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THE APPEALS CHAMBER

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR V. BOSCO NTAGANDA***

Public

Response on behalf of Mr Ntaganda to the “Appeal Brief of the Common Legal Representative of the Victims of the Attacks against the Reparations Order”

Source: Defence Team of Mr Bosco Ntaganda

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The Office of the Prosecutor

Mr Karim Asad Ahmad Khan
Mr James Stewart
Ms Nicole Samson

Counsel for the Defence

Me Stéphane Bourgon, *Ad.E.*
Ms Kate Gibson
Me Mélissa Beaulieu Lussier

Legal Representatives of Victims

Ms Sarah Pellet
Ms Anna Bonini

Legal Representatives of Applicants

Mr Dmytro Suprun
Ms Anne Grabowski

Unrepresented Victims

**Unrepresented Applicants
(Participation / Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Mr Philipp Ambach

Trust Fund for Victims

Mr Pieter de Baan

Further to the “Reparations Order”¹ issued by Trial Chamber VI on 8 March 2021 and the “Appeal Brief of the Common Legal Representative of the Victims of the Attacks against the Reparations Order” on 7 June 2021 (“LRV2 Appeal Brief”),² Counsel representing Mr Ntaganda (“Defence”)³ hereby submits this:

Response on behalf of Mr Ntaganda to the “Appeal Brief of the Common Legal Representative of the Victims of the Attacks against the Reparations Order”

(“Response to LRV2 Appeal Brief”)

INTRODUCTION

1. The Common Legal Representative of the Victims of the Attacks (“LRV2”) raises seven grounds of appeal against the 8 March Reparations Order. Focusing almost exclusively on Part V Section D of the 8 March Reparations Order, the LRV2 Appeal Brief harshly criticizes Trial Chamber VI, in particular for “the manner in which the Trial Chamber has set the scope of Mr Ntaganda’s liability for reparations (which) is fraught with errors.”⁴

2. Whereas the seven grounds of appeal address numerous topics and are often repetitive, the LRV2 challenges the 8 March Reparations Order on six main issues, namely: (i) misinterpreting the law and failing to provide a reasoned opinion; (ii) unduly prioritizing the expeditiousness over the fairness of the determination of the scope of Mr Ntaganda’s liability for reparations; (iii) failing to inquire into and to obtain an accurate estimate of the number of potential beneficiaries for reparations; (iv) determining the cost of repair in the abstract, without a proper basis; (v) setting the overall cost to repair jointly for both groups of victims, thereby failing to give due

¹ Reparations Order, 8 March 2021, [ICC-01/04-02/06-2659](#) (“8 March Reparations Order”).

² Appeal Brief of the Common Legal Representative of the Victims of the Attacks against the Reparations Order, 7 June 2021, [ICC-01/04-02/06-2674](#) (“LRV2 Appeal Brief”).

³ Defence Appellant Brief against the 8 March Reparations Order, 7 June 2021, [ICC-01/04-02/06-2675](#) (“Defence Appellant Brief”).

⁴ [LRV2 Appeal Brief](#), para.150.

regard to risks of potential unequal treatment; and (vi) improper delegation of judicial functions to the Trust Funds for Victims (“TFV”) resulting in unfettered and unchallengeable discretion being conferred upon the TFV, a non-judicial body.

3. There are many similarities between the content of the LRV2 Appeal Brief and that of the Defence Appellant Brief. In fact, the Defence generally concurs with many of the arguments advanced by the LRV2. Both appeals thus lead to the conclusion that the 8 March Reparations Order cannot stand and that a new or substantially modified reparations order must be issued by the Appeals Chamber or, if considered appropriate in the circumstances, by the newly constituted Trial Chamber II.

4. That said, Mr Ntaganda takes issue with certain submissions put forward by the LRV2, in particular in his first, second, third and fifth grounds of appeal. These differences are presented with a view to assisting the adjudication of both appeals and the designing of a fair and operational reparations order, fully respecting the rights of the victims and the rights of the convicted person.

5. Misinterpreting the law and failing to provide a reasoned opinion are recurring themes in many grounds of appeal raised by the LRV2. Whereas the Defence previously argued that Trial Chamber VI misinterpreted the law in respect of many findings found in other sections of the 8 March Reparations Order, the LRV2 submission that Trial Chamber VI misinterpreted the law in Part V Section D is not supported. Nonetheless, therein, Trial Chamber VI misapplied the law in many respects. Furthermore, as argued in the Defence Appellant Brief, Mr Ntaganda fully supports the LRV2 submission that Trial Chamber VI failed to provide a reasoned opinion.⁵

6. The Defence also agrees that Trial Chamber VI unduly prioritized expeditiousness over the fairness of the reparation proceedings, rushing to issue the

⁵ [Defence Appellant Brief](#), Ground 2, pp.20-30.

8 March Reparations Order, prematurely,⁶ on the basis of extraneous factors,⁷ in the absence of crucial information,⁸ without any obligation to do so⁹ and contrary to the submissions of the parties.¹⁰ Unfortunately, the impact on the reparations process is likely to be significant. Strikingly, Trial Chamber II recently followed the same pattern as Trial Chamber VI, approving the TFV's initial draft implementation plan over the submissions of the parties and the Registry,¹¹ and in the absence of crucial information yet to be provided by the TFV, including an alternative proposal for the eligibility assessment and urgency screening of victims.¹²

7. The LRV2 avers that Trial Chamber VI failed to obtain an accurate estimate of the number of potential beneficiaries for reparations.¹³ This is in fact the main thrust of his submissions on appeal as it relates to most of his grounds of appeal. The Defence agrees that this was an error. Indeed, referring to estimates provided by the parties, the experts and the Registry, and concluding that "thousands of victims may be eligible for reparations in this case"¹⁴ was by no means sufficient for the purposes of issuing the reparations order. At a minimum, Trial Chamber VI was required to engage the parties', experts', and Registry's submissions before it with a view to determining a figure or sufficiently precise range to determine the scope of Mr Ntaganda's liability. Weighing the various estimates and their sources was imperative, taking into account in particular, the role, the actions and the experience of the Registry.

⁶ [Defence Appellant Brief](#), Ground 1.

⁷ [Defence Appellant Brief](#), para.42.

⁸ [Defence Appellant Brief](#), paras.226,254,242,

⁹ [LRV2 Appeal Brief](#), paras.148.

¹⁰ [Defence Appellant Brief](#), para.87.

¹¹ Decision on the TFV's initial draft implementation plan with focus on priority victims, 23 July 2021, [ICC-01/04-02/06-2696](#), para.3.

¹² Decision on the TFV's initial draft implementation plan with focus on priority victims, 23 July 2021, [ICC-01/04-02/06-2696](#), paras.10-16, 31-38.

¹³ [LRV2 Appeal Brief](#), Ground 1.

¹⁴ [8 March Reparations Order](#), para.246.

8. More importantly, Trial Chamber VI was required to engage with the LRV2's arguments and should have accordingly disregarded his submission that "new beneficiaries will be numbering at least 100,000 people across all locations",¹⁵ rather than just adopting this figure as the top of the estimated range. This estimate of 100,000 is certainly the stand-out figure that cannot be reconciled with the other estimates which were before Trial Chamber VI. Setting aside the LRV2's exaggerated position, it was possible to obtain an accurate estimate or range of potential beneficiaries. Trial Chamber VI failed to do so.

9. Regarding Trial Chamber VI's determination of the cost to repair and thereby of Mr Ntaganda's liability at USD 30,000,000,¹⁶ the arbitrariness and unreasonableness of this determination have already been addressed in the Defence Appellant Brief.¹⁷ Mr Ntaganda stands by his submissions therein and thus generally supports the contentions of the LRV2. It is simply not possible to identify, on the basis of the figures and estimates referred to by Trial Chamber VI, how it could arrive at the figure of USD 30,000,000. To be sure, setting aside the LRV2's fanciful proposition, *i.e.* "a minimum of 100,000 across all locations,"¹⁸ this amount must be revised significantly downwards.

10. As for the LRV2 contention that Trial Chamber VI erred in setting a single amount to cover the cost to repair the harm caused to both groups of victims and that without further guidance, the risk of both groups of victims being treated unfairly is high, it is supported by the Defence. This is further evidence of the arbitrariness of the scope of Mr Ntaganda's liability set by Trial Chamber VI, which cannot stand. However, the LRV2's understanding of the impact of Trial Chamber VI's finding that

¹⁵ [8 March Reparations Order](#), para.233, fn.614 (referring to "CLR2 February 2020 Submissions, [ICC-01/04-02/06-2477-Red](#), para. 72"), fn.615 (referring to "CLR2 Observations on the Second Report, [ICC-01/04-02/06-2642-Red](#), para. 27").

¹⁶ [LRV2 Appeal Brief](#), Ground 2.

¹⁷ [Defence Appellant Brief](#), Ground 15.

¹⁸ [LRV2 Appeal Brief](#), para.59.

Mr Lubanga and Mr Ntaganda are liable *in solidum* to repair the harm caused to child soldier victims is erroneous. It is important to set the record straight in this regard.

11. Lastly, the improper delegation of judicial functions to the TFV, resulting in unfettered and unchallengeable discretion being conferred upon the TFV, a non-judicial body, is another issue on which the LRV2 and Defence are in agreement. Indeed, the content of the 8 March Reparations Order – in particular the absence of criteria to be followed by the TFV – allows the TFV to design the implementation plan as it sees fit without judicial oversight. In these circumstances, Regulation 57 of the Regulations of the TFV, which provides that the “TFV shall consult the relevant Chamber, as appropriate, on any questions that arise in connection with the implementation of the award”¹⁹ and the possibility for the Trial Chamber to review the TFV draft implementation plan are insufficient and impractical to guarantee the rights of the convicted person, who will not be able to challenge the same. This is yet another reason why the 8 March Reparations Order cannot stand and a new or substantially modified reparations order must be issued to ensure that judicial functions are indeed exercised by elected judges.

12. The 8 March Reparations Order must be quashed. Both the victims and the convicted person deserve nothing less.

PROCEDURAL BACKGROUND

13. On 8 March 2021, Trial Chamber VI issued the 8 March Reparations Order.

14. On 8 April 2021, the LRV2²⁰ and the Defence²¹ filed their respective notices of appeal against the 8 March Reparations Order.

¹⁹ Regulations of the Trust Fund for Victims, 3 December 2005, [ICC-ASP/4/Res.3](#).

²⁰ Notice of Appeal of the Common Legal Representative of the Victims of the Attacks against the Reparations Order, 8 April 2021, [ICC-01/04-02/06-2668](#).

15. On 7 June 2021, the LRV2²² and the Defence²³ filed their respective appeal briefs against the 8 March Reparations Order.

SUBMISSIONS

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

16. The Defence agrees with the LRV2 that by failing to obtain an accurate estimate of the number of potential beneficiaries for reparations, Trial Chamber VI committed an error of law, which paved the way to its arbitrary determination of Mr Ntaganda's liability for reparations at USD 30,000,000.

17. In support of his first ground of appeal, the LRV2 addresses a number of issues, many of which have already been discussed in the Defence Appellant Brief.²⁴ Consequently, in this response, the Defence focuses on (i) the reasons why it was imperative for Trial Chamber VI to determine the number of potential beneficiaries and the consequences of its error; and (ii) the reasons why Trial Chamber VI should have engaged with and set aside the LRV2's submission that "potential beneficiaries will be numbering at least 100,000 people across all locations".²⁵

I. Why it was imperative for Trial Chamber VI to determine the number potential beneficiaries

18. Trial Chamber VI held that "[c]onsidering its decision to award collective reparations with individualized components, the Chamber sees no need to rule on

²¹ Defence Notice of Appeal against the Reparations Order, ICC-01/04-02/06-2659, 8 April 2021, [ICC-01/04-02/06-2669](#).

²² [LRV2 Appeal Brief](#).

²³ [Defence Appellant Brief](#).

²⁴ Submissions by the Common Legal Representative of the Victims of the Attacks on Reparations, 28 February 2020, [ICC-01/04-02/06-2477-Conf](#), para.72.

²⁵ [8 March Reparations Order](#), para.233.

the merits of individualized applications for reparations, pursuant to Rule 94 of the Rules”.²⁶ As argued in the Defence Appellant Brief,²⁷ this was an error. According to the Appeals Chamber, if collective reparations are ordered “[...] the number of victims will be an ‘important parameter’ for determining what reparations are appropriate.”²⁸ The number of potential beneficiaries is also an important factor in determining the liability of the convicted person, even when collective reparations are awarded. Moreover, the nature of the collective reparations with individualized components ordered by Trial Chamber VI in this case, is akin to individual reparations and thus necessarily requires: (i) a determination of the number of potential beneficiaries, *i.e.* identifying those who could benefit from the reparations projects designed by the TFV and authorized by the Trial Chamber; and (ii) an evaluation of the cost *per capita* of the designated projects so that the liability of the convicted person can be established.

19. Although in exceptional cases, it might be possible for a trial chamber to determine the liability of a convicted person for reparations on the basis of reliable estimates of the cost of projects to be implemented, this is *not so* in a case such as this one, involving different groups of victims, various types of harm and collective reparations comprising individualized components. In any event, the figures and estimates considered by Trial Chamber VI including the figures for 10 projects conducted in Ituri since July 2020,²⁹ pursuant to the TFV’s assistance mandate, were wholly insufficient to determine Mr Ntaganda’s liability for reparations.

20. In these circumstances, the single most important determination Trial Chamber VI was required to make for the purpose of assessing Mr Ntaganda’s liability for reparations was estimating the total number of potential beneficiaries.

²⁶ [8 March Reparations Order](#), para.196.

²⁷ [Defence Appellant Brief](#), Ground 12.

²⁸ [Lubanga 2019 Appeals Judgment on Reparations](#), para.89.

²⁹ [8 March Reparations Order](#), para 241.

21. As previously held by the Appeals Chamber: “[...] it makes a difference whether the crimes for which the conviction was entered resulted in the victimization of one hundred, one thousand or one hundred thousand individuals.”³⁰ Yet, this did not deter Trial Chamber VI from noting that “[...] 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’”,³¹ and to conclude on this basis that “[...] thousands of victims may be eligible for reparations in the present case.”³² Neither the range set by Trial Chamber VI nor could its conclusion be of any assistance in determining on a sound basis the liability of Mr Ntaganda for reparations.

II. Trial Chamber VI should have engaged with and set aside the LRV2’s submission that “new beneficiaries will be numbering at least 100,000 people across all locations”

22. The total reparations award for which Mr Ntaganda is liable was set by the Trial Chamber at USD 30,000,000 on the basis of “[...] of all information the information before it, at this point in time, on the basis of conservative estimates, and weighing the need for accuracy of estimates against the goal of awarding reparations without delay.”³³ In the name of expediency, Trial Chamber VI set Mr Ntaganda’s liability in the absence of the most important factor, *i.e.* the number of potential beneficiaries. However, in the absence of this estimate, it was simply not possible to justify how the amount of USD 30,000,000 was calculated. Yet, during the 20-month period from the beginning of the reparations proceedings, Trial Chamber VI had ample opportunity to engage with the parties, the Registry and the TFV for the purpose of seeking and obtaining more accurate estimates, if more information was needed.

³⁰ [Lubanga 2019 Appeals Judgment on Reparations](#), para.89.

³¹ [8 March Reparations Order](#), para.246.

³² [8 March Reparations Order](#), para.246.

³³ [8 March Reparations Order](#), para.247.

23. In reality, Trial Chamber VI had sufficient information before it to determine the number of potential beneficiaries. The number of participating victims was known,³⁴ which was a good starting point despite the fact that the quasi totality of participating victims had not requested reparations.³⁵ The number of participating victims, adjusted in the light of the findings in the Trial Judgment was also determined,³⁶ even though Trial Chamber VI refused to allow the Defence to be involved in this assessment³⁷ and to grant the Defence access to participating victims' application forms.³⁸ The number of victims of child soldier related crimes common to Mr Lubanga and Mr Ntaganda was established even though the Defence was not granted access to the relevant application forms.³⁹ As for the number of victims of child soldier related crimes not included in the time period covered by the *Lubanga* conviction, although not established, is likely to be minimal. It was unknown however whether these victims were included in the number of participating victims. In fact, only the number of new potential beneficiaries, yet to be identified, remained to be assessed by Trial Chamber VI.

24. Considering the vast difference between the estimates provided by the Registry/the Victims Participation and Reparations Section ("VPRS") and the LRV2, Trial Chamber VI was required to engage with the VPRS, the LRVs and the Defence with a view to pronouncing on the matter. Its failure to do so was an error. Had Trial Chamber VI done so, it would necessarily have set aside the submissions of the

³⁴ See [8 March Reparations Order](#), para.234 stating "The Chamber notes that 2,121 victims participated in the trial proceedings".

³⁵ [Defence Appellant Brief](#), paras.52-54.

³⁶ See [8 March Reparations Order](#), para.234 stating "1,460 participating victims of the attacks remain eligible to receive reparations" and para.235 stating "Regarding the former child soldiers, the Registry's assessment is that the 284 participating victims in the *Ntaganda* case have not been impacted by the scope of the conviction, and that all victims recognised to date as potential beneficiaries in the *Lubanga* case are also potentially eligible for reparations in the *Ntaganda* case [...] as of December 2020, Trial Chamber II had recognised 933 beneficiaries for reparations in the *Lubanga* case."

³⁷ [Defence Appellant Brief](#), para.47.

³⁸ [Defence Appellant Brief](#), para.50.

³⁹ [8 March Reparations Order](#), para.235: "[...] as of December 2020, Trial Chamber II had recognised 933 beneficiaries for reparations in the *Lubanga* case."

³⁹ [Defence Appellant Brief](#), para.47.

LRV2, which cannot be reconciled with any of the other estimates provided, or with the realities on the ground in Ituri during the relevant period.

25. The LRV2 posits that Trial Chamber VI erred by failing to take into account relevant information, in particular “publicly available figures on the number of inhabitants at the time of the events in some villages”⁴⁰ such as Mongbwalu. The LRV2 also points to figures provided by the Registry on the number of inhabitants at the time of the events in some other affected villages such as Kobu and Bambu, and contends that “[t]hese figures provided a strong basis to believe that the number of potential beneficiaries of reparations who were direct victims of the crimes committed in these three locations only could be several tens of thousands.”⁴¹

26. The LRV2 is mistaken in many ways. First, there is no official information available regarding the size of the population in the various villages of Ituri. This was confirmed by Prosecution expert P-0453 who stated in her report, covering the time period from 2000 to 2005, that “[t]rue population numbers were not available at the time of the 2010 DRC study.”⁴² Second, the LRV2 fails to consider the significant movement of the population in Ituri between 2001 and 2003. Prosecution witness P-0907, whom Trial Chamber VI found to be credible,⁴³ agreed that members of the Hema ethnic group were chased out of Mongbwalu in 2002, that they started to leave before July and that the majority started to move from the month of July.⁴⁴ Consequently, any public figure or census purported to represent the population of Mongbwalu in 2002 would necessarily be unreliable.

27. Third, the Appeals Chamber has previously held that “[t]he number of victims at the time of the crimes may be a starting point” when considering the scope of the

⁴⁰ [LRV2 Appeal Brief](#), para.64.

⁴¹ [LRV2 Appeal Brief](#), para.64.

⁴² P-0453: [DRC-OTP-2084-0523](#), pp.0556-0557.

⁴³ Judgment, 8 July 2019, [ICC-01/04-02/06-2359](#), paras.223-224.

⁴⁴ P-0907: [T-89](#), 25 April 2016, ICC-01/04-02/06, p.12, ll.20-25; P-0907: [T-91](#), 28 April 2016, ICC-01/04-02/06, p.28, ll.19-22.

damage.⁴⁵ This sheds light on the main defect in the LRV2's argument, namely, that there is necessarily a difference between the population of a town or village and the number of victims when the crimes were committed. Indeed, to qualify as a potential beneficiary, one must fulfil all of the applicable material and temporal requirements. For example, to qualify as a potential beneficiary for reparations for the crime of unlawful attack on civilians on Mongbwalu, one must, *inter alia*, (i) be a civilian; (ii) be present during the unlawful attack in Mongbwalu; (iii) not have taken an active part in the hostilities at the time the crime was committed; and (iv) have suffered harm during the attack. It stems from these requirements that being a member of the population of Mongbwalu at a given time is by no means sufficient to qualify as a potential beneficiary.

28. Regarding Mongbwalu *in concreto*, the number of persons present when the unlawful attack took place was not established by Trial Chamber VI, let alone the number of civilians present. The evidence does reveal however that members of the RCD-KML and Lendu combatants / fighters, *i.e.* non-civilians, were present. It is also in evidence that most Lendu combatants did not wear uniforms, thereby making it very difficult to distinguish them from civilians.⁴⁶ Furthermore, it is part of the evidentiary record that Lendu women and children also participated in the fighting alongside the so-called Lendu combatants.⁴⁷ In these circumstances, for the purpose of determining the number of potential beneficiaries of reparations, no weight can be attributed to the LRV2's submission that the population of Mongbwalu numbered 80,000.

29. The same reasoning applies to the localities of Bambu and Kobu. No official figure or census concerning the population of these villages in 2002 – 2003 could be of assistance in determining the number of potential beneficiaries in these towns

⁴⁵ [Lubanga 2019 Appeals Judgment on Reparations](#), para.89.

⁴⁶ See *inter alia* P-0907 : [T-91](#), 28 April 2016, ICC-01/04-02/06, p.29, ll.16-22; Judgment, 8 July 2019, [ICC-01/04-02/06-2359](#), para.568.

⁴⁷ See *inter alia* P-0907 : [T-91](#), 28 April 2016, ICC-01/04-02/06, p.29, l.23-p.30, l.1.

when the relevant crimes were committed. How many persons were present; how many combatants were present; how many civilians took an active part in the hostilities; and how many persons actually suffered harm as a result of the unlawful attacks on these villages; none of these questions can be answered on the basis of the information sought to be obtained by the LRV2. A notable fact regarding Bambu is that even though Trial Chamber VI made no findings in this regard, it is part of the evidentiary record that 3,000 trained and armed Lendu combatants would have been present in Bambu at the relevant time.⁴⁸ The LRV2's submissions regarding the estimated number of potential beneficiaries for crimes related to attacks are baseless.

30. The LRV2 also argues that Trial Chamber VI erred by failing to consider United Nations estimates of the number of victims affected by the *shika na mukono* operation,⁴⁹ and then claims that an estimated 60,000 were displaced in this operation.⁵⁰ The *shika na mukono* operation is not mentioned in the Trial Judgment, and therefore does not form part of the crimes for which reparations can be ordered. Regardless, no weight can be attributed to these United Nations estimates, given the length of time between the events and the compilation of the report in 2004, and the fact that the section of the United Nations report, where this operation is referred to was *not* admitted into the record of the case.⁵¹

31. Lastly, referring to Trial Chamber VI's 15 December Decision on issues raised in the Registry's First Report on Reparations, recalled in the 8 March Reparations Order,⁵² the LRV2 submits that Trial Chamber VI erred by failing to take into account "a likely very high number of an additional category of potential eligible direct victims (...)" acknowledged therein.⁵³ The LRV2 is mistaken. Trial Chamber VI

⁴⁸ P-0127:T-140,12:21-24; DRC-OTP-1033-0222,06:34-06:50..

⁴⁹ [LRV2 Appeal Brief](#), para.64.

⁵⁰ [LRV2 Appeal Brief](#), para.81.

⁵¹ DRC-OTP-0074-0422.

⁵² Decision on issues raised in the Registry's First Report on Reparations, 15 December 2020, [ICC-01/04-02/06-2630](#) ("Decision on the First Report"); [8 March Reparations Order](#), para.107.

⁵³ [LRV2 Appeal Brief](#), para. 66.

neither acknowledged *nor* endorsed an additional category of potential victims. Trial Chamber VI solely clarified that in respect of two locations, namely, Sangi and Kobu, victims alleging to have suffered harm in the forest or bush surrounding these locations may be eligible for reparations using a margin of appreciation of five kilometers.⁵⁴ It is incorrect to assume that Trial Chamber VI's finding impacts in any meaningful way the number of potential beneficiaries. Nonetheless, the Defence deems it appropriate to underscore that in this Decision - rendered three days before the deadline for the parties' final submissions on reparations - Trial Chamber VI issued guidelines for the Registry to assess, which of the participating victims could be considered potential beneficiaries as a result of the findings in the Trial Judgment. Had the guidelines set therein been issued when Trial Chamber VI initially requested the Registry to determine the number of participating victims considered to be potential beneficiaries, this exercise could have been completed much earlier, and with the benefit of the parties' input. Trial Chamber VI rather opted to wait until three days before final submissions before proceeding to issue the 8 March Reparations Order two months later without entertaining submissions on such an important topic. This is yet another reason why it is important for the Defence to be involved in the eligibility assessment process, which is not forecasted in the Impugned Decision.

32. It stems from the foregoing that reports, census or other official documents regarding the size of the population of certain villages at the time relevant to the charges laid against Mr Ntaganda cannot be attributed probative value in determining the number of potential beneficiary of reparations. Indeed, the determination of the number of beneficiaries is a fact intensive inquiry that requires field work and the conduct of interviews with potential beneficiaries by an independent and impartial agency, namely the VPRS.

⁵⁴ [Decision on the First Report](#), paras.19-26.

33. The LRV2 further claims that Trial Chamber VI erred when denying his request “[...] to issue an order instructing the Registry to obtain information pertaining to the reparations proceedings, in particular on the official census of persons residing in the affected areas at the time of the events.”⁵⁵ This request was properly denied, albeit for the wrong reasons.⁵⁶ The information sought by the LRV2 could not be of any assistance in determining the number of potential beneficiaries at any stage.

34. In fact, considering that the estimates provided by the LRV2 rested on information with very little (if any) probative value, as well as on unknown information also lacking probative value, the Trial Chamber should have set aside the LRV2’s proposition that the number of potential beneficiaries in this case comprises “a minimum of 100,000 across all locations affected by Mr Ntaganda’s crimes”. Trial Chamber VI erred by not doing so.

35. Having set aside this outlying figure, Trial Chamber VI could have properly focused on the other estimates before it, in particular the estimates provided by the VPRS. The Registry has consistently indicated that: “[...] it estimates that approximately 1,100 individuals may qualify as new potential victims of the attacks” and, significantly “that it does not anticipate the final number to be exponentially higher.”⁵⁷ The Registry has the most practical experience in the field of reparations, and its estimates result from its own work in the field. The experts assigned by Trial Chamber VI neither challenged the Registry estimation regarding the number of potential beneficiaries nor the fact that this number is not expected to increase exponentially.

⁵⁵ [LRV2 Appeal Brief](#), para.73.

⁵⁶ Decision on the Request of the Common Legal Representative of the Victims of the Attacks for an Order to the Registry to collect information pertaining to reparations, 18 December 2021, [ICC-01/04-02/06-2631](#), para.18.

⁵⁷ [8 March Reparations Order](#), para.232.

36. In these circumstances, it may well have been possible for Trial Chamber VI, relying on the estimates provided by the Registry – and possibly delaying the delivery of the 8 March Reparations Order for the purpose of obtaining additional information – to determine a sufficiently precise range of potential beneficiaries. However, by simply adopting the LRV2’s manifestly exaggerated and unsupported figure of “a minimum of 100,000” potential beneficiaries, Trial Chamber VI’s determination of Mr Ntaganda’s liability for reparations at USD 30,000,000 is nothing more than arbitrary, and must be revised.

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

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

37. The Defence and LRV2 agree that the Trial Chamber had no discernible basis to set Mr Ntaganda’s liability at USD 30,000,000.⁵⁸

38. As the LRV2 rightly points out, without determining how many victims would ultimately benefit from reparations in the present case, “the determination of a cost was by definition impossible”,⁵⁹ and the figure plucked by the Trial Chamber was “fully arbitrary”.⁶⁰ Without first determining who is potentially eligible, reparations becomes an exercise that is completely removed from repairing the harm stemming from the conviction. The Defence agrees that the fact that the Trial Chamber conducted a *purported* assessment, but then set an overall sum in the abstract (given that the beneficiaries are unknown), “casts serious doubt on the decision making process” and is undoubtedly an error.⁶¹ Both the victims and the convicted person, despite having different interests in the reparations proceedings,

⁵⁸ [LRV2 Appeal Brief](#), Ground 2; [Defence Appellant Brief](#), Ground 5.

⁵⁹ [LRV2 Appeal Brief](#), para.87.

⁶⁰ [LRV2 Appeal Brief](#), paras.88-89.

⁶¹ [LRV2 Appeal Brief](#), para.88.

are therefore aligned in their views that Trial Chamber VI erroneously distorted the reparations proceedings. The significance of this should not be underestimated.

39. Both the LRV2 and the Defence also challenge the Trial Chamber's finding that the number of potential new beneficiaries ranges from: "'at least approximately 1,000' to 'a minimum of 100,000 across all locations'", and the Defence agrees with the LRV2 that this error had the practical effect of making a determination of cost impossible.⁶²

40. Where the LRV2 and the Defence diverge, is on whether a meaningful process of estimation was possible, and where it would have arrived. Notably, and as discussed in Ground 1, the LRV2 submits again that the number of potential beneficiaries of reparations "might be in the tens of thousands", and as such "the individual assessment of harm is impractical" and putting a "specific monetary value on different types of multi-dimensional harm" is unnecessary.⁶³

41. Again, there is no basis for the LRV2's estimated figure of "tens of thousands" of potential beneficiaries, nor can it be credibly linked to apparent census information, which remains unknown. Rather, the Defence has submitted that the Trial Chamber should have been guided by the more accurate and specific numbers available; the VPRS consistently suggested that the number of new potential beneficiaries would be 1,100 or, alternatively, the Joint Experts submitted that the direct victims are likely comprised of about 3,500 victims, for which it gave the basis for its calculation.⁶⁴ In that context, while the estimation of between 1,100 and 100,000 potential victims was a wildly insufficient basis upon which to calculate reparations, the figure of "tens of thousands" is similarly baseless.

⁶² [LRV2 Appeal Brief](#), para.87.

⁶³ [LRV2 Appeal Brief](#), para.88.

⁶⁴ [Defence Appellant Brief](#), para.231.

42. As such, while the LRV2 is right to criticize the Trial Chamber's approach, like the Trial Chamber, it then ignores that the more accurate and specific figures already in the record of the case, which were sufficient to guide the Trial Chamber's assessment, but for some reason, simply ignored.

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

43. Again, the LRV2 and Defence appeals reach the same conclusion, being that "in concluding that the award of USD 30,000,000 was appropriate, the Trial Chamber erred in the exercise of its discretion".⁶⁵ The paths taken differ. The LRV2 focuses on the Trial Chamber's apparent consideration of "fairness", noting that while the concept of fairness has some basis in the Court's reparations jurisprudence, nothing in the 8 March Reparations Order suggests that the Trial Chamber conducted any analysis or consideration of what was actually fair in the circumstances.⁶⁶

44. By contrast, the Defence submissions are more specific, focusing on the error of the adoption of an *ex aequo et bono* approach to determine the entire amount of Mr Ntaganda's liability, rather than to set the amount per victim, as was the practice in *Lubanga* and *Katanga*.⁶⁷ Regardless, both appeals note that the Trial Chamber's purported reliance on 'fairness' in reaching the reparations amount was entirely unsound.

45. However, as regards the LRV2 criticism of the Trial Chamber's "conservative approach", there is no basis for the LRV2's claim that references in the 8 March Reparations Order to a "conservative approach", meant that the Trial Chamber "purposefully took low estimates into account".⁶⁸ By contrast, on its face,

⁶⁵ [LRV2 Appeal Brief](#), para.95.

⁶⁶ [LRV2 Appeal Brief](#), para.93.

⁶⁷ [Defence Appellant Brief](#), paras.251-254.

⁶⁸ [LRV2 Appeal Brief](#), paras.98-99.

taking into account the cost of the proposed programs, previous *per capita* estimates, the number of participating victims, and the number of additional potential beneficiaries as anticipated by the Registry, the amount of USD 30,000,000 is far beyond what could possibly be considered a credible or reasonable figure. The LRV2's attempt to rely on the Oxford English Dictionary definition to try to divine what the Trial Chamber meant by a "conservative approach" is unhelpful, in the absence of any indication that this aligned with the Trial Chamber's understanding.

46. Similarly unhelpful is the claim, made entirely in the abstract, that "a cost to repair cannot be appropriate if it corresponds to the lowest possible figure".⁶⁹ There is no suggestion, either explicit or implicit, in the 8 March Reparations Order that the "lowest possible figure" was used as a basis for anything. Similarly, the idea that "the lowest estimated number of potentially eligible beneficiaries" multiplied by the "lowest possible estimated cost to repair" would amount to USD 30,000,000 is not a credible submission,⁷⁰ as is shown by the most basic calculations.

47. The Trial Chamber's approach to the computation of the USD 30,000,000 liability was undoubtedly flawed. Rather than being a computation of the harm suffered by identified beneficiaries, Mr Ntaganda's liability is tethered to nothing more than a stab in the dark by a Chamber rushing to meet a self-imposed unmovable deadline. Both the LRV2 and the Defence appeals demonstrate that the Trial Chamber's failings in mean that the amount of USD 30,000,000 represents an error by the Trial Chamber in the exercise of its discretion.

⁶⁹ [LRV2 Appeal Brief](#), para.98.

⁷⁰ [LRV2 Appeal Brief](#), para.98.

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

48. Noting that the errors identified in this Ground are complementary to and result from the errors identified in Ground 1, the LRV2 explains that the distinction between the two is that “Ground 1 pertains to all potential beneficiaries of reparations, while the present Ground pertains to victims likely to come forward for reparations [...]”.⁷¹ However, considering that victims likely to come forward for reparations, *i.e.* new potential beneficiaries yet to be identified, are included in *all potential beneficiaries of reparations*, Ground 3 of the LRV2 Appeal Brief appears ill conceived.

49. Pursuant to the 8 March Reparations Order, potential beneficiaries of reparations in this case include participating victims, eligible victims in *Lubanga* and new potential beneficiaries yet to be identified.⁷² To the extent that the LRV2 is challenging Trial Chamber VI’s failure to inquire into and to obtain an accurate estimate – or sufficiently precise range – of potentially eligible victims, the Defence has already explained its agreement with this position in response to Ground 1.

50. The LRV2’s description of ‘victims likely to come forward’ as ‘actual beneficiaries out of the total number of all potentially eligible victims’ is erroneous. The latter refers to a different reality, namely, the fact that even though they fulfil all requirements to be included in the category of potential beneficiaries – *i.e.* fulfilling all subject matter and temporal requirements to be considered as potential victims of one of the crimes Mr Ntaganda was convicted of – some potential beneficiaries might not come forward for reparations for various reasons.

⁷¹ [LRV2 Appeal Brief](#), para.102.

⁷² [8 March Reparations Order](#), paras.234 and 235.

51. The LRV2 misreads the Appeals Chamber in *Lubanga*, which held when addressing the importance of the number of victims, even when collective reparations are ordered:⁷³

[h]owever, 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.

52. Whereas the Appeals Chamber noted that the number of victims likely to come forward and benefit from reparations (participating victims and new potential beneficiaries) is likely to be smaller than the overall number of victims of the crimes at the time they were committed (totality of the potential beneficiaries), it did not refer to any duty incumbent on a trial chamber to “[...] inquire into and give a reasoned opinion on possible reasons for which potentially eligible victims would not come forward for reparations.”⁷⁴ Although a trial chamber will likely consider and take steps to minimize the number of potential beneficiaries who will not seek reparations – such as by shaping the reparations measures envisaged – it does not have a duty to determine, which potential beneficiaries might not seek reparations.

53. Contrary to the LRV2 submissions, Trial Chamber VI did not conclude “[...] that *not all victims* would come forward to benefit from reparations in the present case.”⁷⁵ Trial Chamber VI merely referred to the findings of the Appeals Chamber in *Lubanga*.⁷⁶ As such, the error committed by Trial Chamber VI is different and much more important as noted in the submissions related to Ground 1. Trial Chamber VI failed to determine an accurate estimate of the number, or a sufficiently precise range, of the number of potential beneficiaries. Trial Chamber VI also erred, holding

⁷³ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against Trial Chamber II’s ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’, 18 July 2019, [ICC-01/04-01/06-3466-Red](#), para.89 (“Lubanga 2019 Appeals Judgment on Reparations”).

⁷⁴ [LRV2 Appeal Brief](#), para.108.

⁷⁵ [LRV2 Appeal Brief](#), para.105.

⁷⁶ [8 March Reparations Order](#), paras.230 and 246.

that it was impossible to do so in advance.⁷⁷ As previously argued,⁷⁸ it was possible to do so on the basis of the estimates before it, and having set aside the exaggerated position of the LRV2.

54. Lastly, the LRV2 also contends that “[...] the Trial Chamber failed to inquire into and to give a reasoned opinion on possible reasons for which potentially eligible victims *would not* come forward for reparations.”⁷⁹ Even though Trial Chamber VI did not have a duty to inquire, at least at this stage, into the reasons why eligible victims would not come forward, the LRV2’s submissions on this issue must be addressed.

55. Referring first to Trial Chamber VI’s finding that the victims in the present case have not benefited from any sort of support and assistance since the events,⁸⁰ as well as to the prevailing poverty in the region highlighted by one of the experts relied upon by Trial Chamber VI,⁸¹ the LRV2 opines: “it seems doubtful that any potentially eligible victim would voluntarily opt not to present him or herself for reparations [...]”.⁸² The LRV2 further contends that neither the prevailing insecurity *nor* the death of a potential beneficiary would justify a potential beneficiary, or his or her descendants or successors, from seeking reparations.

56. Although the LRV2 submission points to incentives which can reasonably be expected to motivate potential beneficiaries to seek reparations, these ignore numerous other reasons why potential beneficiaries *would not* do so. The main consideration in this regard is the fact that reparations are voluntary and that victims

⁷⁷ [8 March Reparations Order](#), para.246.

⁷⁸ See *supra* para.23.

⁷⁹ [LRV2 Appeal Brief](#), para.108 [emphasis added].

⁸⁰ [LRV2 Appeal Brief](#), para.108; [8 March Reparations Order](#), para.5.

⁸¹ [LRV2 Appeal Brief](#), para.108, fn.188.

⁸² [LRV2 Appeal Brief](#), para.108, fn.189.

have no obligation to request reparations. This principle, underscored in the Defence Appellant Brief,⁸³ has been reiterated in many decisions of this Court.⁸⁴

57. Whether potential beneficiaries decide to come forward and seek reparations depends on the particular circumstances of each potential beneficiary. Reasons why victims may chose not to ask for reparations include, *inter alia*, the time elapsed between the reparations proceedings and the crimes, the fear of marginalisation, a lack of interest, considerations relating to an ethnic group, geographical considerations and, more importantly, the will to move on with one's life.⁸⁵ In *Lubanga* for example, the TFV asserted that: "a significant number of victims will very likely refrain from coming forward to vindicate their right to reparation [...]."⁸⁶ The fact that some victims might not come forward is also acknowledged by the Appeals Chamber.⁸⁷

58. The fact that potential beneficiaries have chosen not to seek reparations in other cases, not only renders it likely that the same would occur in the present case, it also underscores the importance of the voluntary nature of reparations and the necessity for victims to request reparations pursuant to Rule 94.

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

59. The Defence agrees with the first prong of the LRV2 submissions under Ground 4. It is settled law that uncertainties as to the number of potential beneficiaries must be resolved in favour of the convicted person. However, the Trial Chamber's acknowledgement of this principle did not translate into any

⁸³ [Defence Appellant Brief](#), para.173.

⁸⁴ [8 March Reparations Order](#), para.49, [Lubanga 2019 Appeals Judgment on Reparations](#), para.40.

⁸⁵ [Lubanga 2019 Appeals Judgment on Reparations](#), para.59.

⁸⁶ Request for Leave to Appeal against the "Ordonnance enjoignant au Fonds au profit des victimes de compléter le projet de plan de mise en oeuvre" (9 February 2016), 15 February 2016, [ICC-01/04-01/06-3200](#), para.30.

⁸⁷ [Lubanga 2019 Appeals Judgment on Reparations](#), para.89.

appreciable examples in the 8 March Reparations Order. Namely, there is no indication of what uncertainties were resolved, if any, let alone how they were resolved in favour of Mr Ntaganda. The Defence and the LRV2 are therefore aligned that the Trial Chamber, again, failed to provide a reasoned opinion, and accordingly erred in the exercise of its discretion.⁸⁸

60. Concretely, the LRV2 then submits that the Trial Chamber's error resulted in speculation as to how Mr Ntaganda may have been "favoured" by excessively limiting his liability, which negatively affects the well-being of victims, who have been waiting for many years for reparations.⁸⁹

61. It is at this point that the LRV2 and Defence diverge. The terms of the 8 March Reparations Order, the Trial Chamber's silence as to how any uncertainties were resolved, and the resulting reparations liability set arbitrarily at USD 30,000,000, make it entirely unreasonable to presume that anything was resolved in Mr Ntaganda's favour. Perhaps most obviously, while it would have been in Mr Ntaganda's favour to disregard the outlying figure of 100,000 potential new beneficiaries advanced by the LRV2 and be guided by the figures put forward by the Registry, Trial Chamber VI, instead, embraced this outrageous figure and purported to make calculations on this basis. The number of prejudicial findings in the 8 March Reparations Order indicates that the Trial Chamber not only erred in failing to provide a reasoned opinion on this issue, but also failed to implement the principle itself.

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

62. The LRV2 submits that Trial Chamber VI erred in setting a joint amount for both groups of victims – *i.e.* victims of crimes against children and victims of the

⁸⁸ [LRV2 Appeal Brief](#), para.115.

⁸⁹ [LRV2 Appeal Brief](#), para.115.

attacks – without considering the overlap between the reparations granted in *Lubanga* and the *Ntaganda*, thereby putting the victims of the attacks at a disadvantage *vis-à-vis* the child soldier related victims.⁹⁰

63. The Defence agrees with the LRV2 that Trial Chamber VI was required to be cautious in setting the total amount of Mr Ntaganda's liability and to take into consideration the need to avoid creating tensions between the two groups of victims, in accordance with the *do no harm* principle.⁹¹ The Defence also agrees with the LRV2 that the Trial Chamber failed to properly articulate the consequences of the overlap between the victims in the *Lubanga* and the *Ntaganda* proceedings, including its impact on Mr Ntaganda's liability for all reparations, *i.e.* USD 30,000,000 and how it would be divided between the beneficiaries in both groups of victims.⁹²

64. From the outset of the reparations proceedings in 2019, the Defence underscored that the repartition of responsibility between Mr Lubanga and Mr Ntaganda would be one of the more challenging issues in these proceedings and that Mr Ntaganda should not be held accountable for an amount additional to the financial liability of Mr Lubanga, already determined.⁹³

65. Trial Chamber VI nevertheless erred by merely stating that Mr Lubanga and Mr Ntaganda are liable for the cost to repair the harm caused to former child soldiers *in solidum*. Responsibility *in solidum* arises when two debtors are responsible for the same harm, and the reimbursement of the totality of the debt by one debtor releases both debtors from the totality of the amount owed. Although this principle is a creature of tort law, it has been said that it can be regarded as a 'general principle of

⁹⁰ [LRV2 Appeal Brief](#), para.123.

⁹¹ [LRV2 Appeal Brief](#), para.117.

⁹² [LRV2 Appeal Brief](#), para.125; [Defence Appellant Brief](#), paras.255-256.

⁹³ Response on behalf of Mr. Ntaganda to Registry's preliminary observations on reparations, 3 October 2019, [ICC-01/04-02/06-2431](#), para.20; Defence submissions on reparations, 28 February 2020, [ICC-01/04-02/06-2479](#), paras.57-58, 61-64.

law’ within the meaning of Article 38, paragraph 1(c) of the Statute of the International Court of Justice.⁹⁴

66. The LRV2 wrongly submits that the proportion of Mr Ntaganda’s set liability likely to be required to repair the harm caused to victims of child soldier related crimes is such that the remaining funds would be insufficient to repair the harm caused to victims of the attacks.⁹⁵ The LRV2 is also wrong to assert that the average *per capita* cost established in *Lubanga* to repair the harm to victims of child soldier related crimes – set at USD 8,000 – could potentially be earmarked for new victims of child soldier related crimes identified in this case, such as the alleged 3,000 new child soldier related victims by the LRV1.⁹⁶

67. Indeed, when Trial Chamber II determined Mr Lubanga’s liability for reparations at USD 10,000,000 it did so, based on its estimate of the cost to repair the harm caused to all direct and indirect victims of the crimes Mr Lubanga was convicted of. Notably, the figure of USD 10,000,000 was calculated taking into consideration not only the victims identified at the time of the Decision setting the Size of the Reparations Award⁹⁷ but also its estimation of the number of new potential beneficiaries, yet to be identified. This calculation was subsequently confirmed by the Appeals Chamber.⁹⁸ The amount of USD 10,000,000 was also set by Trial Chamber II “after approving the programmatic framework for collective service-based reparations proposed by the TFF”.⁹⁹

68. As regards direct and indirect victims of crimes related to former child soldiers – leaving aside the crimes related to former child soldiers in a different time

⁹⁴ International Court of Justice, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgement, 6 November 2003, ICJ Reports, p.161, [Separate Opinion of Judge Simma](#), para.74.

⁹⁵ [LRV2 Appeal Brief](#), paras.121,122 and 128.

⁹⁶ [LRV2 Appeal Brief](#), paras.120-123.

⁹⁷ *Prosecutor v. Thomas Lubanga Dyilo*, Corrected version of the “Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable Lubanga”, 21 December 2017, [ICC-01/04-01/06-3379-Red-Corr-tENG](#), para.191 (“Lubanga Decision Setting the Size of the Award”).

⁹⁸ [Lubanga 2019 Appeals Judgment on Reparations](#), paras.118-121.

⁹⁹ [8 March Reparations Order](#), para.244.

period and the crimes involving sexual violence – Mr Ntaganda was convicted of the same crimes as Mr Lubanga. For reparations related to these crimes, Trial Chamber VI found that Mr Lubanga and Mr Ntaganda share this responsibility *in solidum*. Hence, the logical conclusion is that the cost to repair the harm suffered by victims of child soldier related crimes is USD 10,000,000 for which Mr Lubanga and Mr Ntaganda are jointly and severally liable.

69. Of note, Trial Chamber VI also held that “[...] the reparation programmes implemented in *Lubanga*, which comprehensively repair the harm caused to the overlapping direct and indirect victims of both cases, should be understood to repair the victims’ harm on behalf of both Mr Lubanga and Mr Ntaganda.”¹⁰⁰ Hence, contrary to the LRV2’s assertion, no amount taken from Mr Ntaganda’s total liability for reparations is meant to be used to repair the harm to overlapping direct and indirect victims in *Lubanga* and *Ntaganda*, although Mr Ntaganda remains jointly and severally liable to repair in full the harm suffered by the overlapping victims.¹⁰¹ Rather, the set liability of Mr Ntaganda for reparations is meant to be used to repair the harm resulting from: (i) crimes related to former child soldiers that exceed the temporal scope of *Lubanga*’s convictions; (ii) crimes related to former child soldiers having suffered from sexual violence;¹⁰² and (iii) crimes related to the attacks. Trial Chamber VI even reiterated that, where the concept of responsibility *in solidum* would be applied, no over-compensation should take place.¹⁰³ This explains to a certain degree why the amount of USD 30,000,000 set arbitrarily by Trial Chamber VI is too high and must be revised downwards.

70. Significantly, when determining the amount of Mr Lubanga’s liability, Trial Chamber II estimated the number of direct and indirect victims to be between

¹⁰⁰ [8 March Reparations Order](#), para.220.

¹⁰¹ [8 March Reparations Order](#), para.221.

¹⁰² [8 March Reparations Order](#), para.213.

¹⁰³ [8 March Reparations Order](#), para.100.

2,451 and 5,938, while acknowledging it could be higher.¹⁰⁴ Taking into consideration that, as of December 2020, 933 victims have been certified in *Lubanga*,¹⁰⁵ this leaves ample resources to repair the harm caused to overlapping child soldier related victims, yet to be identified in *Ntaganda*. Thus, assuming for the sake of argument that 3,000 child soldier related victims¹⁰⁶ were found eligible and certified in *Ntaganda* for the same period of time Mr Lubanga was convicted for, the harm caused to these direct and indirect victims could be repaired from the liability set *in solidum* against Mr Lubanga and Mr Ntaganda, which was meant to repair up to 5,938 direct and indirect victims. Of course, the Defence disagrees with the estimate provided by the LRV1, which is baseless. The ratio of direct and indirect child soldier related victims certified in *Lubanga*, namely 933, to the number of victims initially estimated by Trial Chamber II, between 2,451 and 5,938, illustrates the point.

71. In light of the foregoing, notwithstanding the fact that on its face the joint amount set for both groups of victims is unlikely to prejudice the victims of the attacks *vis-à-vis* the child soldier related victims, the Defence and the LRV2 agree that Trial Chamber VI erred by not pronouncing precisely on the allocation of Mr Ntaganda's set liability for reparations between the two groups of victims and the various types of harm.

72. What is more, taking into consideration as argued in response to Ground 1 that (i) the LRV2's exaggerated estimate of "a minimum of 100,000 across all locations affected by Mr Ntaganda's crimes"¹⁰⁷ should have been set aside; and (ii) the number of victims in this case could properly have been estimated on the basis of the figures provided by the VPRS, *i.e.* 3,777, it appears evident that the

¹⁰⁴ [Lubanga Decision Setting the Size](#), para.230.

¹⁰⁵ [8 March Reparations Order](#), para.235. This number has since increased to 1094, according to public information available as of August 2021: *Prosecutor v. Thomas Lubanga Dyilo*, Réponse au Fourteenth progress report on the implementation of collective reparations (ICC-01/04-01/06-3519) avec annexes du 21 juillet 2021, 2 August 2021, [ICC-01/04-01/06-3520-Red](#), para.16.

¹⁰⁶ Observations on the Appointed Experts' Reports and further submissions on reparations on behalf of the Former Child Soldiers, 18 December 2020, [ICC-01/04-02/06-2632](#), para.37.

¹⁰⁷ [8 March Reparations Order](#), para.246.

amount of USD 30,000,000 arbitrarily set by Trial Chamber VI is much too high and must be revised downwards.

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

73. For the Legal Representative of Victims before an international court to submit that a reparations order “directly contravenes the ‘do no harm’ principle, will cause “unnecessary anxiety in victims”, and will be the source of “jealousy, animosity, or stigmatisation amongst the affected communities” is extraordinary.¹⁰⁸ The Defence has no reason not to accept that the LRV2 position is correct, with these submissions serving to highlight the extent to which Trial Chamber VII got this process so badly wrong.

74. The Defence Appellant Brief approached the principle of ‘do no harm’ from a different perspective, submitting that reparations addressing the harm suffered by victims belonging to one side of a conflict only, is likely to exacerbate security concerns and tensions among communities.¹⁰⁹ While the LRV2 and Defence are therefore coming from different angles, the concern is the same; the distribution of reparations among an already-vulnerable community in the context of an ongoing conflict poses significant and concrete risks if not done in a careful and considered manner. The 8 March Reparations Order’s rushed approach, in which the central tasks were delegated to a non-judicial body with no meaningful oversight, was neither considered nor careful.

75. In essence, in Ground 6, the LRV2 is submitting that in delegating the tasks at the heart of the reparations process to the TFV, in the absence of any guidance on how to determine the amount of money to be dedicated to the reparation programs for priority victims, how to determine the amount of money to be spent on programs

¹⁰⁸ [LRV2 Appeal Brief](#), paras.133-134.

¹⁰⁹ [Defence Appellant Brief](#), paras.99-100.

for the remainder of eligible beneficiaries and how to ensure that all victims are treated fairly and equally, the Trial Chamber created a process that risks causing harm to the victim communities. These arguments align with and bolster the Defence Appellant Brief in paragraphs 201 to 225, in which the Defence also set out its concern with the Trial Chamber's delegation of its judicial functions to the TFV, and the lack of judicial supervision thereof.

76. Most concerning, as highlighted by the LRV2 in Ground 6, is that the TFV's unfettered discretion on how to divide or allocate resources, will make it nearly impossible for the convicted person or victims to challenge any proposals as the guiding principles and the legal framework to do so are missing.¹¹⁰ The Defence agrees, and notes its parallel concern that the unprecedented level of delegation of duties to the TFV in *Ntaganda*, has also been accompanied by an unprecedented lack of supervision from the Trial Chamber of the reparations process, which does not accord with the current limitations and capacities of the TFV in reality, as noted by the Independent Experts in their 2020 Report.¹¹¹

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

77. The Defence Appellant Brief aligns with the LRV2 position that the expiration of judicial mandates should not have been a relevant factor in the timing of the Reparations Order in this case, and by taking this fact into consideration, the Trial Chamber erred.¹¹² In particular, the Defence adopts and endorses the LRV2 submission that while considerations of expediency are relevant, the Trial Chamber should have been guided by "considerations of fairness to the victims and the convicted person in issuing its order",¹¹³ rather than prioritizing consistent

¹¹⁰ [LRV2 Appeal Brief](#), para.130.

¹¹¹ [Defence Appellant Brief](#), paras.215-225.

¹¹² [LRV2 Appeal Brief](#), para.140; [Defence Appellant Brief](#), paras.41-59.

¹¹³ [LRV2 Appeal Brief](#), para.139.

composition of the bench. Particularly given that, as the LRV2 is right to emphasise, there is no requirement, statutory or otherwise, for the Judges who heard the case on the merits and determined sentence to then form part of the reparations bench.¹¹⁴ As such, both the LRV2 and the Defence are in agreement that the Trial Chamber's premature issuance of the 8 March Reparations Order is a material error.

78. As to the impact of the error, the Defence and the LRV2 agree in part. According to the LRV2, the Trial Chamber's "grave error in the exercise of judicial discretion" in being guided by the expiration of mandates rather than the fulfillment of its judicial function,¹¹⁵ is that "it influenced the decision making process to the detriment of legal certainty" which led it ultimately to confer "undue discretion upon the TFV."¹¹⁶

79. While the Defence agrees with this assessment, particularly as regards the burden now placed on the TFV and utter lack of guidance, the Defence Appellant Brief goes further, and submits that the rush to judgment prevented the Trial Chamber from determining the number of potential beneficiaries with any degree of certainty, the knock-on effect of which was that setting the total reparations award at USD 30,000,000 was then arbitrary, premature, and unfair to the convicted person.¹¹⁷ Moreover, the Defence also hinges on the Trial Chamber's failure, in its rush to issue the order, to consider (or properly consider) many of the Defence submissions on (i) the assessment of beneficiaries; (ii) the need for the VPRS to meet participating victims who had not applied for reparations; and (iii) the involvement of the Defence in the process, in particular as regards submissions on individual applicants.¹¹⁸ However, while the articulation of the impact of the error differs, the Defence and LRV2 agree as the error and its materiality.

¹¹⁴ [LRV2 Appeal Brief](#), paras.139-147.

¹¹⁵ [LRV2 Appeal Brief](#), para.138.

¹¹⁶ [LRV2 Appeal Brief](#), para.148.

¹¹⁷ [Defence Appellant Brief](#), para.56.

¹¹⁸ [Defence Appellant Brief](#), paras.45-46.

80. Significantly, both appeals emphasise that if the involvement of the departing Judges was considered crucial to the delivery of the reparations order, the proper approach would have been to extend their mandates, rather than rush to issue an order that was “missing some of the very basic necessary determinations”,¹¹⁹ and with “many of the fundamental parameters undefined.”¹²⁰ The process of reparations is as important and it is complex, and by drafting an unfinished plan with one foot already out the door and leaving the rest to the TFV, the Trial Chamber has done a significant disservice to the victims, the accused, and the reparations practice more generally at the Court.

RELIEF SOUGHT

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

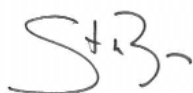
CONSIDER this response to the LRV2 Appeal Brief;

GRANT the LRV2 Appeal in respect of the issues on which the Defence and the LRV2 agree;

DISMISS the remainder of the LRV2 Appeal; and

ISSUE a *new* or *significantly amended* reparations order, or if considered appropriate, **REMIT** the matter to Trial Chamber II.

RESPECTFULLY SUBMITTED ON THIS 9th DAY OF AUGUST 2021



Me Stéphane Bourgon *Ad.E.*, Counsel for Bosco Ntaganda

The Hague, The Netherlands

¹¹⁹ [LRV2 Appeal Brief](#), para.138.

¹²⁰ [LRV2 Appeal Brief](#), para.139.