an error of law.

155. In *Katanga*,[233] before adopting the relevant presumptions, the Trial Chamber relied on (i) its assessment of the facts and harms alleged in victims' applications and the evidence tendered by some victims establishing such harm;[234] (ii) specific findings regarding the circumstances of the attack which led to the conviction, *i.e.* the "extreme violence" of the attack which "led to the murder of scores of civilians";[235] (iii) the submissions of the parties, notably the Defence's non-opposition to the presumption of psychological harm for victims who had demonstrated another type of harm,[236] (iv) the *impossibility* of certain victims tendering medical certificates;[237] and (v) other courts' jurisprudence.[238] The Trial Chamber did not engage in any analysis of this kind.

156. In *Lubanga*, on the basis of its findings in its Sentencing Judgment, the Trial Chamber held that a physical, psychological and material harm could be presumed for both direct and indirect victims.[239] Those findings included "discerned trauma in the direct victims, such as mental dissociation, depression and suicidal

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[232] *Case of the Pueblo Bello Massacre v. Colombia*, Judgment, 31 January 2006, para.255 [emphasis added].
[233] Katanga Order for Reparations, paras.123-131.
[234] Katanga Order for Reparations, paras.64-175.
[235] Katanga Order for Reparations, para.124.
[236] The Defence in the *Katanga* case was in a position to agree to the said presumption because it had access to the victims' applications – hence enabling them to observe the impossibility for some victim to tender the appropriate evidence in support of their allegation of harm within their applications.
[237] Katanga Order for Reparations, para.126.
[238] Katanga Order for Reparations, paras.126-128.
[239] Second Lubanga Decision on Reparations, paras.180-185.

behaviour",[240] the "negative impact on their education and cognitive abilities"[241] and the "inevitable risk of being wounded or killed."[242] These presumptions, however, were particular to the context of child soldiers. More importantly, the Trial Chamber had already conducted an assessment of the harm alleged in the 473 potentially eligible victims' applications and noted that it did "correspond exactly to the harm defined by the Appeals Chamber."[243]

157. The Defence takes issue with the approach in *Lubanga* as regards presumptions, given the lack of sufficient assessment of their impact on due process. However, the Defence notes that access to the victims' applications and the allegations of harm contained therein were deemed necessary to determine whether there were difficulties in obtaining evidence; the extent of the harm suffered by the applicants; and whether presumptions could reasonably be drawn.

158. The seven presumptions thus adopted by Trial Chamber VI are not reasonable in light of the circumstances of the case.[244] No reasonable trier of fact could have reasonably concluded that their adoption was necessary in light of the evidence on the record. These presumptions should not have been applied, and their adoption warrants the intervention of the Appeals Chamber. Moreover, and as discussed below, the Trial Chamber erred in adopting a presumption of psychological and physical harm for all victims present during the attack and in concluding that all victims whose loss of housing or material assets caused a significant effect on their daily life can automatically be presumed to suffer psychological harm.

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[240] Second Lubanga Decision on Reparations, para.181.
[241] Second Lubanga Decision on Reparations, para.183.
[242] Second Lubanga Decision on Reparations, para.184.
[243] Second Lubanga Decision on Reparations, fn.232.
[244] First Katanga Appeals Judgment on Reparations, para.77.

b) Trial Chamber VI erred in creating presumptions of physical harm for victims of the attacks who personally experienced the attacks

159. To presume the existence of physical and psychological harm for all "direct victims of the crimes committed during the attacks, who personally experienced the attacks",[245] represents a departure from the Court's practice.

160. In *Katanga*, the Trial Chamber decided that the victims of the Bogoro attack should benefit from a presumption of *psychological* harm *after* having established, on a balance of probabilities, that they suffered another type of harm.[246] The victims eligible for reparations in *Katanga* could thus benefit from a presumption of psychological harm if they previously had established that they suffered from material or physical harm as a result of the attack.

161. The Appeals Chamber then advised that a presumption of psychological harm for victims who have demonstrated material harm resulting from an attack, but who did not personally experienced it, should be carefully assessed, and that a Trial Chamber should ensure to provide "clear reasons as to the basis on which such a presumption is made."[247]

162. Although Trial Chamber VI refers to this Appeals Chamber finding,[248] it then departs from it in two ways. First, it removed the requirement that victims of the attack should first prove "another type of harm" in order to benefit from a presumption of psychological harm. Second, it extends the presumptions of harm beyond that provided in *Katanga* by allowing presumptions of physical harm for victims having experienced the attack. In doing so, Trial Chamber VI abused its discretion by departing from the established standard without sufficient or any justifications.

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[245] Impugned Decision, para.146.
[246] Katanga Order for Reparations, para.129.
[247] First Katanga Appeals Judgment on Reparations, para.149.
[248] Impugned Decision, para.142.

163. Moreover, it remains impossible for the Defence to make any observations on the victims' applications, not having been given access. As such, the Defence is prevented from assessing the credibility of the harm alleged by the victims and the sufficiency of the evidence to reach this presumption, making it impossible to rebut the lack of evidence to meet the burden of proof on a balance of probabilities.

164. What can be said, however, is that the crimes to which this presumption relates do not *ipso facto* imply physical harm. Indeed, physical and psychological harm does not necessarily automatically flow the war crimes of pillaging, attacking protected objects, seizing the enemy's property and destroying or seizing the enemy's property. None of these crimes require the infliction of physical injury, which would by contrast constitute "unlawful conduct directed against property and/or (civilian) objects."[249] As to the crimes of forcible transfer and deportation, at first glance, a presumption of physical harm is at odds with the very nature of those crimes. And while some of the underlying acts of persecution involve physical harm, not all do; pillaging and the destruction of property have been considered underlying acts of persecution.[250]

165. Concerning the crime of attack against civilian population for which Mr Ntaganda has been convicted, not all instances have resulted in victims being injured. Indeed, the number of potential eligible victims of the attack that could allege physical harm is limited.[251] For instance, Mr Ntaganda was found guilty on the basis that he ordered P-0017 to fire a grenade launcher directly at civilians.[252] However, P-0017 testified that no civilians where hurt.[253] Hence, presuming that because a potential victim was present during an attack and was the object of the crime of directing an attack against civilian population would be unreasonable in the circumstances of this case.

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[249] Sentencing Judgment, para.133.
[250] Trial Judgment, para.995.
[251] Sentencing Judgment, paras. 144, 154, referring a five injured victims during the attack.
[252] Trial Judgment, para.1182.
[253] Trial Judgment, para.508; Appeals Judgment, para.719.

c) Trial Chamber VI erred in creating a presumption of psychological harm for victims who lost their home or material assets with significant impact in their lives

166. The Trial Chamber's finding that psychological harm is to be presumed for victims who lost their home or material assets in a manner that has a significant effect on their daily life,[254] runs counter to the Appeals Chamber jurisprudence in *Katanga*.

167. The Trial Chamber noted the warning formulated in *Katanga* in relation to the presumption of psychological harm to victims that have not personally experienced the attack.[255] The Appeals Chamber held that "if, in the future, trial chambers were to presume psychological harm associated with the experience of an attack for all applicants who have proved material harm, but have not personally experienced the attack, they should carefully approach this issue, providing clear reasons as to the basis on which such a presumption is made."[256]

168. Indeed, the Trial Chamber ruled that it is not necessary to scrutinise the specific psychological harm alleged by those victims who have lost their home or material assets with a specific importance in their live "once their eligibility has been established on a balance of probabilities."[257] Yet, no justification was provided as to why this presumption was adopted. The Trial Chamber's blanket statement fails to apply any caution or care in relation to whether the victim has or has not personally experienced the attack. The departure from the Appeals Chamber's ruling and the absence of clear reasoning by Trial Chamber VI warrants the intervention of the Appeals Chamber.

d) Conclusion

169. By resorting to such presumptions of harm, Trial Chamber VI abused its discretion, thereby unfairly impacting the rights of the Convicted Person without any

[254] Impugned Decision, para.147.
[255] Impugned Decision, para.142 [footnote omitted] [emphasis added].
[256] First Katanga Appeals Judgment on Reparations, para.149.
[257] Impugned Decision, para.147.

tangible benefit for victims whose difficulty in providing and gathering evidence is already acknowledged in the formulation of the burden of proof and the flexibility given by the Trial Chamber in the assessment of the victims' evidence.[258] This abuse of discretion is an error of law and the erroneous presumptions must be quashed.

170. Indeed, even if the Defence is granted access to victims' applications, no reasonable trier of fact could have formulated the presumption in question in light of the particular circumstances in that case.[259] The presumptions thus improperly and erroneously shift the standard of proof onto the Convicted Person, further contributing to the unfairness of the 8 March Reparations Order and the manner of its determination.

PART III: GROUND 10 TO 15

I. Overview

171. As outlined above, reparations are entirely voluntary. They cannot be imposed on individual victims or their communities, in the absence of their consent and agreement.[260]

172. The Appeals Chamber in *Lubanga* was explicit that "the informed consent of the recipient is necessary prior to any award of reparations."[261] Indeed, in *Lubanga*, there were participating victims who expressly declined to continue to be part of the reparations process, as was of course their right.[262] The fact that victims must "sign up" to the reparations process is also reflected in the Court's statutory framework,

[258] Impugned Decision, para.140.
[259] First Katanga Appeals Judgment on Reparations, para. 77.
[260] *See* Impugned Decision, para.49: "Reparations are entirely voluntary and the informed consent of the recipient is necessary prior to any award of reparations, including participation in any reparations programme."
[261] *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, ICC-01/04-01/06-3121-Red, paras.159-160.
[262] *Prosecutor v. Thomas Lubanga Dyilo,* First submission of victim dossiers, 31 May 2016, ICC-01/04-01/06-3208, paras.55-56.

which distinguishes between "participation" and "reparations", with the granting of the first not leading necessarily to participation in the second.[263]

173. Victim communities cannot be presumed to exist *en bloc* and hold identical views as to how the crimes against them can be repaired. Nor can the Court simply presume that all victims will be grateful recipients of reparations in whatever form, particularly given that victims in other cases have declined to be part of the reparations process out of concerns for security.[264] Reparations are entirely voluntary, and consent must be sought and obtained.

174. In the present case, the Trial Chamber failed entirely to respect this principle. The Trial Chamber created a regime where potentially "a minimum of 100,000"[265] victims have been identified as the potential beneficiaries of reparations, an estimate that was then used to "calculate" the precise financial liability of Mr Ntaganda, **before** the victims themselves had given any indication of their consent to be involved. The Trial Chamber then unilaterally dispensed with its role of assessing applications, before delegating the entirety of the design of the reparations award, and its size and nature to the TFV,[266] with no reporting, monitoring or supervision regime in place. The 8 March Reparations Order thereby sets out a scheme that could not be further removed from a meaningful process of reparations, from the Court's prior practice, or from reparations principles as developed and accepted in other jurisdictions.

175. Trial Chamber VI's errors, committed in its rush to issue a reparations order before the expiration of individual judges' mandates,[267] are identified below, organised sequentially, and provide further support for the position that the

[263] *See* rule 91 of the Rules as opposed to rule 94 of the Rules.
[264] *Prosecutor v. Thomas Lubanga Dyilo*, First submission of victim dossiers, 31 May 2016, ICC-01/04-01/06-3208, paras.55-56.
[265] Impugned Decision, para.246.
[266] Impugned Decision, para.248.
[267] Impugned Decision, para.5.

8 March Reparations Order is so fundamentally flawed, that it cannot be salvaged. A *new* or *significantly amended* reparations order should be put in place.

II. Trial Chamber VI erred in finding that it "[…] sees no need to rule on the merits of individual applications for reparations, pursuant to rule 94 of the Rules"[268]

176. The Trial Chamber decided that it would not assess any victims' applications for reparations.[269] As far as the Defence can see from the 8 March Reparations Order, the Trial Chamber has not engaged with the content of a single victims' application, and not even reviewed a "sample" of applications as was done in other cases, despite VPRS being ordered to create one.[270]

177. Having declared itself unencumbered by this task, the Trial Chamber then designated the entire assessment process to the TFV (which *has* been done before), but without any guidelines or criteria in place, and in the absence of any judicial supervision (which has *not*). Compounding this error, the Trial Chamber then went on to make concrete pronouncements on, for example, the precise quantum of Mr Ntaganda's liability, without any understanding on how many victims were entitled to reparations, or on what basis. The victims' applications are rendered utterly irrelevant to the *Ntaganda* reparations regime. While this appears to be the antithesis of a victims'-centred approach to reparations, it also serves to deprive the Convicted Person of any meaningful ability to review or challenge the inclusion of potential beneficiaries in the award against him. Trial Chamber VI's numerous errors are outlined further below.

a) Trial Chamber VI erred by failing to pronounce on the need for victims to apply to be part of the reparations process[271]

178. The latest information available to the Defence, as of 21 February 2021, is that the VPRS had been able to consult with approximately *25 potential new identified*

[268] Ground 12.
[269] Impugned Decision, para.169.
[270] Second Lubanga Decision on Reparations para.36.
[271] Ground 10.

beneficiaries.[272] Not 100,000, but 25. Since that date, the Defence has been provided with no new information regarding identification efforts. Certainly, the Registry's reference to "COVID-19-related constraints and the complex situation on the ground",[273] would suggest that this process has not significantly advanced, particularly given that the security situation in Ituri has deteriorated since February 2021.

179. In relation to the victims already participating in the case, the Trial Chamber held in its First Reparations Decision that they would not need to file a new application form to be considered as potential beneficiaries for reparations, but that *their consent must be sought* once the types and modalities of reparations were known.[274] As regards any potential *new beneficiaries*, the Trial Chamber asked VPRS to *design a reparations form* that would be used for their identification.[275]

180. The need to design a reparations form arises from the fact that reparations information has not previously been collected in the *Ntaganda* case. In later cases such as *Yekatom and Ngaïssona* VPRS has been using a dual-purpose form, that "enables the VPRS to safely secure all procedurally relevant victim-related information through a single application process" which in turn "increases the efficiency of the Registry's field activities". If a case then moves to the reparations phase, "relevant processes would be accelerated since core information related to reparations would have already been securely registered in the VPRS's database".[276]

[272] Registry Second Report, para.39.
[273] Registry Second Report, para.39.
[274] First Decision on Reparations, para.30.
[275] First Decision on Reparations, para.35.
[276] *Prosecutor v. Alfred Yekatom & Patrice-Edouard Ngaïssona,* Registry Observations on Aspects Related to the Admission of Victims for Participation in the Proceedings, 6 February 2019, ICC-01/14-01/18-78, para.12.

In *Al Hassan*, reparations questions are also included in a dual-purpose form, already in use in the proceedings.[277]

181. The forms used in *Ntaganda*, however, were not "dual purpose". They were one page in length, and collected information relevant to participation. They did not ask questions about the harm suffered, the type of reparations deemed acceptable and asked only whether, in the case of a conviction, the victim intended to later apply for reparations. As such, that the potential "minimum of 100,000 victims" *have not given information relevant to reparations, or their consent, to anyone*.

182. This puts the procedure in *Ntaganda* far outside the process adopted in other cases, where victims not only had to provide the information that would allow for adequate and accurate assessment of the link between themselves and the conviction, but also gave their consent to be part of the process. Reparations must be entirely voluntary. They cannot just be imposed *en masse* on a community in the absence of any volition on their part.

183. The Appeals Chamber's ruling (discussed further below) that a Trial Chamber is not obliged to perform an individualised assessment of each written request for reparations if *only* collective reparations are being ordered, cannot translate into a *carte blanche* for a Trial Chamber to simply dispense with any process of collecting reparations information in the first place. Particularly given the care that is properly being directed towards this process in other cases; it cannot just be thrown out the window in *Ntaganda*.

184. This is a manifest and significant error of law that vitiates the entire Impugned Decision, and undermines the scheme set out by it in full. Without the collection of information from potential beneficiaries, Trial Chamber VI is endorsing a scheme

[277] *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on the procedure for the admission of victims to participate in proceedings for the purposes of, 12 March 2020, ICC-01/12-01/18-661, para.34.

whereby it imposes reparations on entire communities without their involvement, or consent.

b) The collective reparations with individualized components ordered by Trial Chamber VI are not the same as 'collective reparations only'[278]

185. In *Lubanga*, the Appeals Chamber ruled that there is no need to rule of individual application for reparations.[279] However, this ruling is limited in its application to a reparations program whereby *only* collective reparations are being imposed. This is clear from the decision:

> […] when only *collective* reparations are awarded pursuant to rule 98 (3) of the Rules of Procedure and Evidence, a Trial Chamber is not required to rule on the merits of the individual requests for reparations.[280]

186. In the present case, the Trial Chamber concluded that the appropriate type of reparations would be collective *with individualised components*.[281] The Trial Chamber was specific that this would respond to "the needs and current situation of **individual** victims in the group".[282]

187. In *Katanga*, the collective part of the reparations also had an individualised component.[283] Trial Chamber II complied with its obligation to assess individual applications for reparations.[284] In *Al Mahdi*, the reparations were collective with some individual awards to people whose economic activity exclusively depended on the mausoleums.[285] Regardless, Trial Chamber VIII did not simply skip over the process of assessing the victim applications. Rather, it sought the assistance of the TFV to put

[278] Ground 12.
[279] First Lubanga Appeals Judgment on Reparations, para.152; Second Lubanga Decision on Reparations, para.87.
[280] First Lubanga Appeals Judgment on Reparations, para.152.
[281] Impugned Decision, paras.81, 186-196.
[282] Impugned Decision, para.81 [emphasize added].
[283] Katanga Order for Reparations, paras.294, 295.
[284] Katanga Order for Reparations, para.33.
[285] Al Mahdi Reparations Order, paras.67, 81.

in place a "screening process" for individual beneficiaries as against the eligibility criteria that it then set.[286]

188. As such, Trial Chamber VI's adoption of the *Lubanga* exception for collective reparations, when its collective reparations have an individualised component, was a legal error. The Appeals Chamber's language was clear, and did not envisage that individuals could be given individual awards from an ICC-ordered reparations scheme when their applications had not been assessed.

c) The Impugned Decision impedes the right of the Convicted Person to challenge the eligibility of victims to benefit from reparations[287]

189. The next problem with the Trial Chamber's regime, is that it precludes Mr Ntaganda from having any role in the assessment of the eligibility of victims. The practice of the Court has been to allow the Convicted Person to make observations on the victims' applications *before* a determination is made on their eligibility. In failing to incorporate this step, the Trial Chamber was in error.

190. A reparations order is directed at the convicted person. As such, basic principles of fairness dictate that he should be afforded an ability to make submissions on the eligibility of the victims he is being ordered to pay. In this context, His Honour Judge Eboe-Osuji has identified "the convicted person's internationally recognised due process right" as encompassing "a meaningful opportunity to challenge the reparation claims".[288]

191. Indeed, in *Lubanga*, the Defence was given access to the victims' applications and was afforded the opportunity to make observations, despite the fact that the reparations were of collective nature. Before Trial Chamber II issued its decision on the quantum of reparations, it said that the Defence must be involved in the process

[286] Al Mahdi Appeal Judgment on Reparations, para.72.
[287] Ground 10.
[288] Separate Opinion of Judge Eboe-Osuji, para.8.

of determining the eligibility of victims before the Trial Chamber set the amount of liability:

> […] the Chamber will not be able to rule on the monetary amount of Mr Lubanga's liability until the potential victims have been identified and it has examined both their status as victims eligible to benefit from the reparations and the extent of the harm they have suffered. In this context, the Chamber recalls that it is responsible for deciding on the status of eligible victims **once the Defence has had the opportunity to submit its observations on the eligibility of each victim**.[289]

192. The Appeals Chamber in *Lubanga* then provided the Defence with an opportunity to review the proposed screening process of victims in the implementation phase.[290] The Defence was also able make observations on potential beneficiaries that were included in the "sample", being the 473 reparations *dossiers*.[291]

193. In his Separate Opinion to the Second Appeals Judgement in *Lubanga*, Judge Eboe-Osuji noted that a process of assessing victims' eligibility before setting the quantum "would preserve the convicted person's internationally recognised due process right to a meaningful opportunity to challenge the reparation claims in a way that would have an impact on the final reparation award", which importantly "gives meaning to both the victims' and convicted person's right to seize the Appeals Chamber of an appeal, in an orderly way, under article 82(4) of the Statute in relation to the eligibility assessment."[292]

194. In *Al Mahdi*, the Defence was also able to make representations on the applications made by potential victims before any determination of eligibility status for individual reparations.[293] Trial Chamber VIII was clear that the screening methodology it employed:

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[289] *Prosecutor v. Thomas Lubanga Dyilo*, Order instructing the Trust Fund for Victims to supplement the draft implementation plan, 9 February 2019, ICC-01/04-01/06-3198-tENG, para.14.
[290] Amended Order 3 March 2015, para.66.
[291] Second Lubanga Decision on Reparations, para.27.
[292] Separate Opinion of Judge Eboe-Osuji, para.8.
[293] Al Mahdi Reparations Order, para.146.

> has due regard to the rights of the Defence, which is given three types of opportunities to make representations: (i) by making observations before the trial chamber on the draft implementation plan submitted by the Trust Fund, including on the devised screening process; (ii) by being given the opportunity to make representations when the preliminary administrative recommendation on the eligibility of individual applications is positive; and (iii) by having the option of seizing the trial chamber at any time during the implementation phase 'on an exceptional basis and with specific relief sought.'[294]

Importantly, even after this screening process was designated to the TFV, the Defence was still able to bring matters directly to the attention of the Trial Chamber in exceptional circumstances, where it was seeking specific relief.[295]

195. The Defence in this case was never given access to the potential beneficiaries' applications, let alone the opportunity to present observations thereon, despite repeated requests.[296] As such, the 8 March Reparations Order sets out a regime that fails to respect the Convicted Person's process right to a meaningful opportunity to challenge the reparation claims,[297] and must accordingly be re-done.

d) Trial Chamber VI was required to rule on individual applications for reparations for the purpose of setting the appropriate amount of Bosco Ntaganda's liability[298]

196. As discussed above, in *Lubanga*, the Appeals Chamber carved out a narrow exception to the requirement that a Trial Chamber explicitly rule on the merits of each individual request for reparations, in the case where **only** collective reparations had been ordered pursuant to rule 98(3) of the Rules.[299] Trial Chamber VI in *Ntaganda* appears to have relied on this narrow exception to render all victims' applications irrelevant to the issues addressed in the 8 March Reparations Order. This approach is erroneous.

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[294] *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Decision on Trust Fund for Victims' Draft Implementation Plan for Reparations, 13 July 2018, ICC-01/12-01/15-273-Red, para.70, ("Al Mahdi Decision on TFV Draft Implementation Plan'').
[295] Al Mahdi Decision on TFV Draft Implementation Plan, para.106.
[296] 3 October Defence Observations, paras.20-23; Defence Request for Clarifications, paras.11, 17, 19; Defence Final Submissions, para.144; 28 January Defence Observations, paras.29-34.
[297] Separate Opinion of Judge Eboe-Osuji, para.8.
[298] Ground 12.
[299] First Lubanga Appeals Judgment on Reparations, para.152.

197. Even if a Trial Chamber is not required to explicitly rule on the merits of each individual application for reparations (which is not the case here given the individualised components), the victims' applications remain essential to an informed decision about the quantum of the award.

198. First, without deciding whether victim applicants are eligible for reparations, the Trial Chamber is forced to make the central decisions about the reparations regime completely in the dark. In *Lubanga*, for example, Trial Chamber II made a direct link between calculating Mr Lubanga's liability and an assessment and review of application forms themselves.[300] Its approach was confirmed on appeal, with the Appeals Chamber finding that Trial Chamber II was correct in considering all the information available, *including the applications by victims*, to set the amount of liability.[301] As held by His Honour Judge Eboe-Osuji, it would be "preferable for the Trial Chamber to assess victims' eligibility before it sets the amount of the convicted person's liability for reparation. As a matter of legal practice and precedent, this makes more sense." This is because, according to Judge Eboe-Osuji, the Trial Chamber would be in a position to assess information contained the application forms "thus better enabling it to make proper findings as to the total number of eligible victims. This finding would, in turn, directly underlie the Trial Chamber's determination of the scope and extent of harm and the resulting cost to repair that harm." For His Honour, to reverse this process would amount "in a manner of speaking, to an awkward approach that puts the proverbial cart before the horse."[302]

199. This, of course, makes sense. And there is a more fundamental consideration at play. A Trial Chamber is not entitled to simply assume that all, or a significant majority, or even half of the applications have been submitted by individuals who are eligible beneficiaries. The practice of the Court certainly demonstrates that among

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[300] *Prosecutor v. Thomas Lubanga Dyilo*, Order for the Transmission of the Application Files of Victims who may be Eligible for Reparations to The Defence Team of Thomas Lubanga Dyilo, 22 February 2017, ICC-01/04-01/06-3275-tENG, para.12.
[301] Second Lubanga Appeals Judgment on Reparations, para.141.
[302] Separate Opinion of Judge Eboe-Osuji, para.7 [footnotes omitted].

victims' applications there will be a percentage that will not be eligible,[303] hence the time and effort invested by other Trial Chambers is performing this assessment. A system whereby the amount of reparations is set *without any assessment* of whether the potential victims are eligible, will set a precedent whereby the *submission of applications alone* will increase the scope of the award. This would expose the entire reparations process to manipulation, if the mere process of sending application forms by their hundreds or thousands would have the potential to dramatically shape the award and the liability of the Convicted Person.

200. It is clear that the Trial Chamber was determined to skip the step of reading or engaging with the victims' applications. However, these applications are at the heart of the process it was obliged to perform. Failing to rule on the eligibility of victims made the Trial Chamber unable to assess the amount of Mr Ntaganda's liability. By simply stabbing in the dark, the Trial Chamber was engaging in a flawed methodology, which further undermines the 8 March Reparations Order.

III. Trial Chamber VI erred by delegating judicial functions to an administrative body, *i.e.* the Trust Fund for Victims[304]

201. The Trust Fund for Victims is an administrative body, comprised of unelected officials and staff. The extent to which it can assume judicial functions in the context of reparations remains unsettled and controversial.

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[303] 15 December Decision, para. 25 ("as such, victims authorised to participate in the trial proceedings alleging to have suffered harm in Kilo and/or Kilo-Mission during the Second Operation between on or around 18 February and on or about 26 February 2003 are not eligible for reparations in the Ntaganda case."); Katanga Decision on Transgenerational Harm, paras. 141-142 ("On the basis of the foregoing, the Chamber considers that the evidence brought in support of the applications for reparations assessed above does not establish, to the standard of proof of a balance of probabilities, the causal nexus between the psychological harm suffered and the crimes of which Mr Katanga was convicted."); Second Lubanga Decision on Reparations, para.190 ("The Chamber is satisfied that 425 of the 473 potentially eligible victims in the sample have shown on a balance of probabilities that they are victims – direct or indirect – of the crimes of which Mr Lubanga was convicted and, accordingly, are entitled to reparations awarded in the case. The Chamber has found that 48 persons have not proven on a balance of probabilities that they qualify as victims for the purposes of reparations in the case.").

[304] Ground 11.

202. In early cases, the determination of victims' eligibility in the context of reparations was held to be a *judicial function*.[305] As noted by Honour Judge Ibáñez Carranza, "[i]n the context of judicial proceedings, making a determination as to the liability of the convicted person for reparations as well as the eligibility of victims **is** *the responsibility of judges*. Determining who is and who is not a victim is part of the power of judges." According to Her Honour "[t]his is because, within the framework of the Rome Statute, the task of adjudicating on the condition of a person who is legally recognised as a **victim entitled to reparations is to be performed only by the elected judges, who were vested by the international community with international jurisdiction and powers to adjudicate these matters**."[306]

203. Seemingly overwhelmed by the volume of victim applications in *Al Mahdi*, the Trial Chamber in that case was explicit that its decision to delegate its judicial functions to the TFV was a result of "the impracticability of identifying all those meeting its individual reparations parameters" which it found "justifies an eligibility screening during the implementation phase."[307] The legal basis to justify the deployment of this task to the TFV was that, according to the Trial Chamber, "the Appeals Chamber in *Lubanga* expressly took no position on whether a Trial Chamber would be required to rule on each individual reparations request if it decided to award reparations on an individual basis".[308]

204. Whether the volume of victims' applications can justify the designation of judicial functions to an administrative body remains controversial, as seen by the Appeals Chamber subsequently re-inserting the Trial Chamber into the *Al Madhi* reparations process to make the final determination on contested eligibility claims.[309]

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[305] See for example, First Lubanga Appeals Judgment on Reparations, para.152; Katanga Order for Reparations, para.33; *Prosecutor vs. Jean-Pierre Bemba Gombo*, Registry's observations pursuant to Trial Chamber Order ICC-01/05-01/08-3410 of 22 July 2016, 31 October 2016, ICC-01/05-01/08-3460-AnxII, para.86.
[306] Judge Ibáñez Carranza Separate Opinion, para.27 [emphasise added].
[307] Al Mahdi Reparations Order, para.144.
[308] Al Mahdi Reparations Order, para.142.
[309] Al Mahdi Appeal Judgment on Reparations, para.72.

Importantly, the Trial Chamber in *Al Madhi* set out an extremely detailed step-by-step roadmap for the TFV to follow when performing eligibility assessments, with built-in safeguards to ensure that the rights of the convicted person would be taken into account throughout the process, requiring that "Mr Al Mahdi be afforded an opportunity to present informed views and concerns regarding the individuals claiming to be owed individual reparations from him".[310]

205. Regardless of the ultimate position taken on the propriety of the TFV's involvement, it is clear that the *extent of the abdication of judicial functions to the TFV in the Ntaganda case is entirely unprecedented*. Not only has the Trial Chamber left the TFV to its own devices to figure out "the way in which **it expects** to conduct the administrative eligibility assessment",[311] it has failed to adequately "identify the modalities of reparations that are appropriate for the circumstances of that case".[312] The Appeals Chamber in *Lubanga* set strict parameters for the Trial Chamber's resort to the TFV, none of which have been followed in this case. The regime put in place is not one whereby the TFV designs and implements on the basis of well-defined decisions and guidelines from the judiciary; rather it represents a wholesale abdication of the Trial Chamber's functions, in a manner outside what was contemplated by the Appeals Chamber.

a) Trial Chamber VI erred by failing to set clear criteria for the assessment of the eligibility of victims to benefit from reparations

206. The criteria for victims' eligibility in *Al Madhi* is found in paragraph 146 of the Al Mahdi Reparations Order, and spans three pages. When designating the "administrative screening" to the TFV in that case, the Trial Chamber set out:

- that screening process itself must respect the rights of both the victims and the convicted person;
- the process through which the TFV should identify eligible victims (through "reasonable efforts and the use of a timeframe);

[310] Al Mahdi Reparations Order, para.146.
[311] Impugned Decision, para.253 [emphasize added].
[312] First Lubanga Appeals Judgment on Reparations, para.200.

- the process through which individuals who want to be considered for the screening process should make themselves known, and what they should provide (a reparations application and any supporting documents);
- the process for applicants who have already filed reparations applications;
- the TFV's order of priority in screening applicants;
- the requirement that the Defence be given an opportunity to make representations before any TFV assessment of eligibility;
- the limits on the information on which a TFV decision on eligibility can be based (being information to which the Defence has had an opportunity access and respond);
- the need for the Defence to be able to present informed views and concerns, and the limits on the provision of victim applications to Mr *Al Mahdi* (consent of the victim);
- the process for the communication of the screening results.

207. In the present case, the Trial Chamber instructed the TFV "to include in its draft implementation plan a detailed proposal **as to the way in which it expects to** conduct the administrative eligibility assessment, based on the eligibility requirements established by the Chamber in the present order".[313] The Trial Chamber provided no more guidance than that. No procedure was laid out for the timeframes, the process, any distinction to be drawn between prior and new applicants, or their respective prioritisation, the limits on information which should form part of the assessment, or what should happen with the results. Significantly, no mention is made of the involvement or rights of the Defence in the screening process, or any overview by the Trial Chamber.

208. This is manifestly inadequate. The delegation of a Trial Chamber's functions in this process cannot be done by merely instructing the TFV staff to figure it out by themselves. At a minimum, the Trial Chamber should have set out a clear procedure for the TFV to follow, at least with the same level of detail as in *Al Mahdi*. The process of determining *which* individuals will benefit from the ultimate reparations award is not an ancillary consideration, it is at the heart of the reparations process. If the Trial Chamber is unwilling to directly engage in this question, it must at least give

[313] Impugned Decision, para.253 [emphasize added].

the TFV the guidance it needs to be able to do it, in order to ensure that the screening process itself "respects the rights of both the victims and the convicted person",[314] which is a determination that must, ultimately and always, lie with Trial Chamber.

209. A further error was the Trial Chamber listing the "harms suffered by indirect victims", but without then linking these harms to the crimes that form part of the conviction.[315] It appears that Trial Chamber VI has taken its lead from the *Lubanga* Order. Indeed, of the six "harms" of indirect victims identified, four of them have been copied almost directly across. The problem with this shortcut, is that Mr Lubanga was convicted only for the conscription and use of child soldiers, whereas Mr Ntaganda was convicted of 18 different crimes under the Statute.[316] As such, the Trial Chamber was required to engage with the scope of the conviction, rather than simply listing generic harm for indirect victims with no link to the different crimes. This is another factor that must be corrected in a new reparations order.

b) Trial Chamber VI erred by failing to adequately identify the modalities of reparations considered appropriate, thereby impeding the right of the Convicted Person to challenge the 8 March Reparations Order on appeal

210. The Trial Chamber correctly defined 'modalities' as "the specific means identified to address the types of harm subject to reparation".[317] In "Part IV. Principles on Reparations" the Trial Chamber then lists and explains the different reparation modalities available.[318] In "Part V. Order for Reparations Against Mr Ntaganda", the Trial Chamber then acknowledges its obligation to *identify the modalities of reparations* that the Trial Chamber considers appropriate based on the circumstances of the specific case before it".[319]

[314] Al Mahdi Reparations Order, para.146.
[315] Impugned Decision, para.183(d).
[316] Trial Judgement Disposition VII; confirmed on appeal see Appeals Judgement.
[317] Impugned Decision, para.82.
[318] Impugned Decision, paras.82-88.
[319] First Lubanga Appeals Judgment on Reparations, para.32.

211. However, rather than identifying and determining the modalities with reference to the harms suffered, the Trial Chamber goes on to find that "**in principle**, the following modalities of reparation **appear** appropriate to address the harms caused", before reciting the same shopping list of reparations identified in Part IV. The Trial Chamber then concludes that "[i]t is possible that not all the modalities outlined above may ultimately be included in such a plan. In this respect, should the TFV consider that any of the above modalities of reparations is not appropriate, it is instructed to include in its draft implementation plan an explanation regarding the reasons".[320]

212. In reality therefore, the 8 March Reparations Order does little more than list the available modalities options, and leave the choice to the TFV. This cannot reasonably be characterised as meeting "its obligation to **identify the modalities of reparations** that the Trial Chamber considers appropriate based on the circumstances of the specific case before it".[321] That the modalities remain unclear is demonstrated by an ICC job advertisement issued on 4 June 2021, searching for a "Reparations Expert", which states in relation to the *Ntaganda* Reparations Order that "[t[he modalities of reparations **may include** measures of restitution, compensation, rehabilitation, and satisfaction, **which may incorporate, when appropriate**, a symbolic, preventative, or transformative value."[322]

213. The failings in the Trial Chamber's approach contrast with the approach in other cases; the Trial Chamber in *Katanga*, for example, noted that the LRV had advanced four specific types of collective modalities to address the harm, being "(1) a housing support measure; (2) an income-generating activity support measure; (3) an education assistance measure; and (4) a measure designed to provide psychological support". The *Katanga* Chamber went on to hold that:

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[320] Impugned Decision, para.212 [emphasize added].
[321] First Lubanga Appeals Judgment on Reparations, para.32.
[322] ICC, Career Opportunities: Reparations Experts, 4 June 2021, consulted on 5 June 2021 [emphasize added].

> it is the Chamber's view that the collective reparations must be designed to benefit each of Mr Katanga's victims it has identified. Thus, to its mind, the four modalities of collective reparations put forward by the Legal Representative allow the individual needs of the victims in question to be addressed. What is more, in the Chamber's opinion, the four modalities could contribute in a meaningful manner to the reparation of the harm which the victims suffered, individually and collectively.[323]

214. The contrast with the 8 March Reparations Order in the present case is marked. By failing to sufficiently identify the modalities of reparations, the Trial Chamber has also materially impeded Mr Ntaganda's right to challenge elements of the 8 March Reparations Order on appeal. The modalities of the reparations are a central part of the 8 March Reparations Order, and Mr Ntaganda should be able to make concrete submissions about the modalities that will be implemented in this case. Leaving the question open makes it impossible for Mr Ntaganda to bring effective challenges given that, according to the Trial Chamber "not all the modalities outlined above may ultimately be included in such a plan".[324]

IV. Trial Chamber VI erred by failing to put in place a monitoring system allowing it to exercise oversight over the administrative decisions of the TFV[325]

215. The unprecedented level of delegation of duties to the TFV in *Ntaganda*, has also been accompanied by an unprecedented lack of supervision from the Trial Chamber of the reparations process.

216. The TFV has been asked to "design the award for reparations" and "determin[e] the size and nature of the reparations awards".[326] It has then been instructed to provide "a draft implementation plan and submit it for the Chamber's approval within six months".[327] While it is therefore clear that the Trial Chamber retains the ability to approve (or not) the design, size and nature of the awards as

[323] Katanga Order for Reparations, para.302 [footnote omitted].
[324] Impugned Decision, para.212.
[325] Ground 10.
[326] Impugned Decision, para.248.
[327] Impugned Decision, para.249.

decided by the TFV, it does not appear that the Trial Chamber envisaged any other type of supervision, monitoring, or oversight over this process. As such, the 8 March Reparations Order establishes a regime that is incompatible with the prior practice of the Court, for the reasons discussed below.

a) Trial Chamber VI erred by failing to put in place a system to pronounce on the decisions of the TFV on the eligibility of victims to benefit from reparations[328]

217. The identification of new potential beneficiaries, and determinations of eligibility, appear to rest solely with the TFV. No kind of monitoring of this process, or review of these decisions, even in terms of adjudicating contested issues, can be found within the 8 March Reparations Order.

218. In *Lubanga*, Trial Chamber II monitored the TFV's actions in the implementation phase, monitoring the screening process, the decisions on the eligibility of potential beneficiaries, and implementation activities. The Amended Order allowed for the Trial Chamber to "be seized of any contested issues arising out of the work and the decisions of the TFV."[329] The Trial Chamber was required to "monitor and oversee the implementation stage", which was found to encompass more than simply approving the draft implementation plan. [330]

219. The same broader monitoring role was foreseen by the Trial Chamber in the *Katanga* reparations proceedings as an integral part of the Reparations Order:

> The Chamber will require regular updates from the TFV in order to monitor and oversee the implementation of the Draft Plan […] any matter of contention arising from the activities and decisions of the TFV may be brought before the Chamber at any point in the procedure.[331]

[328] Ground 10.
[329] First Lubanga Decision on Reparations, para.286.
[330] Amended Order 3 March 2015, para.76.
[331] Katanga Order for Reparations, para.313-314.

Following this, a more formal reporting system was put in place in *Katanga*, with the TFV being required to report to the Trial Chamber every six months.[332]

220. The Appeals Chamber confirmed this approach following the appeal of the Reparations Order in *Al Mahdi*, finding that:

> it is for the Trial Chamber, in the exercise of its judicial functions, to make final determinations on individual victim applications where administrative decisions of the TFV are contested or *proprio motu*. Therefore, victim applicants, who are not found eligible for individual reparations, are entitled to request that the Trial Chamber review any such decision.[333]

Again, in *Al Mahdi*, the TFV itself later proposed a detailed screening procedure whereby it was required to report every three months to the Trial Chamber on the progress achieved.[334]

221. As such, while the TFV was used in other cases to assist the Trial Chamber in the design and implementation of the reparations award, it remained incumbent on the Trial Chamber to outline how it intends to exercise its judicial functions over the TFV's activities. And while additional layers of monitoring were put in place *after* the Reparations Orders in *Al Mahdi* and *Katanga*, there is no indication that the Trial Chamber in the present case intends to revisit the issue, nor any reason why monitoring procedures could not have been incorporated in the current 8 March Reparations Order.

222. In *Ntaganda*, not only does the Trial Chamber appear unwilling to exercise any judicial functions over the TFV's activities, but also fails to give proper consideration to the capacities (and limitations) of the TFV to assume the monumental task which it

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[332] *Prosecutor v. Germain Katanga*, Public redacted document Draft implementation plan relevant to Trial Chamber II's order for reparations of 24 March 2017 (ICC-01/04-01/07-3728), 25 July 2017, ICC-01/04-01/07-3751-Red, para.153.

[333] Al Mahdi Appeal Judgment on Reparations, para.72.

[334] *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Public redacted version of "Corrected version of Draft Implementation Plan for Reparations, With public redacted Annex I, 20 April 2018, ICC-01/12-01/15-265-Conf", 30 April 2018 ICC-01/12-01/15-265-Conf-Corr+Corr-Anx, 18 May 2018, ICC-01/12-01/15-265-Corr-Red, paras.38, 279.

is being assigned. This is of particular importance, given that the TFV was not conceptualised as an organ to play such an active role in the screening system, and make decisions on the eligibility of tens or hundreds of thousands of potential beneficiaries.

223. The TFV's limitations in this regard were recognised by the Independent Experts ("Independent Experts") who drafted the *Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report* issued in September 2020 ("IER"). The Independent Experts found "the TFV – in its current set-up – to be overstretched and unable to effectively and meaningfully carry out its reparations and assistance mandates".[335] As a related recommendation, the Independent Experts recommended that the TFV limit its activities to "its original mission as a trust fund, with functions restricted to fundraising, administration of the funds and release of funds as ordered by the Court."[336]

224. Relevantly, the Independent Experts suggested that a means through which the Trial Chamber could extricate from the monitoring of the implementation phase, was for VPRS to be charged with identifying beneficiaries and collecting application forms.[337] The Experts recommended that "[r]esponsabilities and resources related to implementation of reparations and assistance mandates should be gradually moved under the Registry's authority, to the VPRS",[338] given that VPRS is the organ with the knowledge and experience allowing for an effective collection of victim's applications,[339] rather than the TFV.

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[335] Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report, 30 September 2020, ICC-ASP/19/16, para.942.
[336] Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report, 30 September 2020, ICC-ASP/19/16, R354.
[337] Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report, 30 September 2020, ICC-ASP/19/16, paras.921-923.
[338] Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report, 30 September 2020, ICC-ASP/19/16, R358.
[339] Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report, 30 September 2020, ICC-ASP/19/16, paras.905, 910.

225. Of course, recommendations made by the Independent Experts are not binding or even persuasive in the adjudication of issues before the Court. However, given that they were produced after a rigorous study of the role of the TFV and the Registry in the reparations phase, they lend support to the Defence argument that the Trial Chamber erred in delegating its functions to the TFV, without due consideration of its limitations, and without any appreciable oversight or monitoring.

V. Trial Chamber VI erred by determining that the number of potential new beneficiaries ranged between 1,100 and 100,000[340]

226. The amount of liability to be set against Mr Ntaganda must be "fair and properly reflects the rights of the victims, bearing in mind the rights of the convicted person".[341] The Trial Chamber acknowledged the "importance to set the amount with precision, with caution, rely[ing] 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".[342] In the *Ntaganda* case, this was not done.

227. The Trial Chamber, after considering the different estimates of the parties, determined that the number of potential new beneficiaries ranged "from 'at least approximately 1,100' to 'a minimum of 100,000 across all locations affected by Mr Ntaganda's crimes'".[343] It is not reasonable for a Trial Chamber to set an amount of liability on this basis. A range of nearly 100,000 people is manifestly imprecise. It does not flow from any considered analysis, but rather amounts to nothing more than the Trial Chamber taking the high point, and low point from within the parties' submissions, and saying "anything in between".

228. The *Lubanga* Trial Chamber II's estimate of "hundreds and possibly thousands more victims" already drew the criticism of His Honour Judge Eboe-Osuji, on the

[340] Ground 14.
[341] Second Lubanga Appeals Judgment on Reparations, para.108.
[342] Impugned Decision, para.228.
[343] Impugned Decision, para.246.

basis that while Trial Chambers should have a reasonable margin of appreciation in assessing reparations:

> it must be emphasised that such margins are also reasonably constrained by the requirements of due process of the law in which defendants also have rights that must be respected. It does distort the idea of the burden of proof, if a convicted person is held liable for reparation in favour of a victim before that victim has proved his or her eligibility. The procedure for the demonstration of eligibility should be the natural and logical antecedent to the reparation award.[344]

229. Simply accepting the highest and lowest estimates as a reasonable range, also sets an unhelpful precedent, whereby parties could be motivated to under or over-estimate victims numbers, in the knowledge that their estimates will serve as a starting or ending point for an assessment of liability. This cannot be accepted as a reasonable basis on which to design any meaningful award of reparations.

a) Trial Chamber VI erred by disregarding the estimates provided by the Registry/VPRS and the Appointed Experts[345]

230. In fact, the Trial Chamber had before it more accurate and specific numbers to guide its assessment. VPRS consistently suggested that the number of new potential beneficiaries would be 1,100.[346] Added to the number of participating victims and the number of eligible victims in *Lubanga* (assuming that an overlap exists with the present proceedings), the Trial Chamber had sufficient information to have made a credible and reasonable assessment of potential beneficiaries.

231. Alternatively, the Joint Experts submitted that the direct victims are likely comprised of about 3,500 victims, considering the number of participating victims (before VPRS' final assessment), the number of child soldiers in *Lubanga* that had already applied in the present case, and the number of potential new beneficiaries suggested by VPRS in the context of its mapping exercise.[347] Although not all victims who fall within the scope of a reparations award in this case will be direct victims,

[344] Second Lubanga Appeals Judgment on Reparations, para.12 [footnote omitted].
[345] Ground 14.
[346] Registry Second Report, Annex I, para.39.
[347] Joint Experts Report, paras.26-29.

this was certainly a reasonable basis from which the Trial Chamber could have begun its calculations. To disregard these estimates and make reference instead to the outlying figure of "at a minimum of 100,000 victims", was manifestly unreasonable, and undermines the resulting order.

b) Trial Chamber VI erred by failing to duly consider and apply the precedent in Lubanga regarding the estimation of potential beneficiaries of reparations[348]

232. In its final observations prior to the issuance of the 8 March Reparations Order, the Defence submitted that the Trial Chamber should be guided by the precedent set in *Lubanga* regarding an estimation of the number of eligible victims, and its effect on the calculation of the quantum of reparations liability.[349]

233. Relevantly, in *Lubanga*, the TFV had submitted that number of eligible victims was approximately 3,000,[350] while the Trial Chamber estimated that the number of potential beneficiaries would fall between 2,451 and 5,938.[351] As at December 2020, the number of victims authorized to receive reparations was 933.[352] This represented about one third of the TFV's estimate. Although Trial Chamber II extended the time within which victims could submit applications to 1 October 2021,[353] the Trial Chamber authorized only 161 additional victims to the total group as of May 2021, for what is in the public record.[354]

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[348] Ground 14.
[349] Defence Final Submissions, para.115.
[350] *Prosecutor v. Thomas Lubanga Dyilo*, Redaction of Filing on Reparations and Draft Implementation Plan, 3 November 2015, ICC-01/04-01/06-3177-Red, para.253.
[351] Second Lubanga Decision on Reparations, paras.222.
[352] *Prosecutor v. Thomas Lubanga Dyilo*, Rectificatif de la Version publique expurgée de la Décision faisant droit à la requête du Fonds au profit des victimes du 21 septembre 2020 et approuvant la mise en œuvre des réparations collectives prenant la forme de prestations de services, 5 March 2021, ICC-01/04-01/06-3495-Red-Corr, para.106.
[353] *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the submission by the Legal Representative of Victims V01 in its Response to the Twelfth Report of the Trust fund for Victims on the implementation of collective reparations, filing ICC-01/04-01/06-3500-Conf-Exp, 26 March 2021, ICC-01/04-01/06-3508.
[354] *Prosecutor v. Thomas Lubanga Dyilo*, Quatrième décision sur les décisions administratives du Fonds au profit des victimes portant sur de nouvelles demandes en réparation ainsi que la demande a3021320, 3 February 2021, ICC-01/04-01/06-3499, pp.9-10; *Prosecutor v. Thomas Lubanga Dyilo*, Fifth Decision on the TFV's administrative Decisions on applications for reparations, 10 May 2021, ICC-01/04-01/06-3514, p.5.

234. Against this backdrop, the LRV1 estimation that 3,000 child soldiers will come forward in these proceedings[355] is unreasonable, given the significant overlap in the convictions between Mr Ntaganda and Mr Lubanga. CLR1's submission, that the number of former child soldiers who will seek reparations in this case will be higher because Mr Ntaganda is not a Hema, is utterly without merit and should not have been considered by the Trial Chamber in any way.[356]

235. Nor was it reasonable for Trial Chamber VI to make reference to the cut-off date for victim applications in *Lubanga* as a reason that the ultimate number was lower than anticipated. The Trial Chamber reiterated that Trial Chamber II had estimated that "hundreds and possibly thousands more victims suffered harm as a consequence of the crimes for which Mr Lubanga was convicted",[357] before noting that the Trial Chamber had set a cut-off date for new potential beneficiaries, thereby suggesting that this limitation was a reason for the much lower-than-anticipated number.[358] It must be underlined that the *Lubanga* Trial Judgment was issued in 2012,[359] the Appeals Judgment in 2014,[360] and the cut-off date to apply for reparations was October 2021,[361] *seven years after* the judgement against Mr Lubanga became final. The alleged "hundreds and possibly thousands of victims" in *Lubanga* had sufficient time to register their interest in reparations, making the Trial Chamber's reliance on these "possibly thousands" of victims, again, unreasonable.

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[355] LRV1 Final Submissions, para.37.
[356] Impugned Decision, para.233.
[357] Second Lubanga Decision on Reparations, paras.278-279, 292.
[358] Impugned Decision para.235.
[359] *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842.
[360] *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, ICC-01/04-01/06-3121-Red.
[361] *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the submission by the Legal Representative of Victims V01 in its Response to the Twelfth Report of the Trust fund for Victims on the implementation of collective reparations, filing ICC-01/04-01/06-3500-Conf-Exp, 26 March 2021, ICC-01/04-01/06-3508.

c) Trial Chamber VI erred by according weight to the LRV2's estimates[362]

236. For its part, LRV2 did not agree with VPRS's assessment of the potential new beneficiaries and maintained that the number of potential beneficiaries would approximate 100,000 victims. This number found no support in any evidence on the record.[363]

237. On 18 December 2020, the Trial Chamber issued its decision on LRV2's request to order the Registry to collect data concerning the number of individuals residing "in and around" the affected locations, in order to support its suggestion that the number of affected victims equates with this expanded number of residents.[364] In rejecting this request, the Single Judge noted that in order to be entitled to reparations in the *Ntaganda* case, victims must have suffered harm as a result of a crime for which Mr Ntaganda has been convicted, and that the language "in or around" was retained in the Judgment only in relation to houses burned down in two specific locations, relevant only for counts 10 and 18 for which Mr Ntaganda was convicted.[365] This finding already undermines the LRV2's approximation of 100,000, which was premised on the kind of broad estimates that had already been rejected by the Single Judge.

238. In this context, the Trial Chamber should never have entertained the estimate of 100,000 victims, let alone setting it as the high-point of a proposed range. These estimates were without a basis in either the record of the case, the practice of the Court, or any sensible assessment of eligibility. In according weight to this manifestly unreasonable figure, the Trial Chamber erred.

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[362] Ground 14.
[363] 28 February 2020 LRV2 Submissions, para.72.
[364] Decision Rejecting LRV2 Request for an Order.
[365] Decision Rejecting LRV2 Request for an Order, para.16.

VI. Trial Chamber VI erred and abused its discretion in assessing Mr Ntaganda's liability at US$ 30,000,000[366]

239. In setting Mr Ntaganda's liability at USD 30,000,000, the Trial Chamber made three significant errors which undermine this assessment, and provide further justification for a new Reparations Order.

240. The Trial Chamber correctly articulated that in assessing the quantum of Mr Ntaganda's liability, it would need to look at "the applicable law, as interpreted by the Appeals Chamber, the estimated number of potentially eligible victims, and the cost to repair the harms they suffered."[367] However, the Trial Chamber neither correctly applied the relevant law, nor took into account the estimated number of eligible victims, nor did it set a cost to repair the harms the victims suffered. Instead, the Trial Chamber adopted an *ex aequo et bono* approach to reach an amount which is untethered to the considerations it was required to take into account, and incompatible with the practice of the Court.

a) Trial Chamber VI erred in ruling that "the number of potential beneficiaries is not a precondition to the issuance of the reparations order" and thereby failing to establish an estimate of potential beneficiaries for the purpose of setting the amount of liability

241. While correctly acknowledging the need "to make every effort to obtain calculations that are as accurate as possible",[368] the Trial Chamber incorrectly asserted that determining "the number of potential beneficiaries is not a precondition to the issuance of the reparations order."[369] In doing so, the Trial Chamber relies on the following paragraph in the *Lubanga* reparations decision:

> Given the uncertainty as to the number of victims of the crimes in this case - save that a considerable number of people were affected - and the limited number of individuals who have applied for reparations, the Court should

[366] Ground 15.
[367] Impugned Decision, para.226.
[368] Impugned Decision, para.228.
[369] Impugned Decision, para.231.

> ensure there is a collective approach that ensures reparations reach those victims who are currently unidentified.[370]

242. While this paragraph, which appears under the heading "Scope of reparations" certainly makes reference to a collective approach to ensure reparations reach unidentified victims, it does not stand for the more general proposition that a Trial Chamber is relieved from determining the number of beneficiaries before fixing the quantum of liability. Nor does it stand for the idea that a reference to a range nearly 100,000 wide can stand as a reasonable basis upon which to assess how much a Convicted Person must pay.

243. Indeed, as has been argued in Part III Section V, because the primary function of a reparations award is to repair the harms arising from the crimes,[371] the number of potential beneficiaries is an essential ingredient to understanding the extent of the damages and harms caused by the crimes for which Mr Ntaganda has been convicted, and his resultant financial liability. The demonstration of eligibility "should be the natural and logical antecedent to the reparation award."[372] With no knowledge of how many victims are likely to benefit from reparations, setting a financial number becomes a completely arbitrary exercise, in violation of the rights of the Convicted Person.

244. At the very least, and as it was done in *Lubanga*,[373] Trial Chamber VI should have determined the eligibility of as many victims as possible and set a reasonable estimate of the number of potential victims before setting an amount. By relieving itself of the obstacle of estimating the number of potential beneficiaries, the Trial Chamber erred in law, and its resultant finding of financial liability has no basis and must be quashed.

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[370] Impugned Decision, para.2331, referring to First Lubanga Decision on Reparations, para.219.
[371] Second Lubanga Appeals Judgment on Reparations, para.107.
[372] Separate Opinion of Judge Eboe-Osuji, para.12.
[373] Second Lubanga Appeals Judgment on Reparations, paras.119-120.

b) Trial Chamber VI erred by failing to provide objective calculations justifying the amount of US$ 30,000,000[374]

245. In the *Lubanga* appeal on the size of the award, the Appeals Chamber authorised the use of "estimates", *with caution* if the information and evidence on which a Trial Chamber relies does not allow it to set the amount of liability with precision. Specifically, however, the Appeals Chamber said "[i]n this regard, depending on the type of reparations contemplated, and the information it has managed to obtain, the trial chamber may have to rely on estimates **as to the cost of reparations programmes**. In doing so, it should, however, make every effort to obtain estimates that are as accurate as possible in the circumstances of the case." [375]

246. This was by no means a general invitation to rely only on "estimates" for all aspects of the assessment the financial award. To this end, the Trial Chamber's pronouncement that if it does not have the information to set an amount with precision it can "with caution, rely on estimates", makes no reference to these estimates being in relation to the cost of the reparations programs themselves, rather than the Convicted Person's liability.[376] Having freed itself from the burden of assessments and calculations, the Trial Chamber then appeared to feel able to simply "estimate" Mr Ntaganda's liability in the amount of USD 30,000,000, a figure which has no basis in any kind of objective calculation on its part.

247. In reality, the figures submitted by the Appointed Experts are *not* estimates of financial liability for the case at hand, but are wholly extrinsic figures. The Appointed Experts themselves said that they were "not in a position to assess themselves the costs of the collective reparations."[377] The figures provided by the TFV regarding its ten projects in Ituri implemented under its *assistance mandate* are again *not* estimates of the costs for repairing an identified harm in the present case,

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[374] Ground 15.
[375] Second Lubanga Appeals Judgment on Reparations, para.108 [emphasize added]. Second Lubanga Appeals Judgment on Reparations, para.108.
[376] Impugned Decision, para.228.
[377] Impugned Decision, paras.237-240.

but extrinsic figures of programs with a humanitarian purpose.[378] The amounts set in both *Katanga* and *Lubanga* to which the Trial Chamber refers are again *not* estimates of the costs of repairing an identified harm in the present case.[379]

248. Importantly, the Trial Chamber had already established categories of victims and the potential harms suffered by each of those categories within the Impugned Decision;[380] this should have been the starting point for its analysis and assessment of the relevant financial amount.[381] Then the estimates that were required – and which are wholly absent – would have been the amounts of the costs of repairing those identified harms and the estimated number of victims in each category. Moreover, the level of accuracy of those estimates would have needed to be demonstrated.[382] Only then could the Defence have been in a position to submit its views, or appeal the Impugned Decision in any meaningful way.

249. The Trial Chamber's approach of simply citing all figures provided by the TFV and Appointed Experts in their respective submissions is meaningless, in the absence of any explanation of how these figures were relevant to its overall assessment of financial liability.[383] Particularly given that the Appointed Experts' estimated damages do not correspond with the findings made by the Trial Chamber in the Sentencing Judgement, as set out in Part II, Section III d).[384]

250. After having failed make any findings on the number of potential beneficiaries, and having empowered itself to rely only on "estimates" in the assessment of financial harm, the Trial Chamber failed in discharging its duty of setting an amount representing the financial liability of Mr Ntaganda. Its errors in

[378] Impugned Decision, para.241.
[379] Impugned Decision, para.243.
[380] Impugned Decision, para.183.
[381] See Impugned Decision, para.228: "When determining the extent of harm, 'rather than attempting to determine the "sumtotal" of the monetary value of the harm caused', the Chamber should seek to define the harms and the appropriate modalities for repairing them, 'with a view to, ultimately, assessing the costs of the identified remedy'."
[382] Second Lubanga Appeals Judgment on Reparations, para.108.
[383] Impugned Decision, paras. 236, 242.
[384] See also Sentencing Judgment, para.153.

doing so materially impact the validity of the entire 8 March Reparations Order, warranting a reversal.

c) Trial Chamber VI erred by adopting a baseless ex aequo et bono *approach*[385]

251. Having failed to engage in any meaningful calculations or assessments in support of its figure of USD 30,000,000, the Trial Chamber appears to have erroneously adopted an *ex aequo et bono* approach to its assessment of Mr Ntaganda's liabiltiy. Although the lack of reasoning makes this unclear, it appears that the Trial Chamber's path to the figure of USD 30,000,000 was to take into account figures submitted by the participants, without discriminating between them in accordance with their relevance, and rely on its discretion, rather than calculations, to establish what seemed like a 'fair' amount of liability.

252. Despite the Trial Chamber's implication to the contrary, this approach finds no basis in the jurisprudence. In *Lubanga*, the Trial Chamber examined the estimated amount **per victim** which could be seen to repair the psychological, physical and material harms for a single category of victims, *i.e.* child soldiers. The Trial Chamber then exercised a certain degree of discretion and proceeded on an *ex aequo et bono* basis to set the amount of USD 8,000 per victim, which remained within the range of the amounts suggested by the participants who themselves had relied on calculations. Based on this first determination and on the number of eligible and potentially eligible victims, Trial Chamber II then set the total amount of Mr Lubanga's financial liability. Despite this quite clinical approach, the Appeals Chamber in *Lubanga* still held that "it would have been preferable for the Trial Chamber to set out clearly how the factors on which it relied impacted on its conclusion."[386]

253. In *Katanga*, the Trial Chamber's resort to an *ex aequo et bono* was similarly limited, being used to determine the costs of repair *per victim* of an identified harm,

[385] Ground 15.
[386] Second Lubanga Appeals Judgment on Reparations, para.118.

in a situation where the parties had not provided an estimate for it and/or for harm that was difficult to quantify.[387] The final amount of Mr Katanga's liability was assessed through calculations,[388] with the Trial Chamber determining the cost of repair for the different heads of harm (relying on the parties' estimates), considering the number of victims that suffered of each harm, and then arriving at a final amount.[389] This method was transparent and clear, providing certainty to both the victims and the convicted person.

254. As such, the Trial Chamber's approach of resorting to an *ex aequo et bono* approach to the entire amount of Mr Ntaganda's financial liability is unprecedented, incompatible with due process, and with the principle of proportionality. Indeed, the Defence agrees that without reliable and credible figures related to the different harms suffered by the identified categories of victims, the Trial Chamber was not in a position to determine a monetary amount that is proportional to the liability of the convicted person. This cannot justify, however, simply picking a figure that appears "fair". A failure to ground the figure in fulfilling a *restitutio in integrum* purpose means that it is, in fact, nothing more than a discretionary amount set by the Trial Chamber and therefore a punitive measure against Mr Ntaganda, rather than a reparations award linked to the conviction. Trial Chamber VI's error materially impacts the validity of the 8 March Reparations Order, warranting a reversal.

VII. Trial Chamber VI erred by failing to indicate and/or to take into account the joint liability between Mr Ntaganda and Mr Lubanga[390]

255. Next, the Trial Chamber failed establish how the joint liability between Mr Ntaganda and Mr Lubanga affected the amount of financial liability.

256. Trial Chamber VI held in relation to reparations to be granted to child soldiers, that Mr Lubanga and the Mr Ntaganda's are jointly and severally liable to

[387] Katanga Order for Reparations, para.191.
[388] Katanga Order for Reparations, paras.237-239.
[389] See Katanga Order for Reparations, paras.181, 190 and followings.
[390] Ground 15.

repair in full the harm suffered by overlapping victims, and that they shall both reimburse the TFV.[391] The Trial Chamber did not, however, provide any guidance as to how this ruling affects the final amount for which Mr Ntaganda is now liable. This absence of reasoning materially affects the total amount of liability provided by the Trial Chamber, and provides yet further justification for the quashing of the 8 March Reparations Order.

VIII. Conclusion for Grounds 10 to 15

257. Even had the Trial Chamber not been transparent about the impetus for issuing the 8 March Reparations Order within such a limited timeframe,[392] this would have been blindingly obvious from the vacuous nature of the Order itself. The Trial Chamber was working in the dark; no information about the number of potential beneficiaries; a very limited number of application forms, meaning no consent from groups of victims alleged to be in their tens of thousands; no engagement with the application forms themselves; no instructions or system in place for the TFV to perform a screening process; and no meaningful figures about the amounts necessary to repair the harm linked to the conviction beyond those copied from earlier cases.

258. Reparations are a complicated and resource-heavy procedure. In other cases, monumental efforts on the part of VPRS and LRVs gave victim communities the opportunity and ability to engage and consent to the reparations process, accompanied by monumental efforts on the part of Chambers and their staff to engage with the applications of potential beneficiaries, and work with experts to quantify the identified harms for the crimes forming part of the conviction. In *Ntaganda*, these steps are missing. Not only has the Trial Chamber failed to put in place a system whereby victims can consent and engage, it has then declined to engage with any of the victim applications received, failed to establish a meaningful procedure for their screening by the TFV, made no provision for the Convicted Person to challenge or review the assessment process, set a 100,000-wide margin of

[391] Impugned Decision, para.221.
[392] Impugned Decision, para.5.

beneficiary participation, before arriving at a figure that has no demonstrable or quantifiable link to the harms and victims groups identified.

259. This flawed methodology has resulted in a reparations order that risks being found illegitimate in the eyes of the victim community, and certainly fails to accord with the "the convicted person's internationally recognised due process right" to "a meaningful opportunity to challenge the reparation claims".[393] It should be quashed, and a new order put in place that follows the practice of the Court, and ensures compliance with the rights of the Convicted Person as established therein.

REQUEST FOR SUSPENSIVE EFFECT

260. Pursuant to article 82(3) of the Statute and rule 156(5) of the Rules and in light of the foregoing, alleging numerous errors committed by Trial Chamber VI when issuing the 8 March Reparations Order, the Defence respectfully requests suspension of the implementation of the Impugned Decision.

261. Taking into consideration the nature of the errors alleged to have been committed by Trial Chamber VI when issuing the 8 March Reparations Order, which impact all facets of the Impugned Decision, the possibility that the Impugned Decision will be reversed or amended is real.

262. Aspects of the Impugned Decision impacted by this appeal include the reparations process itself, the applicable principles, the implementation of the reparations order, the determination of Mr Ntaganda's liability and legal pronouncements directly related to the identification of harm suffered by victims and the eligibility of potential beneficiaries.

263. The likelihood of the Impugned Decision being reversed or amended is strengthened by the Grounds of appeal included in the LRV2 Notice of Appeal,

[393] Separate Opinion of Judge Eboe-Osuji, para.8.

which raise similar arguments and concerns regarding the manner in which the Impugned Decision was adopted and the outcome of the 8 March Reparations Order.

264. The Appeals Chamber "[…] has the power to grant a request for suspensive effect under article 82(3) of the Statute and rule 156(5) of the Rules of Procedure and Evidence when seized of such a request in relation to an appeal under article 82 (4) of the Statute".[394]

265. In relation to when suspensive effect will be granted, the Appeals Chamber has previously explained:

> […] [t]he decision on such a request is within the discretion of the Appeals Chamber. Therefore, when faced with a request for suspensive effect, the Appeals Chamber will consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under the circumstances[395]

266. In past decisions, the Appeals Chamber, "[…] when deciding on requests for suspensive effect, has considered whether the implementation of the decision under appeal (i) 'would create an irreversible situation that could not be corrected, even if the Appeals Chamber were to find in favour of the appellant' (ii) 'would lead to consequences that would be very difficult to correct and may be irreversible', or (iii) 'could potentially defeat the purpose of the […] appeal'."[396]

267. Notably, the possible outcome of this appeal, includes *inter alia*: (i) a requirement being identified for reparations application forms to be transmitted to the Defence; (ii) a requirement being identified for the Defence to become involved in determining the eligibility of potential beneficiaries, both participating victims and new potential beneficiaries; (iii) a requirement being identified for Trial Chamber II becoming involved in some way in ruling on individual applications; (iv) a

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[394] *Prosecutor v. Thomas Lubanga Dyilo,* 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, 14 December 2012, ICC-01/04-01/06-2953, para.79 ("Lubanga Decision on the Admissibility of the Appeal").
[395] Lubanga Decision on the Admissibility of the Appeal, fn.195.
[396] Lubanga Decision on the Admissibility of the Appeal, fn.196.

requirement being identified for guidelines having to be issued to the TFV that would circumscribe its work during the implementation phase; (v) the eligibility of beneficiaries having to be reviewed pursuant to different criteria or using a different standard of proof; (vi) a lesser number of potential beneficiaries being identified; (vii) the liability of the Convicted Person being determined to be less than USD 30,000,000, thereby impacting the implementation of programs; and (viii) the implementation of the reparations process in this case having to be revisited to ensure it is in conformity with the *sui generis* scheme being developed by the Court. Needless to say, this list is not exhaustive.

268. Consequently, implementation of the Impugned Decision at this stage could result in considerable time being spent and resources being allocated by the TFV, as well as raised expectations of victims.

269. The criteria identified by the Appeals Chamber to grant suspensive effect are thus clearly met and it is in the interest of justice that the implementation of the 8 March Reparations Order be suspended until the Appeals Chamber rules on this appeal.

270. While the Defence acknowledges that implementation of the reparations process could be delayed as a result of the Appeals Chamber granting suspensive effect pursuant to article 82(3), it must also be taken into consideration that implementation of an amended, rectifying these errors, reparations order will certainly be swifter and more expeditious, one it is final.

271. What is more, it is significant that the suspension of the 8 March Reparations Order is without prejudice to the other activities that the TFV could undertake independently of the Impugned Decision, including activities pursuant to its

assistance mandate,[397] for the benefit of victims without specific reference to the responsibility of the Convicted Person.

272. The benefits associated with suspensive effect being granted far outweigh the potential adverse consequences.

RELIEF SOUGHT

273. In light of the foregoing and as a result of Trial Chamber VI's errors of law, fact and procedure, the Defence respectfully requests the Appeals Chamber to:

ORDER the immediate suspension of the Impugned Decision;

GRANT Mr Ntaganda's appeal;

QUASH the 8 March Reparations Order;

ISSUE a *new* or *significantly amended* reparations order;

OR, IN THE ALTERNATIVE,

REMIT the 8 March Reparations Order to Trial Chamber II; and

ORDER Trial Chamber II to issue a *new* or *significantly amended* reparations order, in conformity with the findings of the Appeals Chamber in its Judgment on this appeal.

RESPECTFULLY SUBMITTED ON THIS 7th DAY OF JUNE 2021

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands

[397] Regulation 50(a) of the Regulations of the Trust Fund.