

Annex 1

Public

Registry's Preliminary Observations on Reparations

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I. Introduction

1. On 25 July 2019, the Single Judge in Trial Chamber VI (“Chamber”) issued his Order for preliminary information on reparations (“Order”)¹ in *The Prosecutor v. Bosco Ntaganda* case (“Case”), requesting the Registry to submit, by 5 September 2019: 1) information on, and any proposed methodology for, the identification of victims (not yet participating); 2) observations on whether experts may be usefully appointed to assist the Chamber pursuant to rule 97 of the Rules of Procedure and Evidence (“Rules”) and, if so, submit a list of relevant experts available to assist the Chamber; and 3) an update on the security situation in the Democratic Republic of the Congo (“DRC”) based on information currently available.² The Single Judge further noted that the Chamber “intends to order the LRVs [Common Legal Representatives of Victims (“CLR”)], the Defence, the Prosecution, the Registry, and the TFV to submit observations on reparations six weeks after the issuance of the Chamber’s decision on sentence pursuant to Article 76 of the Statute.”³
2. In the present context and in response to the Order, the Victims Participation and Reparations Section (“VPRS”) of the Registry proposes a series of recommendations designed to facilitate a streamlined system for the identification of new potential beneficiaries of reparations *in advance* of the reparations order.
3. The VPRS has set out its preliminary observations and recommendations below without yet delving into matters more appropriately addressed in its observations on reparations as scheduled by the Chamber for six weeks after the issuance of the Chamber’s decision on sentence.⁴

¹ Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, “Order for preliminary information on reparations”, 25 July 2019, ICC-01/04-02/06-2366, para. 4(a)(i) to (iii).

² *Id.*, at para. 4.

³ Order, para. 5.

⁴ *Ibid.*

II. Proposed Methodology for the Identification of Potential New Beneficiaries of Reparations

i. Preliminary Factual Considerations

4. The VPRS has set forth below a series of facts necessary for the consideration of the overall proposal on the identification of potential new beneficiaries of reparations.

1) Updated Number of Participating Victims

5. Following the issuance of the Judgment,⁵ the VPRS conducted a detailed review of the victims' participatory records in the Case, including the various death certificates and resumption of action forms received and the various decisions taken thereon. After this exercise, the VPRS notes that the total number of victims authorized to participate at trial is 2,132, not 2,129 as previously reported.⁶ The number of participating victims at the conclusion of trial includes 283 former child soldiers and 1,849 victims of the attacks.

2) Reduced Scope of the Case Following Judgment

6. While the scope of the Case appears to remain relatively unchanged for the former child soldiers, the status of the victims of the attacks appears to have been significantly impacted with the removal of specific crimes and village locations in the Judgment.⁷ Accordingly, the number of certified reparation beneficiaries emanating from the list of participating victims (particularly the victims of the attacks) is likely to be reduced. Should the Single Judge so order,

⁵ Trial Chamber VI, *Ntaganda*, "Judgment", 8 July 2019, ICC-01/04-02/06-2359 ("*Ntaganda* Judgment").

⁶ The VPRS notes that the figure presented in its 13th Periodic Report (2,129) was missing three victims (a/00206/13, a/00472/13, a/01540/13). This was due to the fact that the deaths of these participants were mistakenly reported twice in the Registry's 8th (ICC-01/04-02/06-2056) and 9th (ICC-01/04-02/06-2212) Periodic Report. The Chamber appropriately approved the resumption of action for these participants only once in the 11th decision on victims' participation in trial proceedings (ICC-01/04-02/06-2279). The VPRS, however, erroneously deducted their numbers twice from the total number of participating victims due to the double reporting of death in the Periodic Reports. The appropriate final number of participating victims at trial should thus be 2,132.

⁷ The VPRS notes that 18 villages included in the confirmation decision were not included in the final Judgment. The VPRS also notes that a number of specific crimes included in the confirmation decision (with regards to certain villages that remain) were also not included in the final Judgment.

the VPRS will thus proceed with an assessment of how many of the 2,132 participating victims have been impacted by the reduced scope of the Case following the Judgment.⁸ In accordance with relevant Appeals Chamber jurisprudence, it is important that the participating victims are assessed against the same criteria applied to any newly identified victim, as further outlined *infra*. The VPRS therefore recommends proceeding with the assessment of eligibility for reparations of both the victims already participating at trial and any potential new reparation beneficiaries applying the same standard once the criteria have been set by the Chamber.

3) Number of Reparations Applications Received

7. The participation form used at pre-trial and trial only asked victims whether they “intend to apply for reparations” and therefore does not constitute a formal request for reparations as per the requirements set out in rule 94 of the Rules. However, 38 victims participating in the Case submitted a previous version of the application form which included a section devoted to requesting reparations in accordance with rule 94 of the Rules.⁹

4) Documentation Available and Estimated Number of Potential New Beneficiaries of Reparations

8. Throughout the trial and particularly in the run-up to the issuance of the Judgment, the VPRS conducted a number of activities in the field to prepare for the various potential outcomes. Following the issuance of the Judgment, the relevant victim groups were well recognizable. In consulting with the community leaders¹⁰ in all of the relevant Case locations,¹¹ the VPRS took the

⁸ It is envisaged to proceed with this task in appropriate consultation with the CLR. A first approximation has already been carried out based on the locations that, while part of the charges admitted at trial, are not subject to the convictions in the Judgment.

⁹ The VPRS notes that this information may be deemed relevant for the application of article 75(1) of the Statute and rule 95 of the Rules. The VPRS also notes that out of these 38 applications, 15 were transmitted to the Defence during pre-trial proceedings, and the remaining applications were filed during the trial proceedings as group A applications (transmitted only to the Chamber). A further 77 “joint forms” including reparations applications have been submitted by participating victims but not filed in the Case (as they subsequently submitted forms approved solely for participation in the Case).

¹⁰ The VPRS notes that intermediaries, civil society organizations and authorities in refugee settlements were also consulted.

opportunity to gather information per village within the remit of the Case on the available forms of documentation that could be used to support potential new beneficiaries' claims, as well as to estimate the number of potential additional reparations beneficiaries who have not yet been identified. This information can be made available in the next Registry report should the Chamber consider it relevant to the proceedings.

5) Lubanga Reparations Proceedings

9. In relation to the former child soldiers, the VPRS notes the ongoing reparations proceedings in the *Lubanga* case where the TFV indicated that approximately 3,000 victims may have been impacted.¹² The VPRS notes the close similarities between the territorial, temporal and subject matter scope of both the *Lubanga* case and the present Case in relation to conscripting, enlisting and using child soldiers to participate actively in hostilities.¹³ The VPRS also notes the differences, namely in relation to the temporal scope and the inclusion of rape and sexual slavery in the Judgment in the present Case.¹⁴ While the approximate number of victims established in the *Lubanga* case may be instructive with respect to calculating the liability of Mr Ntaganda *vis-à-vis* this group of victims, in order to reduce complication regarding confidentiality and legal representation between the two proceedings, the VPRS recommends

¹¹ The VPRS notes that by "Case locations" it is referring to the locations enumerated in the Judgment pertaining to the victims of the attacks.

¹² Trust Fund for Victims, "Draft Implementation Plan for collective reparations to victims", 3 November 2015, ICC-01/04-01/06-3177-AnxA, para. 28. The VPRS notes the difficulties encountered in the *Lubanga* proceedings in arriving at a precise figure of potential beneficiaries of reparations. See Trial Chamber II, *Lubanga*, "Decision setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable", 21 December 2017, ICC-01/04-01/06-3379-Red-Corr-tENG, paras. 232-244.

¹³ Both the Judgment pursuant to Article 74 of the Statute, issued by the Trial Chamber I on 14 March 2012 in the *Lubanga* Case, ICC-01/04-01/06-2842 (paras. 1346, 1347) and the *Ntaganda* Judgment (p. 538), confirm that direct victims in the respective cases are persons that were children, younger than 15 years of age at the time of their conscription, enlistment and use as soldiers in the ranks of the *Union Patriotique du Congo* (UPC)/*Force Patriotique pour la Libération du Congo* (FPLC).

¹⁴ The VPRS notes that in the *Lubanga* case, minors under the age of 15 years that were enlisted, conscripted or used in the service of the UPC/FPLC within the period of 1 September 2002 through 13 August 2003 may be eligible for reparations as direct victim beneficiaries. In the *Ntaganda* case, the temporal scope for conscripting and enlisting children under the age of 15 years into an armed group is on or about 6 August 2002 and 31 December 2003 and using them to participate actively in hostilities is on or about 6 August 2002 and on or about 30 May 2003.

maintaining a separate registration process¹⁵ in the Case, particularly for former child soldier victims. By efficiently managing the separate processes through its single database, the VPRS' Victim Application Management System ("VAMS"), the Registry can work together with all relevant actors to ensure that those beneficiaries identified through the *Lubanga* process, and who would fall within the remit of the present Case, are afforded the opportunity to also complete a reparations application form for the current proceedings.

*ii. Proposed Methodology for the Identification of Potential New Beneficiaries of Reparations*¹⁶

10. The VPRS proposes that the Chamber adopts a uniform system for the identification of potential new reparations beneficiaries that *in essence* mirrors the system adopted for participation at trial.¹⁷ This process entails the use of an individualised reparations form allowing the Registry to collect pertinent information on an individualised basis. The Registry submits that such a process is appropriate and necessary independent of the Chamber's determination on whether to pursue a collective or individual reparations procedure.¹⁸

¹⁵ This means *inter alia* a separate application process ensuring that the victims who came forward with respect to the *Lubanga* proceedings are consulted on whether or not they wish to complete an application form for reparations in the *Ntaganda* proceedings as well.

¹⁶ The VPRS notes that for victims that already participated at the trial stage as well as for any potential new beneficiaries of reparations, a similar standard in the identification process is recommended. This is to ensure that no double standard is created between the participating victims and the potential new beneficiaries of reparations. The VPRS notes the role of the CLRs in the collection of reparations forms and supplementary information with respect to participating victims. As a general rule, the VPRS will ensure proper consultation/coordination as appropriate with the CLRs on all matters of concern, mindful of the Registry's neutrality in the proceedings.

¹⁷ Appeals Chamber, *Al Mahdi*, "Judgment on the appeal of the victims against the 'Reparations Order'", 8 March 2018, ICC-01/12-01/15-259-Red2 ("*Al Mahdi* AC Decision"), para. 56. "The Appeals Chamber understands that the Trial Chamber considered that all applications should be screened at the same time and by the same entity, which would ensure that the screening would be done in a consistent and equal manner."; Trial Chamber VI, *Ntaganda*, "Decision on victims' participation in trial proceedings", 6 February 2015, ICC-01/04-02/06-449, ("*Ntaganda* Participation Decision"), para. 30.

¹⁸ See also *infra*, paras. 15 *et seq*; Trial Chamber II, *Lubanga*, "Corrected version of the 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable'", 21 December 2017, No. ICC-01/04-02/06

11. The victim identification process would be initiated at the start of the reparations proceedings and finalised before the Chamber issues its reparations order.¹⁹ Such a process would entail the Chamber setting out the criteria to be applied for the assessment of potential reparations beneficiaries at the outset (following observations from the parties, the TFV and the Registry), and the Registry, in close cooperation and consultation with the TFV and CLRs, subsequently carrying out a victim identification process for potential new beneficiaries of reparations²⁰ (which would also include a registration, assessment and transmission process) in advance of the reparations order. If this process were to be adopted, the identification of potential new reparations beneficiaries would not be left to the implementation phase (*i.e.* subsequent to the appeals phase, if any, and the Chamber's reparations order). Instead, utilizing the period prior to the Chamber's reparations order for the purpose of identifying potential beneficiaries may reduce (and focus) the litigation period of the parties²¹ and facilitate implementation-related activities for a certified list of beneficiaries during the implementation phase (since most, if not all, of the legal matters would have been settled in advance).²²

ICC-01/04-01/06-3379-Red-Corr-tENG, paras. 37, 40-43, 60-189 ("*Lubanga* Trial Decision on Size of Reparations Award").

¹⁹ The VPRS notes that it is always possible that additional potential new reparations beneficiaries will come forward after the issuance of the reparations order. To address this potentiality, a residual identification mechanism could be carried out by the Registry (FO and VPRS) during the implementation phase, under the guidance of the Chamber. It would involve the application of the same criteria used by the VPRS during the pre-order phase. If utilized, the VPRS could inform the Chamber through periodic update reports on the identification of new victims. The Chamber could then ultimately ratify the VPRS's assessment barring clear and material error. If necessary, adding additional beneficiaries after the reparations order has been issued would have no bearing on the rights of the convicted person as the numbers of additional beneficiaries would not factor in the total liability assigned to Mr. Ntaganda.

²⁰ It is noted, as already mentioned in footnote 17, that a similar standard for the verification of reparations eligibility would be applied by the Registry to victims that have already participated at trial.

²¹ Focusing the main litigating role of the parties on the pre-order reparations and appeals phase is highly likely to moderate the total length of litigious proceedings and maximize the impact of legal aid resources.

²² This proposal implies that the Registry, the parties and the TFV would continue to consult each other at all critical junctions of the pre-order process in order to maximize the transparency and coherence of the process.

12. Having already conducted a preliminary mapping of the potential new beneficiaries of reparations,²³ the Registry would focus its resources in the field on reaching out to the pre-identified potential new beneficiaries who have yet to complete reparations forms. Following this process, the VPRS proposes to send the newly collected forms (for non-participating victims), once legally assessed by the VPRS as being part of one or the other of the two victims' groups existing in the Case (former child soldiers or victims of the attacks), to the relevant CLR for immediate and ongoing representation. A draft reparations form is currently being prepared for the Chamber's consideration and will be submitted to the Chamber in due course if considered appropriate.
13. The reparations forms received would be processed by the VPRS in accordance with the identification criteria and standard of proof set by the Chamber and divided into three groups, following the logic already applied by the Chamber for the assessment of victim applications at trial:²⁴
- Applicants who have been clearly identified as beneficiaries of reparations in the Case ("Group A");
 - Applicants who have been clearly identified as not qualifying as beneficiaries of reparations in the Case ("Group B"); and
 - Applicants for whom the VPRS could not make a clear determination for any reason ("Group C").
14. Group C applications would be transmitted to the parties systematically for the litigation of unclear issues and decided upon by the Chamber as the issues arise. This would afford the parties a possibility to submit their views to the Chamber on the unclear issues that arise from the identification process. The benefits of this process include *inter alia* focusing litigation on key legal and factual issues. Amongst the potential new victim beneficiaries who come forward to apply for reparations, many will invariably be "clearly in" or "clearly out" and their application forms will be relatively uncontroversial with respect to whether or not they fall within the confines of the Case. Separating the straightforward applications from those where legitimate legal or factual issues are apparent

²³ See *supra*, para. 8.

²⁴ See the *Ntaganda* Participation Decision.

may result in notable time and resource savings for the parties, the TFV and the Chamber.²⁵

15. Additional potential benefits of early action on reparations include: 1) the ability to manage expectations of victims from the outset with clear and precise information regarding the procedure to be applied; 2) the ability to quickly identify the most pressing needs of victims (including urgent medical or psychological assistance) and act on any risks related to the reparations process; and 3) the possibility of reducing the number of procedural hurdles and time required for victims to qualify for reparations.

iii. Timeline

16. Considering the *sui generis* nature of reparations proceedings at the Court and the specific statutory and jurisprudential requirements attending reparations in particular, the VPRS respectfully proposes the following sequence of procedural steps for the identification of potential new beneficiaries of reparations in the Case.
17. As set out in the Order, the parties, the TFV and the Registry would first be called upon to provide observations on the principles to be applied to reparations in the Case. These may include the criteria to be applied to all potential beneficiaries, the standard of proof to be applied in light of the specific circumstances of the Case, and any other core requirements necessary for the proper identification of potential beneficiaries of reparations and inclusion on the Registry's certified list of beneficiaries in the Case, i.e. Group A.²⁶
18. The Chamber would then be in the position to issue its first decision on reparations setting out, *inter alia*:

²⁵ This approach of focused discussion of unclear matters by the parties has been applied in the victim application processes in *Al Hassan* (see Pre-Trial Chamber I, "Decision Establishing the Principles Applicable to Victims' Applications for Participation", 24 May 2018, ICC-01/12-01/18-37-tENG, para. 59) and, most recently, *Yekatoni/Ngaissona* (see Pre-Trial Chamber I, "Decision Establishing the Principles Applicable to Victims' Applications for Participation", 5 March 2019, ICC-01/14-01/18-141, para. 41) both cases following the approach originally applied by this Chamber in the Case.

²⁶ The VPRS notes that the Order has already set the schedule for the submission of observations on *inter alia* the principles to be applied to reparations proceedings in the Case, see the Order, para. 4b.

- 1) The criteria to be applied²⁷ to all potential beneficiaries of reparations,²⁸ including:
 - i. The standard of proof and its application in the present Case;²⁹ and
 - ii. The requirements for a complete application.³⁰
- 2) The identification system: including the collection of forms and the certification of potential new beneficiaries by the Registry which would also entail the registration, assessment³¹ and transmission of all complete forms into three groups:
 - i. Group A – Applicants who have been clearly identified as beneficiaries of reparations:
 - Their forms would be filed only to the Chamber;³²
 - The Chamber would ratify the VPRS assessments barring a clear and material error in the assessment;³³

²⁷ In accordance with Essential Element 5 of Appeals Chamber, *Lubanga*, “Judgment on the appeals against the ‘Decision establishing the principles and procedures to be applied to reparations’ of 7 August 2012”, 3 March 2015, ICC-01/04-01/06-3129, para. 1 (“First *Lubanga* AC Decision”) and the *Al Mahdi* AC Decision, para. 64.

²⁸ In accordance with *Al Mahdi* AC Decision, para. 56; and Appeals Chamber, *Lubanga*, “Judgment on the appeals against Trial Chamber II’s ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’”, ICC-01/04-01/06-3466-Red, 18 July 2019, (“Second *Lubanga* AC Decision”) para. 156.

²⁹ The VPRS would indicate to the Chamber and the parties how it has implemented the standard of proof when transmitting the result of its identification process of new potential beneficiaries of reparations, for the Chamber’s endorsement, barring a clear and material error. This process would ensure full transparency and the awareness of the parties.

³⁰ See for example, Pre-Trial Chamber I, *Al Hassan*, “Decision Establishing the Principles Applicable to Victims’ Applications for Participation”, 24 May 2018, ICC-01/12-01/18-37-tENG, para. 46.

³¹ In the course of the VPRS’ preliminary legal assessment, it may appear that some application forms are either incomplete or unclear. In such cases, the VPRS would request supplementary information either from the victim directly or through the legal representative of the victims where there is one, in order to ensure completeness of the form and/or clarity on the narrative of the victim, before it concludes its assessment on the form.

³² It is recalled that the new victims’ applications would be transmitted to the CLRs for ongoing representation as soon as they would be preliminarily assessed by the VPRS as a former child soldier / victim of the attack.

³³ In accordance with *Al Mahdi* AC Decision, para. 72, and; First *Lubanga* AC Decision, para. 1, Essential element 5, first clause.

ii. Group B – Applicants who have been clearly identified as not qualifying as beneficiaries of reparations:

- Their forms would be filed with the Chamber and the CLRs in the Case;
- The CLRs would be given a deadline (to be determined by the Chamber) to make submissions challenging the Registry's assessment before the Chamber ratifies/amends the Registry's assessment, as the case may be;³⁴

iii. Group C – Applicants for whom the Registry could not make a clear determination for any reason:

- The CLRs and the Defence would be invited to make observations on each individual application (subject to necessary redactions³⁵), and the Chamber would decide.³⁶

3) Time limit for the identification process:

- The completion of field registration and transmission of applications in Groups A, B and C would be finalised before the conclusion of the anticipated appeals phase;³⁷
- Applications would be filed on a rolling basis; filing intervals would be subject to the security and health context on the ground in the DRC.

19. Should the abovementioned sequence of events be carried out, and should a potential appeal process lead to a confirmation of the Judgment where appealed, the Chamber would be in the position to issue its reparations order at

³⁴ In accordance with *Al Mahdi* AC Decision, para. 72.

³⁵ In accordance with *Al Mahdi* AC Decision, para. 95.

³⁶ As done in *Lubanga*, where the Trial Chamber made findings on the temporal and geographical scope of the crimes for the purpose of determining eligibility; *Lubanga* Trial Decision on Size of Reparations Award, paras. 92-94; Second *Lubanga* AC Decision, para. 188.

³⁷ Provided a permissive security/health environment where field registration missions can be undertaken.

the conclusion of the potential appeals phase, complete with all “essential elements”,³⁸ including a Chamber’s certified list of beneficiaries.

20. Following the issuance of the reparations order, the implementation phase would commence for the certified list of beneficiaries, with the TFV in the lead as the Chamber may find appropriate.³⁹

iv. Legal Considerations

1) Form-based Approach

21. As practice at this Court has shown, regardless of whether individual or collective awards are contemplated, so long as an individualized benefit is foreseen from the reparations award (i.e. not a purely symbolic award), some type of individualized tool is necessary to ensure that those entitled are also actually awarded reparations. The logic for applying a form-based approach is even stronger when the number of potential applicants is known and is of a size where administering such a process is feasible in light of the Court’s limited resources, as is the situation in the present Case.
22. As briefly outlined *supra*, through its field activities the Registry has already carried out a preliminary mapping of potential new beneficiaries of reparations. This mapping can be completed with the help of the CLR’s who may also have relevant information to share with the Registry in this regard. Once this information has been gathered, the Registry can start organising the collection of reparations forms from the pre-identified group of potential new beneficiaries of reparations.
23. The Chamber may consider adopting the form-based procedure as outlined *supra* to ensure a reliable identification process of all remaining potential new reparations beneficiaries.

³⁸ First *Lubanga* AC Decision, para. 1.

³⁹ The Registry would stand ready to support the TFV in any way appropriate and necessary in the implementation of reparations, within its financial/staff capacity.

2) Administrative Screening

24. The proposed methodology set out above essentially calls for the Registry to perform the task of administratively applying a decision from the Chamber to all potential reparations applicants. The delegation of administrative processes to a neutral body within a court (typically a registry) has been the approach chosen by other institutions dealing with mass claims, to ensure the efficiency and neutrality of the process.⁴⁰ In the context of reparations, the Appeals Chamber in *Al Mahdi* has held that “it is within the discretion of a Trial Chamber to request, on a case-by-case basis, [...] assistance [...] to undertake the administrative screening of beneficiaries of individual reparations meeting the eligibility criteria set out by the Trial Chamber”, but that “it is for the Trial Chamber, in the exercise of its judicial functions, to make final determinations on individual victim applications where administrative decisions [...] are contested”.⁴¹
25. In accordance with the jurisprudence cited above, in the Registry’s proposal, all complete applications would be filed with the Chamber.⁴² Additionally, it would be for the Chamber to ultimately decide whether to ratify the legal

⁴⁰ The Registry considers certain international mass claims processes to be relevant to the work of the Court with respect to reparations. For an analysis on how the Registry can perform certain “secretariat” functions typically found in mass claims processes, *see generally* Henzelin M., Heiskanen V. and Mettraux G., “Reparations to victims before the International Criminal Court: Lessons from the International Mass Claims processes”, *Criminal Law Forum* (2016), pp. 333-334. The Registry notes that certain international mass claims processes have inbuilt systems designed to delegate certain administrative processes to secretariats or registries. *See for example* The Housing and Property Claims Commission (HPCC) addressing claims relating to the 1999 conflict in Kosovo. Pursuant to the United Nations Interim Administration Mission in Kosovo (UNMIK) regulation 2000/60, the HPCC has delegated the review of uncontested claims to the Registrar after having rendered a precedent-setting decision on “the legal, factual, and evidentiary issues raised by the types of claims whose review functions are to be delegated.” For further examples of similar delegations, *see* the United Nations Compensation Commission (UNCC) [1990-1991 Gulf War], the Commission for Real Property Claims of Displaced Persons and Refugees (CRPC) [1992-1995 War in Bosnia Herzegovina], and the Mass Claims Process administered by the IOM: German Forced Labour Compensation Programme (GFLCP) [Nazi Germany]. For a cursory overview of each of these processes, *see generally* Holtzmann HM, Edda Kristjánsdóttir. “International Mass Claims Processes : Legal and Practical Perspectives”. Oxford University Press (2007).

⁴¹ *Al Mahdi* AC Decision, para. 72.

⁴² Appeals Chamber jurisprudence clarified that “the Trial Chamber should maintain judicial control over the entire reparations proceedings, including the screening process ...”, *Al Mahdi* AC Decision, para. 98. *See also* Second *Lubanga* AC Decision, para. 163.

assessments of the VPRS. In the context of applications categorized as Group C (unclear applications), the Chamber would benefit from the legal submissions of the parties before reviewing the applications individually and making a final determination on their status as reparations beneficiaries.

26. With regards to fair trial rights of the convicted person, the Appeals Chamber in the *Lubanga* case has held that providing the convicted person with an opportunity to review the key pillars or the reparations scheme selected by the Chamber, including the screening process of victims and the opportunity to comment on the draft implementation plan, may be sufficient to ensure the interests of the convicted person.⁴³ In the Registry's proposal, it is submitted that these safeguards would be observed by transmitting all complete applications to the Chamber for ultimate ratification and by involving Mr Ntaganda as well as the CLR's in the litigation of all unclear (Group C) applications. At trial, albeit in the context of participation, this Chamber has held that "limiting the parties' submissions to applications which cannot be clearly resolved by the Registry is an appropriate procedure which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."⁴⁴
27. In a security context where victims are likely to oppose the disclosure of their identities to Mr Ntaganda,⁴⁵ enabling the Defence to participate in the adjudication of unclear procedural matters may be seen as an effective way to preserve fairness to the Defence and adhere to the principles enshrined in *inter alia* rule 97(3) of the Rules.⁴⁶

⁴³ First *Lubanga* AC Decision, paras. 167,168 (with reference to "procedures under rule 98 of the Rules [...] and the Regulations of the Trust Fund"); Second *Lubanga* AC Decision, para. 3.

⁴⁴ *Ntaganda* Participation Decision, para. 30.

⁴⁵ At the participation phase, nearly all of the victims communicated security-related concerns with respect to ICC proceedings. Since the participation phase at trial, the security situation in the region has worsened if anything. For more details on the updated security situation, see section IV *infra* and annex 2.

⁴⁶ The VPRS notes that enabling the Defence to participate in resolving unclear issues arising out of victims' applications is also a feature in the *Al Mahdi* proceedings; Trial Chamber VIII, *Al Mahdi*, "Public redacted version of 'Decision on Trust Fund for Victims' Draft Implementation Plan for Reparations', 12 July 2018", ICC-01/12-01/15-273-Red, para. 42.

3) Notice to the Defence and Victims on the Standard of Proof to be Applied and the Documents to be relied upon for Assessing Reparations

28. By mapping the forms of documentation available to victims in the Case, as noted *supra*,⁴⁷ the Registry aims to assist the Chamber in setting the standard of proof and the documentary (evidentiary) requirements for potential beneficiaries seeking reparations, at the outset of reparations proceedings. In so doing, the VPRS would be in the position, through its administrative screening, to ensure that the relevant standards are applied uniformly to all prospective claimants, thereby avoiding any procedural unfairness.

4) Legal Representation

29. To maximize available resources, ensure the continuity and coherence of the victims' legal representation scheme in place in the Case and avoid any gap in legal representation, the VPRS recommends that any newly pre-identified applicants for reparations be immediately represented by the relevant CLR in the Case. The VPRS would transmit the forms collected from the new applicants for reparations to the relevant CLRs once it has completed its preliminary legal assessment on whether the newly identified applicants belong to one or the other of the two groups of victims in the Case (former child soldiers or victims of the attacks).

v. Role of the Registry

30. The section below seeks to summarize the proposal laid out above by clearly delineating the envisaged roles for the Registry, for the Chamber's consideration.

31. The role of the Registry, in cooperation and consultation with the TFV and CLRs where appropriate and relevant, would include, *inter alia*:

- i. Providing the Chamber with sufficient information at the outset to approximate the number of potential beneficiaries in the Case

⁴⁷ See *supra*, para. 8.

(should that be necessary) and set the standard of documentation required to meet the burden of proof;

- ii. Providing the Chamber with a draft reparations form for its approval;
- iii. Disseminating reparations forms amongst potential beneficiaries following the Chamber's approval;⁴⁸
- iv. Submitting periodic reports to the Chamber on the security and health situation in the DRC as well as any attendant travel/activity restrictions in the region;
- v. Collecting forms for and registering all newly identified potential beneficiaries;
- vi. Assessing all reparations forms in accordance with the Chamber's first decision on reparations;⁴⁹
- vii. Transmitting all newly completed applications to the relevant CLR for ongoing representation;
- viii. Transmitting all complete applications (on a rolling basis) in Groups A, B or C;
- ix. Presenting a consolidated report to the Chamber at the conclusion of the process together with a list of all victims certified by the Chamber to receive reparations.⁵⁰

⁴⁸ The proposed reparation form would give the victims the opportunity to consent to have their information shared with the TFV in accordance with the *Al Mahdi* AC Decision, para. 96.

⁴⁹ In accordance with the *Al Mahdi* AC Decision, para. 56.

⁵⁰ The Registry would follow the same uniform approach for all potential beneficiaries of reparations (*ie* the participating victims remaining within the scope of the Case and the newly identified applicants for reparations) as indicated *supra*.

III. Observations on Whether Experts May be Usefully Appointed Pursuant to Rule 97 of the Rules

32. The Registry observes, including from the *Bemba* and *Al-Mahdi* cases, that during the reparations phase, experts may be usefully appointed to assist the Chamber in determining particularly:

- The scope of liability of the convicted person;
- The scope, extent and evolution of the harm suffered by both direct and indirect victims, including the potential cost of repair;⁵¹ and
- Appropriate modalities of reparations based on the specific circumstances of the case at hand.

33. Further specific issues may benefit from specialised expert input depending on the circumstances of a particular case.⁵² The Registry notes that this may be achieved through a process including Chamber-appointed experts pursuant to rule 97(2) of the Rules, or by the parties and/or the TFV appointing their own experts if deemed necessary. Specific to the *Ntaganda* proceedings, the Registry sees general merit in special advice on the scope of victimisation and long-term consequences affecting the victim communities, notably in light of the lapse of time since the crimes subject to Mr Ntaganda's conviction were committed, and mindful of the complex security situation for these affected communities. In addition, the Registry believes that the parties' and the TFV's input on this matter are of high value.

34. The Chamber may wish to consider the parties' and the TFV's submissions scheduled for later this month on whether experts may be usefully appointed, as they may suggest specific expertise from their perspective, including from the implementation-specific viewpoint of the TFV.

35. Once the parties' suggestions are received, the Chamber could decide whether expert advice is considered appropriate and necessary on any specific matter.

⁵¹ See Appeals Chamber, *Katanga*, "Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled 'Order for Reparations pursuant to Article 75 of the Statute'", 9 March 2018, ICC-01/04-01/07-3778-Red, paras. 2, 72; Second *Lubanga* AC Decision, paras. 107 *et seq.*

⁵² This may include an analysis of risks and mitigating measures necessary to guarantee that victims are able to fully benefit from reparations awards.

The Registry would stand ready to organise and facilitate the selection of experts pursuant to regulations 44 of the RoC and regulation 56 of the RoR, as the case may be.

IV. Registry's Update on the Security Situation in DRC

36. The Registry's update on the security situation in the DRC set out *infra* and the more detailed report on the same attached as annex 2 have each been prepared by the Registry's Country Analysis Unit. The overall security situation in Ituri province remains permissive to date, although two significant factors currently serve as potential inhibitors for the implementation of reparations, namely the volatile security situation primarily affecting Djugu territory and the Ebola Outbreak in DRC, with confirmed cases in two out of five territories in Ituri, namely Mambasa and Irumu.
37. December 2017 marked a significant shift in Ituri dynamics resulting in the most significant deterioration of the security situation since the 1999-2004 conflict. A wave of attacks spread across Djugu territory, reaching a peak in February and March 2018, during which over 260 people were killed according to United Nations Joint Human Rights Office in the DRC. Although the violence was depicted by the government and mainstream media as the result of long-standing ethnic tensions, it drew attention given the significant departure from the habitual threat context for the province. In fact, the apparent coordination and sheer scale of the attacks contrasted sharply with the prevailing tensions between the Hema and Lendu communities over the past 15 years. Moreover, consistent reports pointed to the presence of armed men from outside Ituri, suggesting that other dynamics were at play.
38. In May-June 2019, Djugu territory experienced a similar episode of apparently orchestrated violence. To date, reports indicate that about 200 people have been killed since the beginning of the year. While the perpetrators and motives driving the violence have yet to be confirmed, indicators point to an element of overall control to the attacks. Indeed, numerous and coordinated attacks against villages and military positions can last for days and suddenly reduce significantly. For example, the wave of attacks in May-June 2019 was followed by two months during which there were significantly less attacks. The waves of violence can be best described as someone turning on and off a tap. A

confluence of elite interests may likely be a key factor influencing the violence, with business, political and possibly military circles working hand-in-hand to achieve certain objectives through the destabilisation of Djugu.

39. Unlike the 1999-2004 conflict where attempts to stoke tensions over land and ethnicity engulfed Ituri, similar attempts to destabilise Ituri in 2018 and 2019 have so far failed to gain traction among local communities. To date, the population and local leaders have appeared more resistant to manipulation serving the interests of elites. Looking forward, should these interests be satisfied, Ituri could see a return to its previous norm. If not, Ituri could experience further waves of orchestrated violence. While the situation is subject to change and will require further analysis, the current security dynamics may provide periods of relative calm enabling continued work in the province during the months to come.
40. Meanwhile the outbreak of Ebola in DRC continues to add a further layer of complexity to the overall security concerns in eastern DRC, including Ituri. The current Ebola outbreak began on 1 August 2018 and has spread to 19 health zones in North Kivu, nine health zones in Ituri province and one health zone in South Kivu. On 17 July the WHO declared the Ebola outbreak in the DRC a Public Health Emergency of International Concern (PHEIC). The decision was based on the recent developments in the outbreak, including the geographical expansion of the virus. The declaration of the PHEIC is not a reflection on the performance of the response team but rather a measure that recognizes the possible increased national and regional risks and the need for intensified and coordinated action to manage them.
41. As of 26 August, the Ebola outbreak has a total of 2,934 confirmed cases and 1,965 deaths. The fatality rate among confirmed cases remains at 67%. Over the past six weeks, on average, 81 cases have been reported per week. The majority of recent cases are coming from Beni (North Kivu) and Mandima (Ituri) health zones. In Ituri province the outbreak areas have been mainly located in the Mandima and Kmanda health zones covering parts of Mambasa and Irumu territories. A total of 329 confirmed cases resulting in 187 deaths, including four cases and four deaths in Bunia, have been registered in Ituri Province. To date, there have been no reported cases in Aru, Mahagi, or Djugu territories. Ituri is still an active Ebola outbreak area.

42. In this context, the Court's inter-organ Joint Threat Assessment Group (JTAG) issued its last monthly recommendations on 1 August 2019 which included restrictions on missions to Ituri, namely "all international travel to and from Ebola outbreak areas is suspended due to the prevailing and expanding Ebola situation". With regards to "in-country missions", travel to Bunia "can take place following normal mission planning and security procedures" and "all in-country missions outside Bunia are to be reviewed on a case by case basis to determine the appropriate level of security support". The next JTAG recommendations are expected on 12 September 2019.

V. Conclusions and Recommendations

43. In light of the proposals submitted above and in the interests of facilitating the fair and expeditious conduct of the reparations proceedings in the Case, the VPRS respectfully recommends the Chamber to consider:

- a. Approving the proposed identification process set out above in paragraphs 10-31;
- b. whether and what kind of expert advice may be required in the Case, following the parties' and the TFV's submissions, noting the Registry will stand ready to implement any expert appointment; and
- c. taking note of the prevailing security environment in DRC as set out above in paragraphs 38-45 and in annex 2 with respect to all future reparations-related activities, and the timing thereof.