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No.: **ICC-01/04-02/06**
Date: **9 August 2021**

THE APPEALS CHAMBER

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR v. BOSCO NTAGANDA

Public Document

Response of the Common Legal Representative of the Former Child Soldiers on Mr Ntaganda and the Victims of the Attacks' Appeals against the Reparations Order (ICC-01/04-02/06-2659)

Source: **Office of Public Counsel for Victims (CLR1)**

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I. INTRODUCTION

1. The Common Legal Representative of the Former Child Soldiers (the "Legal Representative") hereby files her Response to the Common Legal Representative of the Victims of the Attacks' (the "CLR2") and the Defence's Appeals against the Reparations Order.[1] The Legal Representative limits her observations to grounds of appeal directly affecting the interests of former child soldiers, direct and indirect victims, and their families.

2. Preliminary, in light of the present case's time line, the Legal Representative fails to see how a reparations order issued almost two years after the conviction of the accused and a year and a half after the sentencing decision, eight years after Mr Ntaganda's first appearance before the Court, and nearly 19 years after the crimes he was convicted for were perpetrated, can reasonably be qualified as being "*hastily*" issued.[2] Moreover, contrary to the Defence's contention, and as recently recognised by the jurisprudence of this Court, the Chamber did not miss "*the opportunity to further contribute to the development of a coherent and responsive ICC reparations process*",[3] but rather, "*adapted and expanded*" the "*consistent jurisprudence of the Court*" on reparations.[4]

3. For the reasons developed *infra*, the Legal Representative posits that none of the grounds of appeals put forward by either the Defence or the CLR2 are founded and therefore that both appeals shall be rejected.

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[1] See the "Defence Appellant Brief against the 8 March Reparations Order", No. ICC-01/04-02/06-2675 A5, 7 June 2021 (the "Defence Brief"); and the "Appeal Brief of the Common Legal Representative of the Victims of the Attacks against the Reparations Order", No. ICC-01/04-02/06-2674 A4, 7 June 2021 (the "CLR2 Brief").
[2] See the Defence Brief, *idem*, paras. 1, 5, 13, 14, 41 *et seq*., and 59 (referring therewith to a decision issued "*prematurely*").
[3] *Idem*, para. 4.
[4] See the "Order for Submissions on Reparations" (Trial Chamber IX), No. ICC-02/04-01/15-1820 A4 A5, 6 May 2021, para. 5(i)a.

II. PROCEDURAL BACKGROUND

4. On 8 July 2019, Trial Chamber VI (the "Chamber") convicted Mr Ntaganda of five counts of crimes against humanity and thirteen counts of war crimes.[5] A conviction that was fully confirmed by the Appeals Chamber on 30 March 2021.[6]

5. On 7 November 2019, the Chamber issued the Sentencing Judgment, imposing individual sentences for each of the counts for which Mr Ntaganda had been convicted and a joint sentence of 30 years.[7] A decision that was also entirely confirmed by the Appeals Chamber on 30 March 2021.[8]

6. On 8 March 2021, the Chamber issued the "Reparations Order", notably acknowledging the harm suffered by the victims and the corresponding needs in terms of reparations modalities. The Chamber thereby established Mr Ntaganda's liability, the principles on reparations, and the procedure for the preparation of the implementation plans by the Trust Fund for Victims.[9]

7. On 8 April 2021, the CLR2 and the Defence filed their respective Notice of Appeal against the Reparations Order.[10]

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[5] See the "Judgment" (Trial Chamber VI), No. ICC-01/04-02/06-2359, 8 July 2019 (the "Judgment").
[6] See the "Public redacted version of Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment'" (Appeals Chamber), No. ICC-01/04-02/06-2666-Red A A2, 30 March 2021 with AnxA and AnxB; as well as the "Separate opinion of Judge Howard Morrison and Judge Piotr Hofmański on the Prosecutor's appeal", No. ICC-01/04-02/06-2666-Anx1 A A2; the "Separate opinion of Judge Howard Morrison on Mr Ntaganda's appeal", No. ICC-01/04-02/06-2666-Anx2 A A2; the "Separate opinion of Judge Luz Del Carmen Ibáñez Carranza on Mr Ntaganda's appeal", No. ICC-01/04-02/06-2666-Anx3 A A2; the "Separate opinion of Judge Solomy Balungi Bossa on the Prosecutor's appeal", No. ICC-01/04-02/06-2666-Anx4 A A2; and the "Corrected version of partly concurring opinion of Judge Chile Eboe-Osuji", No. ICC-01/04-02/06-2666-Anx5-Corr A A2, all dated from the same day.
[7] See the "Sentencing judgment" (Trial Chamber VI), No. ICC-01/04-02/06-2442, 7 November 2019.
[8] See the "Public redacted version of Judgment on the appeal of Mr Bosco Ntaganda against the decision of Trial Chamber VI of 7 November 2019 entitled 'Sentencing judgment'" (Appeals Chamber), No. ICC-01/04-02/06-2667-Red A3, 30 March 2021.
[9] See the "Reparations Order" (Trial Chamber VI), No. ICC-01/04-02/06-2659, 8 March 2021 (the "Order").
[10] See the "Notice of Appeal of the Common Legal Representative of the Victims of the Attacks against the Reparations Order", No. ICC-01/04-02/06-2668 A4, 8 March 2021; and the "Defence Notice of Appeal against the Reparations Order, ICC-01/04-02/06-2659", No. ICC-01/04-02/06-2669 A5, 8 March 2021.

8. On 9 April 2021, the Appeals Chamber appointed Judge Perrin de Brichambaut to preside over the appeals against the Reparations Order.[11]

9. On 7 June 2021, the CLR2 and the Defence filed their respective documents in support of the appeal against the Reparations Order.[12]

10. On 9 June 2021, the Trust Fund for Victims (the "TFV") submitted its Report on its Preparation for an Initial Draft Implementation Plan with focus on Priority Victims (the "IDIP"),[13] to which the parties and the Registry were directed to file any observation they may have by 23 June 2021.[14]

11. On 11 June, the Appeals Chamber issued an Order setting a time limit for responses to the Defence request for suspensive effect contained in its Appeal Brief against the Reparations Order.[15] On 22 and 25 June respectively, the TFV and both LRV submitted their respective responses.[16]

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[11] See the "Decision on the Presiding Judge of the Appeals Chamber in the appeals against the decision of Trial Chamber VI entitled 'Reparations Order'" (Appeals Chamber), No. ICC-01/04-02/06-2670 A4 A5, 9 April 2021.

[12] See the Defence Brief and the CLR2 Brief, *supra* note 1.

[13] See the "Report on Trust Fund's Preparation for Draft Implementation Plan With Annex A Initial Draft Implementation Plan with focus on Priority Victims", No. ICC-01/04-02/06-2676-Conf and No. ICC-01/04-02/06-2676-Conf-AnxA, 9 June 2021. On 14 June, the TFV submitted a *Corrigendum* to said Annex A, No. ICC-01/04-02/06-2676-Conf-AnxA-Corr and No. ICC-01/04-02/06-2676-Conf-AnxA-Corr-Anx. See also No. ICC-01/04-02/06-2676-Red and No. ICC-01/04-02/06-2676-AnxA-Corr-Red2.

[14] See the "Order for the submission of observations on the initial draft implementation plan with focus on priority victims" (Trial Chamber II), No. ICC-01/04-02/06-2677, 10 June 2021. See also the "Registry Observations on the Trust Fund for Victims' Initial Draft Implementation Plan", No. ICC-01/04-02/06-2683, 23 June 2021; the "Defence Observations on the TFV initial draft implementation plan", No. ICC-01/04-02/06-2682-Conf, 23 June 2021; the "Response of the Common Legal Representative of the Former Child Soldiers to the TFV Initial Draft Implementation Plan with focus on Priority Victims", No. ICC-01/04-02/06-2681, 23 June 2021; and the "Public Redacted Version of the 'Observations of the Common Legal Representative of the Victims of the Attacks on the Trust Fund for Victims' Draft Initial Implementation Plan' (ICC-01/04-02/06-2680-Conf)", No. ICC-01/04-02/06-2680-Red, 28 June 2021 (the original confidential version thereof was filed on 23 June 2021).

[15] See the "Order setting a time limit for responses to the request for suspensive effect and invitation to the Trust Fund for Victims to submit observations on that request" (Appeals Chamber), No. ICC-01/04-02/06-2678 A4 A5, 11 June 2021.

[16] See the "Observations on the Defence Request for Suspensive Effect and Request under rule 103 of the Rules of Procedure and Evidence", No. ICC-01/04-02/06-2679 A4 A5, 22 June 2021; the "Response of the Common Legal Representative of the Former Child Soldiers to Mr Ntaganda Request for suspensive effect of the Reparations Order", No. ICC-01/04-02/06-2685 A4 A5, 25 June 2021; and the "Public Redacted Version of the 'Response of the Common Legal Representative of the Victims of the Attacks to

12. On 28 June, the TFV submitted additional observations regarding its IDIP.[17]

13. On 2 July 2021, the Appeals Chamber rejected the Defence's request for suspensive effect of the Reparations Order. The Chamber found that it has not been demonstrated that unless the Impugned Decision were suspended, its implementation would create an irreversible situation, lead to consequences that would be very difficult to correct, or potentially defeat the purpose of the appeals.[18]

14. The same day, the Defence requested the disqualification of Judge Lordkipanidze for the appeals against the Reparations Order.[19] On 8 July 2021, the Presidency set a calendar to receive any observations by the LRV and by Judge Lordkipanidze on said request, before convening a plenary session to address the request.[20]

15. On 16 July 2021, the TFV submitted a request to postpone the submission of its Draft Implementation Plan (the "DIP") by 17 December 2021. The TFV highlighted the difficulties posed by the public health situation and the security situation both in the

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the Defence Request for Suspensive Effect of the Reparations Order, to the TFV's Observations on the Defence Request for Suspensive Effect, and to the TFV's Request under rule 103 of the Rules' (ICC-01/04-02/06-2684-Conf)", No. ICC-01/04-02/06-2684-Red A4 A5, 25 June 2021. See also the "Response on behalf of Mr Ntaganda to the Trust Fund for Victims' Observations and Request", No. ICC-01/04-02/06-2686 A4 A5, 25 June 2021.

[17] See the "Public redacted version of 'Observations on the responses and observations submitted on the Initial Draft Implementation Plan', submitted on 28 June 2021", No. ICC-01/04-02/06-2687-Red, 28 June 2021.

[18] See the "Decision on the Defence request for suspensive effect" (Appeals Chamber), No. ICC-01/04-02/06-2691 A4 A5, 2 July 2021.

[19] See the "Request seeking Judge Lordkipanidze to recuse himself or be disqualified to adjudicate the appeals against the Reparations Order issued by Trial Chamber VI on 8 March 2021", No. ICC-01/04-02/06-2690 A4 A5, 2 July 2021.

[20] See the "Order concerning the 'Request seeking Judge Lordkipanidze to recuse himself or be disqualified to adjudicate the appeals against the Reparations Order issued by Trial Chamber VI on 8 March 2021' dated 2 July 2021 (ICC-01/04-02/06-2690)" (Presidency), No. ICC-01/04-02/06-2692 A4 A5, 8 July 2021.

Democratic Republic of the Congo and in Uganda.[21] On 22 July, the LRV and the Defence filed their response supporting the Request.[22]

16. On 23 July 2021, the Chamber issued its Decision on the TFV's IDIP, approving the latter subject to amendments and additional information to be provided by the TFV when submitting its next report.[23]

17. On the same day, the Chamber granted the TFV's extension of time to submit its DIP. The Chamber however directed the TFV to find all possible alternatives to finalise it as efficiently and expeditiously as possible, taking into account the fact that the time-limit cannot be extended indefinitely without infringing on the rights of victims to prompt reparations.[24]

III. SUBMISSIONS

1. Preliminary observations on the Defence Brief

18. The Legal Representative wishes to first underlines the inherent flaws running through the Defence's Appeal – and where specified *infra*, in the CLR2's Appeal:

(a) The Defence failed in its duty to present a structured and organised Appeal Brief by continuously amalgamating and repeating the same submissions under various grounds of appeals.[25] By doing so, the Defence failed

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[21] See the "Trust Fund for Victims' Request to Vary the Time Limit to Submit Draft Implementation Plan", No. ICC-01/04-02/06-2693, 16 July 2021.

[22] See the "Observations on Behalf of Mr Ntaganda on the 'Trust Fund for Victims' Request to Vary the Time Limit to Submit Draft Implementation Plan'", No. ICC-01/04-02/06-2695, 22 July 2021; the "Joint Response of the Common Legal Representatives of Victims to the 'Trust Fund for Victims' Request to Vary the Time Limit to Submit Draft Implementation Plan'", No. ICC-01/04-02/06-2694, 22 July 2021.

[23] See the "Decision on the TFV's initial draft implementation plan with focus on priority victims" (Trial Chamber II), No. ICC-01/04-02/06-2696, 23 July 2021.

[24] See the "Decision on the Trust Fund for Victims' Request to Vary the Time Limit to Submit Draft Implementation Plan" (Trial Chamber II), No. ICC-01/04-02/06-2697, 23 July 2021.

[25] See the Defence Brief, *supra* note 1, *inter alia*, paras. 42 *et seq.*, 77 *et seq.*, 165, 198, 226 *et seq.*, 240 *et seq.*, (submissions on the determination of the exact number of beneficiaries); paras. 42 *et seq.*, 71 *et seq.*, 112-113, 138-139, 174, 177, 191, 196 *et seq.*, 226 *et seq.*, 239 *et seq.*, and 255 *et seq.* (submissions on the determination of the convicted person's liability); paras. 43, 49-53, 75, 157, 163, 173, and 189 *et seq.* (submissions on access to victims' applications for reparations); paras. 118-123, and 131-133 (submissions on transgenerational harm), *etc*. See also, *inter alia*, para. 105: "*Part II of Mr Ntaganda's Appeal, namely*

to respect the structure announced in its Notice to Appeal and proceeded in amending grounds of appeal without seeking the Chamber's authorisation.[26] It failed to identify clear and distinct grounds of appeal, which should have been addressed one after the other, in accordance with regulation 58(2) of the Regulations of the Court.[27]

(b) The Defence's various contentions on the Reparations Order appear to clearly amount to mere disagreements with the Chamber rather than constituting valid grounds of appeal as *per* the constant jurisprudence of this Court.[28] The recurrent Defence's statement according to which the Chamber would have failed to consider many of its submissions,[29] and/or did not rule on each and every argument it raised,[30] thereby purportedly violating the right of the convicted person to be heard – is very illustrative of this trend. However,

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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 […]" (emphasis added).

[26] See the "Decision and order in relation to the request of 23 December 2013 filed by Mr Thomas Lubanga Dyilo" (Appeals Chamber), No. ICC-01/04-01/06-3057-Corr, 14 January 2014, para. 7: "*In this respect, the Appeals Chamber notes that regulation 61 of the Regulations of the Court addresses 'Variation of grounds of appeal presented before the Appeals Chamber'. Regarding whether a 'variation' includes the addition of a new ground, the Appeals Chamber notes that the Appeals Chambers of the International Tribunals for the former Yugoslavia and for Rwanda* […] *interpret the term 'variation' in their respective Rules of Procedure and Evidence to include both 'new or amended' grounds of appeal, provided that good cause is shown why those grounds were not included or were not correctly phrased. The Appeals Chamber considers that the term 'variation' in regulation 61 of the Regulations of the Court should be interpreted in the same manner*". See also Regulation 61 of the Regulations of the Court.

[27] Pursuant to regulation 58(2) of the Regulations of the Court, the requirements underpinning the presentation of each ground of appeal are as follows: "*The appeal brief shall set out the legal and/or factual reasons in support of each ground of appeal. Reference shall be made to the relevant part of the record or any other document or source of information as regards any factual issue. Each legal reason shall be set out together with reference to any relevant article, rule, regulation or other applicable law, and any authority cited in support thereof. Where applicable, the finding or ruling challenged in the decision shall be identified, with specific reference to the page and paragraph number*".

[28] See, *inter alia*, the "Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 8 July 2015 entitled 'Ninth decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60(3) of the Statute'" (Appeals Chamber), No. ICC-02/11-01/15-208 OA6, 8 September 2015, para. 73: "*The Appeals Chamber has further held that mere disagreement with the conclusions that the first-instance Chamber drew from the available information or the weight it accorded to particular factors does not suffice to establish an error*".

[29] See the Defence Brief, *supra* note 1, *inter alia*, paras. 1, 72, 76, 79, 80, 85-86, 89, 94-95, and 104.

[30] *Idem*, *inter alia*, paras. 5, 7, 43, 45 *et seq*., and 53.

rather than constituting a legal error as advanced by the Defence, it corresponds to the prerogative of every Chamber of this Court.[31] It is in fact quite enlightening that the Defence itself notes that "*the Trial Chamber does not have a duty to give written reasons in response to each and every argument put forward by the parties*", while simultaneously objecting to it.[32] The same conclusion can be made with regard to the CLR2 whose contentions on the Reparations Order appear to clearly amount to mere disagreements with the Chamber, rather than constituting valid grounds of appeal, as developed *infra*.

(c) Coming back to the Defence, it is further illustrated by the fact that the latter did not attempt – or rather could not indeed – adequately and sufficiently substantiate its own arguments, although such a duty falls squarely under the appellant's responsibility.[33] This in turn impacted the validity of its appeal and

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[31] See the "Decision on the confirmation of charges against Laurent Gbagbo" (Pre-Trial Chamber I), No. ICC-02/11-01/11-656-Red, 12 June 2014, para. 23: "*The same applies to the arguments advanced by the parties and participants in their submissions, each of which has been carefully considered as part of the Chamber's determination. In light of the limited scope and purpose of the current proceedings and the large number of discrete factual and legal arguments placed before the Chamber, this decision does not explicitly address each and every submission of the parties and participants, but only those that are necessary to provide sufficient reasoning for the Chamber's determination under article 61(7) of the Statute*".

[32] See the Defence Brief, *supra* note 1, para. 89.

[33] See the "Decision on Defence Request for Reconsideration of or Leave to Appeal the Directions on Closing Briefs and Closing Statements" (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-1259, 11 May 2018, para. 21 (albeit in a different context): "*The Defence merely speculates as to how the three issues would affect their closing submissions and closing statements and how this, as a result, could then potentially affect the outcome of the judgment. Accordingly, the conjectures of the Defence do not fulfil the criteria for leave to appeal*". See also the "Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala and Mr Narcisse Arido against the Decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute" (Appeals Chamber), No. ICC-01/05-01/13-2275-Red A A2 A3 A4 A5, 8 March 2018, para. 72: "*The Appeals Chamber notes that an appellant is required to set out the grounds of appeal in the appeal brief*"; and paras. 109 and 110: "[…] *The Appeals Chamber has previously held that, in order to substantiate an argument, 'the appellant is required to set out the alleged error and how the alleged error materially affected the impugned decision. If an appellant fails to do so, the Appeals Chamber may dismiss the argument without analysing it in substance'*". See also para. 1456: "*The Appeals Chamber also recalls that appellants are required to substantiate the error they allege, as well as the material impact on the decision under review*"; and the "Decision on the request for leave to appeal the "Decision on the 'Prosecution's application submitting material in written form in relation to Witnesses P-0414, P-0428, P-0501, P-0549 and P-0550'" (Trial Chamber I, Single Judge), No. ICC-02/11-01/15-685-Red, 27 September 2016, para. 6: "*The Chamber emphasises that it is not obliged, under article 82(1) (d) of the Statute, to entertain applications for leave to appeal that do not present complete arguments under the requirements of said provision. As is clear from a previous decision of the Chamber, incomplete applications may be rejected for that reason alone*".

the ability for the Legal Representative to formulate comprehensive responses. It follows, in conformity with the jurisprudence of this Court, that it is not for the other parties and participants, and certainly not for a Chamber, to guess what a party's arguments and line of reasoning are.[34] As a consequence, arguments insufficiently substantiated may be dismissed *in limine* by the Appeals Chamber.[35]

19. For these reasons alone, the Legal Representative submits that the Defence's Appeals and the CLR2's Appeal should be rejected *in limine*. However, should the Appeals Chamber be minded to entertain the merits of both Briefs, the Legal Representative submits her response *infra*.

2. Ground 1: The Trial Chamber's Reparations Order was filed timely

20. The Defence argues that the Chamber issued the Reparations Order prematurely and that it impacted the rights of Mr Ntaganda regarding the determination of his liability; inappropriately raised the expectations of the potential reparations beneficiaries; and prejudiced the timely implementation of the reparations process.[36]

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[34] See, *inter alia*, the "Decision on the Prosecutor's and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges" (Pre-Trial Chamber I), No. ICC-02/11-01/11-464, 31 July 2013, para. 70: "*The Chamber reiterates, in this regard, that it is incumbent on the parties to identify the issue(s) they wish to appeal clearly and unambiguously. It is not the Chamber's duty to decompose broadly formulated issues in order to identify potential issues for certification*"; and para. 26: "*Shortcomings such as those identified above by the Chamber in the presentation of the issue cannot be remedied by the Chamber*".

[35] See Regulation 29 of the Regulations of the Court: "*In the event of non-compliance by a participant with the provisions of any regulation* [...] *the Chamber may issue any order that is deemed necessary in the interests of justice*". See also the "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute'" (Appeals Chamber), No. ICC-01/05-01/08-3636-Red A, 8 June 2018, paras. 63 *et seq.*; and the "Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled 'Decision on the 'Defence Request for Interim Release'" (Appeals Chamber), No. ICC-01/04-01/10-283 OA, 14 July 2011, para. 18: "*Finally, the Appeals Chamber recalls that the obligation is on the appellant 'not only to set out the alleged error, but also to indicate, with sufficient precision how [an] error would have materially affected the impugned decision'. Failure to do so will result in the Appeals Chamber rejecting a ground of appeal* in limine, *without consideration of the merits*".

[36] See the Defence Brief, *supra* note 1, paras. 41-59, especially paras. 43-44.

21. Regarding the expectations of the potential beneficiaries, the Legal Representative would like to reassure the Defence and the Appeals Chamber. The Reparations Order issued by the Chamber did not raise new expectations, to the contrary. Not only is the Legal Representative of victims continuously informing her clients and contact persons about the signification and content of said orders and associated proceedings, but so is the Court, and in particular the Registry. Moreover, the message conveyed by said order is rather one of hope, a signal for victims that since Mr Ntaganda's conviction has been established and further confirmed, the Court has effectively started to work on the reparations for the crimes he committed and that they suffered from. They know that the reparations proceedings have merely begun and require to be translated into services for their benefit. The Legal Representative posits that it is precisely because this process is not carried over night, that it is of essence that the Trial Chamber initiates said process as soon as possible.[37] In this regard, it is difficult to follow the Defence's line of thoughts as to how the issuance of the Reparations Order could prejudiced the timely implementation of the reparations.

22. Furthermore, the Legal Representative underlines that the Defence's arguments with respect to this first ground of appeal are presented in a very disordered fashion. She will therefore limit her responses to what appear to be argued.

23. First of all, she submits that the fact that the Trial Chamber is not yet in a position to identify precisely the exact number of potential new beneficiaries is absolutely normal at this stage of the proceedings.[38] Said approach has been followed in other

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[37] As underlined by Trial Chamber III in the *Bemba* case: "*The reparations proceedings in the present case are, in contrast, at a preliminary stage. All currently envisaged steps in these proceedings, such as the appointment of experts, are of a preparatory nature. Thus, they are not only permissible within the legal framework of the Court but, moreover, logical and necessary steps for the Chamber to take following the Conviction and Sentencing Decisions* […]". See the "Decision on the Defence's request to suspend the reparations proceedings" (Trial Chamber III), No. ICC-01/05-01/08-3522, 5 May 2017, para. 16. In paragraph 19 of the same decision, the Trial Chamber also referred to the Appeals Chamber determination that "*victims should not only receive appropriate and adequate, but also prompt reparations*", and to the "*victims' interests to access reparations in a timely manner*". Finally, in paragraph 22, the Chamber reaffirms that it "*needs to balance its duty to make use of the Court's resources appropriately, with its obligation to promote efficient and expeditious proceedings, taking into account the ultimate goal of reparations proceedings and victims' rights*".

[38] See the Defence Brief, *supra* note 1, paras. 47-54.

reparations proceedings before the Court and was not invalidated by the Appeals Chamber when seized of this very issue. Indeed, in the *Lubanga* case, the Appeals Chamber underlined the following:

> "*One of the factors that a trial chamber must consider in deciding what reparations are 'appropriate' for the purposes of article 75(2) of the Statute is how many victims are likely to come forward and benefit from collective reparations programs during the implementation phase. In its inquiry, a trial chamber must endeavour to obtain an* estimate *that is* as concrete as possible.[39] […] *If the trial chamber resorts to estimates as to the number of victims, such estimates must be* based on a sufficiently strong evidential basis; any uncertainties must be resolved in favour of the convicted person *(for instance, by assuming a lower number of victims, or by discounting the amount of liability)*".[40]

24. In this regard, and contrary to the Defence's argument,[41] it is worth noting the Chamber's conclusion stating:

> "*Taking all the above considerations into account,* resolving uncertainties in favour of the convicted person and taking a conservative approach, *the Chamber sets the total reparations award for which Mr Ntaganda is liable at USD 30,000,000 (thirty million dollars)*".[42]

25. Moreover, as further clarified by the Appeals Chamber itself, a Trial Chamber does not commit a legal error by deciding the scope of liability of a convicted person before knowing the exact numbers of reparations beneficiaries:

> "*In light of the Appeals Chamber's findings* […] *the reparations phase of the proceedings was commenced based on requests for reparations received and the Trial Chamber, contrary to Mr Lubanga's argument,* did not err in law

[39] See the "Public redacted Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable'" (Appeals Chamber), No. ICC-01/04-01/06-3466-Red A7 A8, 18 July 2019 (the "*Lubanga* Reparations Appeals Judgment"), para. 224 (emphasis added).
[40] *Idem*, para. 90 (emphasis added).
[41] See the Defence Brief, *supra* note 1, para. 247.
[42] See the Reparations Order, *supra* note 9, para. 247.

> by determining the scope of Mr Lubanga's liability not exclusively based on those requests".[43]

26. In that respect, the Legal Representative also submits that the Defence's argument is therefore unsupported.[44]

27. Incidentally, the fact that the Defence did not contribute to the establishment of a list of potential beneficiaries is by its nature not an unorthodox fact, nor a questionable one.[45] Indeed, potential beneficiaries of reparations, victims of Mr Ntaganda's crimes, are most certainly not going to approach the Defence team – but indeed, and as *per* submissions filed in the proceedings to date, will rather be in contact with the legal representatives of victims (the "LRVs"), or the Registry, as a neutral interlocutor.

28. The Legal Representative further notes with concerns that the Defence appears to be using these appeals proceedings which are circumscribed, legally and procedurally, to the Reparations Order, to question decisions previously issued by the Chamber.[46] Choosing not to appeal them in due course, the Defence foreclosed its ability to question these decisions at the present stage.[47] By doing so within the present appeal, the Defence is attempting to circumvent the legal requirements of this Court in an unacceptable manner, using the Reparations Order as a cover-up to its obvious disagreements with the Chamber's approach. As recalled by the Appeals Chamber:

> "[…] *a party to a proceeding who claims to have an enforceable right must exercise due diligence in asserting such a right. This is as it should be in order for the Trial Chamber to take account of the interests of the other parties to and participants in the proceedings and of the statutory injunction for fairness and expeditiousness.* […] *Requiring the accused person to act in an expeditious manner is not in itself inconsistent with full respect for his rights.*

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[43] See the *Lubanga* Reparations Appeals Judgment, *supra* note 39, para. 92 (emphasis added).
[44] See the Defence Brief, *supra* note 1, para. 56.
[45] *Idem*, para. 53.
[46] See, *inter alia*, the "Decision on victims' participation in trial proceedings" (Trial Chamber VI), No. ICC-01/04-02/06-449, 6 February 2015; and the "Fourth decision on victims' participation in trial proceedings" (Trial Chamber VI), No. ICC-01/04-02/06-805, 1 September 2015.
[47] See the Defence Brief, *supra* note 1, para. 53.

> *In the view of the Appeals Chamber* [...] *the accused's rights are given full respect so long as the accused person has been given adequate opportunity to assert them*. […] *While a party has a discretion to organise and conduct his or her case in a manner that he or she deems appropriate, that discretion is not absolute*. […] *The defence strategy must respect both the procedural framework established by the Court's legal instruments and the overall interests of the administration of justice*".[48]

29. The *raison d'être* of interlocutory appeal proceedings is precisely to allow parties and participants to challenge decisions that they deem contrary, or at odds, with the rights they have a duty to protect. Having knowingly relinquished its rights, the Defence is no longer entitled to question issues that it could have appealed, or sought leave to appeal, throughout the trial and which it suddenly disagrees with at the present stage of the proceedings. Indeed, *nemo auditur propriam turpitudinem allegans*.

30. Further, while not supporting its argument with any facts or figures, the Defence states that the delivery of the Reparations Order was in essence premature in light of the delays resulting from the COVID-19 pandemic.[49] Although the Defence does not even try to substantiate its argument, the Legal Representative notes that this statement is all the more inconsistent that the Defence itself admits that the Chamber "*did refer to the ongoing COVID-19 pandemic and its potential impact on the reparations process* […] [and] *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*".[50] Therefore, what appears to trouble the Defence is not any legal, factual or procedural error the Chamber would have committed, but rather the fact that the Chamber reached a different conclusion than its own – which, again, is not a valid ground of appeal.

31. Finally, the Legal Representative underlines that the Defence also failed to substantiate its statement according to which the Chamber "*erred when balancing*" the

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[48] See the "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"" (Appeals Chamber), No. ICC-01/04-01/07-2259, 12 July 2010, paras. 54, 64, and 77.
[49] See the Defence Brief, *supra* note 1, para. 55.
[50] *Ibid.*

"*competing interests*" of, on the one hand, issuing the Reparations Order before the end of the judicial mandate of two Judges and, on the other hand, ensuring the fairness of the reparations proceedings by issuing the Order at the appropriate time.[51] To the contrary, the Legal Representative notes that the Chamber duly took into consideration the opportunity of doing so, and took an informed and substantiated decision in this regard, expressly stating:

> "*The Chamber has taken into account the submission that the victims' expectations should not be unduly raised before the outcome of the appeals on Mr Ntaganda's conviction and sentence. The Chamber acknowledges the need to take into account and manage the victims' expectations, while respecting their agency and capacity as parties to the proceedings, and stresses that their right to prompt reparations is of paramount importance*".[52]

32. Finally, the Legal Representative observes that the Defence changed its line of argument with regard to the calendar established by the Reparations Order, from stating that such calendar did "*not take into account the right of the convicted person to appeal the Reparations Order*"[53] – which appeared frivolous and unsupported; to stating that such calendar is "*very likely to impact the activities of the TFV and the reparations process*".[54] The Legal Representative underlines that the Chamber only asked the TFV to submit draft implementation plans in June and in September, with respect to which the Defence is entitled to submit observations. Moreover, these plans are only draft documents by nature, on the basis of which proceedings can move forward with propositions to be debated amongst the parties, and under the control of the Chamber.

33. The CLR2 put forward a similar ground, *i.e.* that the Chamber committed a combination of errors of law, fact and/or procedure in setting the overall cost to repair by failing to inquire into and to obtain an accurate estimate of the number of potential beneficiaries for reparations, and by failing to give a reasoned opinion on the estimates

[51] *Idem*, paras. 57-58.
[52] See the Reparations Order, *supra* note 9, paras. 5 and 6.
[53] See the Defence Notice of Appeal against the Reparations Order, *supra* note 10, para. 30.
[54] See the Defence Brief, *supra* note 1, para. 59.

provided by the parties and participants.[55] The Legal Representative observes that the CLR2's submissions appear to amount to mere disagreements with the methodology and conclusions reached by the Chamber, in as much as the Chamber did not follow all his suggestions and therefore fall short to constituting valid grounds of appeal.[56] In this regard, the Chamber explicitly explained why it did not follow the CLR2's main suggestion in a previous Decision which was not appealed in due course,[57] and which cannot be the subject of the present appeal.[58] In any event, the same Appeals Chamber's jurisprudence opposed to the Defence's arguments *supra*[59] applies in response to the CLR2's submissions.

34. For all these reasons, Ground 1 of the Defence's appeal, and Grounds 1 and 3 of the CLR2's appeal, should be dismissed.

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[55] See the CLR2 Brief, *supra* note 1, paras. 44-83, and 102-109.

[56] *Idem*, paras. 54-58, 60, 61, and 64-78. Paragraphs 69 and 77 are of particular relevance demonstrating the mere disagreement of the CLR2 with the Chamber's decision: "*The Trial Chamber in particular erred in the exercise of its discretion* when it had continuously been disregarding the Legal Representative's repeated submissions on the need to inquire into the size of the population in the affected villages at the time of the events, *and* when it ultimately denied the Legal Representative's corresponding request for the discovery of said figures on the basis that the information was not necessary at the stage prior to a decision on the types and modalities of the reparations being issued"; and "*The Legal Representative contends that relying on the size of the population in the affected villages at the time the crimes were committed* was the easiest way open to the Trial Chamber to estimate the number of potential beneficiaries of reparations *at least as direct victims, which was apparent from the facts and evidence before it demonstrating that the victimisation in the present case extended to the entire village communities*" (emphasis added). See in contrast, the *Lubanga* Reparations Appeals Judgment, *supra* note 39, para. 89: "[…] *In making that determination* [of the number of victims who are potential reparations beneficiaries], *the trial chamber should consider the scope of damage as it is in the current reality, based on the crimes for which the convicted person was found culpable. The number of victims at the time of the crimes may be a starting point for this consideration. However, other parameters for determining what reparations are appropriate include considerations of what reparations measures are envisaged and how many victims are likely to come forward and benefit from them – a number that is likely to be smaller in the current reality than the overall number of victims of the crimes at the time they were committed. These determinations can be made based on, inter alia, submissions received from the parties and reports of experts*".

[57] See the "Decision on the Request of the Common Legal Representative of the Victims of the Attacks for an Order to the Registry to collect information pertaining to reparations" (Trial Chamber VI, Single Judge), No. ICC-01/04-02/06-2631, 18 December 2020, paras. 17 and 18. See also the "Request of the Common Legal Representative of the Victims of the Attacks for an Order to the Registry to collect information pertaining to reparations", No. ICC-01/04-02/06-2624, 9 November 2020.

[58] See *supra*, para. 28, and note 48.

[59] See *supra* para. 23, and notes 28 and 31.

3. Ground 2 (and Ground 8): The Trial Chamber duly informed the convicted person of his liability with respect to the reparations awarded in the Reparations Order

35. The Defence develops an argument that is difficult to reconcile with the heading chosen and once again presents submissions that are disorganised at the minimum, if not entirely unsubstantiated. The Defence argues that its right to fair and impartial proceedings includes the right to a reasoned decision and the right to be heard.[60] The Legal Representative does not take issue with this principle and, incidentally, notes that the same applies to the LRVs in the present proceedings.

36. She submits however that the Defence's allegation that the Chamber failed to provide the necessary legal and/or factual reasoning in its Reparations Order is not only plainly incorrect, but also unsubstantiated in the Defence Brief.[61] The Defence points out, *inter alia*, to the categories of victims referred to by the Chamber, the use of presumptions in relation to victims' harms and the use of a sample of victims' applications for reparations by the Chamber at this stage.[62] Starting with the latter, the Legal Representative opposes to the Defence's reading the very letter of the Reparations Order,[63] as well as the jurisprudence developed in the *Lubanga* case on this issue, and already confirmed by the Appeals Chamber:

> "*By contrast, there may be cases where the trial chamber contemplates an award for reparations that is not based on an individual assessment of the harm alleged in the requests filed. This may be, for instance, due to the number of victims. In such cases, the trial chamber 'is not required to rule on*

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[60] See the Defence Brief, *supra* note 1, paras. 62-69.
[61] *Idem*, paras. 70-90.
[62] *Idem*, paras. 70-76.
[63] See the Reparations Order, *supra* note 9, para. 16: "*On 26 June 2020, the Chamber issued the 'First Decision on Reparations Process'* […], *noting that it had decided to adopt an approach to reparations that sought to rely on the full collaboration and cooperation of the Registry's VPRS and the TFV, as well as that of the LRVs, to benefit from their combined knowledge, expertise, and experience. The Chamber stressed that it considered that the Registry, through the VPRS, was the right entity to lead the identification of potential new beneficiaries, due to its familiarity with the case and its field presence in the DRC. However, in light of the impact of the COVID-19 pandemic on the operations of the Court in the field and on the expected timeline of the reparations proceedings, the Chamber noted that it had decided to adapt its approach to the proceedings. Accordingly, it instructed the Registry to (i) finalise, as soon as practicable, the assessments and mapping; (ii) prepare, in consultation with the parties and the TFV, a sample of potential beneficiaries of reparations*; […]". See also *idem*, paras. 17 and 21.

> *the merits of the individual requests for reparations'* […] In this regard, once it has become clear that the trial chamber does not intend to make individual determinations with respect to each victim who has filed a request, elements of rule 94 may be of less relevance, as the requests which have been filed will not be individually considered" […] "*The Appeals Chamber is of the view that, in cases with more than a few victims, proceeding in this manner may prove to be more efficient than awarding, or deciding on the eligibility for, reparations on an individual basis, precisely because it is not necessary for the trial chamber to consider individual requests for reparations*. […]".[64]
>
> "[I]*t would be incorrect to assume that the number of victims may only be established based on individual requests for reparations received by the Court. It would be undesirable for the trial chamber to be restrained in that determination simply because not all victims had presented themselves to the Court by making a request under rule 94 of the Rules*".[65]

37. The Defence's statement is plainly incorrect. The Chamber did explain and founded not only factually, with references to the specific circumstances and needs of

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[64] See the *Lubanga* Reparations Appeals Judgment, *supra* note 39, para. 87 (emphasis added) and para. 88. See also the "Corrected version of the 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable'" (Trial Chamber II), No. ICC-01/04-01/06-3379-Red-Corr-tENG, 21 December 2017, paras. 27, 28 and 35 *et seq*., 191, 245-259, and 279-281.

[65] See the *Lubanga* Reparations Appeals Judgment, *supra* note 39, para. 89: "*This is not to say that, if collective reparations are ordered, the number of victims is not relevant to the determination of the scope of a convicted person's liability for reparations; to the contrary, the number of victims will be an important parameter for determining what reparations are appropriate. Clearly, it makes a difference whether the crimes for which the conviction was entered resulted in the victimisation of one hundred, one thousand or one hundred thousand individuals.* […] *In making that determination, the trial chamber should consider the scope of damage as it is in the current reality, based on the crimes for which the convicted person was found culpable. The number of victims at the time of the crimes may be a starting point for this consideration. However, other parameters for determining what reparations are appropriate include considerations of what reparations measures are envisaged and how many victims are likely to come forward and benefit from them – a number that is likely to be smaller in the current reality than the overall number of victims of the crimes at the time they were committed. These determinations can be made based on, inter alia, submissions received from the parties and reports of experts*" (emphasis added); footnote 153: "*In the course of preparatory work on the Rules of Procedure and Evidence, the Preparatory Commission for the International Criminal Court suggested the following:* […] 2. Where the large number of claimants precludes individualized determination of damage, loss and injury, and of reparations, the Court may appoint a representative to recommend to the Court the appropriate reparations based on a representative sample of the victims and the damage, loss and injuries they have suffered, utilizing accepted scientific methodology. *[UN, Preparatory Commission for the ICC, 'Report on the international seminar on victims' access to the International Criminal Court', 6 July 1999, PCNICC/1999/WGRPE/INF/2, p. 7]*" (emphasis added); and paras. 119-122.

the case, but also legally, its choice to proceed based on a sample. Indeed, as emphasised by the Chamber,

> "[…] *in light of the impact of the COVID-19 pandemic on the operations of the Court in the field and on the expected timeline of the reparations proceedings, the Chamber noted that it had decided to adapt its approach to the proceedings. Accordingly, it instructed the Registry to (i) finalise, as soon as practicable, the assessments and mapping; (ii) prepare, in consultation with the parties and the TFV, a sample of potential beneficiaries of reparations; (iii) report to the Chamber on the aforementioned activities, together with any request for guidance as to any legal and factual issues, by 30 September 2020, and thereafter every three months*".[66]

38. Moreover, the Legal Representative notes that the Defence uses the reference to the victims' applications forms to once again voiced its disagreement with previous decisions of the Chamber pertaining to its access to the forms and the grouping of applications by the Registry, which not only constitute completely distinct issues, but also fail to constitute valid grounds of appeal of the Reparations Order.[67]

39. Finally, the Legal Representative notes that the Defence also reiterates its arguments contained in Ground 1 of its Appeal for the purpose of Ground 2 (on the determination of the exact number of beneficiaries and the financial liability of the convicted person).[68] Therefore, she refers to her submissions in this regard *supra*, notwithstanding the fact that the Defence's arguments once again merely reveal a disagreement with the Chamber's rulings and a manifest frustration that some of its submissions, while duly made and considered, were nonetheless not followed by the Chamber.[69]

40. Regarding the Defence's contentions on the alleged Chamber's failure to provide a proper reasoning for its pronouncement on some categories of victims, the use of presumptions for certain types of harms and the standard of evidentiary proof

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[66] See the Reparations Order, *supra* note 9, para. 16.
[67] See the Defence Brief, *supra* note 1, paras. 73-76. See also *supra* para. 28, and footnote 48.
[68] See the Defence Brief, *supra* note 1, paras. 77-79, and 80-85.
[69] *Ibid*. See also *supra* para. 18(b).

proposed for certain categories of victims,[70] the Legal Representative notes that the Defence did not even attempt to substantiate its arguments under Ground 2 where it chose to present them. It merely limits itself to referring to parts of the Reparations Order with which it takes issues, without further explaining how the Chamber would have committed an error in its reasoning. Absent any proper arguments to respond to, the Legal Representative cannot address these grounds of appeal and submits that they appear to be wholly unsubstantiated.[71]

41. Regarding the use of presumptions however − which appears to have been developed by the Defence under Ground 8, in addition to being simply alluded to in ground 2[72] − the Defence alleged that it constitutes an abuse of the Chamber's discretion and improperly shift the standard of proof onto the convicted person without any tangible benefit for the victims. The Legal Representative posits that contrary to the Defence's allegations, the Chamber had the benefit of the parties and participants and of the Expert's submissions on the subject matter covered by the presumptions and on their possible use.[73] Indeed, not only did said submissions informed the Chamber on

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[70] See the Defence Brief, *supra* note 1, paras. 86-87.
[71] See *supra* para. 18(c), and footnotes 33-35.
[72] See the Defence Brief, *supra* note 1, paras. 149 *et seq.* and 60 *et seq*.
[73] See the "Submissions on Reparations on behalf of the Former Child Soldiers", No. ICC-01/04-02/06-2474 and its Annex, No. ICC-01/04-02/06-2474-Anx (list of expert reports relevant to the harm suffered by victims and available to the Chamber in other proceedings before the Court), 28 February 2020, especially paras. 38-51; the "Corrigendum of the 'Public Redacted Version of the 'Submissions by the Common Legal Representative of the Victims of the Attacks on Reparations'' (ICC-01/04-02/06-2477-Red)", No. ICC-01/04-02/06-2477-Red-Corr and its Annex No. ICC-01/04-02/06-2477-Red-Corr-Anx1, 20 November 2020; the "Experts Report on Reparation Presented to Trial Chamber VI, International Criminal Court" by Karine Bonneau, Eric Mongo Malolo and Norbert Wühler, No. ICC-01/04-02/06-2623-Anx1-Red2, 3 November 2020, paras. 8, 16, 48 (and footnote 64), 57, and 58; and the "Expert Report on Reparations for Victims of Rape, Sexual Slavery and Attacks on Healthcare Dr Sunneva Gilmore", No. ICC-01/04-02/06-2623-Anx2-Red2, 3 November 2020, in its entirety and in particular paras. 80 and 81. See also the "Annex I: The Registry's Observations on Reparations in the *Ntaganda* Case", No. ICC-01/04-02/06-2475-AnxI, 28 February 2020, paras. 44 *et seq*: "*As set out in annex II to the present submission, almost no contemporaneous documentation (from before or immediately after the war and the commission of the crimes charged) has survived to the present day. What is available, are local authorities who may be in the position to issue certain documentation on request (sometimes at considerable cost to victims), such as, a residency certificate, death certificate, kinship certificate or lost property certification. The availability of each of the above mentioned forms of documentation may vary depending on location and, should they be required, would extend the length and complexity of the proceedings*"; and the "Trust Fund for Victims' observations relevant to reparations", No. ICC-01/04-02/06-2476, 28 February 2020, para. 90: "[…] *Another consequence of property crimes identified at the Trust Fund's workshop is the loss of important documents, such as diplomas, identity cards,*

the environment in which victims live, but it also provided precious information on their (non-)ability to gather evidence for certain type of harm, and on the corollary necessity and appropriateness of using said presumptions. By assessing said information, the Chamber did consider the rights of the convicted person and, in accordance with the Appeals Chamber's ruling on the matter,[74] approached the issue of presumptions with caution by taking into consideration both the environment in which victims are[75] and the balance of probabilities standard.[76] Moreover, while challenging the factual presumptions used by the Chamber, the Defence did not demonstrate that no reasonable trier of fact could have formulated them in light of the particular set of circumstances of the present case, as required by the Appeals Chamber.[77] And indeed, contrary to what the Defence alleges, the Chamber did refer to the particular set of circumstances of the case, *i.e.* the specific findings pertaining to the crimes for which Mr Ntaganda was convicted and the factual and expert information available before it with regard to the corresponding harm.[78] Using the relevant standard of balance of probabilities, the Chamber then rightly deducted that

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or land ownership titles. This is something that the Trial Chamber may wish to bear in mind when considering the appropriate standard required to prove harm resulting from this crime, as well as the possible cooperation of the Government of the DRC, in connection to the implementation of reparations awards".

[74] See the "Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled 'Order for Reparations pursuant to Article 75 of the Statute'" (Appeals Chamber), No. ICC-01/04-01-07-3778-Red A3 A4 A5, 9 March 2018 (the "*Katanga* Reparations Appeal Judgment"), para. 70: "*The Appeals Chamber considers that, in doing so, a trial chamber should, generally speaking, establish the types or categories of harm caused by the crimes for which the convicted person was convicted, based on all relevant information before it, including the decision on conviction, sentencing decision, submissions by the parties or* amici curiae*, expert reports and the applications by the victims for reparations*".

[75] See the Reparations Order, *supra* note 9, para. 138: "*The Chamber is aware of some of the difficulties the victims may face in producing the relevant information. For instance, the Chamber notes that one of the consequences of the crimes against property for which Mr Ntaganda was convicted is the loss of important documents, such as diplomas, identity cards, and land ownership titles. In addition, the Chamber notes that victims may often have difficulties obtaining or producing copies of official documents in the DRC*".

[76] See the Reparations Order, *supra* note 9, paras. 136-147, and in particular, paras. 140-147, and especially para. 143: "*Considering the difficulties to obtain or produce evidence, as mentioned above, and the severe harms suffered by the victims as a result of the types of crimes committed, the Chamber finds that certain harms may be presumed, once a victim has proved, on a balance of probabilities standard, to be a victim of the crimes for which Mr Ntaganda was convicted*".

[77] See the *Katanga* Reparations Appeal Judgment, *supra* note 74, para. 77: "*On appeal, bearing in mind the standard of review, a party challenging a factual presumption must demonstrate that no reasonable trier of fact could have formulated the presumption in question in light of the particular set of circumstances in that case*".

[78] See *inter alia* the "Judgment", *supra* note 5, *inter alia*, paras. 496, 722, 806, 818, and 1044; as well as the submissions of the parties and participants referred *supra* note 73.

the specific presumptions were reasonable and appropriate. As previously recalled by the Appeals Chamber,

> "[…] *in reparations proceedings, a standard 'less exacting' than that for trial applies. This is, in part, due to the difficulties victims may face in obtaining evidence in support of their claims. The Appeals Chamber considers that, in the absence of direct evidence in certain circumstances, for example, owing to difficulties in obtaining evidence, a trial chamber may resort to factual presumptions in its identification of the heads of harm. The Appeals Chamber considers that resort to factual presumptions in reparations proceedings is within a trial chamber's discretion in determining 'what is 'sufficient' for purposes of an applicant meeting the burden of proof'.* […] *In light of the above, the Appeals Chamber emphasises that the reasonableness of a factual presumption drawn by a trial chamber in reparation proceedings will depend upon the circumstances of the case*".[79]

42. Moreover, as further underlined by the Appeals Chamber, "[t]*he legal framework leaves it for chambers to decide the best approach to take in reparations proceedings before the Court. Chambers have thus ample margin to determine how best to deal with the matter before them, depending on the concrete circumstances at hand. However, in the exercise of their discretion, it is clear that proceedings intended to compensate victims for the harm they suffered, often years ago, must be as expeditious and cost effective as possible and thus avoid unnecessarily protracted, complex and expensive litigation*".[80]

43. Finally, contrary to the Defence submissions,[81] the latter did have a chance to formulate observations on the victims' individual applications throughout trial,[82] and in particular to respond to the submissions made on their behalf regarding the harm

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[79] See the *Katanga* Reparations Appeal Judgment, *supra* note 74, paras. 75-76.
[80] *Idem*, para. 64.
[81] See the Defence Brief, *supra* note 1, paras. 189-195.
[82] See the Decision on victims' participation in trial proceedings, *supra* note 46. See also *inter alia*, the "Third Transmission to the Parties of Applications for Participation in Trial Proceedings", No. ICC-01/04-02/06-1015, 17 November 2015; or the Registry's Periodic Reports on the Victims and their General Situation, such as the "Thirteenth Periodic Report on Victims in the Case and their General Situation", No. ICC-01/04-02/06-2353, 6 June 2019. Similarly, the parties had access to all the victims' files who applied to participate at the pre-trial stage. See, *inter alia*, the "Public redacted version of the 'Fifth Report to the Pre-Trial Chamber on applications to participate in the proceedings' (ICC-01/04-02/06-179-Conf) dated 13 December 2013", No. ICC-01/04-02/06-179-Red, 1 August 2014.

they have been suffering from.[83] The same holds true with regard to subsequent submissions to be made by the Registry and the TFV, to which the Defence will have an opportunity to respond.

44. More generally, the fact that the Chamber chose not to follow some of the Court's prior practice does not constitute an error or law nor of procedure, and therefore does not constitute a valid ground of appeal.[84] As recalled in this very Court's jurisprudence, Chambers of this Court are not bound by their prior practice or jurisprudence:

> "[t]*he argument would have merit if the Single Judge was bound by previous decisions of other Chambers pursuant to article 21(2) of the Statute. To this end, the Single Judge recalls that the usage of the verb 'may' in article 21(2) of the Statute provides the Chamber with the discretion as to whether to follow previous precedents. Consequently, the provision as drafted rejects the stare decisis doctrine. Following the Prosecutor's line of argumentation would have meant that, in essence, article 21(2) of the Statute itself automatically affects the fairness of the proceedings on the grounds that precedents were not followed; this is an erroneous interpretation of the article 21(2) of the Statute*".[85]

45. This interpretation was confirmed by the Appeals Chamber stating that "*Article 21 (2) of the Statute provides that* '[t]he Court may apply principles and rules of law as interpreted in its previous decisions'. *Thus, the Appeals Chamber is not obliged to*

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[83] See, *inter alia*, the "Public Redacted Version of 'Defence reply to 'Response to the 'Defence request for admission of additional evidence on appeal' (No. ICC-01/04-02/06-2570-Conf) of 28 August 2020 on behalf of the Former Child Soldiers', 21 September 2020, ICC-01/04- 02/06-2596-Conf", No. ICC-01/04-02/06-2596-Red, 29 October 2020; the "Public Redacted Version of 'Response on behalf of Mr. Ntaganda to Prosecution CLR1/CLR2 submissions on sentence', 8 October 2019, ICC-01/04-02/06-2438-Conf", No. ICC-01/04-02/06-2438-Red, 24 January 2020; the "Response to 'Former Child Soldiers' observations on the 'Document in support of the appeal on behalf of Mr Ntaganda against Trial Chamber VI's 'Decision on the Defence's Challenge to the jurisdiction of the Court in respect of Counts 6 and 9', ICC-01/04-02/06-892'", No. ICC-01/04-02/06-1045 OA2, 7 December 2015; the "Response on behalf of Mr Ntaganda to 'Information related to the death of victims a/00579/13 and a/00712/13 and application for resumption of action submitted by a family member of victim a/00579/13'", No. ICC-01/04-02/06-758-Conf, 31 July 2015.

[84] See the Defence Brief, *supra* note 1, paras. 88, 106, 131, 170-174, and 216.

[85] See, *inter alia*, the "Decision on the 'Prosecution's Application for leave to Appeal the "Decision Setting the Regime for Evidence Disclosure and Other Related Matters" (ICC-01/09-02/11-48)'" (Pre-Trial Chamber II), No. ICC-01/09-02/11-77, 2 May 2011, para. 23.

follow its previous interpretations of principles and rules of law through binding stare decisis; rather it is vested with discretion as to whether to do so".[86]

46. Furthermore, the Legal Representative questions the Defence's statement according to which the Chamber's failure to provide sufficient reasons and justification materially affects the fairness of the Reparations Order, and the rights of the convicted person to submit a meaningful appeal and to be heard. Indeed, the very fact that the Defence found itself in a position to file its Appeal Brief, formulating no less than 15 grounds of appeals, seems to largely disprove by its very existence and content its allegation.[87]

47. Regarding the CLR2's contentions as to the alleged failure of the Chamber to establish a proper basis for its approach to the cost to repair[88] and to give a reasoned opinion on the principles it relied upon,[89] the Legal Representative refers to her submission *supra* on the same grounds alleged by the Defence.[90] She further underlines, as for its Ground 1, that the CLR2's arguments in relation to Ground 2 of its Appeal rather reveal a difference of opinions and therefore a mere disagreement with the Chamber's reasoning, but fail to constitute valid grounds to appeal the Reparations Order.[91]

48. For all these reasons, Grounds 2 and 8 of the Defence's appeal and Ground 2 of the CLR2's appeal should be dismissed.

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[86] See the "Reasons for the 'Decision on the 'Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate'" (Appeals Chamber), No. ICC-02/11-01/15-172, 31 July 2015, para. 14.
[87] See the Defence Brief, *supra* note 1, paras. 66-69.
[88] See the CLR2 Brief, *supra* note 1, paras. 84-90.
[89] *Idem*, paras. 91-101.
[90] See *supra* para. 35 *et seq*.
[91] See *supra* para. 18(b), and note 28.

4. Ground 3: The Trial Chamber duly implemented the *Do no harm* principle in its Reparations Order

49. The Legal Representative underlines once again that the fact that the Chamber did not follow the Defence's arguments is not a proper ground of appeal. Moreover, contrary to the Defence's assertion,[92] it clearly stems out from the letter of the Reparations Order that the Chamber took into account the victims' security situation:

> "*At the same time, this approach* [collective reparations with individual components] *addresses the concerns that victims should receive equal reparations to avoid awards being a source of jealousy, animosity, or stigmatisation among the affected communities and between interethnic groups, especially given the unstable security situation on the ground*".[93]

50. Furthermore, the Legal Representative strongly highlights that the *do no harm* principle is everything but a new principle[94] and the fact that the Chamber refers to it for the first time at this stage of the proceedings pleads for the opposite of the Defence's argument,[95] *i.e.,* that the Chamber did – and does – cater for the needs of the victims by placing them at the centre of any actions that concern them. The Chamber indeed emphasised that,

> "[c]*onsultations with victims and outreach activities are crucial to ensure that reparations have a broad and real significance, are meaningful to victims,* have the intended impact, and are perceived as such. They are also necessary to promote ownership of the process, and to prevent any group of victims from being excluded or marginalised. *Consultations and outreach activities should take into account the victims' diversity, different needs, and interests, including sensitivities associated with sexual violence.* Consultations should include 'gender- and ethnic-inclusive programmes' that take into account the legal, cultural, economic, and other obstacles victims may face in coming forward and expressing their views".[96]

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[92] See the Defence Brief, *supra* note 1, paras. 93-98.
[93] See the Reparations Order, *supra* note 9, para. 194. See also para. 51.
[94] See the Defence Brief, *supra* note 1, paras. 91 *et seq*.
[95] *Idem*, paras. 91-104.
[96] See the Reparations Order, *supra* note 9, para. 47 (emphasis added). See also paras. 50-52, and 250.

51. The Legal Representative underlines that these considerations are even more important in the context of an interethnic conflict, where one community cannot be favoured over another.[97] In fact, the principles of dignity, non-discrimination, non-stigmatisation, and the *do no harm* principle were recently re-emphasised by the Chamber in its Decision approving the TFV's IDIP for priority victims.[98]

52. It is therefore difficult to follow the Defence's reasoning on this point, in as much as reparations are limited by the scope of the present case, and therefore cannot – and shall not – as emphasised by the Defence itself throughout the proceedings,[99] go beyond said scope.

53. Victims in the present case do belong to several distinct ethnicities, contrary to what the Defence portrays.[100] It is indeed expected and foreseen that the TFV, in collaboration with the LRVs and the Registry, will work with the relevant communities and adapt its communication in the field to the specific circumstances of the present case.[101] Moreover, the balance between the services provided to victims of the three cases having reached the reparations stages in the DRC situation and the support provided through the TFV assistance programs in DRC[102] should indeed help in

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[97] All parties to the present proceedings agree on this point. See the Defence Brief, *supra* note 1, paras. 98 *et seq.*; the CLR2 Brief, *supra* note 1, paras. 133 *et seq.*

[98] See the Decision on the TFV's initial draft implementation plan with focus on priority victims, *supra* note 23, para. 19.

[99] See, *inter alia*, the Defence Brief, *supra* note 1, paras. 49, 52, 140, and 209.

[100] *Idem*, para. 99.

[101] See the Reparations Order, *supra* note 9, para. 6: "*After the issuance of this Order, it will be the duty of the Court as a whole, including the Registry as appropriate, and of all those who assist its work, including the Legal Representatives of Victims (the 'LRVs') and the Trust Fund for Victims (the 'TFV'), depending on their roles, to manage the victims' expectations through proper outreach and communication*". See also, *inter alia*, the "Report on Trust Fund's Preparation for Draft Implementation Plan With Annex A Initial Draft Implementation Plan with focus on Priority Victims", *supra* note 13, paras. 27, 30 and 31; and the Submissions on Reparations on behalf of the Former Child Soldiers, *supra* note 73, paras. 26, 66, 75, and 80.

[102] See the *Lubanga* and *Katanga* reparations proceedings. See also the assistance programs developed by the TFV in DRC, information available on the TFV website, at the following addresses: https://www.trustfundforvictims.org/index.php/en/locations/democratic-republic-congo and https://www.trustfundforvictims.org/index.php/en/news/trust-fund-victims-launches-ten-new-assistance-projects-democratic-republic-congo.

mitigating any detrimental impacts that could arise from assisting the victims of each specific case[103] – which, incidentally, is the natural corollary to judicial proceedings.

54. For all these reasons, Ground 3 of the Defence's appeal should be dismissed.

55. The Legal Representative further notes that the CLR2 also developed arguments in relation to the *do no harm* principle (Ground 5), specifically putting forward risks of potential unequal treatment between the former child soldiers on the one hand, and the victims of the attacks on the other hand, in relation to the way the Chamber has approach the overall cost to repair. She underlines that this ground of appeal is without merit. Indeed, as recently confirmed by the Chamber,

> "*dignity, non-discrimination, and non-stigmatisation, as well as the do no harm principles are among the key principles that should guide the design and implementation of reparations in the case. In compliance with these principles, victims should,* inter alia*, be treated fairly and equally during the reparation process, reparations awards must avoid creating tensions, jealousy, or animosity among victims, and access to reparation by victims shall not lead to further or secondary victimisation, create or exacerbate security concerns or tensions among communities, and victims should not be endangered or stigmatised as a result*".[104]

56. To tackle this issue, the Chamber has instructed the TFV to proceed with some amendments to its IDIP and rejected two of the TFV;s proposals, which notably "*do not appear to fully guarantee equal treatment among the different groups of victims who experience similar urgent needs*".[105] This confirmed approach by the Chamber illustrates how Ground 5 of the CLR2 constitutes a misinterpretation and possibly a mischaracterisation of the Reparations Order. For these reasons, Ground 5 of the CLR2 Appeal should be dismissed.

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[103] See the Defence Brief, *supra* note 1, para. 103; and the Reparations Order, *supra* note 9, para. 241.
[104] See the "Decision on the TFV's initial draft implementation plan with focus on priority victims", *supra* note 23, paras. 19 *et seq*.
[105] *Idem*, para. 20.

5. Grounds 4, 6, and 7: The Trial Chamber did apply the correct standard of proof in relation to the harm suffered by children born out of rape and sexual slavery, to transgenerational harm, and indirect victims

57. The Defence takes issue with the fact that the Chamber qualified children born out of rape and sexual slavery as *direct* victims – instead of *indirect* ones – arguing that it impacts the reparations process. The Defence submits that by affording them incorrect presumptions of harm, the Reparations Order increases the number of direct victims, thereby artificially expanding the financial liability of the convicted person.[106] While the Legal Representative agrees with the Defence that the nature and types of harm suffered by victims of rape and sexual slavery are not the same as the one suffered by their children born out of these crimes, she cannot agree with the Defence interpretation of the Chamber's reasoning.

58. Indeed, the Chamber has recognised several categories of direct victims without ever alluding to the fact that the harm suffered by them would be identical. This is for instance the case of direct victims of murders, direct victims of the attacks and direct victims of rape, who have, without any doubt, suffered different kinds of harm. It is therefore only logical that if, within one broad category of direct victims, several sub-categories co-exist, such as victims of sexual violence, with victims of rape and victims born out of rape for instance, the same reasoning shall apply.

59. Finally, as to the significance attached to such a characterisation, the recognition provided by the Chamber is an important step for the children born of rape and/or sexual slavery. Whereas it bears no legal consequences, it can however make a substantial difference in acknowledging the crimes suffered and therefore bring upon psychological benefits for the persons concerned, but also more generally for the affected communities. In as much as the Defence portrays itself as a defender/protector of victims' rights in the present proceedings,[107] it should also agree with said

[106] See the Defence Brief, *supra* note 1, paras. 107-113, and 122-123.
[107] *Idem*, paras. 13, 44, and 268.

characterisation. In any event, the Defence fails to substantiate how making such a determination bears any legal consequences and therefore, its argument is intrinsically unsupported.

60. On a lexical point of view, the Legal Representative also finds it reasonable to describe children born out of rape and/or sexual slavery as direct victims of these crimes, as their birth is indeed one of the direct consequences of said crimes. She refers to her previous submissions to reaffirm that children born out of rape have been suffering from the crimes for which Mr Ntaganda was convicted.[108]

61. Furthermore, while arguing that the Chamber lowered the applicable burden of proof for victims of sexual violence, the Defence seems to be overlooking the existing special evidentiary regime established by the legal texts of the Court in relation to the establishment of acts of sexual violence, which reflects principles recognised in international criminal law.[109] The Elements of Crimes represent a long awaited evolution and provide important clarifications regarding the use of sexual violence in conflicts. Beyond the recognition of individual crimes as war crimes, crimes against humanity, and genocide, they finally recognise the gender-neutral definition of acts of sexual violence, and remove any element regarding consent from the constitutive elements of the crimes and therefore from the evidence required.[110] They further provide important clarification as to the use of the terms 'invasion' and 'forcibly'.[111] Indeed, in accordance with rule 63(4) of the Rules of Procedure and Evidence,

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[108] See the Legal Representative opening statements at trial, transcript of the hearing held on 3 September 2015, No. ICC-01/04-02/06-T-24-ENG ET WT, pp. 8-9. See also the "Public redacted version of ICC-01/04-02/06-2276-Conf-Corr, Closing brief on behalf of the Former Child Soldiers", No. ICC-01/04-02/06-2276-Corr-Red, 7 November 2018, para. 180.

[109] See, *inter alia*, the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law, Second Edition, March 2017; the "The Hague principles on Sexual Violence", 2019; and the Security Council Resolution Calling upon Belligerents Worldwide to Adopt Concrete Commitments on Ending Sexual Violence in Conflict, UN Doc. S/RES/2467 (2019), 21 April 2019.

[110] See the Elements of Crimes, *inter alia*, for the crimes of rape and sexual violence. See also the findings in the Judgment, *supra* note 5, *inter alia*, paras. 933 *et seq.*, 941 *et seq.*, 943 *et seq.*, 952, and 975 *et seq.*

[111] See the Elements of Crimes, footnote 5: "*The term 'forcibly' is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological*

> "[w]*ithout prejudice to article 66, paragraph 3, a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence*".[112]

62. Additionally, the Legal Representative refers to the general principle articulated by the Appeals Chamber in the *Lubanga* case, and according to which,

> "[i]*n the reparation proceedings, the applicant shall provide sufficient proof of the causal link between the crime and the harm suffered, based on the specific circumstances of the case. In this sense, what is the 'appropriate' standard of proof and what is 'sufficient' for purposes of an applicant meeting the burden of proof will depend upon the circumstances of the specific case. For purposes of determining what is sufficient, Trial Chambers should take into account any difficulties that are present from the circumstances of the case at hand*".[113]

63. Finally, the Legal Representative submits that the qualification of direct or indirect victims does not impact the reparations process, nor the financial liability of the convicted person contrary to the Defence's contentions. Indeed, both direct and indirect beneficiaries will access the relevant services and support corresponding to the nature of the harm they have been suffering from and to their needs, on an equal

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oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment"; footnote 15: "*The concept of 'invasion' is intended to be broad enough to be gender-neutral*"; and article 7(1)(g)-1.2 regarding the crime against humanity of rape: "*The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent*".

[112] See also Rules 70, 71, and 86 of the Rules of Procedure and Evidence and the general principle regarding protection of the dignity and well-being of victims, guiding the Chambers and set in article 68 of the Rome Statute.

[113] See the "Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2" (Appeals Chamber), No. ICC-01/04-01/06-3129 A A2 A3, 3 March 2015, para. 81. See also the "ORDER FOR REPARATIONS (amended)" (Appeals Chamber), No. ICC-01/04-01/06-3129-AnxA A A2 A3 para. 22: "Given the fundamentally different nature of reparations proceedings, a standard less exacting than that for trial, *where the prosecution must establish the relevant facts to the standard of 'beyond a reasonable doubt',* should apply. In determining the appropriate standard of proof in reparation proceedings, various factors specific to the case should be considered, including the difficulty victims may face in obtaining evidence in support of their claim due to the destruction or unavailability of evidence" (emphasis added).

footing, and not because of their qualification as direct or indirect victim. As underlined by the Chamber itself,

> "[i]*n determining the amount of the convicted person's liability*, the primary consideration should be the extent of the harm *and the costs to repair it*. Other criteria, such as modes of liability, *gravity of the crimes, or mitigating factors* are not relevant to this determination".[114]

64. Regarding transgenerational harm, the Defence argues, on the one hand, that the "*the Trial Chamber's reliance on the concept of transgenerational harm is unsound*"; while, on the other hand, within the same sentence, recognising that the Chamber, for that purpose, "*relied on the submissions from the LRVs, the Appointed Experts Reports and the IACtHR's jurisprudence*".[115] In this regard, the Legal Representative fails to see how the Trial Chamber would have committed an error of law. Moreover, the Defence does not explain how the Chamber would have – if not committed an error of law as it relied on relevant and reliable sources – interpreted the latter in an erroneous way. Here again, absent such submissions, the Legal Representative is bound in her response by the arguments developed in the Defence Brief – or absence thereof – and will not argue beyond them.

65. Furthermore, the fact that the relevant Chambers in the *Katanga* and *Lubanga* cases, while establishing first principles on transgenerational harm, did not find that the situation of the applicants concerned triggered the application of a transgenerational harm presumption, does not amount to saying that the jurisprudence of the Court on that topic is "*undefined*", as suggested by the Defence.[116]

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[114] See the Reparations Order, *supra* note 9, para. 98 (emphasis added). See also para. 96: "*The convicted person's liability for reparations must be proportionate* to the harm caused, *in the specific circumstances of the case*" (emphasis added).

[115] See the Defence Brief, *supra* note 1, para. 120.

[116] See the Defence Brief, *supra* note 1, para. 118. See also the *Katanga* Reparations Appeal Judgment, *supra* note 74, para. 236: "*The Appeals Chamber underlines that this must not be understood as a definite conclusion by the Appeals Chamber that it would have been wrong for the Trial Chamber to make such a presumption: the question before the Appeals Chamber was only whether it was wrong for the Trial Chamber not to have done so*".

66. In addition, whether the Chamber acknowledged or not the fact that this concept has only been developed and referred to in the proceedings before the Court more recently – although it is debatable whether discussions which took place in 2009,[117] does indeed constitute a "novelty" when referred to 12 years later, in 2021 – does not constitute in itself an error or law. It also does not automatically mean that the Chamber would have failed to consider the possible limitations or characteristics of said concept, as alleged by the Defence.[118]

67. Incidentally, in that regard, the Legal Representative notes that the existence of two schools and natures of transgenerational trauma recognised scientifically nowadays – one of an epigenetic nature and the other of a psycho-social nature – does not weaken the concept, nor does it make it "*uncertain*".[119] To the contrary, the Legal Representative posits that it reinforces its very existence and provides explanations for two distinct ways traumas are transmitted from one generation to another, both of which exist in parallel and therefore complement one another, therefore rendering the generational transmission more likely to happen – and not the contrary.

68. The Defence also argues for a need to establish a casual *nexus* via the date of birth of the alleged victim for the establishment of transgenerational trauma, and further also suggests the use of a diagnosis or psychological expertise.[120] Regarding the date of birth, whether the children born out of rape were born in the militia or a few months later, the harm they are suffering from are the same and the struggle they are facing in the community in which their mother lives, is the same. For the children of the victims born after the latter's ordeal in the militia, the date of birth does not matter more either, as transgenerational trauma is by nature transmitted to the next generation(s). Accordingly, whether the children of the victims (the ones not born out

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[117] See the "The Psychological Impact of Child Soldiering", No. ICC-01/04-01/06-1729-Anx1, 25 February 2009, annexed to the "Report of Ms. Elisabeth Schauer following the 6 February 2009 'Instructions to the Court's expert on child soldiers and trauma'", No. ICC-01/04-01/06-1729, 25 February 2009.
[118] See the Defence Brief, *supra* note 1, para. 119.
[119] *Ibid*.
[120] *Idem*, paras. 118-123, and 131-133.

of rape) are born one, ten or thirty years after the commission of the crimes, it would therefore not change anything in relation to the establishment and proof of the harm suffered; especially in a context where victims have not received any support nor assistance for decades. Regarding the suggested medical expertise for each victim, not only does it appear in total contradiction with the reasoning underpinning the use of a presumption, but it also appears in total contradiction with the evidentiary threshold at the reparations stage. The Legal Representative further notes that the testimonies referred to by the Defence were delivered at trial, therefore not in the context of reparations proceedings. Consequently, the fact that the experts concerned mentioned the need to scientifically establish the presence of such trauma by way of a diagnosis, was not a statement made in relation to the possibility for the person concerned to benefit from reparations. The Legal Representative submits that the recourse to, and validity of, the use of presumptions has been clearly established by the Chamber in the present case. Indeed, as mentioned *supra*, scientifically establishing the presence of transgenerational trauma and post-traumatic stress disorder for each and every victim of the crimes referred to would be completely unrealistic and detrimental to the victims concerned. In any event, the prevalence of psychological trauma and transgenerational harm is more likely than not to have occurred in light of the crimes for which Mr Ntaganda has been convicted, as established by the various reports presented in these proceedings.[121]

69. Finally, the Legal Representative fails to see how the recognition of such harm would prejudice the Defence and its client. Indeed the reparations proceedings aim at addressing the needs of the victims and as long as these needs stem from the crimes Mr Ntaganda has been convicted for, the use of presumptions aims at identifying and

[121] See the "Experts Report on Reparation Presented to Trial Chamber VI, International Criminal Court by Karine Bonneau, Eric Mongo Malolo and Norbert Wühler", and the "Expert Report on Reparations for Victims of Rape, Sexual Slavery and Attacks on Healthcare Dr Sunneva Gilmore", *supra* note 73. See also the witness statement of Forensic Psychology Expert Professor John Yuille, P-0933, transcripts of the hearings held on 18, 21 and 22 April 2016, respectively No. ICC-01/04-02/06-T-84-ENG ET WT, No. ICC-01/04-02/06-T-87-ENG ET WT, and No. ICC-01/04-02/06-T-88-ENG ET WT; and the findings in the Judgment, *supra* note 5, *inter alia*, paras. 406-413, in particular para. 411, paras. 960-961, and 977 *et seq*.

providing explanations for the existence of said needs in relation to the harm the victims have been suffering from. Accordingly, as long as the harm suffered by the victims are related to Mr Ntaganda's crimes, whether or not said harm are transgenerational, physical, psychological, material or of a different nature, they ought to be, and will be, repaired in accordance with the legal framework of the Court.

70. The Legal Representative further notes that the Defence also developed arguments in relation to the interpretation of the terms 'indirect victims' (Ground 7).[122] In this regard, she submits that the Trial Chamber correctly interpreted said terms. Indeed, the definition of 'family' and 'close relationship' varies from a case to another according to the jurisprudence of the Court. In this regard, it can hardly be said that a Chamber would expand the scope of the definition of 'indirect victim', as it appears to be in direct contradiction with the very notion of cultural variation. Moreover, it squarely falls within the Chamber's duty to rule taking due account of the specific context of the case, in more general terms. As noted by the Appeals Chamber,

> "*the ECtHR follows a similar approach in* preferring eligibility based upon the demonstration of harm rather than the demonstration that the indirect victim falls within a specified class of persons. *Thus, the approach of human rights courts does not create a principle that would constrain a trial chamber's discretion in its assessment of harm under article 75 (1) of the Statute.* Rather, the approach is case-specific and focuses on the existence of harm".[123]

71. Furthermore, the Legal Representative notes that the same argument was already raised by the Defence earlier in the proceedings and addressed by the Chamber,[124] rendering Ground 7 moot.

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[122] See the Defence Brief, *supra* note 1, paras. 114-117.
[123] See the *Katanga* Reparations Appeal Judgment, *supra* note 74, paras. 119-120 (emphasis added). See also paras. 113-121.
[124] See the "Decision on issues raised in the Registry's First Report on Reparations" (Trial Chamber VI), No. ICC-01/04-02/06-2630, 15 December 2020, paras. 52-56.

72. For all these reasons, Grounds 4, 6 and 7 of the Defence's appeal should be dismissed.

6. Ground 9: The Trial Chamber applied a correct standard for the establishment of the causal link

73. The Legal Representative submits that the Defence is wrongly stating that "*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'*".[125] Indeed, contrary to the Defence's assertion, it appears that the scope of the conviction and the applicable evidentiary standard are the only guarantees needed when establishing who can benefit from reparations. If a victim demonstrates that he or she has suffered a harm in relation to a crime for which Mr Ntaganda was convicted, it can logically be concluded that said harm is attributable to the convicted person.[126]

74. Regarding transgenerational harm, in particular, the fact that other difficult events might have impacted the life of the victims concerned subsequent to the crimes attributed to Mr Ntaganda does not change the fact that the traumas and harm suffered then are more likely than not to be transmitted from a generation to another. These traumas and harm suffered as a result of Mr Ntaganda's crimes will not be nullified nor diminished by further additional harm that might be suffered during one's life. Whether or not other traumas and harm attributable to other subsequent events will be

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[125] See the Defence Brief, *supra* note 1, paras. 140-148.

[126] This principle was also restated by the Chamber in its "Decision on issues raised in the Registry's First Report on Reparations", *supra* note 124, para. 11: "*At the outset, the Chamber notes 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. As stressed by the Appeals Chamber, 'reparation orders are intrinsically linked to the individual whose criminal liability is established in the conviction and whose culpability for those criminal acts is determined in a sentence'. Accordingly, the assessment as to whether a person may be entitled to reparations in the Ntaganda case shall be based exclusively on the conviction and not on the Chamber's prior decisions regarding the scope of the case brought to trial or the requirements for victims' participation during the trial proceedings*"; and para. 60: "*The Chamber reiterates that reparations are intrinsically linked to the individual whose criminal liability is established in a conviction and whose culpability for the criminal acts is determined in a sentence. Accordingly, only victims of underlying acts that served as the basis for the Chamber to convict Mr Ntaganda for the crime of persecution are eligible for reparations*".

also transmitted is irrelevant. Indeed, such sufferings are not quantifiable – unlike *e.g.* material loss, and accordingly do not infringe upon the convicted person's rights.[127] As a result, the date of birth of the children is irrelevant, all the more so since transgenerational trauma is also transmitted through behaviours, habits and emotions shared, over years and multiple generations.[128]

75. In any case, the Legal Representative emphasises that the recruitment of her clients into the UPC/FPLC, under Mr Ntaganda's command, is the starting point of a series of harm the former child soldiers and their families have been suffering from ever since.

76. Whether their situation has then been worsened by subsequent events, as observed by the Chamber itself,[129] must be considered indeed, but not as a lens that would nuance or even reduce these established and recognised harm, to the contrary. Because of the time that has elapsed since the events concerned by the present case, the absence of any support or assistance ever provided since and the deleterious environment in which the victims have been living since their original victimisation, it is highly foreseeable that their respective situation could only have worsened. Whether the starting point of the harm they have been suffering from is, as established, their experience – or the experiences of their loved ones – as child soldiers is the fundamental element. Further widespread violence and poverty, associated to various pandemics and displacement are additional objective facts which reparations programs will have to take into consideration, as valuable information on the environment in which these victims have been maintained, in a holistic and victims-centred approach.

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[127] See the Defence Brief, *supra* note 1, paras. 142 *et seq*.

[128] In addition to the references used by the Chamber and the expertise presents, see also for instance DANIELI (Y.) (Ed.), *International Handbook of Multigenerational Legacies of Trauma*, the International Center for the Study, Prevention and Treatment of Multigenerational Legacies of Trauma, 1998; and DANIELI (Y.), NORRIS (F. H.), LINDERT (J.), PAISNER (V.), ENGDAHL (B.), & RICHTER (J.), "The Danieli Inventory of Multigenerational Legacies of Trauma, Part I: Survivors' post trauma adaptational styles in their children's eyes", *Journal of psychiatric research*, vol. 68, 2015, pp. 167-175.

[129] See the Reparations Order, *supra* note 9, *inter alia*, paras. 99 and 159.

77. For all these reasons, Ground 9 of the Defence's appeal should be dismissed.

7. Ground 10: The Trial Chamber did put in place a monitoring system for the implementation of the Reparations Order by the Trust Fund for Victims

78. The Legal Representative would like first to correct a misperception carried out by the Defence in its submissions related to the fact that some victims might opt not to benefit from reparations, which somehow, as presented by the Defence, would constitute one of the flows in the Chamber's approach.[130] Albeit true, the Defence is citing security concerns and different victims' wishes in term of reparations, but is conveniently omitting the very reason why in the cited case (*Lubanga*), some victims had expressed their unwillingness to participate at an early stage where the Trust Fund could not provide any information on the content of the reparations programs. Indeed, as underlined by the TFV then, consultations with victims are key at all stages of the proceedings, but the very stage of the eligibility screening of victims should only take place once an approved plan is implemented, allowing for a secure setting, for informed decision making, and avoiding misunderstandings about the types and modalities of reparations accessible.[131] The Legal Representative underlines that it is precisely in respect of these principles − victims-centred and trauma-sensitive approach, respecting victims' agency and promoting victims' empowerment − that the Chamber devised the current reparations process. Contrary to the Defence's allegation, allowing the TFV and the LRVs to first ensure meaningful consultations with victims, prior to the drafting of an implementation plan and during the implementation phase itself, gives way to an eligibility process and is a prerequisite for upholding the applicable principles.

79. The Defence purports that the Chamber has not reviewed any reparations requests and has totally delegated the eligibility assessment to the TFV, without

[130] See the Defence Brief, *supra* note 1, para. 171.
[131] See the "First submission of victim dossiers With Twelve confidential, *ex parte* annexes, available to the Registrar, and Legal Representatives of Victims V01 only", No. ICC-01/04-01/06-3208, 31 May 2016, paras. 54-59.

providing the latter with sufficient criteria to proceed, and without putting in place a monitoring or oversight system of its decisions.[132] This representation of the Reparations Order could not be further away from the reality.

80. At the onset of its Reparations Order, the Chamber underlined the necessity to ensure that the critical elements of the Order are subject to judicial control, in accordance with rule 97(3) of the Rules of Procedure and Evidence and with respect to the right to appeal provided for in article 82(4) of the Rome Statute.[133] In order to enable the TFV to proceed with the identification of eligible additional beneficiaries, the Chamber has established criteria defining the characteristics of the categories of eligible victims, distinguishing between direct and indirect victims, and taking into account considerations related to the temporal, geographical, and material scope of the conviction entered against Mr Ntaganda.[134] In fact, the Chamber proceeded in detailing examples of victimisation for each count (crime).[135] Moreover, the Chamber detailed the different types of harm suffered by the victims, the criteria to be applied by the TFV to design the reparations awards; to assess the causal link; and detailed the evidentiary criteria and how to assess them.[136]

81. Moreover, the Chamber did review, assess, and issued a decision on the 2405 victims participating at trial and asked the Registry to make an assessment of their situation in light of the scope of the conviction.[137] Finally, and most importantly, the Chamber asked the TFV to include, within its DIP, "*a detailed proposal as to the way in which it expects to conduct the administrative eligibility assessment*", based on the requirements set out by the Chamber in the Reparations Order.[138] It is worth recalling for the benefit of the Defence that such DIP remains under the control of the Chamber and needs to be approved by the latter, thereby ensuring the essential judicial and

[132] See the Defence Brief, *supra* note 1, paras. 215-225.
[133] See the Reparations Order, *supra* note 9, para. 24.
[134] *Idem*, paras. 105-128.
[135] *Idem*, paras. 148 *et seq*.
[136] *Idem*, paras. 50-52, and 129-183.
[137] *Idem*, paras. 2, and 234-235.
[138] *Idem*, para. 253.

monitoring control referred to by the Defence as lacking in these proceedings. Such monitoring and retained judicial control have been reaffirmed by the Chamber in its recent Decision on the TFV's IDIP.[139]

82. Therefore, the Legal Representative understands that the Defence's ground of appeal is based on a misconception of the process and overlooks the fact that the Reparations Order is but one step in the reparation proceedings, and will be complemented by further decisions to be taken by the Chamber, thereby safeguarding both the Defence's and the victims' rights.

83. As for the Defence's arguments concerning the sampling exercise realised in the present case, compared to other cases before the Court, the Legal Representative underlines that the very specificity of this case calls for a different nature and sampling arrangements. Indeed, contrary to previous cases, many victims of Mr Ntaganda have already been identified at the pre-trial and trial stage,[140] and considering the scope of Mr Ntaganda's case, victims of the *Lubanga* case – many of which are already identified – have also been deemed eligible to benefit from reparations in the present case. As such, and contrary to the other cases cited by the Defence, the Chamber already had the benefit of several thousands of victims' files in order to proceed with the required assessments[141] and benefited from the necessary information to issue a reparations order.[142] Moreover, and in light of this already available information, the Chamber asked the Registry to proceed with an additional sampling in order to provide the parties and participants, and the Chamber, with additional information before the issuance of the Reparations Order, encompassing victims' experience of harm, specific

[139] See the "Decision on the TFV's initial draft implementation plan with focus on priority victims", *supra* note 23.
[140] At least when former child soldiers are concerned.
[141] See, *inter alia*, the "Sixth Transmission to the Trial Chamber of Applications for Participation in the Proceedings", No. ICC-01/04-02/06-783, 18 August 2015, With 13 Confidential EX PARTE annexes only available to the Registry.
[142] In this regard, it is also noteworthy that both parties also already had the benefit of hundreds of victims' dossiers throughout trial (victims dossiers falling under the category C, and Registry's Reports regarding dossiers falling in all three categories A, B and C).

needs and desired reparation measures.[143] It is worth noting that the Defence also had the benefit of this information and was given the opportunity to respond to it – and actually did,[144] prior to the Chamber issuing its Order.

84. Moreover, the Legal Representative cannot but note another confusion in the Defence Brief regarding the number of new potential beneficiaries referred to by the Registry in its sampling and mapping exercises. Contrary to what the Defence suggests,[145] the Registry did not put forward numbers such as 100,000 possible victims. Rather, as further recalled by the Chamber in the Reparations Order,[146] it consistently indicated that approximately 1,100 individuals may qualify as new potential victims of the attacks. Furthermore, and contrary to what the Defence and the CLR2 keep referring to in their respective Briefs, the Chamber assessed that the potential number of new beneficiaries to reparations revolved around "*thousands of victims*". It is on this basis that the Chamber issued its Reparations Order.[147]

85. The Legal Representative further recalls that the Chamber's decision to instruct the TFV to proceed with the administrative assessment of the eligibility of further applicants to reparations while remaining under the Chamber's control is in conformity with the Appeals Chamber's ruling in the *Lubanga* case. Indeed, when seized with a similar argument, the Appeals Chamber underlined that "*any recommendations as to eligibility made by the TFV shall be subject to the approval of the Trial*

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[143] See the "Decision on issues raised in the Registry's First Report on Reparations", *supra* note 124; the "Public Redacted Version of Annex I (ICC-01/04-02/06-2639-Conf-AnxI) notified on 15 January 2021 Registry Second Report on Reparations", No. ICC-01/04-02/06-2639-AnxI-Red, 10 February 2021; and the "Registry's First Report on Reparations", No. ICC-01/04-02/06-2602 with No. ICC-01/04-02/06-2602-AnxI-Red, 30 September 2020.

[144] See the "Defence Observations on the Registry's Second Report on Reparations", No. ICC-01/04-02/06-2643-Red, 28 January 2021; and the "Defence Observations on the Registry First Report on Reparations", No. ICC-01/04-02/06-2622, 30 October 2020.

[145] See the Defence Brief, *supra* note 1, paras. 178 *et seq*.

[146] See the Reparations Order, *supra* note 9, para. 232.

[147] *Idem*, para. 246. The very mention of the number of 100,000 by the Chamber was used in the context of the following sentence only, and is not part of the conclusion of the Chamber: "[…] *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*" (emphasis added).

Chamber".[148] More generally, the Appeals Chamber also noted that "*the relevant legal provisions – article 75(1) of the Statute, rules 94-98 of the Rules* […] *and the Regulations of the TFV – do not stipulate who should assess eligibility in cases where collective reparations are awarded nor how exactly this should be done. Furthermore, as discussed earlier in this judgment, in the type of reparations proceedings facing the Trial Chamber in the present case, the Appeals Chamber has found that trial chambers need not, in all cases, individually consider requests for reparations which have been filed* […]".[149]

86. Finally, the Legal Representative fails to follow the reasoning proposed by the Defence. Indeed, while recognising that the Registry was asked to produce a form specifically for the purpose of the reparations proceedings,[150] the Defence nonetheless concludes that the Chamber cut short any process of collecting reparations information, imposing reparations on entire communities without their involvement or consent, and thereby committing an error of law vitiating the Reparations Order in its entirety.[151] The Legal Representative refers for that matter to Annexes II and III to the Registry's First Report on Reparations,[152] which contain respectively the Registry's Draft Reparations Form and the Registry's Draft Consultation Form. The Legal Representative understands that these forms were and will be used to collect information and requests from potential new beneficiaries as well as from the victims who participated at trial and remain within the scope of the conviction. The Legal Representative submits that these forms contain all the necessary fields aiming at informing the reparations process, from the harm they suffer from and their impacts (including information allowing the TFV and the Chamber to confirm that they are victims of Mr Ntaganda's crimes), to their needs and reparations wishes, and any specific vulnerabilities. The relevant and necessary information will hence be collected with individuals who wish to benefit from reparations, contrary to the Defence's

[148] See the *Lubanga* Reparations Appeals Judgment, *supra* note 39, paras. 163 and 332.
[149] *Idem*, paras. 138-143.
[150] See the Defence Brief, *supra* note 1, paras. 49, 53, 75, and 179-180.
[151] *Idem*, paras. 180 *et seq*.
[152] See the Registry's First Report on Reparations, *supra* note 143, No. ICC-01/04-02/06-2602-Conf-AnxII and No. ICC-01/04-02/06-2602-Conf-AnxIII.

allegations.[153] This applies both to potential new beneficiaries and to the victims already participating, who will also be consulted on their current situation, but as understood by the Legal Representative, only again at the implementation/screening stage when questioned on their specific needs.

87. Furthermore, the Legal Representative refers to the constant jurisprudence of this Court which supports the non-disclosure of victim's identities to the Defence at the reparations stage when victims express concerns as to their well-being and security, and therefore supports a limited access of the Defence to the victims' reparations applications.[154] Moreover, once a Trial Chamber has issued its decision on the liability of the convicted person, the Appeals Chamber further established the limited interest of the Defence at that stage of the proceedings, and the correlative disproportionality of giving it access to victim's personal information.[155] The Legal Representative insists on the current deleterious security situation in Ituri, as recognised by all parties and participants in the present case, including the Defence,[156] and as established recently in

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[153] See the Defence Brief, *supra* note 1, paras. 180 *et seq*.

[154] See the *Lubanga* Reparations Appeals Judgment, *supra* note 39, para. 256: "*In doing so, the Appeals Chamber considers that in reparations proceedings, a trial chamber should also take into account the relevance of the information at issue and the purpose for which it will be relied upon, including whether, in reality, its non-disclosure affects the convicted person's rights. For example, if the information in the requests is considered with a view to deciding on collective reparations but not with a view to deciding on the merits of the individual requests, this may also be taken into account. What this means will depend on the circumstances of each case*". See also the "Corrected version of the 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable'", *supra* note 64, para. 59; the "Order for Reparations pursuant to Article 75 of the Statute" (Trial Chamber II), No. ICC-01/04-01/07-3728-tENG, 24 March 2017, footnote 8; the "Decision on the 'Defence Request for the Disclosure of Unredacted or Less Redacted Victim Applications'" (Trial Chamber II), No. ICC-01/04-01/07-3583-tENG, 1 September 2015, paras. 15, 19, and 24; the "Decision establishing the principles and procedures to be applied to reparations" (Trial Chamber I), No. ICC-01/04-01/06-2904, 7 August 2012, para. 4 referring to the Registry "First Report to the Trial Chamber on the applications for reparations", No. ICC-01/04-01/06-2847, 28 March 2012; the "First Transmission to the Trial Chamber of applications for reparations", with confidential *ex parte* annexes, available to the Registry only, No. ICC-01/04-01/06-2852, 29 March 2012; and the "Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties' observations on applications for participation by 86 applicants" (Trial Chamber III), No. ICC-01/05-01/08-699, 22 February 2010, para. 32.

[155] See the "Public redacted Judgment on the appeal of the victims against the 'Reparations Order'" (Appeals Chamber), No. ICC-01/12-01/15-259-Red2_A, 8 March 2018, paras. 78-95, and in particular para. 93.

[156] See most recently the "Joint Response of the Common Legal Representatives of Victims to the 'Trust Fund for Victims' Request to Vary the Time Limit to Submit Draft Implementation Plan'", *supra* note 22, para. 11; the "Trust Fund for Victims' Request to Vary the Time Limit to Submit Draft Implementation

the *Lubanga* case,[157] which concerns part of the similar events, localities, and people involved. Moreover, as underlined by the Appeals Chamber in the *Lubanga* case, the Legal Representative notes that the ultimate purpose for which the Chamber used the requests for reparations was limited:

> "*In this regard, even though the Trial Chamber made findings as to the eligibility of the 473 victims who filed dossiers before it, it is not clear to the Appeals Chamber that the overall monetary award made, USD 10,000,000, would have changed had the number of eligible victims been different*. […] *The Appeals Chamber recalls, in this context, that the Trial Chamber assessed the 473 dossiers, as a sample, in the context of determining Mr Lubanga's overall monetary liability and in the knowledge that there were additional victims who had not yet been identified*".[158]

88. Moreover, once the monetary liability has been set, the results of the screening process will have no impact thereon.[159]

89. Finally, the Legal Representative notes that the Defence did have the opportunity to comment on victims' applications through trial (at the very least on victims dossiers falling into the category C, and on each and every Reports filed by the Registry regarding all victims' dossiers transmitted to the Chamber and participating at trial);[160] and that the Defence did not appeal the Decision on victims' participation at trial as recalled *supra*.[161] These applications mainly form the basis of the Chamber's Order, and as recognised by the Appeals Chamber, once the liability of the convicted

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Plan", *supra* note 21, paras. 7 and 9; and the "Registry Observations on the Trust Fund for Victims' Initial Draft Implementation Plan", *supra* note 14, paras. 6 and 14. See also the Defence Brief, *supra* note 1, paras. 43, 94, 96-97, and 178.

[157] See the "Fourteenth progress report on the implementation of collective reparations as per Trial Chamber II's decisions of 21 October 2016, 6 April 2017 and 7 February 2019, Annex D corresponding to the Registry 'Overview of the Security and Political Dynamics in Ituri with potential impact on ICC activities Reporting period: 15 April 2021 – 10 July 2021'", No. ICC-01/04-01/06-3519-Conf-Exp and No. ICC-01/04-01/06-3519-Conf-Exp-AnxD, 21 July 2021 (referred to by the TFV at footnote 14 of its "Trust Fund for Victims' Request to Vary the Time Limit to Submit Draft Implementation Plan", *supra* note 21).

[158] See the *Lubanga* Reparations Appeals Judgment, *supra* note 39, paras. 257 *et seq*.

[159] *Idem*, para. 251.

[160] See the Decision on victims' participation in trial proceedings, *supra* note 46.

[161] See *supra* para. 28, and notes 46-48.

person has been determined, the interests, and therefore role of the Defence with regard to new victims requests for reparations is limited.[162] As a consequence, the Legal Representative posits that even if the Defence were to be granted access to redacted versions of new reparations requests, it would be put in a position to make its observations (as developed *infra*), and that it would be sufficient for the purpose of the these proceedings.[163]

90. For all these reasons, Ground 10 of the Defence's appeal should be dismissed.

8. Ground 11: The Trial Chamber correctly assigned the role of the Trust Fund for Victims with regard to the eligibility of potential new beneficiaries and with the designing of programs corresponding to the collective modality of reparations adopted by the Chamber

91. The Legal Representative wholly opposes the Defence's analysis of the current jurisprudence of this Court. It incorrectly portrays said jurisprudence as unsettled and controversial,[164] when the TFV's role in the reparations proceedings has been examined and settled by the Appeals Chamber, in a context, and for reasons, very similar to the ones put forward by the Defence in its Appeal Brief.

92. As mentioned by the Appeals Chamber in the *Al Mahdi* case, "*the Trial Chamber delegated a relatively limited task to the TFV, namely the determination of whether the 139 current applicants as well as any future applicants fall within the group of individuals that are, according to the Trial Chamber's determination, entitled to individual reparations. As has been stated more fully above, the applicable legal texts at the Court confer discretion on the trial chamber in its determination of reparations* […]".[165] The Appeals Chamber also noted that, "[s]*imilarly, in respect of the group of unidentified victims referred to by the Trial*

[162] See the "Public redacted Judgment on the appeal of the victims against the "Reparations Order"" (Appeals Chamber), No. ICC-01/12-01/15-259-Red2, 8 March 2018, paras. 78-95, and in particular para. 93.
[163] See the Defence Brief, *supra* note 1, paras. 189-195.
[164] *Idem*, paras. 201-214.
[165] See the "Public redacted Judgment on the appeal of the victims against the 'Reparations Order'", *supra* note 155, paras. 59 and 60.

Chamber, […] *the Regulations of the TFV clearly envisage a situation where, in implementing an award under rule 98 (2) of the Rules, the TFV is given responsibility for identifying a group of beneficiaries, when not already identified by the Trial Chamber (regulations 60 to 65 of the Regulations of the TFV)*".[166] It further restated what it had already ruled upon in the *Lubanga* case, and according to which "*in previously setting out general principles on reparations, it found that one of the five essential elements for an order for reparations under article 75 of the Statute was that the order 'must identify the victims eligible to benefit from the awards for reparations* or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted'. *This jurisprudence illustrates that the actual assessment of individual applications must not necessarily be carried out by the Trial Chamber, as long as it sets out the eligibility criteria*".[167]

93. Finally, recalling that a Trial Chamber is not required to rule on the merits of individual requests for reparations, the Appeals Chamber concluded that "[t]*his lends further support to the conclusion that the Trial Chamber may delegate aspects of the assessment of applications for individual reparations to the TFV. In this regard, the Appeals Chamber stresses that, in any event, and as developed in more detail below, the Trial Chamber will exercise judicial control over the overall process*. […] *The Appeals Chamber finds that the oversight of the Trial Chamber exercising judicial control over the screening process shall include that the Trial Chamber finally endorse the results of the screening, with the possibility of amending the conclusions of the TFV on the eligibility of applicants for individual reparations, upon request of those applicants, or* proprio motu *by the Trial Chamber*".[168] The Legal Representative submits that such a judicial oversight shall be carried out in the present case and understands from the Reparations Order that it will, indeed, be carried out. Finally, as

[166] *Idem*, para. 63.
[167] *Idem*, para. 64 (emphasis added).
[168] See the "Public redacted Judgment on the appeal of the victims against the 'Reparations Order'", *supra* note 155, paras. 66 and 69. See also para. 72: "*In conclusion, the Appeals Chamber considers that the Trial Chamber did not err when it delegated the particular aspects it did, relating to the administrative screening of the applications for individual reparations, to the TFV. It is within the discretion of a trial chamber to request, on a case-by-case basis, the assistance of, for example, the TFV to undertake the administrative screening of beneficiaries of individual reparations meeting the eligibility criteria set out by the trial chamber*".

argued *supra*, the Trial Chamber did provide the TFV with the guidance and criteria it needs to proceed with the administrative screening of new reparations requests.[169]

94. Regarding the Defence's arguments as to the modalities of reparations that would not have been sufficiently addressed by the Chamber, the Legal Representative notes that in conformity with the existing jurisprudence,[170] the Chamber did determine the framework in which the reparations programs should be developed by the TFV, which in effect corresponds to collective reparations (*versus* individual reparations). Once the TFV submits its DIP taking into consideration, *inter alia*, the submissions of the parties, not only said parties will have an opportunity to provide their observations to the Chamber in response, but the Chamber will also be able to approve, or reject, the concrete programs proposed by the TFV, therefore exercising its judicial control.[171]

95. For all these reasons, Ground 11 of the Defence's appeal should be dismissed.

9. Ground 12: The Trial Chamber correctly defined the methodology to assess possible new victims' applications for reparations

96. As already developed *supra*,[172] and contrary to the Defence's submissions,[173] the Trial Chamber was not required to rule on individual applications for reparations for the purpose of setting the appropriate amount of Mr Ntaganda's liability.[174] Indeed, as underlined by the Appeals Chamber in various proceedings to date,

> "[i] *n such cases* [where there are high number of potential beneficiaries and where a Chamber is in addition ruling in favour of collective reparations], *the trial chamber 'is not required to rule on the merits of the individual requests for reparations'*. […] *This is not to say that, if collective reparations are ordered, the number of victims is not relevant to the determination of the scope of a convicted person's liability for reparations.* […] *Nevertheless, it would be incorrect to assume that the number of victims*

[169] See *supra* paras. 78 *et seq*.
[170] See the *Lubanga* Reparations Appeals Judgment, *supra* note 39.
[171] See also *supra* paras. 80, 81, and 93.
[172] See *supra* paras. 36, 85, 92, and 93.
[173] See the Defence Brief, *supra* note 1, paras. 176 *et seq.*, and paras. 196-200.
[174] See *supra*, paras. 78 *et seq*.

> *may only be established based on individual requests for reparations received by the Court. It would be undesirable for the trial chamber to be restrained in that determination simply because not all victims had presented themselves to the Court by making a request under rule 94 of the Rules*".[175]

97. In addition, it is obvious from the Defence's submissions that a misunderstanding persists at to the meaning of collective reparations with individual components *versus* individual reparations.[176] The former, which is the modality favoured by the Chamber in the present case, entails the development of programs which correspond to the deployment of specific services for the benefit of the victims concerned. However, and by its very nature, while remaining collective (because they correspond to families of services provided), said services are accessed by each victim concerned in accordance with their respective needs. This is the aspect covered by the notion of individual components, or individual impacts. Moreover, each beneficiary will access one, some, or all the services proposed based on their own situation, harm suffered, and correlative needs. This is how, additionally, the collective reparations of access to services have an inherent individual component, in as much as the reparations for each beneficiary will necessarily vary from a person to another. Accordingly, if a victim is suffering from physical harm (for instance with a bullet still lodged in his or

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[175] See the *Lubanga* Reparations Appeals Judgment, *supra* note 39, para. 87: "*By contrast, there may be cases where the trial chamber contemplates an award for reparations that is not based on an individual assessment of the harm alleged in the requests filed. This may be, for instance, due to the number of victims. In such cases, the trial chamber 'is not required to rule on the merits of the individual requests for reparations'* […]. In this regard, once it has become clear that the trial chamber does not intend to make individual determinations with respect to each victim who has filed a request, elements of rule 94 may be of less relevance, as the requests which have been filed will not be individually considered" (emphasis added); para. 88: "*The Appeals Chamber is of the view that, in cases with more than a few victims, proceeding in this manner may prove to be more efficient than awarding, or deciding on the eligibility for, reparations on an individual basis, precisely because it is not necessary for the trial chamber to consider individual requests for reparations*. […]"; and para. 89: "*This is not to say that, if collective reparations are ordered, the number of victims is not relevant to the determination of the scope of a convicted person's liability for reparations; to the contrary, the number of victims will be an important parameter for determining what reparations are appropriate. Clearly, it makes a difference whether the crimes for which the conviction was entered resulted in the victimisation of one hundred, one thousand or one hundred thousand individuals.* Nevertheless, it would be incorrect to assume that the number of victims may only be established based on individual requests for reparations received by the Court. It would be undesirable for the trial chamber to be restrained in that determination simply because not all victims had presented themselves to the Court by making a request under rule 94 of the Rules" (emphasis added).

[176] See the Defence Brief, *supra* note 1, paras. 185-188.

her body), is currently living in a rental place of which he or she is about to get expelled and is not able to find a job because of the interruption of his or her schooling by the events (for instance by being conscripted) and the absence of further professional trainings accessible, the type of services this victim will be given access to will be tailored to his or her needs, and will be different that the ones accessed by another victim, who for instance came back from the militia with mental illness or troubles. This is one amongst thousands scenarii that could arise and that makes this modality of reparations the most appropriate in the circumstances, in light of, as acknowledged by the Chamber, "*the multiple, diverse, and multi-faceted nature of the harms suffered by the victims in this case*".[177] Indeed, most of the victims concerned are in need of both physical and psychological, but also educational and professional, economical and material help, which makes the corresponding categories of services provided under the umbrella of collective reparations the most appropriate to respond to their specific situation.

98. For all these reasons, Ground 12 of the Defence's appeal, and Ground 6 of the CLR2's appeal, should be dismissed.

10. Ground 14: The Trial Chamber correctly ruled on the number of potential beneficiaries

99. The Legal Representative refers to her developments *supra* in relation to the basis of the Chamber's decision in relation to the numbers of potential beneficiaries in the present case.[178] Contrary to the Defence's submissions,[179] the Chamber did assess all the very distinct estimations provided by the parties, the Registry, and the Experts, regarding the number of possible victims of the present case. It also took into consideration both the likeliness that victims of the *Lubanga* case are also concerned by the *Ntaganda* case and the way the Chamber in *Lubanga* proceeded with an estimation of the potential beneficiaries, and did proceed to determine both the best modalities of

[177] See the Reparations Order, *supra* note 9, para. 198; see also paras. 166, 176, 183, and 244.
[178] See *supra* para. 84.
[179] See the Defence Brief, *supra* note 1, paras. 226-238.

reparations and the liability of the accused on the basis that "*thousands of victims*" may come forward and qualify. Not 100,000, but thousands. The number of 100,000 was only referred to by the Chamber as the highest estimate that was provided, and not the actual number the Chamber based its decision on.[180] The same reasoning was used by Trial Chambers I and II in the *Lubanga* case[181] and was validated by the Appeals Chamber.[182] In the *Katanga* case, a different approach was chosen in light of the small number of victims due to the case specificities, as underlined by Trial Chamber II itself.[183]

100. The Legal Representative uses this opportunity to note once again that the actual number of potential new beneficiaries who are former child soldiers and/or their dependants is most likely to increase since many of them did not dare coming forward at an earlier stage of the proceedings.[184] Moreover, children born of rape or sexual violence and other dependants will most certainly come forward.

101. For these reasons, Ground 14 of the Defence's appeal and Grounds 1 and 3 of the CLR2's appeal should be dismissed.

11. Ground 15: The Trial Chamber correctly assessed Mr Ntaganda's liability for the purpose of reparations

102. The Legal Representative notes that this argument has been advanced by the Defence through other grounds of appeal, and therefore is already addressed in her

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[180] See the Reparations Order, *supra* note 9, para. 246. See also *supra* note 188.
[181] See the "Corrected version of the 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable'", *supra* note 64, paras. 268 *et seq*.; and the "Decision establishing the principles and procedures to be applied to reparations", *supra* note 154, paras. 44, 47, 96, and 219.
[182] See the *Lubanga* Reparations Appeals Judgment, *supra* note 39, paras. 194, 196 and 22, 228, 257, 300, and 329-331.
[183] See the "Order for Reparations pursuant to Article 75 of the Statute", *supra* note 154, para. 33, and footnote 71.
[184] See the Submissions on Reparations on behalf of the Former Child Soldiers, *supra* note 73, para. 64: "*These estimations will have to be adjusted to the specificities of the Ntaganda case, at least with respect to the three following points. First, the Legal Representative expects more former child soldiers to be willing to participate in the reparations proceedings in the present case because Mr Ntaganda is not of Hema ethnicity. Accordingly Hema victims will be more inclined to come forwards which might not have been the case in the* Lubanga *reparations proceedings*".

submissions *supra*.[185] However, she insists that, contrary to what the Defence advances,[186] the Chamber did not adopt an *ex aequo et bono* approach to determine Mr Ntaganda's liability. Instead, it did refer to the use of such method by the Chamber in the *Lubanga* case. The Chamber did not proceed with an "*arbitrary exercise*"[187] setting a financial figure for Mr Ntaganda's liability, but proceeded by referring to the estimated number of potentially eligible victims[188] – contrary to the Defence's assertion – and to the extent of the harm) caused to the victims of all crimes for which he was convicted, and to the cost to repair these harms.[189] Contrary to the way the Defence chose to portray the jurisprudence of this Court, the Appeals Chamber already specified that determining the exact number of beneficiaries is not a pre-condition to issuing a reparations order and to determining the financial liability of the convicted person.[190] In this regard, as mentioned *supra*, the Appeals Chamber already underlined that

> "[i]*n making that determination* [of the number of victims of the convicted person's crimes], *the trial chamber should consider the scope of damage as it is in the current reality, based on the crimes for which the convicted person was found culpable. The number of victims at the time of the crimes may be a starting point for this consideration. However, other parameters for determining what reparations are appropriate include considerations of what reparations measures are envisaged and how many victims are likely to come forward and benefit from them – a number that is likely to be smaller in the current reality than the overall number of victims of the crimes at the time they were committed*".[191]

It also indicated that in the *Lubanga* case,

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[185] See *supra* the developments regarding the Defence Grounds 2, 8, 12, and 14.
[186] See the Defence Brief, *supra* note 1, paras. 239-256.
[187] *Idem*, para. 243.
[188] See the Reparations Order, *supra* note 9, para. 246: "*Based on the above, the Chamber has concluded that* thousands of victims *may be eligible for reparations in the present case*" (emphasis added).
[189] *Idem*, paras. 218, and 223-247.
[190] See *supra* paras. 35 *et seq*. See also the *Lubanga* Reparations Appeals Judgment, *supra* note 39, paras. 89 *et seq*.
[191] *Ibid*.

> "[…] *Trial Chamber I found that, '[g]iven the uncertainty as to the number of victims of the crimes* […] *– save that a considerable number of people were affected – and the limited number of individuals who have applied for reparations, the Court should ensure there is a collective approach that ensures reparations reach those victims who are currently unidentified.' This finding was not overturned by the Appeals Chamber.* […] This finding was not overturned by the Appeals Chamber".[192]

103. Finally, upon assessment of the evidential basis on which Trial Chamber I estimated the number of potential other beneficiaries in an attempt to fix the amount of the convicted person's liability for collective reparations, the Appeals Chamber decided that the Defence had not demonstrated an error.[193] In light of the information examined by the Chamber to reach its conclusion,[194] the Legal Representative submits that the same conclusion should be reached by the Appeals Chamber in the present case.

104. In this regard, the Legal Representative submits that the Chamber did provide its reasoning for setting Mr Ntaganda's liability at USD 30,000,000, and did use figures, estimates, and information provided by the parties, the participants, and the Experts in order to arrive to its conclusion. It is plainly incorrect to state that "*the Chamber freed itself from the burden of assessments and calculations*".[195] The Legal Representative refers to the following parts of the Reparations Order: general considerations on the scope of Mr Ntaganda's liability (paras. 215-216); modes of liability and victims entitled to reparations in other cases (paras. 217-222); indigence, funds available to the TFV, and other criteria (paras. 223-225); applicable law (paras. 227-231); victims potentially eligible for reparations (paras. 232-235); and cost to repair the victims' harms (paras. 236-244).[196] She fails to see how, and based on what elements, the Defence can reasonably argue that the figures and information provided by all the participants in the present proceedings do not qualify as legitimate and real estimates for that very

[192] *Idem,* paras. 92, and 257.
[193] *Idem*, paras. 222-235.
[194] See the Reparations Order, *supra* note 9, paras. 232-235.
[195] See the Defence Brief, *supra* note 1, para. 246.
[196] See the Reparations Order, *supra* note 9.

purpose.[197] Absent more information provided, the Legal Representative is not going to venture in guessing why such information is not seen as a reliable estimate by the Defence and cannot but conclude that the Defence's submissions are unsubstantiated.

105. Finally, regarding the Defence's arguments concerning Mr Lubanga and Mr Ntaganda's joint liability and its possible impacts in the present proceedings,[198] it is first important to note that said joint liability only exists regarding the former child soldiers. If it is true that the Trial Chamber has not provided guidelines *yet* on how the Trust Fund for victims should take it into consideration in its design and more importantly in implementing its programs; it is however important to recall that the Chamber has already underlined the key aspect of this principle, namely that victims should not benefit twice from reparations (what the Chamber referred to as the principle of "*no over-compensation*"):

> "*Reparations may neither 'enrich' nor 'impoverish' the victim, but adequately repair the harm caused, to the extent possible* […] *The goal of reparations is not to punish the convicted person but to repair the harm caused to others. Where the Court considers the application of joint and several liability or responsibility* in solidum*, victims shall not be over-compensated for the harm they have suffered*".[199]

106. The Legal Representative submits that there is no impact of the concept of joint liability on the determination of Mr Ntaganda's own liability. As underlined by the Chamber, "[a]*s to the shared liability of Mr Ntaganda and his co-perpetrators in the crimes for which he was convicted, including Mr Thomas Lubanga, the Chamber notes that they are all jointly liable* in solidum *to repair the full extent of the harm caused to the victims*".[200] In fact, concerning the overlapping direct and indirect victims of both the *Lubanga* and *Ntaganda* cases, the Chamber did determine that "*the reparation programmes implemented in the* Lubanga *case, which comprehensively repair the harm caused to the* [latter]*, should be*

[197] See the Defence Brief, *supra* note 1, para. 247.
[198] *Idem*, paras. 255 *et seq*.
[199] See the Reparations Order, *supra* note 9, paras. 99, 100, and 220.
[200] *Idem*, para. 219. See also footnote 273 (emphasis added).

understood to repair the victims' harm on behalf of both, Mr Lubanga and Mr Ntaganda".[201] The Chamber further underlined that "[i]*t should be stressed however that this, under no circumstances, diminishes Mr Ntaganda's liability to repair in full the harm caused to all victims of the crimes for which he was convicted*".[202] It is also important to note that for all the additional harm suffered by the victims of Mr Ntaganda's other crimes, the convicted person bares sole liability, as recognised by the Chamber.[203]

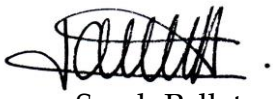
107. Finally, because both convicted persons are indigent and most likely will remain indigent for the purposes of the Court's assessment, they will most likely never be in a position to reimburse the TFV for the funds advanced in both reparations proceedings.[204] As a result, the Legal Representative submits that their recognised indigence is rendering moot the ground of appeal of the Defence, which in addition appears in itself wholly premature. The legal and symbolical importance of setting the liability of the convicted person has been covered by the Chamber's assessment according to which "*the indigence of the convicted person at the time of the issuance of the reparations order is neither an obstacle to the imposition of liability for reparations.* […] *criteria such as the gravity of the crimes are not relevant to this question.* […] *Most importantly,* […] *goal of reparations is not to punish the person but indeed to repair the harm caused to others, the objective of reparation proceedings being remedial and not punitive*".[205]

108. For all these reasons, Ground 15 of the Defence's appeal, and Grounds 4 and 5 of the CLR2's appeal, should be dismissed.

[201] *Idem*, para. 220.
[202] *Idem*, para. 221.
[203] *Idem*, para. 222.
[204] *Idem*, para. 221.
[205] *Idem*, para. 224.

IV. CONCLUSION

109. In an appeal pursuant to article 82(4) of the Rome Statute, the Appeals Chamber may confirm, reverse or amend the Reparations Order.[206] In the present case, the Legal Representative respectfully requests the Appeals Chambers to dismiss both the CLR2 and the Defence's appeals in their entirety and submits that it is appropriate to confirm the Impugned Decision in its entirety.



Sarah Pellet
Common Legal Representative of the
Former Child Soldiers

Dated this 9th day of August 2021
At The Hague, The Netherlands

[206] See rule 153(1) of the Rules of Procedure and Evidence.