

## Oxford Reports on International Law

**Situation in the Democratic Republic of the Congo, Prosecutor (on the application of Victims) v Ntaganda (Bosco), First decision on reparations process, Case No ICC-01/04-02/06, ICC-01/04-02/06-2547, ICL 2004 (ICC 2020), 26th June 2020, International Criminal Court [ICC]; Trial Chamber VI [ICC]**

**Date:** 26 June 2020

**Citation(s):** Case No ICC-01/04-02/06 (Official Case No)

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**Jurisdiction:** International Criminal Court [ICC]; Trial Chamber VI [ICC]

**Parties:** Bosco Ntaganda  
Prosecutor

**Additional parties:** (On the application of) Victims

**Judges/Arbitrators:** Chang-ho Chung (President); Robert Fremr; Olga Herrera Carbuccion

**Procedural Stage:** First decision on reparations process

**Previous Procedural Stage(s):**

Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Bosco Ntaganda; *Prosecutor v Ntaganda*, Case no ICC-01/04-02/06-309, 9 June 2014

Trial judgment; *Situation in the Democratic Republic of the Congo, Prosecutor v Ntaganda*, Case no ICC-01/04-02/06-2359; ICL 1949 (ICC 2019), 8 July 2019

Order for preliminary information on reparations; *Situation in the Democratic Republic of the Congo, Prosecutor v Ntaganda*, Case no ICC-01/04-02/06-2366, 25 July 2019

Sentencing judgment; *Prosecutor v Ntaganda*, Case no ICC-01/04-02/06-2442; ICL 1954 (ICC 2019), 7 November 2019

Order setting deadlines in relation to reparations; *Situation in the Democratic Republic of the Congo, Prosecutor v Ntaganda*, Case no ICC-01/04-02/06-2447, 5 December 2019

Public redacted version of 'Decision appointing experts on reparations'; *Prosecutor v Ntaganda*, Case no ICC-01/04-02/06-2528-Red, 14 May 2020

**Subsequent Development(s):**

Decision on issues raised in the Registry's first report on reparations; *Prosecutor v Ntaganda*, Case no ICC-01/04-02/06-2630, 15 December 2020

Reparations order; *Prosecutor v Ntaganda*, Case no ICC-01/04-02/06-2659, 8 March 2021

Public redacted version of Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment'; *Prosecutor v Ntaganda*, Case no ICC-01/04-02/06-2666-Red, 30 March 2021

Public redacted version of Judgment on the appeal of Mr Bosco Ntaganda against the decision of Trial Chamber VI of 7 November 2019 entitled 'Sentencing judgment', *Prosecutor v Ntaganda*, Case no ICC-01/04-02/06-2667-Red, 30 March 2021

Decision on the Presiding Judge of the Appeals Chamber in the appeals against the decision of Trial Chamber VI entitled 'Reparations order'; *Prosecutor v Ntaganda*, Case no ICC-01/04-02/06-2670, 9 April 2021

**Related Development(s):**

*Situation in the Democratic Republic of the Congo, Prosecutor v Lubanga, Prosecutor v Lubanga*, Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012, Case no ICC-01/04-01/06-3129, 3 March 2015

*Prosecutor v Katanga*, Order for reparations pursuant to Article 75 of the Statute, Case no ICC-01/04-01/07-3728-tENG; ICL 1774 (ICC 2017), 24 March 2017

*Situation in the Republic of Mali, Prosecutor v Al Mahdi*, Reparations order, Case no ICC-01/12-01/15-236; ICL 1813 (ICC 2017), 17 August 2017

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**Subject(s):**

Right to effective remedy — International criminal law, victims — Appeals — Registry — Trial Chamber — Compensation — Damages — Reparations

**Core Issue(s):**

Whether reparations proceedings should be initiated or proceed pending an appeal on the defendant's conviction.

Whether a particular organ within the International Criminal Court ('ICC')'s institutional framework should be responsible for the identification of victims potentially eligible for reparations.

Whether and how the ICC should carry out the identification of victims potentially eligible for reparations during the COVID-19 pandemic.

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## **Facts**

**F1** Bosco Ntaganda ('Ntaganda') was the Deputy Chief of Staff of the Patriotic Forces for the Liberation of Congo ('FPLC'), a non-state armed group from the Democratic Republic of Congo ('DRC').

**F2** On 8 July 2019, in *Situation in the Democratic Republic of the Congo, Prosecutor v Ntaganda*, Trial judgment, Case no ICC-01/04-02/06-2359; ICL 1949 (ICC 2019), 8 July 2019, Trial Chamber VI of the International Criminal Court ('ICC') found Ntaganda guilty of five counts of crimes against humanity and 13 counts of war crimes—2,129 victims were authorized to participate in his trial.

**F3** On 25 July 2019, in *Situation in the Democratic Republic of the Congo, Prosecutor v Ntaganda*, Order for preliminary information on reparations, Case no ICC-01/04-02/06-2366, 25 July 2019, Judge Chang-ho Chung, acting as Single Judge, requested the Registry to submit information on, and any proposed methodology for, the identification of victims not participating in the proceedings who could be potentially eligible for reparations.

**F4** On 5 September 2019, the Registry, through its Victims Participation and Reparations Section ('VPRS'), submitted its proposed methodology, which essentially mirrored the method for the participation of victims at Ntaganda's trial. The VPRS proposed that the identification of potential beneficiaries for reparations could start as soon as the Chamber had established the eligibility criteria and be completed before the issuance of the Reparations Order.

**F5** On 9 September 2019, the Defence filed its notice of appeal against Ntaganda's conviction.

**F6** On 3 October 2019, the Defence submitted its response to the Registry's proposed methodology, opposing some of its aspects. In particular, the Defence argued that the methodology should be modified to ensure that Ntaganda had the opportunity to assess and offer submissions on every reparations request.

**F7** On the same day, the Legal Representatives of Victims ('LRVs') submitted a joint response, also disagreeing with the Registry's methodology. They argued that the process for identification of victims eligible for reparations should be carried out by the Trust Fund for Victims ('TFV') during the implementation of the Reparations Order. Since the screening process in the Lubanga case was delegated to the TFV and due to the overlapping of victims between that case and the present one, the LRVs pointed out that entrusting the identification of potential eligible victims to the VPRS would give rise to inconsistency, inequality, duplication of work, unnecessary expenditures, and duplication of risks for victims. They also claimed that the Registry's proposal of screening the victims while the appeal on Ntaganda's conviction was still pending had serious deficiencies, including the risk of frustration of the victims' expectations, their re-traumatization, and additional exposure to security risks.

**F8** On the same day, the Prosecution submitted its response, in which, inter alia, it supported the Trial Chamber issuing a preliminary decision on the procedure and the approach it intended to adopt in the reparations process.

**F9** Also on the same day, the TFV submitted its response, which also opposed the Registry's proposed methodology. It noted that the screening of victims to identify potential beneficiaries of reparations prior to the issuance of the Reparations Order would be premature and harmful to victims.

**F10** On 7 November 2019, in *Prosecutor v Ntaganda*, Sentencing judgment, Case no ICC-01/04-02/06-2442; ICL 1954 (ICC 2019), 7 November 2019, Trial Chamber VI sentenced Ntaganda to 30 years of imprisonment.

**F11** On 5 December 2019, in *Situation in the Democratic Republic of the Congo, Prosecutor v Ntaganda*, Order setting deadlines in relation to reparations, Case no ICC-01/04-02/06-2447, 5 December 2019, the Single Judge instructed the parties, the Registry, and the TFV, and invited the Prosecution, to present submissions on several issues concerning reparations. The Single Judge also instructed the Registry to continue the preliminary mapping of potential new beneficiaries of reparations and to carry out an assessment of the eligibility of other victims.

**F12** On 28 February 2020, the Defence, the LRVs, the Registry, the Prosecution, and the TFV presented their respective submissions. They essentially restated their previous arguments.

**F13** On 9 April 2020, in response to the COVID-19 pandemic, the Single Judge requested the LRVs, the Defence, the Registry, and the TFV to report on whether, or to what extent, COVID-19-related restrictions would have an impact on their proposals and on their ability to perform their functions during the reparations proceedings (*Situation in the Democratic Republic of the Congo, Prosecutor v Ntaganda*, Order to provide information on the impact of COVID-19 measures on operational capacity, Case no ICC-01/04-02/06-2507, 9 April 2020). In general, they submitted that despite some limited negative impacts, they could continue to carry out their duties. Thus, the reparations process could proceed amid the pandemic.

## **Held**

**H1** The Rome Statute of the International Criminal Court (17 July 1998) UN Doc A/CONF.183/9, entered into force 1 July 2002 ('Rome Statute') empowered the ICC to deliver not just retributive but also reparative justice through, inter alia, the issuance of Reparations Orders in favour of victims of the crimes for which a defendant was convicted. Under Article 75 (1) of the Rome Statute, individual Trial Chambers had significant discretion to define the procedure and methodology to establish reparations in light of the specific circumstances of each case. However, while exercising their discretion, Chambers must avoid unnecessary delays, ensuring that reparations proceedings are expeditious and effective and, ultimately, that victims receive reparations in a prompt, responsive, and efficient manner. Chambers must streamline the proceedings as much as possible and adopt a holistic and integrated approach which views the reparations process in its entirety, including the implementation stage. (paragraphs 22–23)

**H2** The identification of victims potentially eligible for reparations should progress as much as possible before the delivery of the Reparations Order by the Trial Chamber. Nevertheless, it may not be achievable to identify all eligible victims in this early stage, particularly since additional beneficiaries could come forward only during the implementation phase. (paragraph 26)

**H3** The entity best suited to spearhead the identification of eligible victims was the Registry through its VPRS, especially due to its knowledge of the case and field presence in the DRC. Moreover, the Registry's assistance to victims at the reparations phase fell under the scope of Regulation 86(9) of the Regulations of the International Criminal Court, ICC-BD/01-01-04, 26 May 2004. (paragraph 27)

**H4** The potentially eligible beneficiaries were divided into three separate groups: (i) victims participating in the case; (ii) victims eligible for reparations in the Lubanga case; and (iii) potential new beneficiaries of reparations. In light of their particularities, the Chamber devised a different approach for the assessment of the victims' eligibility in each group. (paragraphs 29–36)

**H5** As for the first group—victims participating in the case—the Registry was instructed to determine how many of the victims that participated in Ntaganda's trial could potentially be eligible for reparations. Specifically regarding the participating victims that fell within the scope of Ntaganda's conviction, a further assessment on their eligibility was not necessary at that stage, since the types and modalities of reparations were not yet determined by the Chamber. Besides, the participating victims were not required to file a new and specific application form requesting reparations in order to be considered as potential beneficiaries. As for the participating victims who had not yet expressed views on their wish to receive reparations, the Registry should presume and treat them as potential beneficiaries. Their express consent should not be sought at that stage, but at the implementation phase, when the types and modalities of reparations were already determined by the Chamber and known by the victims. (paragraphs 29–30)

**H6** As for the second group—victims eligible for reparations in the Lubanga case—Ntaganda and Thomas Lubanga were both leaders of the FPLC, resulting in overlapping between their convictions. Consequently, some persons could be victims in both cases and, as such, could *a priori* seek reparations twice, under each of those two cases. The Registry was instructed to finalize the evaluation of how many beneficiaries in the Lubanga case were also potentially eligible for reparations in the present case. The Registry should not contact these victims at that stage to inquire whether they intended to request reparations in the Ntaganda case. For the purposes of identification of eligible victims, they were to be presumed and treated as potential beneficiaries. In case the Chamber later determined in the Reparations Order that these victims were entitled to receive reparations in the present case, their consent should be sought at the implementation stage. (paragraph 31)

**H7** As for the third group—potential new beneficiaries of reparations—the COVID-19 pandemic posed serious limitations on the identification of victims in this group. As a result, the Registry was instructed to focus primarily on the mapping exercise, i.e. the gathering of information per village on the potential beneficiaries' available documentation as well as to estimate the number of potential new applicants for reparations. In order to finish the mapping exercise as soon as practicable, the Registry should, *inter alia*, seek first-hand information and include in its assessment displaced and marginalized or vulnerable victims who may face difficulties in making themselves known. (paragraphs 32–34)

**H8** To the extent that the COVID-19 pandemic allowed it, the Registry could also list potential new beneficiaries identified during the mapping exercise. The Registry should consult with the parties and the TFV to draft an application form specific for reparations purposes. The form should be sufficiently comprehensive to avoid or minimize multiple contacts with the victims. Due to the difficulties some victims might face to fill in the

application form, they could provide the necessary information to the Registry without the need to obligatorily fill in the form. (paragraph 35)

**H9** Since the COVID-19 pandemic prevented regular contact with victims, the Registry should prepare, using the aforementioned form and in consultation with the parties and the TFV, a limited but comprehensive sample of potential beneficiaries of reparations from those three groups of victims. This sample would provide the Chamber with crucial information on the harm suffered by the victims and their needs. (paragraphs 37–38)

**H10** As for the issue of screening victims prior to the issuance of the appeal judgment on Ntaganda's conviction, the pending appeal was not in itself an impediment to the commencement and continuation of the reparations process. The Registry should manage the victims' expectations by clearly explaining the possible outcomes of the appellate proceedings. The Registry was suited for this task due to its role assisting in the participation of victims in all cases and at all stages of the proceedings and its vast experience with victims in the field, including in the DRC. (paragraph 39)

**H11** Even though victims should ideally only be contacted by ICC officials for reparations purposes as close as possible to the actual delivery of the awards, and repeated interviews should be avoided in favor of minimal and meaningful encounters, these concerns must be balanced against the victims' right to prompt and efficient reparations. Accordingly, to ensure an expeditious process, interaction with some victims was necessary, specially to finish the mapping exercise and to prepare the sample of potential beneficiaries. Nevertheless, those concerns had merit, and the Registry should take them into account in its approach to contacting the victims. (paragraphs 40–41)

**H12** The VPRS, the TFV, and the LRVs should collaborate and communicate to facilitate the conduct of the reparations proceedings. The Defence was also invited to communicate to the Registry, where appropriate, any relevant information it may have. (paragraph 42)

Date of Report: 07 June 2021

**Reporter(s):** Bruno de Oliveira Biazatti

### **Analysis**

**A1** The ICC's mandate to order reparations to victims under Article 75 of the Rome Statute comprises a novel regime that has remained underdeveloped and unclear. A relevant step towards more certainty was taken in 2015, when the Appeals Chamber established principles relating to reparations in *Situation in the Democratic Republic of the Congo, Prosecutor v Lubanga*, Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012, Case no ICC-01/04-01/06-3129, 3 March 2015 (*Lubanga Reparations Order*). The Appeals Chamber highlighted that since principles on reparations should be formulated considering the specific circumstances of each case, they 'can ... be applied, adapted, expanded upon, or added to by future Trial Chambers'. (paragraph 22)

**A2** The ICC's jurisprudence on reparations has been slow to flourish. The Ntaganda case was only the fourth time the ICC has engaged in reparations proceedings since its creation two decades ago. The first three cases were Lubanga, Katanga, and Al Mahdi (*Lubanga Reparations Order; Prosecutor v Katanga*, Order for reparations pursuant to Article 75 of the Statute, Case no ICC-01/04-01/07-3728-tENG; ICL 1774 (ICC 2017), 24 March 2017; and *Situation in the Republic of Mali, Prosecutor v Al Mahdi*, Reparations order, Case no ICC-01/12-01/15-236; ICL 1813 (ICC 2017), 17 August 2017). In addition, the Lubanga reparations principles essentially replicated the Katanga and Al Mahdi cases without any

significant development. The Ntaganda case constituted the first time in which those principles were effectively expanded and modified (L Moffett and C Sandoval, 'Tilting at windmills: Reparations and the International Criminal Court' (2021) LJIL 1, 3). Although the full impact of the Ntaganda case on the ICC's legal framework concerning reparations became clearer with the subsequent issuance of the Reparations Order (*Prosecutor v Ntaganda*, Reparations order, Case no ICC-01/04-02/06-2659, 8 March 2021), the present decision offered a glimpse into these developments.

**A3** The decision presented relevant insights on the moment the reparations proceedings should be initiated. Since Article 75(2) of the Rome Statute stated that Reparations Orders must be issued against 'a convicted person', a conviction could be seen as a prerequisite for such Orders (*Prosecutor v Abd-Al-Rahman*, Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II of 18 August 2020 entitled 'Decision on the Defence request and observations on reparations pursuant to article 75(1) of the Rome Statute', Case no ICC-02/05-01/20-237, 18 December 2020). Yet the wording in Article 75 of the Rome Statute did not require the conviction to be final. Accordingly, Trial Chamber VI, in light of the need to ensure an expeditious reparations procedure, decided to move the proceedings along, even though the appeal against Ntaganda's conviction was pending.

**A4** Denial of a stay of the reparations proceedings—as occurred in the present case—was the approach recommended for ICC-wide application by the Independent Expert Review of the International Criminal Court and the Rome Statute System (ICC, 'Independent Expert Review of the International Criminal Court and the Rome Statute System — Final Report' (2020) paras 899-900 ('Independent Expert Review')). A survey of the ICC's practice by the Commentator disclosed that this approach had not been universally implemented by the Trial Chambers. In the Lubanga case, the Chamber did not stay the proceedings and the Reparations Order was issued when the appeal on conviction was still pending. Contrariwise, in the Katanga case, the reparations phase only commenced after the parties withdrew their appeals. In the Al Mahdi case, Trial Chamber VIII did not wait for the conviction to become final: two days after the verdict's issuance, the Chamber set a reparations phase calendar. In *Prosecutor v Bemba*, Final decision on the reparations proceedings, Case no ICC-01/05-01/08-3653, 3 August 2018, Trial Chamber III initiated and advanced the reparations proceedings despite the appeal against the defendant's conviction. Nevertheless, these proceedings had to be discontinued without a final Reparations Order due to Bemba's acquittal by the Appeals Chamber. More recently, in *Prosecutor v Ongwen*, Order for submissions on reparations, Case no ICC-02/04-01/15-1820, 6 May 2021 {mentioned only in headnote}, Trial Chamber IX decided to start the reparations phase even though the Defence challenged the conviction in appeals. In conclusion, except for the Katanga case, the reparations phase generally has been initiated when the conviction was not yet final. This could indicate the beginning of a trend in the ICC.

**A5** However, the denial of a stay of the reparations proceedings has its own shortcomings. Although the need to ensure an expeditious reparations procedure is meritorious, the practical difficulties arising in case the defendant is totally or partially acquitted on appeal can be damaging, especially if the reparations proceedings have already reached the implementation phase. The scope of the proceedings or of the final Reparations Order would have to be amended according to the appeal judgment, which could entail the exclusion of some victims or the re-determination of the monetary amount for which the convicted person was liable (M Lostal, 'The Ntaganda Reparations Order: a marked step towards a victim-centred reparations legal framework at the ICC' EJIL:Talk! (2021)). This creates the risk of frustrating the victims' expectations and faith in the ICC, leading to re-traumatization and re-victimization. In response to these concerns, Trial Chamber VI

adopted, in the present decision, a hands-off approach, simply trusting in the Registry's expertise to handle the victims' expectations and determining some general guidelines on how the Registry should contact them. The Chamber could have adopted a more active role for itself, exercising more oversight over the contact with victims to, inter alia, assess whether its approach was sound or rather harmful to victims.

**A6** The present decision also offers relevant insight into which organ of the ICC should lead the identification of potentially eligible beneficiaries of reparations. So far, the practice of the ICC has been inconsistent in this regard: in the Lubanga and Al Mahdi cases the Trial Chambers entrusted the TFV with such a task; in the Ntaganda case, it was the VPRS; and in the Katanga case, one can identify a hybrid approach, in which the Common Legal Representative of Victims reported on victims already participating in the case and the Registry reported on non-participating victims. According to the Independent Expert Review, paras 903-913, the approach in the Ntaganda case was the most adequate one and should be applied Court-wide.

**A7** As for the effects of the COVID-19 pandemic, the ICC should be praised for safely moving the reparations proceedings along amid sanitary restrictions. One could note as positive developments the efforts to avoid multiple contacts with victims and the Trial Chamber's request for a sample of potential victims instead of a broad list. This illustrates the ICC's ability to adjust its procedure and activities to unexpected scenarios and challenges (H Abtahi, 'The International Criminal Court during the COVID-19 Pandemic' (2020) 18 JICJ 1069).

**A8** The present decision illustrates the ICC's determination to improve its reparations process as a whole, aimed at consolidating a victim-centered procedure. This is evinced through the efforts to streamline the proceedings, making them less bureaucratic and time-consuming for both the victims and the Registry. Moreover, the Trial Chamber's holistic and integrated approach, which views the reparations procedure not in fragmented phases, but in its entirety, allows a more effective and comprehensive decision-making process by the judges, avoiding short-sighted choices.

Date of Analysis: 07 June 2021

Analysis by: Bruno de Oliveira Biazatti

### **Further analysis**

L Moffett and C Sandoval, 'Tilting at windmills: Reparations and the International Criminal Court' (2021) LJIL 1

M Lostal, 'The Ntaganda Reparations Order: a marked step towards a victim-centred reparations legal framework at the ICC' EJIL:Talk! (2021)

### ***Instruments cited in the full text of this decision:***

#### *International*

Rome Statute of the International Criminal Court (17 July 1998) UN Doc A/CONF.183/9, entered into force 1 July 2002, Articles 68, 75

International Criminal Court Rules of Procedure and Evidence, ICC-ASP/1/3 (Part II-A), 9 September 2002, Rules 16, 86

Regulations of the International Criminal Court, ICC-BD/01-01-04, 26 May 2004, Regulation 34, 86

***Cases cited in the full text of this decision:***

*International Criminal Court*

*Situation in the Democratic Republic of the Congo, Prosecutor v Lubanga Dyilo*, Decision on the admissibility of the appeals against Trial Chamber I's 'Decision establishing the principles and procedures to be applied to reparations' and directions on the further conduct of proceedings, Case no ICC-01/04-01/06 A A2 A3 OA 21; ICC-01/04-01/06-2953, 14 December 2012

*Situation in the Democratic Republic of the Congo, Prosecutor v Lubanga*, Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012 with amended order for reparations (Annex A) and public annexes 1 and 2, Case no ICC-01/04-01/06 A A2 A3; ICC-01/04-01/06-3129; OXIO 105; ICL 1655 (ICC 2015), 3 March 2015

*Situation in the Republic of Mali, Prosecutor v Al Mahdi*, Reparations order, Case no ICC-01/12-01/15, ICC-01/12-01/15-236; ICL 1813 (ICC 2017), 17 August 2017

*Situation in the Democratic Republic of the Congo, Prosecutor v Katanga*, Public redacted judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled 'Order for reparations pursuant to Article 75 of the Statute', Case no ICC-01/04-01/07 A3 A4 A5; ICC-01/04-01/07-3778-Red; ICL 1834 (ICC 2018), 8 March 2018

*Situation in the Democratic Republic of the Congo, Prosecutor v Ntaganda*, Trial judgment, Case no ICC-01/04-02/06, ICC-01/04-02/06-2359; ICL 1949 (ICC 2019), 8 July 2019

*Situation in the Democratic Republic of the Congo, Prosecutor v 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', Case no ICC-01/04-01/06, ICC-01/04-01/06-3466-Red; ICL 1952 (ICC 2019), 18 July 2019

*Situation in the Democratic Republic of the Congo, Prosecutor v Ntaganda*, Order for preliminary information on reparations, Case no ICC-01/04-02/06, ICC-01/04-02/06-2366, 25 July 2019

*Situation in the Democratic Republic of the Congo, Prosecutor v Ntaganda*, Order setting deadlines in relation to reparations, Case no ICC-01/04-02/06, ICC-01/04-02/06-2447, 5 December 2019

*Situation in the Democratic Republic of the Congo, Prosecutor v Lubanga Dyilo*, Order relating to the request of the Victims Participation and Reparations Section of 21 January 2020, Case no ICC-01-04/01-06, ICC-01/04-01/06-3472-Conf-tENG, 4 February 2020

*Situation in the Democratic Republic of the Congo, Prosecutor v Ntaganda*, Order to provide information on the impact of COVID-19 measures on operational capacity, Case no ICC-01/04-02/06, ICC-01/04-02/06-2507, 9 April 2020

*Situation in the Democratic Republic of the Congo, Prosecutor v Ntaganda*, Public redacted version of 'Decision appointing experts on reparations', Case no ICC-01/04-02/06, ICC-01/04-02/06-2528-Red, 14 May 2020

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## Decision - full text

**Trial Chamber VI** ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda* ('Ntaganda case'), having regard to Articles 68(3) and 75 of the Rome Statute, Rules 16 and 86 of the Rules of Procedure and Evidence, and Regulation 86(9) of the Regulation of the Court ('Regulations'), issues this 'First Decision on Reparations Process'.

### I. Procedural History and Submissions

1. On 8 July 2019, the Chamber issued its Judgment, convicting Mr Ntaganda of five counts of crimes against humanity and thirteen counts of war crimes.<sup>1</sup>
2. On 25 July 2019, Judge Chang-ho Chung, acting as Single Judge, issued the 'Order for preliminary information on reparations',<sup>2</sup> *inter alia*, requesting the Registry to submit information on, and any proposed methodology for, the identification of nonparticipating victims.<sup>3</sup>
3. On 5 September 2019, the Registry, through the Victims Participation and Reparations Section ('VPRS'), submitted, *inter alia*, its proposed methodology for the identification of potential new reparations beneficiaries ('Registry Preliminary Observations on Reparations').<sup>4</sup> The proposed system mirrors the system adopted for the participation of victims at trial.<sup>5</sup> It entails the Chamber: (i) ratifying the Registry's assessment as to whether individuals qualify as reparations beneficiaries, barring a clear and material error in the assessment; and (ii) making a decision in relation to individuals for whom the Registry could not make a determination for any reason.<sup>6</sup> The Registry submits that the proposed process of identification, including the assessment as to how many of the participating victims would be eligible for reparations, could start as soon as the Chamber sets out the eligibility criteria and be finalised before the issuance of the reparations order.<sup>7</sup>
4. On 3 October 2019,<sup>8</sup> the Defence responded to the Registry Preliminary Observations on Reparations, objecting to certain aspects of the proposed methodology, particularly regarding the role of the Defence in the assessment of the application forms of potential reparations beneficiaries.<sup>9</sup>
5. On 3 October 2019, the LRVs filed a joint response, also opposing the Registry's proposed methodology.<sup>10</sup> They submit that potential new beneficiaries should be identified and screened at the implementation stage by the Trust Fund for Victims ('TFV'), in collaboration with the Registry and the LRVs, on the basis of the criteria set out in the Chamber's reparations order and with the appropriate judicial oversight.<sup>11</sup> They also argue that contacting victims pending the issuance of the appeal against the Judgment poses serious challenges, including, among others, the risk of raising victims' expectations, re-traumatising them, and exposing them to security risks.<sup>12</sup>
6. On the same date, the Office of the Prosecutor ('Prosecution') submitted its response, arguing that the Chamber should issue a preliminary decision setting out the procedure and the approach it intends to adopt in the present reparations proceedings.<sup>13</sup>
7. Also on 3 October 2019, the TFV submitted its response opposing the Registry's proposal, arguing that it would be premature and potentially not in the best interest of the eventual reparations beneficiaries if the Chamber already rendered a decision approving

the proposed pre-order individual application-based screening process, to be conducted by the VPRS.<sup>14</sup>

**8.** On 5 December 2019, the Single Judge issued the ‘Order setting deadlines in relation to reparations’, *inter alia*, instructing the parties, the Registry, and the TFV, and inviting the Prosecution, to make submissions on a number of issues related to reparations.<sup>15</sup> The Single Judge also instructed the Registry, in consultation with the LRVs and/or the TFV, as appropriate, to: (i) continue to carry out its preliminary mapping of potential new beneficiaries of reparations; (ii) carry out an assessment of how many of the victims participating in the *Ntaganda* case may potentially be eligible for reparations given the scope of the Judgment; and (iii) carry out an assessment of how many of the victims eligible for reparations as direct beneficiaries in the case of *The Prosecutor v. Thomas Lubanga Dyilo* (*‘Lubanga case’*) are also potentially eligible for reparations in the *Ntaganda* case.<sup>16</sup>

**9.** On 28 February 2020, the Defence,<sup>17</sup> the LRVs,<sup>18</sup> the Registry,<sup>19</sup> the Prosecution,<sup>20</sup> and the TFV<sup>21</sup> made their respective submissions on reparations, amongst other things, reiterating their respective abovementioned positions. Annexed to its submissions, the Registry also filed: (i) the results of the VPRS’s preliminary mapping of newly identified potential reparations beneficiaries;<sup>22</sup> and (ii) information concerning the victims potentially eligible for reparations in the *Lubanga* case who are also potentially eligible for reparations in the *Ntaganda* case.<sup>23</sup> The Chamber also received observations from the government of the Democratic Republic of the Congo (*‘DRC’*),<sup>24</sup> and the International Organization for Migration.<sup>25</sup>

**10.** In its submissions, the Defence proposes a two-phased reparations system, including: a pre-reparations order phase, during which only *dossiers* of participating victims would be assessed with the participation of the VPRS, the LRVs, and the Defence; and a post-reparations order implementation phase, where, *inter alia*, application forms from potential new beneficiaries would be collected by the VPRS, in consultation with the TFV, and where the parties would make submissions concerning the eligibility of these new applicants.<sup>26</sup>

**11.** The TFV avers that, considering the scope of the case, the security situation in the DRC, existing and future health risks, and the time required to process, analyse, and litigate applications, completing the Registry’s proposed screening process ahead of the issuance of the reparations order would constitute a challenge not to be underestimated.<sup>27</sup> It also argues that a decision on the screening model is premature at the current stage of the proceedings.<sup>28</sup> Instead, the Chamber could delegate to the TFV, in consultation with the VPRS and the LRVs, the design of the screening methodology for potential new beneficiaries, to be included in its draft implementation plan for the Chamber’s approval.<sup>29</sup>

**12.** On 23 March 2020, the Defence filed a request for the reclassification of Annex II and Annex III to the ‘Registry Observations on Reparations’<sup>30</sup> from *ex parte* to confidential (*‘Defence Reclassification Request’*).<sup>31</sup> The Defence argues that access to the two annexes is necessary for it to adequately represent the interests of Mr Ntaganda and play a meaningful role in the reparations process.<sup>32</sup>

**13.** On 30 March 2020, in line with the deadline set by the Chamber,<sup>33</sup> the Registry submitted its observations on the Defence Reclassification Request.<sup>34</sup> The Registry does not oppose providing the Defence with a confidential redacted version of Annex II, should the Chamber so order.<sup>35</sup> As far as Annex III is concerned, the Registry notes that prior authorisation from Trial Chamber II would be necessary before the annex may be disclosed to the Defence, as it contains confidential information related to the *Lubanga* case.<sup>36</sup> The

same day, the LRVs informed the Chamber that they did not intend to respond to the Defence Reclassification Request.<sup>37</sup>

**14.** On 9 April 2020, the Single Judge noted that, due to the measures imposed to contain the COVID-19 pandemic, travel between and within countries had been severely restricted.<sup>38</sup> He ordered the LRVs, the Defence, the Registry, and the TFV to inform the Chamber whether, and if so to what extent, such measures would have an impact on their proposals and on their ability to carry out their duties in relation to the reparations proceedings.<sup>39</sup>

**15.** On 21 April 2020, the Registry submitted the requested information.<sup>40</sup> It indicates that, despite the impact of COVID-19, the VPRS is still in a position to carry out the eligibility assessment of participating victims.<sup>41</sup> As far as new potential beneficiaries are concerned, the Registry notes that the measures put in place by the DRC government have had a significant impact on travel to and within the country, with all of the Court's missions to the DRC suspended until further notice, ICC staff in Bunia and Kinshasa working remotely, and many of the Registry's field activities, including direct contact with existing and potential victims, currently on hold.<sup>42</sup> Should the travel restrictions remain in place beyond the summer recess, delays with respect to the Registry's originally proposed timeline related to the registration and eligibility assessment of potential new applicants would be unavoidable and the Registry's proposal would need to be adapted to take into account the developing circumstances.<sup>43</sup>

**16.** On 21 April 2020, the Defence submitted that the COVID-19-related measures impact certain aspects of its work, to a limited extent.<sup>44</sup> However, it notes that, in the current circumstances, it is unclear when the Appeals Chamber's judgment on Mr Ntaganda's conviction is to be rendered, and stresses that there is a reasonable possibility for the conviction to be overturned.<sup>45</sup> Accordingly, it argues that, although reparations proceedings shall be carried out as expeditiously as possible, victims' expectations should not be unduly raised until Mr Ntaganda's appeal is finally determined.<sup>46</sup>

**17.** On 21 April 2020, the LRVs also submitted the requested information.<sup>47</sup> The LRV1 submits that the circumstances surrounding the COVID-19 pandemic do not impact on the Chamber's ability to issue the reparations order, since the order could be issued on the basis of submissions already before the Chamber.<sup>48</sup> The LRV2 argues that, at this stage, field activities by the Registry should primarily focus on the mapping exercise of the number and location of potential beneficiaries of reparations.<sup>49</sup> It also argues that ways should be explored for the Registry to collect relevant certified statements and information from local authorities remotely and/or with the assistance of local intermediaries, as well as to seek the cooperation of the DRC central government in order to obtain relevant information.<sup>50</sup>

**18.** Lastly, on the same date, the TFV submitted that the Chamber could issue its reparations order as soon as possible, as the case record already contains sufficient information to this end.<sup>51</sup> It further submits that the Chamber should opt to set out the eligibility criteria for reparations beneficiaries in the reparations order and defer the victim identification and verification process to a less turbulent time.<sup>52</sup> The TFV also stresses the high probability that Mr Ntaganda will be considered indigent and notes that COVID-19 is likely to affect donors' financing priorities.<sup>53</sup> Thus, the availability of the Chamber's reparations order would strengthen the TFV's ability to encourage donor funding of the reparations awards.<sup>54</sup>

**19.** On 4 May 2020, the Defence filed a response to the aforementioned submissions, responding to discrete matters arising from the LRV2's, the Registry's, and the TFV's submissions.<sup>55</sup>

**20.** On 14 May 2020, the Chamber appointed four experts ('Appointed Experts') for the purposes of the reparations proceedings and instructed them to submit by 28 August 2020 a report on four issues identified by the Chamber.<sup>56</sup>

## **II. Analysis**

**21.** The purpose of this decision is to continue advancing with the reparation proceedings, in order for them to be as expeditious, effective, and efficient as possible in the current circumstances. This decision also addresses the Defence Reclassification Request. The Chamber has considered all the submissions referred to above but it has not systematically discussed all proposals and submissions.<sup>57</sup> In reaching its decision, the Chamber has also considered the practice of other chambers of the Court.

**22.** The Court's statutory framework, which envisages not only retributive but also reparative justice, affords considerable discretion to individual trial chambers to decide on the best approach to take in reparations proceedings, depending on the concrete circumstances of the case before them.<sup>58</sup> However, in the exercise of their discretion, chambers must ensure that the proceedings are as expeditious and effective as possible,<sup>59</sup> leading to prompt, responsive, and efficient reparations.<sup>60</sup> It is therefore paramount to avoid unnecessary delays in the reparations proceedings taken as a whole.<sup>61</sup> In this regard, streamlining the proceedings as much as possible with a view to ensuring a smooth transition between the preparation of the reparations order and the implementation stage is a critical consideration.<sup>62</sup>

**23.** When determining the steps to be taken in the proceedings up until the issuance of the reparations order, the Chamber has taken a holistic and integrated approach which views the reparations proceedings in their entirety, including the post-reparations order implementation stage, considering it is desirable that the same framework and process are followed in the various stages of the reparations proceedings.

**24.** The Chamber has taken due account of the views and concerns of the victims and the rights of Mr Ntaganda. The Chamber has considered the specific circumstances of the case, including, *inter alia*: (i) the significant number of victims authorised to participate at trial;<sup>63</sup> (ii) the estimated number of potential beneficiaries;<sup>64</sup> (iii) the time elapsed since the relevant events; and (iv) the geographical scope of the case and the scope of victimisation. Additionally, the Chamber is mindful of the security situation in Ituri<sup>65</sup> and the current challenges posed by the COVID-19 pandemic.<sup>66</sup> The Chamber also notes that significant information relevant to the five elements of the reparations order is available in the case record.<sup>67</sup>

**25.** The approach adopted seeks to rely on the full collaboration and cooperation of the Registry's VPRS and the TFV, as well as that of the LRVs, to benefit from their combined knowledge, expertise, and experience in assisting victims and dealing with reparations, in particular in the field. The Chamber notes in particular the importance of including the TFV's input at this stage given its operational experience at the implementation stage of reparations orders.<sup>68</sup> The Chamber considers that it is essential to combine the limited resources available to facilitate the efficient and effective conduct of the reparations proceedings, particularly in the current circumstances.

## **A. Identification of potentially eligible victims**

**26.** For the purpose of enhancing the efficiency and effectiveness of the reparations proceedings taken as a whole, the Chamber considers it desirable for the identification of the victims potentially eligible for reparations to advance as much as possible before the issuance of the reparations order. Several benefits may flow from adopting this approach: (i) the information collected during the identification process may inform the approach to be taken in the Chamber's reparations order; (ii) it will facilitate the effective and timely implementation of the order; and (iii) it may assist the TFV in its preparation of the draft implementation plan of the reparations order. The Chamber recognises that it may not be feasible for all potential victims to come forward at this stage of reparations proceedings. Some victims may choose to come forward only once the types and modalities of reparations have been established; marginalised or vulnerable victims may face significant challenges in coming forward.<sup>69</sup> Additional beneficiaries may therefore only be identified during the implementation stage.

**27.** The Chamber considers that the Registry, through its VPRS, is the right entity to lead the identification of potential beneficiaries and other tasks set out below, particularly due to its familiarity with the case and its field presence in the DRC. In addition, while the reparations proceedings serve different goals than the trial, the Chamber is of the view that the Registry's role in assisting victims in participating in the different phases of the proceedings, including at the reparations stage, is in accordance with Regulation 86(9) of the Regulations.

**28.** The Chamber has however decided to adapt its approach considering the impact of the COVID-19 pandemic on the operations of the Court in the field and on the expected timeline of the reparations proceedings.<sup>70</sup>

### **1. Victims participating in the case**

**29.** The Registry, in consultation with the respective LRV, and the TFV, as appropriate, shall finalise as soon as practicable the assessment of how many of the participating victims may potentially be eligible for reparations given the scope of the Judgment.<sup>71</sup> Considering the fact that the Chamber has not yet decided the types and modalities of reparations, a further assessment as to the eligibility of the participating victims falling within the scope of the Judgment is not required at this stage.<sup>72</sup> The participating victims are also not required to file a new application form in order to be considered as potential reparations beneficiaries.

**30.** The Chamber considers it appropriate for victims already authorised to participate in the proceedings who have not expressed views on their wish to receive reparations to, in principle, be presumed willing to be considered as potential beneficiaries of reparations.<sup>73</sup> In the Chamber's view, their consent is more appropriately sought at the implementation stage, when the victims are able to make an informed decision once the types and modalities of reparations are known.<sup>74</sup>

### **2. Victims eligible for reparations in the Lubanga case**

**31.** The Registry shall finalise, as soon as practicable, taking into consideration the relevant deadline set by Trial Chamber II, the assessment of how many victims eligible for reparations in the *Lubanga* case are also potentially eligible for reparations in the *Ntaganda* case.<sup>75</sup> The Chamber does not consider it necessary to contact these victims at this stage to ask them whether they wish to be considered for reparations in the *Ntaganda* case.<sup>76</sup> They

can be treated as potential beneficiaries, subject to their consent at the implementation stage, should the Chamber determine that they may benefit from reparations in this case.

### **3. Potential new beneficiaries of reparations**

**32.** The Chamber notes that the current estimated number of potential new beneficiaries of reparations, as far as the victims of the attacks are concerned, based on the Registry's mapping exercise is at least approximately 1,100,<sup>77</sup> while the LRV2 submits it can be estimated at a minimum of 100,000 across all locations affected by Mr Ntaganda's crimes.<sup>78</sup>

**33.** As set out above, in order to enhance the efficiency and effectiveness of the reparations proceedings, the Chamber considers that the period prior to the issuance of the reparations order can be used for the purpose of identifying as many potential beneficiaries of reparations as possible, with the aim of facilitating and expediting the implementation stage.<sup>79</sup> However, in the present circumstances, where the COVID-19 pandemic places serious limitations on the feasibility of this process, the Chamber has decided to request the Registry to focus mainly on its mapping exercise.

**34.** The Chamber has taken note of the Registry's update on the mapping of potential reparations beneficiaries.<sup>80</sup> Considering its usefulness for the identification of potential beneficiaries, the Chamber is of the view that the Registry should explore ways to finalise this process as soon as practicable,<sup>81</sup> for example by seeking to obtain relevant first-hand information and by including displaced victims,<sup>82</sup> and marginalised or vulnerable victims who may have particular difficulties in making themselves known.<sup>83</sup> As part of this process, and to the extent possible given the current circumstances, the Registry may also register potential beneficiaries identified in the course of this process.

**35.** Given that the Registry may be able to register potential new beneficiaries during the mapping exercise, the Chamber invites the Registry to consult with the parties<sup>84</sup> and the TFV<sup>85</sup> on its proposed draft application form to be used to this end.<sup>86</sup> The form should be specifically tailored for reparations purposes, taking into account that the Chamber has not yet determined the types and modalities of reparations and that some forms of collective reparations do not require any form of victim screening.<sup>87</sup> The Chamber stresses that one of the goals of this consultation is to ensure that all relevant information is collected from the victims, so as to avoid and/or minimise the need for multiple contacts with them, notably at the implementation stage. Following such consultation, the application form developed by the Registry, with any amendments it considers necessary, may be used for the identification of potential new beneficiaries in the context of the mapping exercise,<sup>88</sup> as far as practicable given the current circumstances. However, any victim who wishes to be considered as a potential beneficiary of future reparations may do so without being required to fill in the application form, as long as the relevant information is provided, considering the difficulties that using an application form may involve for some victims. The forms may be completed by a person assisting with the consent of the victim, or a person acting on behalf of a victim (i.e. in the case of underage or disabled victims).

**36.** Considering that the Chamber has not yet determined the types and modalities of reparations, any application forms collected by the Registry will not be the subject of an individual assessment by the Chamber at this point in time.

### **4. Sample**

**37.** Considering that the current circumstances render contact with victims challenging, the Chamber considers that the preparation by the Registry of a sample constituted of a limited but representative pool of potential beneficiaries is appropriate. The aim of the sample is to collect updated information on the harm experienced by victims and their current needs, so as to inform the reparations order. This approach should also allow for an

opportunity to engage with victims before a decision on reparations is made by the Chamber. The sample should be prepared by the Registry in consultation with the parties and the TFV,<sup>89</sup> using the form referred to in paragraph 35 above.

**38.** The Registry is thus instructed to prepare a sample of potential beneficiaries of reparations in consultation with the parties and TFV from the group of victims: (i) who participated in the trial proceedings and fall within the scope of the Judgment; (ii) who are eligible for reparations in the *Lubanga* case; and (iii) of potential new identified beneficiaries. The Registry may contact such victims to collect information relevant for the purposes of the sample.

## **5. Approach to contacts with victims**

**39.** The Chamber has taken into account the concern that identifying and contacting victims pending the issuance of the appeal against the Judgment may raise their expectations.<sup>90</sup> However, the Chamber relies on the Registry's submission that it will be able manage the victims' expectations with clear information regarding the possible outcomes of the proceedings.<sup>91</sup> The Chamber underlines the role played by the Registry in the participation of victims in all cases and at all stages of the proceedings, and its vast experience with victims in the field, including in the DRC. On this basis, the Chamber considers that the Registry is in a position to adequately manage the victims' expectations, including by way of outreach activities.<sup>92</sup> Similarly, the Chamber is of the view that the Registry has the capability to adequately minimise security risks that could arise for the victims due to their interaction with the Court, including any potential risks of re-traumatisation, guided by the 'do no harm' principle.<sup>93</sup>

**40.** The Chamber notes the TFV's suggestion that reparations-related contact with victims should be as proximate in time as possible to the actual delivery of the awards and that recurring interviews should be avoided in favour of minimal and meaningful encounters with the victims.<sup>94</sup> Although the Chamber agrees with this submission, it is of the view that the aforementioned must be balanced against the need for prompt and efficient reparations proceedings. Therefore, the Chamber considers it appropriate for some victims to be contacted by the Registry at the present stage of the proceedings, either to be registered as potential new beneficiaries identified during the mapping exercise or for the purpose of preparing the sample referred to above. Nonetheless, some of the parameters put forward by the TFV may inform the manner in which contact with victims is to be carried out by the Registry.

**41.** The Chamber encourages the Registry to: (i) favour minimal and meaningful contact with victims, by, *inter alia*, minimising, to the largest possible extent, the number of interviews to be held; (ii) take appropriate measures to avoid victims' re-traumatisation; (iii) take appropriate measures to minimise any security risks that may arise for victims due to their interaction with the Court; (iv) adequately inform victims of the expected duration and the possible outcomes of the appeal proceedings in the case and their potential impact on the reparations proceedings; (v) consider alternative procedures for reaching out to the most vulnerable victims and victims of sexual and gender-based violence, who may not wish to provide information concerning their victimisation to intermediaries and other contact persons;<sup>95</sup> and (vi) take all reasonable measures to reach out to victims who may have been displaced from their localities of origin since the relevant events.

## 6. Cooperation between the relevant actors

42. As set out above, the Chamber considers it essential that the Registry's VPRS, the TFV,<sup>96</sup> and the LRVs fully collaborate and cooperate to facilitate the efficient and effective conduct of the reparations proceedings, notably in the current circumstances. The LRVs and TFV are particularly invited to communicate to the Registry any relevant information they may have to facilitate the actions outlined above, and more generally, collaborate to assist in the efficient conduct of these responsibilities by the Registry. The Defence, where appropriate, is also invited to share its views with the Registry.

## 7. Reporting to the Chamber and other activities

43. The Registry shall submit to the Chamber a report setting out: (i) its assessment as to which participating victims fall within the scope of the case following the Judgment, including the crime(s) reported by them;<sup>97</sup> (ii) a preliminary update on the *Lubanga* victims in accordance with paragraph 31 above; (iii) a report on the mapping and any identification of potential new beneficiaries, including the crime(s) reported by them; and (iv) a preliminary report on the sample. In the same report, the Registry shall also identify any key legal and factual issues relevant to the eligibility assessment of potential beneficiaries that may need a determination by the Chamber.

44. The report, together with any request for guidance as to any legal and factual issues, shall be submitted to the Chamber by **30 September 2020**. Following this, the Registry shall continue reporting to the Chamber on these issues every three months. The reports shall be notified to the LRVs, Defence, and the TFV. The parties may submit observations in relation to any key legal and factual issues identified by the Registry within the regular time limits in accordance with Regulation 34 of the Regulations.

45. The Chamber supports the Registry's proposal to use any time during which travel restrictions are in place to prepare training materials for intermediaries, information tools for victims and local leaders, interview methodologies, and guidance for risk prevention.<sup>98</sup> The Chamber also urges the Registry, to the extent possible, to commence any relevant outreach activities it may consider appropriate for the purpose of the present reparations proceedings.

## 8. Submissions to the Chamber

46. The Chamber invites the parties and TFV to make observations in their upcoming submissions<sup>99</sup> on whether any type of harm suffered by the victims of Mr Ntaganda's crimes may be presumed.<sup>100</sup> Additionally, for the crimes of rape and sexual slavery, as a war crime and as a crime against humanity, the Chamber invites the parties and TFV to address in their upcoming submissions the issue of whether children born out of rape should be presumed as having suffered harm as a result of the commission of these two crimes. Lastly, the Chamber invites the parties and the TFV to address the issue as to whether a lower burden of proof should be retained in cases of sexual violence.

## ***B. Defence Reclassification Request***

47. The Chamber considers it appropriate to order the Registry to file a confidential redacted version of Annex II for the benefit of the Defence. The redactions are to be kept to a minimum. Considering the nature of the information contained in Annex II, balancing the protection of the victims, intermediaries, and other third parties with the rights of the convicted person, a review by the Chamber of the redactions is not necessary.

**48.** In relation to Annex III, considering the reasons put forward by the Registry for its classification,<sup>101</sup> the Chamber orders the Registry to liaise with Trial Chamber II for the purpose of either reclassifying Annex III as confidential or, alternatively, filing a confidential redacted version for the benefit of the Defence.

**49.** As the Registry will be filing a confidential redacted version of Annex II, the Chamber also considers it appropriate to instruct the LRV2 to prepare a confidential redacted version of the LRV2 COVID-19 Submissions. Redactions shall be kept to a minimum and applied only where strictly necessary as a result of any redactions to Annex II.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**INSTRUCTS** the Registry to:

- Finalise, as soon as practicable, the assessment of how many of the participating victims may potentially be eligible for reparations given the scope of the Judgment, in consultation with the respective LRV, and the TFV, as appropriate;
- Finalise, as soon as practicable and taking into consideration the relevant deadline set by Trial Chamber II, the assessment of how many victims eligible for reparations in the *Lubanga* case are also potentially eligible for reparations in the *Ntaganda* case;
- Finalise the mapping of potential new beneficiaries, in accordance with the instructions set out in paragraphs 34 and 35 of the present decision;
- Prepare, in consultation with the parties and TFV, a sample of potential beneficiaries of reparations, in accordance with the instructions set out in paragraphs 3738 of the present decision; and
- Report to the Chamber on the aforementioned activities by **30 September 2020**, and thereafter every three months, in accordance with paragraphs 4344 of the present decision;

**INVITES** the parties and the TFV to make observations on the matters referred to in paragraph 46 of the present decision in their submissions due on 30 October 2020;

**INSTRUCTS** the Registry to file a confidential redacted version of Annex II to the ‘Registry Observations on Reparations’ by **6 July 2020**;

**INSTRUCTS** the LRV2 to file a confidential redacted version of the LRV2 COVID-19 Submissions within three days after the Registry files a confidential redacted version of Annex II, referred to above; and

**DIRECTS** the Registry to liaise with Trial Chamber II, as necessary and as soon as possible, for the purpose of either reclassifying Annex III to the ‘Registry Observations on Reparations’ as confidential or, alternatively, of filing a confidential redacted version thereof.

Done in both English and French, the English version being authoritative.

**Judge Chang-ho Chung, Presiding Judge**

**Judge Robert Fremr**

**Judge Olga Herrera Carbuccion**

Dated 26 June 2020

At The Hague, The Netherlands

## Footnotes:

- <sup>1</sup> Judgment, ICC-01/04-02/06-2359 (with Annexes A, B, and C).
- <sup>2</sup> ICC-01/04-02/06-2366 ('Order').
- <sup>3</sup> Order, para. 4.
- <sup>4</sup> Annex 1, *annexed to* Registry's observations, pursuant to the Single Judge's "Order for preliminary information on reparations" of 25 July 2019, ICC-01/04-02/06-2366, ICC-01/04-02/06-2391.
- <sup>5</sup> Registry Preliminary Observations on Reparations, paras 10-15, 18.
- <sup>6</sup> Registry Preliminary Observations on Reparations, paras 13-14, 18.
- <sup>7</sup> Registry Preliminary Observations on Reparations, paras 11, 16-19.
- <sup>8</sup> The deadline to respond to the Registry Preliminary Observations on Reparations was extended following a Defence request in this respect, *see* Request for a variation of time limit to submit the Defence response to "Registry's observations, pursuant to the Single Judge's 'Order for preliminary information on reparations' of 25 July 2019, ICC-01/04-02/06-2366", 18 September 2019, ICC-01/04-02/06-2411 and email from the Single Judge to the parties, the Prosecution, and the Registry on 18 September 2019, at 18:50.
- <sup>9</sup> Response on behalf of Mr. Ntaganda to Registry's preliminary observations on reparations, ICC-01/04-02/06-2431 ('Defence Response').
- <sup>10</sup> Joint Response of the Legal Representatives of Victims to the Registry's Observations on Reparations, ICC-01/04-02/06-2430 ('LRVs Response').
- <sup>11</sup> LRVs Response, paras 2, 34-35.
- <sup>12</sup> LRVs Response, paras 22-24.
- <sup>13</sup> Prosecution's response to the Registry's observations, pursuant to the Single Judge's "Order for preliminary information on reparations" (ICC-01/04-02/06-2391-Anx1), ICC-01/04-02/06-2429.
- <sup>14</sup> Trust Fund for Victims' response to the Registry's Preliminary Observations pursuant to the Order for Preliminary Information on Reparations, ICC-01/04-02/06-2428).
- <sup>15</sup> ICC-01/04-02/06-2447 ('December 2019 Order').
- <sup>16</sup> December 2019 Order, para. 9(a).
- <sup>17</sup> Defence submissions on reparations, ICC-01/04-02/06-2479-Conf (the Defence's submissions initially filed as public were reclassified as confidential pursuant to the instruction of the Single Judge dated 6 March 2020; a public redacted version was notified on 6 March 2020 as ICC-01/04-02/06-2479-Red pursuant to the Chamber's instruction dated 5 March 2020; 'Defence Submissions').

- 18** Submissions on Reparations on behalf of the Former Child Soldiers, ICC-01/04-02/06-2474 (with one public annex; 'LRV1 Submissions'); and Submissions by the Common Legal Representative of the Victims of the Attacks on Reparations, ICC-01/04-02/06-2477-Conf (confidential; a public redacted version was notified on the same day as ICC-01/04-02/06-2477-Red; 'LRV2 Submissions').
- 19** Annex I, *annexed to* Registry's Observations on Reparations, ICC-01/04-02/06-2475 ('Registry Submissions').
- 20** Prosecution's Observations on Reparations, ICC-01/04-02/06-2478 (with public Annex A).
- 21** Trust Fund for Victims' observations relevant to reparations, ICC-01/04-02/06-2476 ('TFV Submissions').
- 22** Annex II, *annexed to* Registry Submissions.
- 23** Annex III, *annexed to* Registry Submissions.
- 24** Annex, *annexed to* Transmission des observations de la République démocratique du Congo, 2 March 2020, ICC-01/04-02/06-2480 (confidential; the filing was notified on 3 March 2020).
- 25** Submission of observations on the issues identified under paragraph 9 (c) (i), (ii), and (iii) pursuant to the 'Order setting deadlines in relation to reparations' No. ICC-01/04-02/06, 6 March 2020, ICC-01/04-02/06-2483Conf (confidential).
- 26** Defence Submissions, paras 79-108.
- 27** TFV Submissions, paras 47-48. *See also* para. 45.
- 28** TFV Submissions, para. 61.
- 29** TFV Submissions, paras 67, 143. *See also* paras 68-72.
- 30** ICC-01/04-02/06-2475, 28 February 2020 (with public Annex I, confidential *ex parte* Annex II only available to the LRVs, the TFV, and the Registry, and confidential *ex parte* Annex III only available to the Registry).
- 31** Request on behalf of Mr. Ntaganda seeking reclassification of Annex II and III to the "Registry's Observations on Reparations", ICC-01/04-02/06-2493.
- 32** Defence Reclassification Request, paras 3-5, 14, 25-35, 38, 46.
- 33** Email from the Chamber to the Registry, the parties, and the TFV on 23 March 2020, at 18:55.
- 34** Registry Observations on the Defence request for reclassification of Annexes II and III of the "Registry's Observations on Reparations" (ICC-01/04-02/06-2493), ICC-01/04-02/06-2496 ('Registry Response').
- 35** Registry Response, para. 1. *See also* paras 10-12.
- 36** Registry Response, paras 1, 14.

- 37** Email from the Common Legal Representative of the Former Child Soldiers to the Chamber, the parties, the Registry, and the TFV on 30 March 2020, at 16:37; and email from the Common Legal Representative of the Victims of the Attacks to the Chamber, the parties, the Registry and the TFV on 30 March 2020, at 16:43.
- 38** Order to provide information on the impact of COVID-19 measures on operational capacity, ICC-01/04-02/06-2507 ('Order on Operational Capacity'), para. 4.
- 39** Order on Operational Capacity, paras 4-5.
- 40** Registry Submissions pursuant to the "Order to provide information on the impact of COVID-19 measures on operational capacity", ICC-01/04-02/06-2507, ICC-01/04-02/06-2519-Conf (confidential with confidential Annex I and confidential *ex parte* Annex II, available only to the Registry; a public redacted version of the main filing was notified on the same day as ICC-01/04-02/06-2519-Red and a confidential redacted version of Annex II was notified on 6 May 2020; 'Registry COVID-19 Submissions').
- 41** Registry COVID-19 Submissions, paras 12-14.
- 42** Registry COVID-19 Submissions, paras 6, 9-10, 15.
- 43** Registry COVID-19 Submissions, para. 16.
- 44** Defence observations pursuant to 'Order to provide information on the impact of COVID-19 measures on operational capacity', ICC-01/04-02/06-2515 ('Defence COVID-19 Submissions'), para. 2.
- 45** Defence COVID-19 Submissions, paras 8-9.
- 46** Defence COVID-19 Submissions, para. 9.
- 47** Observations on the impact of COVID-19 measures on operational capacity on behalf of the former child soldiers, ICC-01/04-02/06-2516 ('LRV1 COVID-19 Submissions'); and Submissions by the Common Legal Representative of the Victims of the Attacks pursuant to the "Order to provide information on the impact of COVID-19 measures on operational capacity", ICC-01/04-02/06-2518-Conf-Exp (confidential *ex parte*, available only to the LRVs, the Registry, and the TFV; a public redacted version was notified on 23 April 2020 as ICC-01/04-02/06-2518-Red, 'LRV2 COVID-19 Submissions').
- 48** LRV1 COVID-19 Submissions, paras 15-16.
- 49** LRV2 COVID-19 Submissions, para. 14.
- 50** LRV2 COVID-19 Submissions, paras 15-19.
- 51** Trust Fund for Victims' observations on the impact of COVID-19 on operational capacity, ICC-01/04-02/06-2517 ('TFV COVID-19 Submissions'), para 12-14.
- 52** TFV COVID-19 Submissions, paras 15-17.
- 53** TFV COVID-19 Submissions, para. 24.
- 54** TFV COVID-19 Submissions, para. 24.

- 55 Defence Response to the CLRs, the Registry and the TFV's additional arguments submitted pursuant to the 'Order to provide information on the impact of COVID-19 measures on operational capacity', ICC-01/04-02/06-2523.
- 56 Decision appointing experts on reparations, ICC-01/04-02/06-2528-Conf (a public redacted version was notified on the same day as ICC-01/04-02/06-2528-Red; 'Decision Appointing Experts').
- 57 Some of these submissions will be addressed in the reparations order.
- 58 *The Prosecutor v. Germain 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", 8 March 2018, ICC-01/04-01/07-3778-Conf (confidential, a public redacted version was notified on 9 March 2018 as ICC-01/04-01/07-3778-Red; 'Katanga Appeal Judgment'), para. 64.
- 59 *Katanga Appeal Judgement*, para. 64.
- 60 Annex A, annexed to *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, 3 March 2015, ICC-01/04-01/06-3129 ('Lubanga Reparations Order'), para. 44; *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Reparations Order, 17 August 2017, ICC-01/12-01/15-236 ('Al Mahdi Reparations Order'), para. 33.
- 61 See also *Katanga Appeal Judgement*, para. 65.
- 62 See also *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the admissibility of the appeals against Trial Chamber I's "Decision establishing the principles and procedures to be applied to reparations" and directions on the further conduct of proceedings, 14 December 2012, ICC-01/04-01/06-2953, para. 53.
- 63 2,132 victims. See Registry Preliminary Observations on Reparations, para. 5.
- 64 See Registry Submissions, para. 25. See also LRV2 Submissions, para. 72.
- 65 See Registry Preliminary Observations on Reparations, paras 36-42; Registry Submissions, paras 58-61; and Annex I, annexed to Registry Submissions.
- 66 See paragraphs 15-18 above.
- 67 See, e.g., Annex A, annexed to Second Periodic Report on the Victims and their General Situation, 6 October 2015, ICC-01/04-02/06-889.
- 68 See also TFV Submissions, paras 11-14.
- 69 See LRVs Response, para. 36; and LRV1 Submissions, para. 36.
- 70 See Registry COVID-19 Submissions, paras 4-10, 15-18.
- 71 See also December 2019 Order, para. 9(a)(ii).
- 72 See also *Al Mahdi Reparations Order*, para 79; LRVs Response, paras 32-34; LRV1 Submissions, paras 3, 29; and LRV2 Submissions, paras 24-30.

- 73** See also LRVs Response, paras 32; and LRV1 Submissions, paras 3, 29.
- 74** *Lubanga* Reparations Order, para. 30: ‘Reparations are entirely voluntary and the informed consent of the recipient is necessary prior to any award of reparations, including participation in any reparations programme.’
- 75** See also December 2019 Order, para. 9(a)(iii).
- 76** See also LRVs Response, para. 32; and LRV1 Submissions, paras 3, 31, 33.
- 77** Registry Submissions, para. 25.
- 78** LRV2 Submissions, para. 72.
- 79** See paragraphs 26–27 above.
- 80** See Registry COVID-19 Submissions, paras 15–16, 18.
- 81** The Chamber notes that carrying out a Registry-led mapping exercise is also supported by the LRV2 (LRV2 Submissions, para. 28; and LRV2 COVID-19 Submissions, paras 14–17, 19), the Defence (Defence Submissions, paras 8, 94), and the TFV (TFV Submissions, paras 62–63, 66, 143).
- 82** See also Registry Submissions, paras 30, 60; and LRV2 Submissions, para. 19.
- 83** See also TFV Submissions, para. 119. The Chamber encourages the Registry to identify the factors that may prevent some categories of victims from coming forward and to seek ways to overcome them.
- 84** See also Defence Response, para. 38.
- 85** Particular consideration should be given to the inclusion of any information considered necessary by the TFV for the final screening of potential beneficiaries of reparations at the implementation stage so as to avoid having to revert to victims for any missing information.
- 86** See Registry Preliminary Observations on Reparations, para. 12.
- 87** See *The 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-Conf (confidential with public annexes A and B; a public redacted version was notified the same day as ICC-01/04-01/06-3466-Red), paras 82, 85; *Al Mahdi* Reparations Order, para. 145; and TFV Submissions, paras 58–59.
- 88** See also December 2019 Order, para. 9(a)(i).
- 89** See TFV Submissions, paras 62–64. Rather than asking the sampled victims about the types and modalities of reparations in the abstract, it may be beneficial to ask them about their current needs and the challenges that they currently need to overcome in relation to the harm suffered, in line with one of the goals of reparations which is to be transformative. See United Nations, Guidance Note of the Secretary-General’s, Reparations for Conflict-Related Sexual Violence, June 2014 (‘UNSG Guidance Note’), pp. 8–9, Principle 4.
- 90** See LRVs Response, para. 23; LRV1 Submissions, para. 36; and LRV2 Submissions, paras 17–18, 29.

- 91** See Registry Submissions, para. 32.
- 92** The victims should be informed that, if considered eligible for reparations, they will have the opportunity to make an informed decision as to whether they want to benefit from an award once the types and modalities of reparations have been determined.
- 93** UNSG Guidance Note, p. 4.
- 94** TFV Submissions, para. 23.
- 95** See UNSG Guidance Note; and Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation, 19–21 March 2007.
- 96** TFV Submissions, paras 63, 66, 72.
- 97** See, similarly, Registry Submissions, page 20, chart C3.
- 98** See Registry COVID-19 Submissions, paras 16, 18.
- 99** December 2019 Order, para. 9(f); and Decision Appointing Experts, para. 19.
- 100** See *Katanga* Appeal Judgment, para. 91.
- 101** Registry Observations on Reparations, ICC-01/04-02/06-2475, 28 February 2020; and Registry Response, para. 14, also referring to *The Prosecutor v. Thomas Lubanga Dyilo*, “Ordonnance relative à la requête de la Section de la participation des victimes et des réparations du 21 janvier 2020”, 4 February 2020, ICC-01/04-01/06-3472-Conf.